BILATERAL AND REGIONAL FREE TRADE AGREEMENTS: SOME CRITICAL ELEMENTS AND DEVELOPMENT IMPLICATIONS

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CHAPTER 1: BILATERAL FREE TRADE AND ECONOMIC AGREEMENTS

Several developing countries are now either part of bilateral and regional free trade agreements (FTAS), or are involved in negotiations to create them.

There are two broad categories of FTAs. One category involves South-South arrangements, usually among neighbouring countries, and in regional groupings, such as ASEAN, SAARC, SADC, Mercosur, Andean Community. The second category involves an FTA between a developed country or entity (such as the US and European Union) and a developing country or a grouping of developing countries. Examples are the US-Singapore and US-Central America FTAs and the EU-ACP Economic Partnership Agreements (EPAs).

This paper deals with FTAs between a developing country and a developed country.
Such FTAs usually cover a range of issues beyond simply trade in goods. They include market access in trade in goods; services; investment liberalisation and protection of investor rights; intellectual property; government procurement; competition policy; labour and environment standards.

In particular, the paper mainly examines FTAs involving the United States and developing countries. In doing so, examples of the US FTAs with specific countries, particularly Singapore and Chile, are used. The chapters in these FTAs (on services, investment, government procurement and so on) reflect what a "typical" FTA with the US is like. This is because, as is quite well known, the US makes use of a "template" for its negotiating position in its bilateral FTAs. Its recent bilateral FTAs are rather similar in chapter headings as well as in text. It may well be that the US would not agree to conclude an FTA unless its text basically is in accordance with the template.

There is less information available on the European Union's FTAs. The main negotiations currently undertaken by the EU are the Economic Partnership Agreements with the African, Caribbean and Pacific (ACP) countries. The paper also contains a brief section on these EPAs.

The brief conclusion is that many of the chapters of the FTAs reduce, in some cases very significantly, the policy space that developing countries have. In the area of market

access in goods, the elimination or drastic reduction of tariffs in almost all categories of goods will remove an important and powerful instrument (the tariff) that developing countries have as a crucial component of industrial and agricultural policy. The agreement to make use of a "negative list" approach puts greater pressure on the developing country to liberalise and reduces the policy space to be able to choose which sectors to liberalise and when. The chapters on the "Singapore issues" (investment, competition policy and government procurement) drastically curtail the ability of the developing country to regulate the establishment and operations of foreign enterprises and their funds, and also put up new restraints on governments that make it much more difficult for them to provide assistance to domestic enterprises.

The paper argues that entering an FTA with developed countries, with the kind of template that they have for their FTAs, is a serious matter for a developing country to have to consider. An assessment of benefits and costs should be undertaken by the country before embarking on negotiations.

CHAPTER 2: DISADVANTAGES OF FTAs COMPARED TO MULTILATERAL TRADE AGREEMENTS

It is generally recognised that bilateral agreements, especially between a developing and a developed country, are not the best option and that multilateral negotiations and agreements are preferable. The reasons for this include:

1. Bilateral agreements usually lead to "trade diversion", in that the partners divert away products that may be more cheaply priced in favour of products from the FTA partner, even if they are not cheaply priced, thus resulting in inefficiency.

2. In an FTA between a developed country and a developing country or countries, the latter are usually in a weaker bargaining position due to the lack of capacity of their economies, their weaker political situation, and their weaker negotiating resources.

3. In the World Trade Organisation (WTO), the principles of special and differential treatment, and less than full reciprocity, are recognised. Thus, developing countries are better able to negotiate on the basis of non-reciprocity and for non-reciprocal outcomes, in which they are not obliged to open up their markets (or undertake other obligations) to the same degree as developed countries. However, these "development principles" are usually absent in FTAs, or they are only reflected in longer implementation periods for the developing country. The FTAs are basically on the basis of reciprocity. This "equal treatment" of parties that are unequal in capacity is likely to result in unequal outcomes.

4. The FTAs contain many items that are not part of the rules of the WTO. Many North-South FTAs include rules on investment, government procurement and competition law, which have so far been rejected by developing countries as

subjects for WTO negotiations or rules. Developing countries have also objected to making labour standards and environment standards subjects of discussion in the WTO. All these topics are now entering "by the side-door" through the FTAs, even though the same reasons for developing countries to reject rules on these issues should apply in FTAs as they do in the WTO.

5. Even where issues are already the subject of rules in the WTO (e.g. intellectual property and services), there are many "flexibilities" and options open to developing countries in interpreting and in implementing obligations in these areas. However, there are attempts by developed countries to remove these flexibilities for developing countries in the FTAs. If these attempts succeed, the policy space for developing countries to pursue development and socio-economic goals would be significantly reduced.

6. The proliferation of so many agreements also puts pressure on personnel and financial resources in developing countries and requires a lot of technical expertise which may be not adequately available, given the large number of agreements and the limited resources.

The report "The Future of the WTO" commissioned by the WTO Director-General and which was published in January 2005 has criticised the proliferation of bilateral and regional trade agreements, which it says has made the "MFN" (most favoured nation) principle the exception rather than the rule, and which has led to increased discrimination in world trade. (WTO 2005).

However, it appears that FTA negotiations are moving ahead and negotiations on even more FTAs and RTAs (regional trade agreements) are being announced.

Several researchers have pointed out that whilst bilateral agreements may be tempting for a developing country to get some specific advantages from its developed-country partner, such as better market access for some of its products, there are also several potential dangers and disadvantages.

Developed countries such as the US and Japan are known to want to use the instrument of bilateral agreements to obtain from their partners what they failed to achieve at the WTO, in which the developing countries have been able to oppose or resist certain negative elements in various agreements. For example, the inclusion in FTAs of certain provisions that reduce the ability to make use of development flexibilities (such as compulsory licences) in the WTO's TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement is known as "TRIPS-Plus". Another major element is the inclusion of the "Singapore issues" in FTAs involving the US and EU; these issues were removed from the WTO's Doha negotiations at the request of developing countries as they considered that they had adverse development implications. These issues, rejected at the WTO, have made a comeback through the FTAs.

The report on "The Future of the WTO" also criticises the tendency of recent FTAs to introduce "non-trade issues" which had been rejected at the WTO. It says: "One other unanticipated and significant issue that has arisen with the growth of PTAs [preferential trade agreements] is the injection of particular 'non-trade' objectives into trade agreements. Apart from comparatively ambitious and one-sided provisions on intellectual property rights, we have seen an increasing tendency on the part of preference givers to demand significant labour and environmental protection undertakings – and even restrictions on the use of capital controls – as the price for preferential treatment. The evident fear is that such requirements become not merely 'templates' for further PTAs but the forerunners of new demands in the WTO. After all, as more and more countries concede non-trade provisions of this kind at the PTA level the less these WTO Members are likely to stand out against demands for their eventual inclusion in the multilateral rules. We would argue that if such requirements cannot be justified at the front door of the WTO they probably should not be encouraged to enter through the side door." (WTO 2005)

CHAPTER 3: CHANGING VIEWS ON THE EFFECTS OF LIBERALISATION

Whilst an advanced developing country which is already highly liberalised may be able to bear the pressures of faster liberalisation, other developing countries may not be able to compete with the faster opening of their markets or with other demands of the developed country.

Up to a few years ago, there was a widespread belief in the orthodoxy (promoted especially by the International Monetary Fund (IMF) and World Bank, and by policy makers in developed countries) that liberalisation is necessarily good for development, and the faster the liberalisation the better it is for development. This was the intellectual basis for developed countries to pressurize developing countries to quickly and deeply cut their tariffs and remove non-tariff barriers, as well as open up their services sector, financial sector and investment regime.

However, there has been growing skepticism not only from civil society but also policy makers regarding this orthodoxy, mainly because such rapid liberalisation has led to import surges in many developing countries, with adverse effects on the local industrial and agricultural sectors, and on the balance of payments and the debt position. The emerging paradigm is that developing countries require certain degrees of protection to enable the local firms and farms to compete in their own domestic markets, and that this was the way the now-developed countries arranged their own trade and industrial policies when they were at the development stage.

Such protection is especially required by developing countries when many agricultural products are heavily protected by tariffs and subsidies in the developed countries, and where export and domestic subsidies enable these countries to sell artificially-cheapened products on the world market. Tariff protection is the means by which developing

countries can defend their farmers from unfair competition, especially since quantitative restrictions were prohibited under the Uruguay Round.

Arguments have been put forward by developing countries along the above lines in the WTO. The developing countries are also pursuing three tracks to strengthen the development dimension in the WTO: (1) proposals to clarify, review or amend existing WTO rules, due to problems of implementation of these rules; (2) proposals to strengthen existing SDT (special and differential treatment) provisions, and to introduce new ones where they do not exist but are required; (3) proposals to have adequate SDT provisions in new rules or revision of rules in current negotiations (especially in agriculture and industrial products).

Some developed countries are beginning to change their previously strict insistence on liberalisation in developing countries. For instance, the UK government has declared that it will not seek to "impose" liberalisation on African countries and on least developed countries. The G8 summit of the major developed countries in Gleneagles in 2005 also issued a statement along similar lines. Notably, this change in attitude is stated only for "least developed countries" and thus presumably does not apply to non-LDC developing countries. But it can be noted that a change in attitude towards liberalisation has started even in developed countries' policy circles.

CHAPTER 4: "RECIPROCITY" AS A PRINCIPLE IN FTAs

There is a significant lack of a similar "development track" within FTAs between developed and developing countries. Instead, the FTAs are being negotiated mainly on the basis of "reciprocity", i.e. that both sides take on similar levels of obligations.

This is mainly due to the demand for such a basis by trade policy makers of developed countries. They also point to the need for FTAs and RTAs to be consistent with WTO rules, in particular Article XXIV of the General Agreement on Tariffs and Trade (GATT) 1994 (covering customs unions and free trade areas). (WTO 1994: pp522-525). This Article enables FTAs to be established under certain conditions. One provision is that "the purpose of a customs union or a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories." It also defines a free trade area as a group of two or more customs territories in which the duties and other restrictive regulations of commerce are "eliminated on substantially all the trade between the constituent territories in products originating in such territories." [GATT, Article XXIV.8(b)].

This is widely taken to mean that FTAs have to be reciprocal in nature, since SDT provisions are not mentioned in the Article, and that tariffs and other trade restrictions have to be eliminated on "substantially all trade" between the parties. It is not defined what constitutes "substantially all trade." In the course of discussions between the European Union and ACP countries, which are negotiating Economic Partnership

Agreements (EPAs), it is understood that the EU considers this to mean at least 90% of trade, while some ACP countries interpret it to mean at least 60% of trade.

There have been recent proposals to revise or clarify Article XXIV so that it clearly enables non-reciprocal relations to prevail in FTAs between developed and developing countries. The ACP Group has made such a proposal. Recently, China has also made a development-oriented proposal on Article XXIV.

If the Article is not clarified or revised, if reciprocity remains the principle in an FTA between a developed and developing country, and if the FTA covers almost all products, then a typical developing country is likely to be at a serious disadvantage, as it has less production capacity and probably has significantly higher tariffs, especially on industrial products. Experts and policy makers in many developing countries are justifiably concerned that the elimination of tariffs will damage local industries and farms which will be unable to compete with cheaper imported products, especially as some of these imports are heavily subsidised (as in the case of agricultural goods exported from the EU and US).

CHAPTER 5: MAIN FEATURES OF FTAs BETWEEN DEVELOPED AND DEVELOPING COUNTRIES

The main issues in FTAs that involve developed countries such as the US, EU and Japan and developing countries typically include the following:

1. Market access in goods
2. Services in general
3. Specific services sectors (e.g. financial sector and telecommunications)
4. Intellectual property rights
5. Rules on the "Singapore issues" or "non-trade issues"
   -- Investment
   -- Government procurement
   -- Competition policy
6. Labour standards
7. Environment and food standards issues

Only the first item has traditionally been the subject of an FTA. The second and fourth issues were introduced into the multilateral trading system through the Uruguay Round that concluded in 1994. They are the new issues in GATT, and are now in the WTO.

The set of issues in item 5 are known as the Singapore issues as they were first introduced into the WTO through its Ministerial Conference in 1996 in Singapore. However, they were only subjects for discussion in working groups and there has been opposition from developing countries to making them subjects of binding rules. In July 2004, the WTO General Council agreed that there would not be any negotiations on them during the period of the Doha work programme, and the discussions in the working

groups on these issues have stopped. However, the FTAs include these items (or some of them) as subjects of rules.

On the sixth item, it was also agreed by the WTO members that labour standards would not be part of rule-making in the WTO. This decision was made at the first WTO Ministerial Conference, in Singapore in 1996. As a result, "labour standards" is not even a subject of a working-group discussion in the WTO. This is due to the fear of developing countries that the issue would become the basis of protectionist measures against their products.

On the seventh item, the environment as a broad issue is part of the FTAs with the US. Even more significantly, the issue of food standards is a major part of such FTAs, and in particular the demand by the US that there be no mandatory labelling of genetically modified foods, a proposal that is controversial as many countries have laws requiring such labelling.

It can be seen that many subjects that are not within the purview of the WTO, and subjects that have been rejected by developing countries as topics of negotiations or even discussion at the WTO, have entered into the rules of trade through the FTAs.

CHAPTER 6: MARKET ACCESS IN GOODS

Despite the problems arising from FTAs, some developing countries decide to negotiate an FTA with a developed country for fear of being left behind, as they see other countries, especially in their region, entering FTA negotiations with developed countries, which constitute their major markets. There is a fear that those developing countries that are entering FTAs will gain a competitive edge and thus leave those that do not join an FTA behind.

The developing country may also believe that entering an FTA will give it benefits in terms of greater access into the markets of the partners, as the FTA will provide preferences in terms of lower tariffs or quotas.

It is thus crucial for the developing country to identify the products which are important for it, whose exports it hopes will expand through the FTA, and to assess whether realistically there will be an increase in market access and to what extent. This will then have to be measured against the costs to be incurred by the country, in terms of access to its own markets by the partner, as well as in terms of concessions in other areas (such as services, investment and intellectual property).

Many countries that had hoped to obtain significant expansion of market access to the major developed countries have been disappointed in the results of the negotiations. A major reason for this is that there are structural, legal and political impediments that prevent the developed country from opening its market beyond a certain limit, in respect of its sensitive products (where further opening will cause dislocation to its producers).

As Smith (2005) points out, there are a number of structural problems that make it difficult for developing countries to obtain market access in sectors of interest to them in FTAs with developed countries. Firstly, there is usually unequal bargaining power in developing-developed country bilateral negotiations, with the developing countries in a weaker position. Secondly, it is not possible for developed countries to reduce or withdraw agricultural export and domestic subsidies on the products that the developing-country partner is exporting, as the subsidies would have to be removed for all the products, which would then also benefit non-FTA partners. Thirdly, there may exist laws that frame the terms of reference for what the developed country can offer.

The United States negotiators are also constrained in the terms they can offer in FTAs by their Bipartisan Trade Promotion Authority Act of 2002 (Smith 2005). This Act prevents US negotiators from concluding FTAs which:

- "reduce any rate of duty (other than a rate of duty that does not exceed 5 percent ad valorem on the date of the enactment of this Act) to a rate of duty which is less than 50 percent of the rate of such duty that applies on such date of enactment"
- "reduce the rate of duty below that applicable under the Uruguay Round Agreements, on any import sensitive agricultural product"
    - "The term 'import sensitive agricultural product' means an agricultural product—
        - (A) with respect to which, as a result of the Uruguay Round Agreements the rate of duty was the subject of tariff reductions by the United States and, pursuant to such Agreements, was reduced on January 1, 1995, to a rate that was not less than 97.5 percent of the rate of duty that applied to such article on December 31, 1994; or
        - (B) which was subject to a tariff-rate quota on the date of the enactment of this Act."

Besides the above, the Act does not enable special and differential treatment as its negotiating objectives include "reciprocal market access"[1], "to obtain reciprocal tariff and non-tariff barrier elimination agreements"[2] and to obtain rules which are comparable to US ones[3].

Besides the legal constraint posed above, it must be expected that the US negotiators will find it very difficult to make offers in agriculture or in sensitive industrial products where increased market opening for imports will be met with a political backlash from lobby

[1] S2102(a)(1). S2102(b)(10): "RECIPROCAL TRADE IN AGRICULTURE.—(A) The principal negotiating objective of the United States with respect to agriculture is to obtain competitive opportunities for United States exports of agricultural commodities in foreign markets substantially equivalent to the competitive opportunities afforded foreign exports in United States markets", which includes "(ii): reducing tariffs to levels that are the same as or lower than those in the United States."

[2] S2102(b)(1)(B).

[3] For example in investment: S2102(b)(3) and intellectual property: S2102(b)(4)(A)(i)(II).

groups such as big farmers, food companies, labour unions, domestic firms and from Congress. The episode in the US Congress in 2005, in which the bill authorising the US-Central America FTA faced massive opposition and was passed by only two votes, shows how difficult it will be for market access demands of developing-country FTA partners to be met, even though the exports from Central American countries were too small to have an appreciable impact on the US economy.

On **textiles and apparel** (politically extremely sensitive products for the US), even a strong negotiating party like Singapore was unable to overcome the US demand to apply the "yarn forward rule" to qualify for immediate duty-free entry into the US. The "yarn forward rule" means that textiles and apparel from Singapore must be made from yarn sourced from Singapore or the US. This means that US yarn has to be used, instead of cheaper yarn and fabric sourced from the Asian region. (Smith 2005; Koh and Chang 2004). Singapore also had to agree to additional and cumbersome customs procedures (relating to rules of origin) to verify that textiles/apparel are made in Singapore (including allowing on-site inspections of enterprises by US officials) and additional safeguard measures.

On **market access in agricultural products,** the main drawback for developing countries is that reduction or elimination of agricultural subsidies is not accepted by the US as a negotiable issue. Since such subsidies constitute a major form of protectionism that blocks access to its market, the placing of this issue off the table deprives the developing countries of perhaps the most important potential source of gaining more access into the US market. The US argues that the subsidy issue can be dealt with only at the WTO.

The developing countries are thus likely to face a double problem in agriculture: they are asked to eliminate their own agricultural tariffs, while the US declines to reduce or eliminate its subsidies.

The high US subsidies keep the prices of its farm products artificially low, with three effects:

- This prevents other countries from penetrating the US market more. For example, if soybean subsidies were removed, prices would reflect the cost of production more, and increase, making palm oil more competitive.

- Subsidies enable the US to export its otherwise uncompetitive farm products, because they lower the price, often to far below the cost of production. To defend themselves from this unfair practice, countries need higher tariffs, otherwise the US products can take over the market with their artificially low prices.

  According to a recent United Nations Conference on Trade and Development (UNCTAD) paper, "Studies show that under the existing US policy, the cost of producing major crops has been much higher than the prices realized for them. In the year 2001, market prices were 23% below the cost of production for corn, 48% for wheat, 32% for soybean, 52% for cotton, and 45% for rice. In 2001, the

US had a significant share in world exports in these commodities which is as high as 35% in cotton, more than 20% in wheat and around 10% in rice."

- Because of the subsidies, US exports sell at low prices, thus out-competing more efficient producers. For example, if subsidies were removed and US soybean export prices increased, soybean exports from more competitive countries such as Brazil would be able to sell more, while palm oil (which competes with soya oil) coming from Malaysia or Indonesia would be more competitive.

The US government has the intention of using its FTAs to sell more farm products to developing countries, which are asked to reduce their tariffs to zero. With the high subsidies in the US and EU, there are legitimate fears that developing-country farmers will not be able to compete in products such as rice, wheat, tomato and poultry.

Moreover, in the area of tariff reduction in agriculture, the negotiations on certain sensitive products can also be expected to be very difficult. Even a developed country like Australia found that it could not gain any ground with the US on expanding its market access on sugar, which is an important Australian export and is highly protected in the US.

Before its FTA with the US, Australia had a sugar quota of 87,402 tonnes per annum. During the FTA negotiations, the Australian government repeatedly promised “no sugar, no deal”. The Australian government fought very hard to increase the quota but failed to do so. The US-Australia FTA did not provide any extra quota for Australia. (Smith 2005).

On beef, which is Australia’s main export to the US, Australia obtained an 18.5 per cent increase in beef quotas, but this was confined to manufacturing-grade beef (mainly hamburger mince and pet food) and spread over 18 years. It meant that Australia’s share of the American beef market could actually decline, according to Australian projections. Australian academics calculated the benefits for beef farmers from the extra market access under the FTA to be about half a cow, per farm, per year. Furthermore, the US has reserved the right to employ safeguards to raise tariffs again if the quantity of Australian imports or the price of beef changes suddenly. (Smith 2005).

The developing-country partner in an FTA may have limited products where it can effectively make use of increased market access opportunities, due to limited supply capacity or inability to market. For instance, most of the ACP countries and the LDCs have been unable to make use of the preferential access they have to the EU market. And for products that the developing countries have an advantage in, these are usually “sensitive” to the developed country and thus some may be excluded from the FTA market opening. Also, developed countries like the US and Europe are well known for making use of “non-tariff barriers” (such as safety regulations and anti-dumping measures) to block imports of developing countries. The market access hopes may become illusory.

On the other hand, the developing country is expected to reciprocate by opening up its own market to the developed country, by eliminating its tariffs on a wide range of products. This can result in significant dislocation of local producers.

Under the North American Free Trade Agreement (NAFTA), Mexico agreed to total trade liberalisation of all agricultural products by 2008 (even though it had a 15-year adjustment period for corn and beans). According to Carlsen (2003), imports of corn (the most widely grown crop in Mexico) nearly tripled after NAFTA, and the price has dropped. Other crops fared worse, as imports of soybean, wheat, poultry and beef have risen over 500%, displacing domestic production. Exports especially of fruits and vegetables have risen but this failed to compensate for the import rise. About 2 million rural jobs were lost since NAFTA came into effect.

In the case of Singapore's FTA with the US, it might have been expected that Singapore might enjoy a gain in trade benefits, since the country already has very low tariffs and would thus not have to make any significant concessions in trade in goods. However, the trade deficit that Singapore had with the US widened significantly after its FTA with the US came into force. In terms of overall trade balance, Singapore had a trade deficit with the US of US$1.4 bil in 2003. This worsened after the FTA to $4.3 bil in 2004, $5.5 bil in 2005 and $6.9 bil in 2006. (Data from the US government departments, http://tse.export.gov).

CHAPTER 7: SERVICES

Before the Uruguay Round was launched, many developing countries had tried to resist the inclusion of new areas like trade in services and trade-related intellectual property rights as they believed agreements in these areas would be against their interests as they would not have the capacity to gain from them, whist their countries and their local companies would stand to lose. Despite this reluctance, services became a part of the Round on the understanding that developing countries would gain in other areas, especially in agriculture, while development safeguards would also be built into the WTO services agreement.

The WTO's General Agreement on Trade in Services (GATS) that resulted from the Round allows each member to commit in the WTO to services liberalisation according to the extent and rate that it chooses and which suits its conditions. This is especially true for developing countries, as there are some development safeguards built into GATS. These countries may want to try out liberalisation in some sectors to see the extent to which it is beneficial, but they do not have to commit the liberalisation measures in the WTO (as this makes it irreversible, or difficult to reverse).

The WTO has a "positive list" approach (i.e. a country commits only what it puts on the schedule) as against the more drastic "negative list" approach (in which everything is committed to be opened unless specified in the schedule). The positive list approach was insisted on by the developing countries to enable them to have more flexibility and policy

space as to what and when to commit. It is also less risky than the negative list approach as a country may not be aware of the full range of sectors, nor on what it should select to exclude.

In the positive list approach, a country makes commitments to liberalise only in sectors that it places on its schedule. And if a sector is included in the schedule, the country can decide the extent of liberalisation to commit in that sector, in each of the four modes of service delivery. Restrictions and limits can be placed, for example restrictions on foreign equity ownership or on national treatment in Mode 3 on "commercial presence."

Additional "special and differential treatment" clauses have been established in GATS and in subsequent documents that clarify that developing countries should be allowed to liberalise less than developed countries and to choose their own pace of liberalisation. These development provisions are especially contained in Article IV of GATS, Article XIX(2) of GATS, and the Guidelines and Procedures for the Negotiations on Trade in Services of March 2001, which is the main document guiding the present services negotiations.

The developed countries prefer the negative list approach, as this would make it easier for developing countries to commit to liberalisation measures in more sectors. They have tried to change the GATS architecture towards a negative list approach, and now some developed countries are using their FTAs to get developing countries to switch to the negative list approach.

In particular, the US has chosen this negative list approach in its FTAs with developing countries. For example, the US-Singapore FTA has a negative list approach, in which only sectors placed on a schedule can have limitations to the principles of national treatment, market access, local presence, and so on.

Such a negative list approach reduces policy space for developing countries, and goes against the more development-friendly positive list approach of the WTO. It also goes against the principles and architecture of GATS that the developing countries fought so hard to attain in the WTO.

Among the dangers of the negative list approach are:

1. Due to this methodology, the developing country will be more vulnerable to pressures to liberalise.
2. The country may not be sufficiently aware of all the service sectors and sub-sectors, and thus may not list all the sub-sectors it wishes not to liberalise.
3. The country may not be able to predict or plan which sectors it may wish to promote domestically in future and thus may agree to liberalise sectors which in future it may wish its local entrepreneurs to develop and thus it may then regret not putting these sub-sectors in the "negative list".
4. The country may not be aware of risks in liberalising particular sub-sectors and may find it difficult to "backtrack" when circumstances require it to protect

domestic firms or the economy (e.g. as happened or may happen during financial crises).
5. The country will not be able to predict which new services sectors may emerge in future, and thus cannot exclude these in the list.

The typical FTA involving the US has a chapter on cross-border services. It covers cross-border supply of services, but does not cover commercial presence or investment (known as Mode 3 in GATS), as this is covered (with its own dispute settlement system) in the investment chapter of the FTA. However, the annexes in the services chapter with reservations cover the exceptions for services sectors from commitments relating to both the services and the investment chapters.

The definition of "Cross-Border Supply of Services" in the US-Singapore FTA is the supply of a service:

a) From the territory of one party into the territory of the other party. For example, a consultant located in one country giving advice to a client located in another country by mail, phone or Internet service. (This is similar to Mode 1 or cross-border trade in GATS.)
b) In the territory of one party by a person of that party to a person of the other party. (This is similar to "consumption abroad" or Mode 2 in GATS, for example a student from Singapore travelling to the US to attend university.)
c) By a national of a party in the territory of another party. (This is movement of persons, similar to Mode 4 in GATS.) (However, Article 8.2.4 in the US-Singapore FTA says this chapter does not impose any obligation on a party with respect to a national of the other party seeking access to its employment market, or employed on a permanent basis in its territory, and does not confer any right on that national with respect to that access or employment.)

As mentioned above, the non-inclusion of the investment dimension of services does not mean that this aspect (the most prominent one in GATS) is absent. It is covered instead as part of the investment chapter, in which the rights of the foreign investor are very clearly spelt out.

The chapter covers measures by a party affecting cross-border trade in services by service providers of the other party. Some articles also apply to measures affecting the supply of a service by an investor or investment of the other party as defined in the investment chapter. Such measures include the production, distribution, marketing, sale and delivery of a service; purchase or use of a service; access to distribution, transport or telecommunications in connection with supply of a service; and provision of a bond or security as condition for supply of a service.

The main principles and provisions include: national treatment for the foreign service suppliers; most favoured nation treatment; and market access (where both parties agree not to impose limitations on the other party's number of service providers, on the total

value of service transactions or assets, on the total number of service operations and on the total number of natural persons employed in a particular service sector).

There are also provisions on freedom of transfer of funds and payments, on domestic regulation, transparency and professional services.

In the US FTAs, since there is a negative list approach, there are annexes with schedules of exceptions. It is understood that every sector and activity is totally liberalised, except those placed in the annexes.

In the Singapore FTA, there are two annexes of exceptions. Annex I actually has two sets of exceptions. The first set comprises existing "non-conforming measures" that are maintained by a party. Since "conforming" means total liberalisation and national treatment, "non-conforming" refers to those existing measures that restrict or limit the market access, national treatment, MFN and local presence provisions. If listed in Annex I, these measures can continue. The second set in Annex I comprises amendments to any non-conforming measure, "to the extent that the amendment does not decrease the conformity of the measure as it existed immediately before the amendment."

The implication is that the existing measures that do not conform to these provisions are allowed to be exempted but the level of their "non-conformity" can only be decreased, and cannot be increased. This implies that there the existing "applied" levels of liberalisation are notified and a "standstill" is imposed, in that the degree of liberalisation can be increased but not decreased. The developing-country party would give up the flexibility and policy space that is presently available in GATS, to be able to liberalise unilaterally in certain services sectors, yet not "bind" the full degree of that liberalisation. Having a distance between the "applied" and the "bound" levels allows a country to experiment, with the possibility of backtracking, should it be necessary to do so.

However there is also Annex II in which the country lists the sectors and activities it wants to exclude so that it can take more restrictive measures (than what already exists). The exclusion is in respect to market access, national treatment, MFN and local presence.

The US-Singapore FTA excludes application of the chapter to "*services supplied in the exercise of governmental authority…which is supplied neither on a commercial basis nor in competition with one or more service suppliers*". (Article 8.2.5.b)

As pointed out by Shashikant (2005), neither of the criteria is defined. This provision is the same as Article I in GATS, which has been the subject of controversy. Many service sectors involve the public interest and thus are delivered by governments through a mixed system that is wholly or partly funded with a minimum charge being paid by consumers, but tightly regulated by governments at the central, regional and local levels. Often these systems co-exist with other private for-profit delivery systems. Following the criteria above, these systems would fall outside the purview of the exclusion and be subject to the terms of the agreement unless expressly reserved.

In the US-Singapore FTA, a provision on domestic regulations states that measures relating to qualification requirements and procedures, technical standards and licensing requirements are to be "*based on objective and transparent criteria*" and should be "*no more burdensome than necessary to ensure the quality of the service*".

Besides the investor-state dispute settlement process in the investment chapter, the FTAs also have a general dispute settlement mechanism, which allows a government to claim that a law or policy of the other country is inconsistent with the FTA obligations or the other party has failed to fulfil its obligation or a benefit expected from the agreement is being nullified and impaired as a result of a measure not inconsistent with the agreement. The dispute process requires initial consultations, and if that fails, it must be referred to a dispute panel. The panel can declare that a party to the agreement has not conformed to its obligations.

In effect, the infringing law would have to be eliminated or compensation paid. Parties can also under certain conditions take retaliatory action suspending benefits of equivalent effect. Trade sanctions taken by a small developing country against the US will hardly make a difference but if positions were reversed the developing country's economy would be affected. (Shashikant 2005).

In US FTAs with developing countries, there are usually special chapters on financial services and telecommunications, two of the most important and sensitive service sub-sectors. The FTAs with Singapore and Chile, for example, have these special chapters.

The financial services chapter in the US-Singapore FTA applies to investors and investments as well as cross-border trade. Besides the usual principles of national treatment and MFN, the market access clause states that measures by a party shall not impose limitations on the number of financial institutions, the total value of financial service transactions, the total number of financial service operations and the total number of natural persons employed; nor should the parties restrict or require specific types of legal entity or joint venture. Each party shall also permit a financial institution of the other party to supply any new financial service that is permitted to its own institution. There are also liberalisation clauses for cross-border trade and senior management and boards of directors.

There are also annexes of "non-conforming measures" similar to the chapter on services in general, as well as general exceptions.

There are generally similar clauses on financial services in the US-Chile agreement.

In the chapter on telecommunications in the US-Singapore FTA, there are provisions to ensure that enterprises of the other party have access to and use of any public telecommunications transport networks and services offered in the country. There are other provisions with obligations on parties to ensure that suppliers of telecom services provide interconnection with facilities of suppliers of public telecommunications services of the other party, and additional obligations regarding treatment by major suppliers,

competitive safeguards, unbundling of network elements, co-location, resale, interconnection, pricing of leased circuit services etc.

There are also provisions relating to independent regulation and privatisation, universal service, licensing process, allocation and use of scarce resources, etc.

To meet the requirements and obligations desired by the US in the financial services and telecommunications chapters, a typical developing-country partner would have to very significantly re-orientate its policies on these two key sectors, with also significant consequences.

Does the degree of services liberalisation matter for development?

Developed countries advocate for developing countries the fastest and broadest liberalisation in services. Institutions such as the World Bank also encourage or pressurise developing countries to liberalise services so that they can become more efficient. However it is wiser for developing countries to take a cautious approach towards services liberalisation.

There are several reasons why it is important for a developing country to maintain or expand beyond a certain degree of local participation (including ownership and control) in services. During the colonial period, the foreign firms were able to control a large and overwhelming share of the services sectors in many countries, including the financial and distribution sectors. Following independence, governments took measures to increase the share of citizens in services. There developed significant local ownership and control in banking, insurance, construction, wholesale and retail trade, transportation, professional services, etc. Governments tended to have monopolies in railways, telecommunications, water, postal services, energy and power resources. When these were privatised or partly privatised, or when private companies were allowed to compete in these areas, local companies were among those that took up local shares. The increased participation of local firms and persons usually developed with the assistance of the government, including preferential treatment to locals and restraint over the growth of foreign companies.

Presently, the services sector is in many developing countries the largest sector, and it is the area where local firms have larger participation and are better able to compete, as compared with the manufacturing sector. It is a sector in which local ownership and participation can be and has been high, because of the natural advantages local firms enjoy, in activities that require presence and knowledge of local conditions and customers. Thus it is a sector in which strengthening and development of the domestic economy, training and development of local entrepreneurs, and restructuring of social imbalances can and should take place. While it is important to upgrade technology and techniques, this can often be done by the local firms including through importing modern technology. It does not necessarily require that large foreign firms take over, in order for a country to have modern and efficient services.

The service sector is important for developing countries. Also the service sector has many sub-sectors that are strategic in many aspects – economically (for example, finance, distribution); infrastructure and thus economic security (energy and power, telecommunications, transport, postal, water supply); social services and the satisfaction of public and social needs (health, education, transportation, water services).

While there are benefits to foreign investment, there are also costs, and thus a balance is required. The services sector usually produces services that are “non-tradeables”. Thus, there is significant foreign exchange loss associated with foreign service providers, as there is an outflow of profits, while most of the output is for local use.

It is thus crucial that this sector is carefully regulated under national development policy. Foreign participation has a role to play, but what this role is should be carefully considered and given its proper place, within a planned framework, taking into account the factors above (the need to maintain and develop the participation of domestic firms and institutions; and the strategic nature of services – economic, financial, infrastructure, public needs, and social development). Accelerated and excessive liberalisation of key sectors or, worse, an across-the-board liberalisation, under legally binding rules of an FTA, can disrupt or hinder the process of establishing a national services strategy.

For example, many developing countries restrict the participation of foreign service providers in selected sub-sectors, including banking, insurance and other financial services; telecommunications; wholesale and retail distribution trade; business and professional services such as legal, medical, architectural and accounting services. The FTA negotiations, and its negative list approach, would put greater pressure on these countries to liberalise these sectors more than what they have offered at the WTO.

CHAPTER 8: INVESTMENT: LIBERALISATION AND INVESTOR PROTECTION

The “Singapore issues”

The “Singapore issues” – investment, competition and government procurement – are now off the WTO negotiating agenda, at least for the duration of the Doha work programme. Many developing countries worked hard to keep them off the rubric of the multilateral trade agenda. However these topics are proposed by the US and other developed countries in bilateral FTAs.

The African Union’s Trade Ministers’ conference in Cairo in June 2005 adopted a Declaration on Economic Partnership Agreements (that they are negotiating with the EU) which stated that the three Singapore issues should remain outside the scope of the EPA agenda and negotiations. This is despite the fact that these issues had been listed as

agenda topics. The reason put forward is that these issues were recently rejected as negotiation topics by the members of the WTO.

Background to investment issue

Many developing countries opposed the introduction of an investment agreement in the WTO, as they were concerned this would prevent or reduce their policy space to determine their own investment policies, such as choice of and conditions for foreign investment, including entry requirements, equity requirements, performance requirements, regulation on funds transfer, etc.

Most bilateral FTAs with developed countries (for example, the US, EU and Japan) now include investment chapters, which can incorporate the elements and "standards" preferred by the developed countries.

The US-Singapore FTA, for example, allows for a broad definition of investors and investments, "high" standards for the right of establishment, national treatment, prohibition of performance standards, freedom for funds transfer, an expropriation clause, as well as an investor-to-state dispute settlement system (in which the foreign investor, not only its government, can take the host government to an international court for claimed violation of the agreement).

In FTAs involving the US, the expropriation clause typically has a broad definition of expropriation that includes "regulatory takings", or loss of profit and revenue due to an application or change of government regulation or policy. Investors claiming to have suffered losses due to expropriation within this broad definition can take up cases against the host government for compensation. Many such investor-to-state cases have been taken up under NAFTA.

Developing countries should be very cautious with regard to the following: (a) whether they would like to include an investment component to their FTA; and (b) if so, that such a component does not commit them to standards and elements that may be detrimental to their investment and development policies.

Present national policy and legal space to determine the definition and scope of investment, right to establishment, type of foreign investment to welcome and not welcome, national treatment, transfer of funds, and on performance requirements, dispute settlement system, etc. should not be narrowed or removed by the FTAs. It should be noted that some of the policies undertaken by Malaysia during the financial crisis of 1997-2000, for example, may not be allowed under provisions that could be proposed under an FTA. There is a strong case that binding rules relating to investment should not be part of a developed-developing country FTA. This is especially since the WTO members have decided not to start any negotiations on an investment agreement in the WTO, as developing countries are concerned about the adverse implications for development.

The investment issue has been a controversial subject at the WTO. It was part of the Doha agenda agreed to in 2001, but there was a groundswell of opposition to starting negotiations on investment and other Singapore issues at the WTO's Cancun Ministerial Conference in 2003. In July 2004, investment was dropped off the Doha negotiations agenda by the WTO General Council.

However the investment issue in a deeper and broader way has made a comeback in bilateral free trade agreements. At present this is the main arena where the battle is being fought, of whether to include investment or what kind of investment chapter to include within the FTA.

There is a long history of developed countries attempting to persuade developing countries to agree to a binding international investment treaty. During the Uruguay Round, the developed countries included investment rules in the TRIMs negotiations. However, developing countries were unable to accept this and succeeded in restricting the TRIMs Agreement to only trade-related measures. The developed countries tried again in 1995-96 to have the WTO negotiate an investment agreement but the Singapore Ministerial Conference only agreed on setting up a working group for discussion on trade and investment. They tried again through the Organisation for Economic Cooperation and Development (OECD) to have an investment agreement, but this failed. They then tried to have the issue as part of the Doha Round, but they failed again. The attempt is being made now through bilateral FTAs.

Main design and features of the investment chapter

The main features of the investment chapter in an FTA involving a developed country with a developing country are as follows:

1. **Scope and definition:** The scope and definition of investment are usually very broad. In US FTAs, the definition of foreign investment covers foreign direct investment (FDI), portfolio investments, credit, intellectual property rights (IPRs) and practically all sectors except security and defence. In the US-Singapore FTA, investment means every asset owned or controlled, directly or indirectly, by an investor, that has the characteristics of an investment. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licences, authorisations, permits, and similar rights conferred pursuant to applicable domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges. This means that all these forms of investments (and the investors) will be subject to the rules on pre-establishment rights, market access and national treatment, as well as funds transfer, expropriation and investor-to-state dispute.

2. **Obligations on the right to entry and establishment:** These provide foreign investors the rights to entry and establishment in member countries without (or with minimal) conditions and regulations and to operate in the host countries without most conditions now existing. In FTAs involving the US, the foreign investor is given "pre-establishment" rights. This means that rights are provided to potential investors even before they enter the country, implying that there would be no or minimal regulation on the entry of investments. In contrast, post-establishment rights means that the host country can decide whether or not to accept a potential investor or investment and can impose conditions on the investment if it decides to allow entry to the investor.

3. **"Non-discrimination" and national treatment principles:** National treatment and MFN status would be given to foreign investors and investments. National treatment means that the foreign investor would be given rights to be treated no less favourably than local investors (thus, the foreign investor can be given treatment better than or equal to but not less than the treatment accorded to the local investor). Measures that promote or give preferential treatment to local investors may be curbed as these are seen to be discriminating against foreign investors.

4. **Ban on performance requirements:** The host state would be prohibited from imposing performance requirements on the foreign investor or investment. For example, regulation on limits and conditions on equity, obligations for technology transfer, measures for using local materials and for increasing exports or limiting imports would be prohibited or disciplined.

5. **Rights given for funds transfer:** The countries are obliged to allow free mobility of funds into and out of the country, thus restricting or prohibiting regulations/controls on funds transfer.

6. **Protection of investors' rights against expropriation:** There are also strict standards of protection for foreign investors' rights, especially in relation to "expropriation" of property. A wide definition is given to expropriation in the US FTA model; it includes both direct and "indirect expropriation". The meaning of "indirect expropriation" includes the loss of goodwill and future revenue/profits of a company or an investor as a result of a government measure or policy. If there is such an expropriation, the host state is liable to compensate the investor for such losses.

7. **Dispute settlement:** The agreement is legally binding and subject to dispute settlement in designated international courts. In FTAs involving the US, the dispute settlement system includes enabling investors to bring cases against the host state in the designated international courts, one of which is the International Centre for Settlement of Investment Disputes.

US companies are given the right to sue the developing-country host government directly, and if the case is found in the investor's favour, the government is liable to pay compensation.

NAFTA was the first regional agreement that had not only an investment chapter but also the investor-to-state dispute settlement system. Many cases have been taken against Canada, Mexico and the US under NAFTA. Cases such as these can be expected against countries which sign on to FTAs with the US.

Among the cases under NAFTA are the following[4]:

- The United States has been sued by Methanex, a Canadian corporation, as the state of California had phased out a chemical additive that contaminates the ground water. The company is seeking damages of $970 million. (Methanex case)
- Canada's environmental regulation that banned a chemical that causes global warming and is a neurotoxin was challenged by US corporation Ethyl, which sought compensation of $250 million. The case was settled and Ethyl was paid $13 million. (Ethyl case)
- US chemical company Crompton has challenged a voluntary agreement established by Canada to restrict production of the chemical lindane (a pesticide that is a possible carcinogen). Crompton is seeking damages of $100 million. (Crompton case)
- Canadian company Glamis Gold is seeking compensation of $50 million from the United States for a California regulation that requires backfilling and restoration of open pit mines that would damage Native American sacred sites. (Glamis Gold case)
- US firm Metalclad sued Mexico for $90 million, challenging a Mexican municipality's refusal to grant a construction permit for a toxic waste dump and the governor's declaration of an ecological preserve surrounding the site. Metalclad won and $15.6 million was paid in compensation. (Metalclad case)
- A Canadian temporary ban on hazardous PCB exports was challenged by US waste treatment company, S.D. Myers. The temporary ban was put in place while Canada was considering its obligations under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. S.D. Myers sued for US$ 20 million, won the case and was paid $4.8 million. (Myers case)

Not all these cases have been decided in favour of the foreign investor yet, but it indicates the possible ways that companies may use the investment chapter to challenge environmental measures. Even if the company does not sue, the mere threat of legal action may be enough to prevent governments from carrying out policies that are put in place to protect the environment.

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[4] A good source on investor-to-state dispute cases under NAFTA is Public Citizen (2005). These cases are taken from this paper.

Some implications of the investment chapter in FTAs

The following is a further elaboration of the development implications of an investment chapter of the type found in US FTAs.

- Granting pre-establishment rights to foreign investors and companies would be a radical departure from existing policy for many developing countries. Even before entering the country, the potential investor has the right to invest. The role of the developing country's foreign investment committee to screen and approve/not approve or to impose conditions on intending foreign investors would be much reduced.

- Foreign investors will have "national treatment", i.e. the right to be treated as well as or better than local investors. This prevents governments from having positive policies that favour local investors and firms.

- Many "performance requirements" (conditions for allowing a foreign firm to operate) will have to be banned in relation to US investors. These were imposed so that the US firms would be obliged to contribute to the host economy, by for example establishing joint ventures with locals, transferring technology and using local materials.

- US investors would have the right to own 100% of their own companies. Limits on the extent of ownership by American investors can only be placed if these limitations are listed down in an exclusion list within the FTA.

- There cannot be restrictions placed on the inflow and outflow of funds of American investors. For example, several of the measures adopted by Malaysia during the financial crisis of 1997-1999 (such as a moratorium on the outflow of ringgit-denominated assets held by foreigners in Malaysia) would not be allowed under the FTA rules. Investors who feel their rights have been violated and have suffered a loss can sue the government for compensation for expropriation.

- The investment chapter covers all sectors. The investment aspect of services is also covered in this chapter, in the US FTAs. On market access aspects, the investment chapter in a typical US FTA takes a negative list approach, in that every sector is taken to be totally liberalised unless exceptions are specifically listed. There are many disadvantages with this negative list approach, as mentioned in the section on services, such as that: (a) the country is much more vulnerable to pressures to liberalise; (b) it may not be sufficiently aware of all the sectors and sub-sectors for which protection of local industry or firms is required and thus may not list all the sub-sectors it wishes not to liberalise; (c) the country may not be able to predict or plan which sectors it may wish to promote domestically in future and thus may agree to liberalise sectors which in future it may regret doing; (d) the country will find it difficult to "backtrack" after committing, when circumstances require it to protect domestic firms or the

economy; (e) the country will not be able to predict which new sectors may emerge in future, and thus cannot exclude these in the list.

- As in the services chapter, the exceptions are to be explicitly listed in three categories, in a typical US FTA. Annex I will contain (a) a list of existing "non-conforming measures" (i.e. that do not conform to national treatment, MFN, performance requirements and senior management/board of directors) and (b) an amendment to any non-conforming measure as long as it does not decrease the conformity of the measure. Thus Annex I installs a "standstill" and prevents any existing measure from becoming stricter. It is important to note that the exceptions cover only national treatment, MFN, performance requirements and senior management/board but there is no exception for other provisions, including minimum standard of treatment, transfer of funds and expropriation, nor the investor-to-state dispute system.

- Exceptions can also be entered into an Annex II, in which the country can list sectors and activities it wants to exempt for measures it wants to adopt or maintain. However, again, these measures are only in relation to national treatment, MFN, performance requirements and management/board. Other measures such as transfer of funds and expropriation are not exempted.

- The provision on free and unrestricted transfer of funds (inflows and outflows) for the foreign investors from the FTA partner has the potential to increase financial instability, and to prevent measures that can be taken to lessen financial instability or crises. It would be more difficult to prevent the entry of speculative funds and instruments (given the provisions on pre-establishment rights and free funds transfer) and to take measures that restrict the outflow of funds, as during an emergency. In the negotiations for the US-Singapore FTA, Singapore wanted an exception to freedom of funds transfer in the case of short-term speculative funds during a financial emergency, but the US did not agree. The only concession is that for only certain types of funds, Singapore would not be liable to pay compensation if the restriction on outflow is less than a year and does not "substantially impede transfers". (This was explained by a Singapore negotiator as meaning that a levy or tax can be imposed on funds leaving the country, but not the prohibition of outflow.) (Koh and Chang 2004).

- The developing country would be bound by rules prohibiting "expropriation" of the American investors' property. A wide definition is given to expropriation in the FTA, which includes "direct" and "indirect" expropriation. Indirect expropriation usually includes the loss of goodwill and future revenue/profits of a company or an investor as a result of a government measure or policy. If there is such expropriation, the host state is liable to compensate the investor in full including interest at a "commercially reasonable" rate.

- The developing country would be subject to investment "dispute settlement" under the FTA in which either the US government or US investors can sue the

government for compensation for losses claimed by the investors for expropriation. The cases are to be brought before an international court (the main one being the International Centre for Settlement of Investment Disputes). The cases can involve claims worth millions or hundreds of millions or even more than a billion dollars, as the experience of other countries having an FTA with the US (eg Canada, Mexico) has shown. Through the FTA, the country would thus be agreeing to subject itself to legal suits by American investors claiming that they have suffered or will suffer losses and potential losses resulting from government measures and policies.

- The expropriation and dispute-settlement provisions open the country to legal suits by both the US and its investors, including for "indirect" expropriation, which can include measures taken by government on economic, social, health or environmental grounds. The disadvantages include: (a) the government is not able to undertake many policies which may be construed to be expropriation; (b) even if the government believes the measure is not "expropriation", there can be a "chill effect" of not wanting to be sued, and thus a reluctance to introduce policies that are unpopular with the investors; (c) the government opens itself to being liable for legal suits for compensation directly from US investors and in international courts, with potential claims of many millions or billions of dollars.

- Intellectual property is also listed as an "investment". Thus, IPR holders could make use of the investment chapter to file claims for compensation on the grounds that their property is being "expropriated".

The need for space and flexibility for investment and development policies and the effects of the FTA investment chapter

Foreign investment is a complex phenomenon with many aspects. Its relationship with development is such that there can be positive as well as negative aspects. There is an important need for the role of government and government policy to regulate investments so that the positive benefits are derived while the adverse effects are minimised or controlled. The experience of countries shows that governments have traditionally made use of a wide range of policy instruments in the formulation of investment policy and in the management of investment. It is crucial that developing countries continue to have the policy space and flexibility to exercise their right to such policies and policy instruments.

Due to its particular features, foreign investment can have the tendency towards adverse effects or trends that require careful management. These include:

(a) possible contribution to financial fragility due to the movements of funds into and out of the country, and to some types of financially destabilising activities;
(b) possible effects on the balance of payments (especially increased imports and outflow of investment income, which have to be balanced by export earnings and

new capital inflows; if the balance is not attained naturally, it may have to be attained or attempted through regulation);

(c) possible effects on the competitiveness and viability of local enterprises;

(d) possible effects on the balance between local and foreign ownership and participation in the economy;

(e) possible effect on the balance of ownership and participation among local communities in the society.

On the other hand foreign investment can make positive contributions, such as:

(a) use of modern technology and technological spillovers to local firms
(b) global marketing network
(c) contribution to capital funds and export earnings
(d) increased employment.

In order that these potential benefits be realised, and that a good balance is attained between the negative and positive effects, so that there be an overall net positive effect, there is a crucial role for governments in a sophisticated set of investment and development policies.

An investment chapter of the type envisaged by developed countries in their FTAs with developing countries would make it much more difficult to achieve a positive balance as it would severely constrain the space and flexibility for investment and development policies.

Such a chapter is ultimately designed to maximise foreign investors' rights whilst minimising and curbing the authority, rights and policy space of governments and developing countries. This has serious consequences in terms of policy making in economic, social and political spheres, affecting the ability to plan in relation to local participation and ownership, balancing of equity shares between foreigners and locals and between local communities, the ability to build capacity of local firms and entrepreneurs, etc. It would also weaken the position of government vis-à-vis foreign investors (including portfolio investors) in such areas as choice of investments and investors, transfer of funds, performance requirements aimed at development objectives such as technology transfer, protecting the balance of payments, and the formulation of social and environmental regulations.

It is argued by proponents that an investment agreement will attract more FDI to developing countries. There is no evidence of this. FDI flows to countries that are already quite developed, where there are resources and infrastructure, or where there is a sizable market.

A move towards a binding investment agreement is thus dangerous as it would threaten options for development, social policies and nation-building strategies.

Conclusions

There should not be an investment chapter of the kind envisaged by the developed-country proponents in a FTA.

There should not be a legally binding agreement for securing establishment rights and national treatment for foreign investment and investors, and especially it should not allow for investor-state dispute settlement (i.e. investors to be able to take cases against the host states).

The principles that originate for the purposes of trade relations (e.g. in GATT and WTO), including national treatment and MFN, were meant to apply to trade in goods and are inappropriate when applied to investment. Instead, their application to investment would be damaging to the development interests of developing countries. Traditionally developing countries have had the freedom and right to regulate the entry and conditions of establishment and operation of foreign investments; restricting their rights and policy space would have adverse repercussions.

A more appropriate framework must be a balanced one, with the main aim of regulating corporations (instead of regulating governments); it could be one that is not legally binding. An attempt to establish such a balanced framework was made at the UN in the 1980s, when a code of conduct on transnational corporations was negotiated. However the negotiations failed to produce an outcome.

CHAPTER 9: LIBERALISATION OF GOVERNMENT PROCUREMENT

Government procurement in trade agreements

Government procurement is in some countries even more important than trade in terms of the value and volume of goods and services involved. In some countries it could account for 15 to 30 per cent of the GNP. It comprises the expenditures of government on goods and services (including projects), excluding personnel costs. It is a very important tool of government policy (economic, social and political). Most governments have guidelines that favour the granting of projects to local companies and people (for example, by reserving some purchases or projects only for locals, or by allowing local proposals to be up to 10 or 20 per cent higher in cost than foreign ones).

Procurement has been excluded from the rules of the WTO, such as market access and national treatment. There is only a plurilateral agreement on government procurement in the WTO, which is not compulsory for WTO members to join, and almost no developing country has signed up to it.

The developed countries made great attempts to introduce a multilateral agreement on government procurement, which would make it mandatory for all WTO members to join. The developing countries were extremely reluctant to agree, as they consider this to be a subject of national policy and that the trade rules of the WTO are unsuitable for this subject. Developed countries then proposed that an agreement confined to only "transparency" in government procurement be introduced, which would exclude market access or national treatment. In other words, governments would only have to introduce more transparent rules on what projects are up for tender, who is eligible to apply, and the results, but would not have to open up the projects to foreigners. After years of discussion, even this limited agreement was rejected in July 2004, and remains outside the WTO arena.

As procurement is a trillion-dollar business, the developed countries are determined to break into this business for their companies. They are thus now including a full-fledged procurement chapter (dealing with market access and national treatment) in their FTAs.

Features of government procurement in FTAs involving the US

In the FTAs involving the US, the chapter on government procurement goes far beyond what was being discussed in the WTO for many years (with the discussions eventually suspended). The WTO working group had been given the mandate only to discuss "transparency in government procurement", with possible rules to be limited to only the transparency aspects, and excluding market access aspects. However, the FTA chapter on government procurement covers the market access aspects, i.e. enabling foreign companies to bid on equal terms with local companies for government contracts. This would drastically limit or eliminate policy space for the developing-country government to give preferential treatment to local companies and persons, and remove a crucial instrument for boosting the domestic economy.

The FTA chapter typically involves: (1) market access for each party to the government procurement market of the other party; (2) national treatment for the foreign firms and products; (3) a wide definition of government procurement, involving various levels of government (national, regional and municipal) and various types of government business; (4) "threshold levels" representing monetary values; the agreement applies only if the contracts put out by the governments are valued at the threshold levels or above.

The US-Chile FTA provides an example of such a government procurement chapter. One of the objectives is to "strive to provide comprehensive coverage of procurement markets by eliminating market access barriers to the supply of goods and services, including construction services."

The scope and coverage applies to any measure relating to a procurement "by any contractual means, including purchase and rental or lease, with or without an option to buy, build-operate-transfer contracts, and public works concession contracts." Not

included are non-contractual agreements or assistance provided by government, such as grants, loans and subsidies; purchases funded by international grants; hiring of government employees; and services for regulated financial institutions.

The agreement covers procurement carried out by entities listed in an annex. For Chile, these include 20 federal Ministries, many regional governments and 341 municipalities. For the US, they include 79 federal departments and many offices of state governments.

The same annex has also specified the same threshold levels for both countries. The threshold levels are $56,190 for procurement of goods and services and $6.48 million for procurement of construction services for the central government level, and $460,000 and $6.48 million respectively for the sub-central level.

The main general principles are national treatment and non-discrimination. In any measure governing government procurement, each party shall give to the goods and services of the other party, and to the suppliers of the other party, "treatment no less favourable than the most favourable treatment the Party accords to its own goods, services and suppliers."

Also, neither party may treat a locally established supplier less favourably than another local supplier on the basis of degree of foreign affiliation or ownership, or discriminate against a locally established supplier on the basis that the goods or services offered by that supplier are goods and services of the other party.

The major implications of this are that (1) the government must give the foreign country's companies treatment as good as or better than the treatment it gives its national companies; (2) preferential treatment to national companies in the award of contracts will not be allowed in future; (3) if a local company is providing or distributing the goods and services of the foreign country, it shall not be discriminated against as compared to a local company supplying its own goods and services that are locally made.

Another general principle is the prohibition of "offsets". It says: "An entity shall not consider, seek or impose offsets at any stage of a procurement." Several developing countries make use of offsets to reduce the net cost of purchase or payment for goods and services procured.

The agreement includes a provision requiring the entities to publish in advance a notice inviting interested suppliers to submit tenders for that procurement. The notice will include a description of the procurement, conditions for suppliers to fulfil, time limits to submit tenders and delivery dates for the goods to be procured.

There are many detailed provisions on (1) publication of procurement measures; (2) publication of notice of intended procurement; (3) time limits for the tendering process; (4) information on intended procurements; (5) technical specifications; (6) conditions for participation; (7) tendering procedures; (8) awarding of contracts; (9) information

on awards; (10) ensuring integrity in procurement practices; (11) domestic review of supplier challenges.

These provisions in effect formulate in detail what a country's procurement policy and practice should be. For example, under awarding of contracts, there is the prescriptive provision that the government institution "shall award the contract to the supplier that the entity has determined to be fully capable of undertaking the contract and whose tender is determined to be the most advantageous in terms of the requirements and evaluation criteria set out in the tender documentation."

Under domestic review of supplier challenges, the companies applying for government contracts can bring cases to an independent "impartial administrative or judicial authority". The authority must be given the opportunity to take "prompt interim measures" to preserve the supplier's opportunity to participate in the procurement and to ensure the country complies with measures in the procurement chapter. This includes "suspending the contract award or the performance of a contract that has already been awarded."

Also the country has to ensure that "all documents related to a challenge to a procurement" are made available to the review authority. The authority must allow the supplier to review relevant documents and to be heard in a timely manner, and the entity complained against must respond in writing to the supplier's challenge, and the authority must give prompt decisions in writing with an explanation of the grounds for each decision.

The country can also modify its coverage only if it offers "acceptable compensatory adjustments to the other party" to maintain a level of coverage comparable to that existing before the adjustment, within 30 days.

A procurement committee shall also be set up, including to consider further negotiations to broaden the coverage including with respect to sub-federal entities and state-owned enterprises.

In terms of the treatment of which goods and services are covered by the agreement, the US FTAs seem to take the following approach. Firstly, there are thresholds for the value of goods, services and construction services; only those projects valued at the threshold levels or above are covered. Each country lists the departments in the federal and sub-federal level, and the "other covered entities" under which the thresholds apply. Secondly, for goods, each country lists down the government departments that will be covered by the agreement. Thirdly, for services, each country indicates the departments that are excluded from coverage.

National policy changes needed due to FTA

To implement the obligations, a developing country would have to undertake reforms and new procedures.

Most developing countries provide preferential treatment to local suppliers in government procurement. Thus, the most important reform would be to give up this preferential treatment, and to give equal (or superior) treatment to foreign suppliers, in accordance with the FTA. There are many consequences for such a significant change in policy.

There are also many new procedures that have to be followed. For instance, the FTA specifies what kind of conditions can or cannot be imposed on suppliers interested in participating in a procurement. It specifies what kind of tendering procedures should be followed. Importantly, it obliges the country to set up independent review institutions and processes to enable a supplier to challenge the decision on granting of procurement contracts.

Erosion of policy space and in the role of government procurement

There is a significant role of government procurement in socio-economic development and national policy. This role would be much eroded by the FTA.

A large part of an average developing country's income is made up of the spending of its federal government, on the purchase of goods, payment for all kinds of services, and a variety of projects, from the building of schools and roads to billion-dollar mega-dams and industrial complexes.

Add also the expenditure of state and municipal governments, statutory bodies and state-run enterprises, and the total amount of money spent by the public sector becomes enormous; for many countries, much larger even than their total imports or exports. For example, in some countries, public sector expenditure may comprise 30 to 50 percent of GNP, while imports may comprise 10 to 30 percent of GNP. Even if the salaries of government employees are excluded, government expenditure is often higher than imports.

So far, governments have been able to decide for themselves how this money is to be spent, the system of procuring goods and services, and the tendering, scrutiny of applications and award of projects, subject of course to each country's laws and procedures.

The system of government procurement has been taken for granted as very much a matter of national prerogative, often challenged in some countries by Parliaments, opposition parties or public interest groups, but seldom or never questioned as an issue that lies within the sovereign right of a country to determine.

Because of its sensitive nature, government procurement has so far been excluded from the rules (such as national treatment and most favoured nation) of the WTO, including the GATT, agriculture agreement and the services agreement. There is a plurilateral agreement on government procurement; however members can choose whether or not to join it, and most developing countries have chosen not to do so.

Government procurement and policies related to it have very important economic, social and even political roles in developing countries:

--- The level of expenditure, and the attempt to direct the expenditure to locally produced materials, is a major macroeconomic instrument, especially during recessionary periods, to counter economic downturn. Governments often change the level of expenditure as the major tool of fiscal policy to steer the level of demand and growth in the economy.

--- In many developing countries, there are national policies to give preference to local firms, suppliers and contractors, in order to boost the domestic economy and participation of locals in economic development and benefits. In fact, government procurement is a major policy tool for putting into effect a policy of increasing the opportunities for local enterprises to increase their share of the economy.

--- Also in several developing countries, there are policies aimed at providing preferences for certain groups or communities, especially those that are under-represented in economic standing. While such policies can be abused (often leading to charges of "cronyism"), the fact remains that when judiciously employed, procurement policy can be a major policy tool for attaining greater balance in the participation shares among various communities within a nation. Similarly, it can be used to redress regional imbalances, for instance by specifying that certain provinces be allocated a particular share of procurement business.

--- For procurement or concessions where foreign firms are invited to bid, there could be a preference to give the award to firms from particular countries (e.g. other developing countries, or particular developed countries, with which there is a special commercial or political relationship).

Limited gains from US procurement market access

The FTA also theoretically gives the developing country's firms the opportunity to have greater access to the United States procurement market. However, in reality, the opportunities and benefits are limited.[5]

According to a press report, the US government will open approximately $250 billion worth of procurement to the developing country which it partners in an FTA.

[5] The information in this sub-section is from Third World Network (2007a).

How much of this $250 billion are the developing country's companies likely to be able to access under an FTA? The WTO Secretariat's 2006 trade policy review for the US (WT/TPR/S/160/Rev.1) mentions the US government's Federal Procurement Data System (FPDS), the upgraded version of which is now at https://www.fpds.gov/.

Based on an analysis of the data in the FPDS database, it seems that for the year 2005:

- 94% of the action obligation (payments made or initial contract value) went to companies located in the US.
- The remaining 6% was split between companies located in 170 countries and territories. WT/TPR/S/160/Rev.1 explains how so many countries are eligible to supply to the US government (countries which have signed the WTO Government Procurement Agreement, bilateral/regional trade agreements which include government procurement, the WTO plurilateral Agreement on Trade in Civil Aircraft, the 50 least developed countries, countries eligible under the Caribbean Basin Economic Recovery Act, defence equipment produced in countries with an MOU and other exceptions to the Buy American Act, for example if it is determined that domestic preference is inconsistent with the public interest, in case of US non-availability of a supply or material, or for reasonableness of cost).
- 99.1% of that 6% went (in descending order) to: unspecified countries, Kuwait, Canada, South Korea, Germany, UK, Australia, Switzerland, Netherlands, Russia, Japan.

A preliminary examination of the changes in the US government procurement market access that Chile achieved after its FTA with the US was signed found that for Chile, contracts signed between 1/1/2003 and 31/12/2003 had an action obligation of $32,090. Chile's USFTA came into force on 1/1/2004. Contracts signed between 1/1/2004 and 31/12/2004 had an action obligation of $635,516. Contracts signed between 1/1/2005 and 31/12/2005 had an action obligation of $233,570.

Effects of government procurement liberalisation under FTA

There would be serious effects from an FTA's government procurement chapter on developing countries.

Countries that sign on to FTAs containing a chapter on government procurement in future will not be allowed to give preferences to local companies for the supply of goods and services and for the granting of concessions for implementing projects. (There is however a positive list approach where parties state what sectors they are offering, and thresholds.) The effects on developing countries would be severe.

Should government procurement be opened up through the national treatment and MFN principles, the scope and space for a government to use procurement as an instrument for development would be severely curtailed. For example:

- If the foreign share increases, there would be a "leakage" in government attempts to boost the economy through increased spending during a downturn. This is because an increased part of any expansion in government expenditure would be spent on imported products, thus decreasing the multiplier effects of public spending on the domestic economy.
- The ability to assist local companies, and particular socio-economic groups or ethnic communities, or underdeveloped regions, would be seriously curtailed. This is because national treatment would have to be given to foreign firms to bid for supplying goods and services as well as development projects.
- The ability to give preferences to certain foreign countries would similarly be curtailed, under the most-favoured-nation clause. (This would be the case if government procurement became the subject of a multilateral agreement in the WTO.)

Given the great importance of government procurement policy as a tool required for economic and social development and nation building, it is imperative that developing countries retain the right to have full autonomy and flexibility over their procurement policy.

Therefore, it is important for developing countries to consider avoiding government procurement as an item in a bilateral trade or economic agreement. This is especially so because the developing countries have fought such a controversial battle to exclude this as a negotiating issue within the current Doha work programme in the WTO. At the least, there should be national debates about the ramifications of having a government procurement clause within an FTA.

In an FTA involving a developed and a developing country, it is more likely that the developed country can take advantage of a government procurement market access chapter as it has the supply capacity. Most developing countries will not be able to take advantage, or at least to the same degree, because they lack the supply capacity. Thus there is an inherent imbalance in including this in an FTA.

CHAPTER 10: COMPETITION POLICY

Background to the issue

Competition policy is a complex subject, especially when put in the context of trade agreements. At first glance, "competition policy" is taken to mean restricting the power and scope of activities of the large corporations, especially transnational companies.

However, "competition" is usually taken to mean something different by trade officials of developed countries. They have been trying to make use of "competition policy" as a

concept linked to market access, in which foreign firms and their products and services should have the right to "free competition" vis-à-vis local firms in markets of developing countries. "Free competition" would, in their approach, mean that the preferences given to local firms, and any advantages or assistance they enjoy, should be curtailed or eliminated, so that the foreign firms can compete on a "level playing field".

In this paradigm, the transnational corporations of the US, Europe, Japan, and other countries would be able to compete on "equal ground" as local companies in the local markets. In actual fact, these TNCs already enjoy great advantages, including big size, large financial resources, high technology, marketing networks, and brand names. Thus there is no level playing field to begin with. Without some assistance, preferential treatment, or home-ground advantages (such as being familiar with the local language and customs, and having a distribution system built over generations), the local companies of developing countries will not be able to survive the competition from foreign firms.

From 1996 to 2004, the EU, backed by Japan and the US, tried to introduce a competition agreement in the WTO that would enable foreign firms and their goods and services to compete "equally" with local firms, through the removal of preference and subsidisation of local firms. Later, the proposal was narrowed down to initial topics such as principles of non-discrimination, transparency and procedural fairness, as well as hardcore cartels and modalities for voluntary cooperation. This did not preclude the later full-scale introduction of the initial broad proposal.

The FTAs that involve the US typically require the developing country to establish competition legislation. Development economists have questioned whether the framework of competition policy now in place in the US and other developed countries is appropriate for developing countries which are now in their developmental stage. Their concern is that this framework, which the FTA promotes, may hinder the growth of local firms and make them even less able to compete or survive against the large foreign companies especially in the face of globalisation. The competition issue in FTAs is thus extremely complex.

These economists argue that developing countries should have competition policy and law, but that these must be tailored to their development needs. Ajit Singh, for example, concludes that the kind of competition policy adopted by Japan in its developmental period (1960s-1970s) is more suitable for developing countries. In this model, competition policy and law were formulated that prevented the full onslaught of large foreign firms that were anti-competitive because of their size and monopolistic characteristics, and local firms were able to develop and expand.

In the typical US FTAs there are also typically competition policy elements in some chapters besides the chapter on competition itself. For example, there are competition elements in the telecommunications chapter in the FTA with Singapore in which the parties are obliged that if there is a government-linked company involved in telecoms activity, it should not be able to influence government policy-making; and that the

companies of the FTA partner should have access to certain telecom infrastructure in the country.

The aim of the US is apparently to make use of the competition principle to erode the ability of local firms to have a market advantage or to have preferential treatment or to be promoted by the national government, on the ground that this discriminates against the foreign firms. Another aim is to limit or reduce the influence and position of government-linked companies by arguing that it would be anti-competitive for the government to assist a company (even if it is owned by the government) in its market operations.

Competition law and policy, in appropriate forms, are beneficial to a country's development. However each country must have full flexibility to choose a model which is suitable, and which can also change through time to suit changing conditions. Having an appropriate model is especially important in the context of globalisation and liberalisation where local firms are already facing intense foreign competition. In particular, developing countries must have the flexibility to choose the paradigm of competition and competition policy/law that is deemed to be more suitable to their level of development and their development interests.

The developed countries' approach, that competition policy should provide "effective opportunity for competition" in the local market for foreign firms, and thus to apply the WTO "core principles" to competition law/policy, would affect the needed flexibility for the country to have its own appropriate model or models of competition law/policy.

At present, there is hardly any common understanding let alone agreement among countries on what the competition concept and issue means in the context of a framework of trade rules, especially in terms of its "interaction" with trade and its relationship with development. The whole set of issues of competition, competition law and competition policy and their relation to trade and to development is extremely complex. The proposal of the proponents of a WTO agreement (especially the EU) is to have multilateral rules that discipline members to establish national competition law and policy. According to these advocates, these laws/policies should incorporate the "core principles of the WTO", defined as transparency and non-discrimination (MFN and national treatment). Thus, the location of the venue of the competition issue and the agreement within the WTO would bias the manner in which the subject and the agreement is to be treated. In this case, the "core WTO principles" would be applied to competition.

Towards a development framework on competition for developing countries

The developed countries' conceptual and negotiating framework can be challenged through a different framework that looks at competition through the lens of development. Developing countries can argue that only if local firms and agencies are given certain advantages can they remain viable. If these smaller enterprises are treated on par with the huge foreign conglomerates, most of them would not be able to survive. Perhaps some

would remain because over the years (or generations) they have built up distribution systems based on their intimate knowledge of the local scene that give them an edge over the better-endowed foreign firms. But the operation of such local distribution channels could also come under attack from a competition policy in the WTO or the FTAs as the developed countries are likely to pressure the local firms to also open their marketing channels to their foreign competitors.

At present, many developing countries would argue that giving favourable treatment to locals is in fact pro-competitive, in that the smaller local firms are given some advantages to withstand the might of foreign giants, which otherwise would monopolise the local market. Providing the giant international firms equal rights would overwhelm the local enterprises which are small- and medium-sized in global terms.

However, such arguments will not be accepted by the developed countries, which will insist that their giant firms be provided a “level playing field” to compete “equally” with the smaller local firms. They would like their interpretation of “competition” (which, ironically, would likely lead to foreign monopolisation of developing-country markets) to be enshrined in WTO law or in the FTAs.

Competition can be viewed from many perspectives. From the developing countries' perspective, it is important to curb the mega-mergers and acquisitions taking place which threaten the competitive position of local firms in developing countries. Also, the abuse of anti-dumping actions in the developed countries is anti-competitive against developing countries' products. The restrictive business practices of large firms also hinder competition. However these issues are unlikely to find favour with the major countries, especially the US, which wants to continue its use of anti-dumping actions as a protectionist device. In the FTA, the need for foreign firms to have national treatment and a free competition environment in the host country could well prevail, especially given the unequal negotiating strength which works against the developing countries. The likely result is that developing countries would have to establish national competition laws and policies that are inappropriate for their conditions. This would curb the right of governments to provide advantages to local firms, and local firms themselves may be restricted from practices which are to their advantage.

What is required is a conceptual framework or paradigm to view competition from a development perspective. Competition law/policy should complement other national objectives and policies (such as industrial policy) and the need for local firms and sectors to be able to successfully compete, including in the context of increased liberalisation.

From a development perspective, a competition and development framework should have the following elements:

- An understanding that local industrial and services firms and agricultural farms must build up the capacity to become more and more capable of competing successfully, starting with the local market, and then if possible internationally. This requires a long time frame, and cannot be done in a short while.

- A vital role for the state is required in nurturing, subsidising and encouraging the local firms. The buildup of local capacity to remain competitive and become more competitive also requires protection from the "free" and full force of the world market for the time it takes for the local capacity to build up. This means that development strategy has to be at the centre, and competition as well as competition policy have to be formulated as a means to meet the central development needs and strategy.

- Therefore some of the conventional models of competition may not be appropriate for a developing country. On the other hand other models may be more appropriate, but their adoption may be hindered or prohibited by a WTO agreement on competition that is based on the "core principles of the WTO."

- For example, the economist Ajit Singh has pointed out that: (1) The US and European models of competition law and policy are inappropriate and can cause harm to the development efforts of developing countries. (2) More suitable is the Japanese model of the 1950s and 1960s, when Japan was at its developmental stage. The Japanese government enacted competition law which was a tool to prevent the intrusion of large foreign firms and their products, whilst at the same time used industrial policy to nurture and strengthen Japanese firms so that they could develop and eventually successfully compete with the giant foreign companies. The kind of model represented by the Japanese example, in which competition policy is complemented and indeed subsumed under industrial policy, would not be allowed in the kind of competition agreement being propounded in the FTAs. Indeed, they would precisely seek to outlaw the kind of Japanese-style model that developing countries may find consistent with their development needs.

- There is no convincing case for competition policy to be a subject of an FTA (which should be about trade). If it is in an FTA, then the FTA would create a set of binding rules to govern the competition policies and laws of developing countries. Given the market access and national treatment principles in the FTA, a competition chapter in the FTA is likely to be skewed in a way that is inappropriate for the development interests of developing countries.

- If there is to be a discussion on "competition" in trade negotiations, including in FTAs, developing countries could give their own interpretation of this issue and put forward their own ideas for the discussion (in an attempt not to have a competition chapter in the FTA). The trade expert Bhagirath Lal Das has suggested that the following issues could be put forward:

  -- Obligations of the foreign firms to the host country.
  -- Obligation of the home government to ensure the foreign firms fulfil their obligations.
  -- Competitiveness of domestic firms: to consider measures to be

undertaken by domestic firms, government and a possible multilateral framework to enable local firms (especially small firms) to remain or to be competitive and to grow.
-- Competition impeded by government action (for example, anti-dumping action).
-- Competition impeded by IPR protection.
-- Global monopolies and oligopolies and their effect on local firms in developing countries.
-- Big mergers and acquisitions (by transnational companies) and their effects on developing countries.

The US proposal on competition in its FTAs: Anti-competitive business conduct, designated monopolies and government enterprises

A typical competition chapter in a US FTA can be seen in the FTA with Singapore. The chapter comprises three subjects: (1) anti-competitive business conduct, (2) designated monopolies, and (3) government enterprises. These topics give an idea already of the disciplines the FTA seeks to impose on the operation of national companies.

The objective of the chapter states: "Recognizing that the conduct subject to this Chapter has the potential to restrict bilateral trade and investment, the Parties believe proscribing such conduct, implementing economically sound competition policies, and engaging in cooperation will help secure the benefits of this Agreement." The point being put forward is that the subject (i.e. anti-competitive business conduct, monopolies designated by government, and government-linked companies or GLCs) can restrict the benefits of trade and investment sought by the FTA, and thus both countries have to proscribe or discipline such conduct and have "economically sound" competition policies.

On ANTI-COMPETITIVE BUSINESS CONDUCT, the countries commit:

(a) To having measures to proscribe anti-competitive business conduct and to taking action on such conduct. This is taken to mean that the country will introduce a competition law; a footnote in the US-Singapore FTA says Singapore shall enact general competition legislation by January 2005 (just a year after the FTA was signed).

(b) To establishing an authority to enforce its measures to proscribe anti-competitive business conduct.

(c) That the enforcement policy of the national authority includes not discriminating on the basis of the nationality of the subjects of their proceedings.

(d) That a court will give opportunity to a person charged to be heard and to review the sanction.

On DESIGNATED MONOPOLIES, the countries commit that:

(a) Where a country designates a monopoly that may affect the other country's interests, the country shall: (i) introduce such conditions on the operation of the monopoly as will minimise or eliminate any nullification or impairment of benefits; and (ii) provide written notification to the other party of the designation and any such conditions.

(b) A general competition law will be enacted by a certain date and it shall not exclude government enterprises.

(c) They ensure that any privately-owned monopoly that it designates after the agreement is signed and any designated government monopoly:

(i) acts in a manner that is not inconsistent with the party's obligations under this agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the party has delegated to it, such as the power to grant import or export licences, approve commercial transactions, or impose quotas, fees or other charges;

(ii) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, etc;

(iii) provides non-discriminatory treatment to covered investments, to goods of the other party, and to service suppliers of the other party in its purchase or sale of the monopoly good or service in the relevant market; and

(iv) does not use its monopoly position to engage directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anti-competitive practices in a non-monopolised market in its territory that adversely affect covered investments.

On GOVERNMENT ENTERPRISES, the commitments in the US-Singapore FTA are that:

(a) Each party shall ensure that any government enterprise acts in a manner consistent with the party's obligations under this agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the party has delegated to it, such as the power to expropriate, grant licences, approve commercial transactions, or impose quotas, fees, or other charges.

(b) The United States shall ensure that any government enterprise accords non-discriminatory treatment in the sale of its goods or services to covered investments.

(c) Singapore shall ensure that any government enterprise:

(i) acts solely in accordance with commercial considerations in its purchase or sale of goods or services, such as with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, and provides non-discriminatory treatment to covered investments, to goods of the United States, and to service suppliers of the United States, including with respect to its purchases or sales;

(ii) does not, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership: (1) enter into agreements among competitors that restrain competition on price or output or allocate customers for which there is no plausible efficiency justification, or (2) engage in exclusionary practices that substantially lessen competition in a market in Singapore to the detriment of consumers.

(d) Singapore shall take no action or attempt in any way, directly or indirectly, to influence or direct decisions of its government enterprises, including through the exercise of any rights or interests conferring effective influence over such enterprises, except in a manner consistent with this agreement. However, Singapore may exercise its voting rights in government enterprises.

(e) Singapore shall continue reducing, with a goal of substantially eliminating, its aggregate ownership and other interests that confer effective influence in entities.

(f) Singapore shall, at least annually, make public a consolidated report that details for each covered entity: (1) the percentage of shares and the percentage of voting rights that Singapore and its government enterprises cumulatively own; (2) a description of any special shares or special voting or other rights that Singapore or its government enterprises hold; (3) the name and government title(s) of any government official serving as an officer or member of the board of directors; and (4) its annual revenue or total assets, or both, depending on the basis on which the enterprise qualifies as a covered entity.

(g) Singapore shall also, on receipt from the US of a request regarding a specific enterprise, provide to the US the information listed above, for any enterprise that is not a covered entity or an excluded enterprise, with the understanding that the information may be made public.

There are also provisions on TRANSPARENCY AND INFORMATION REQUESTS. Each party, at the request of the other party, shall make available public information concerning (a) the enforcement of its measures proscribing anti-competitive business conduct; (b) government enterprises, and designated monopolies, public or private. The requests shall indicate the entities involved, specify the particular products and markets concerned, and include some indicia that these entities may be engaging in practices that may hinder trade or investment between the parties. (c) exemptions to its measures proscribing anti-competitive business conduct. Requests for such information shall specify the particular products and markets of concern and include some indicia that the exemption might hinder trade or investment between the parties.

An article on CONSULTATIONS states that to address specific matters that arise under this chapter, the parties shall enter into consultations regarding representations made by a party. In its request, the party shall indicate how the matter affects trade or investment between the parties.

Development implications of the competition chapter

Acceptance of the competition chapter would have serious implications for developing countries in restricting the policy space that now exists in the operations and management of companies, both in the private and public sectors. Among the implications are the following:

1. Given the template of US FTAs, the competition chapter will contain disciplines on (1) anti-competitive business conduct, (2) designated monopolies, and (3) government enterprises. These are very important areas affecting the structure of companies in both the private and public sectors. The FTA will thus have important effects on the structure and operations of enterprises in the developing country. There is a similar aim in these three topics: to mould the structure, behaviour and influence of local enterprises so that they do not block the full benefits of the FTA to be reaped by American companies.

2. The developing country would have to enact a competition law within a short span of time. (Singapore committed to have general legislation on competition just over a year after the FTA was completed.) In itself, having a competition law is not negative and can have positive effects, if it is properly formulated. However it is a complex exercise to formulate a competition law that is appropriate for development, in that it assists rather than undermines a national industrial policy, and that it does not hamper the expansion of domestic enterprises. However the FTA will commit the developing country to enact a competition law and in a short period, i.e. it will fast-track the process. Rushing into such a law would not be the best option; the law should be introduced only when the appropriate elements are found.

3. The competition policy and law that the developing country may have to adopt due to the FTA is likely to be inappropriate because the objective of the competition chapter biases the law towards the narrow goal of “proscribing” anti-competitive business practices that restrict bilateral trade and investment and prevent the benefits of the FTA (i.e. that would otherwise go to the US firms). The meaning of this is that certain business practices and certain characteristics and activities of monopolies designated by the state and of government-linked companies (GLCs) in the developing country may hinder the ability of US companies to reap the full benefits of market access that they expect from the FTA. The aim of the competition chapter is to have rules to discipline the business practices, the monopolies and the GLCs so that their freedom and powers are curbed, and that US companies can take full advantage of market access to the developing country. In actual fact, this turns reality upside down. Because the US companies are so large and powerful, the companies of the developing country require assistance and protection to

enable them to survive and compete. Ironically, by removing the assistance and protection, the competition policy in the FTA will facilitate greater monopolisation by the large foreign companies, thus eventually resulting in less competition and the weakening of the competitive position of local companies.

4. The competition law to be introduced by the developing country will also be constrained by the conditions in the FTA that (a) government enterprises cannot be exempted; and (b) enforcement policy cannot discriminate on the basis of nationality. This has serious implications because (a) certain activities of government enterprises may be seen as "anti-competitive" from one angle but may be useful for development or social purposes from another angle, yet this policy space to have such activities or policies will now be eroded; (b) it may be beneficial to national policy and domestic enterprise growth to have a distinction between local and foreign firms in certain aspects of competition policy; this may now be difficult due to the FTA.

5. Regarding designated monopolies, the developing country will be obliged to introduce conditions on the operation of the monopolies so as to minimise or eliminate "any nullification or impairment of benefits". Another section of the FTA (on administration and dispute settlement) explains this phrase in context, that a party can take the other party to a dispute case if "a benefit the party could reasonably have expected to accrue to it" under the chapters on national treatment and market access for goods, on rules of origin, on services or on intellectual property rights is "being nullified or impaired as a result of a measure that is not inconsistent with this Agreement." This is a provision with serious implications: it means that even if the government maintains a policy measure that is consistent with (i.e. does not violate) the rules of the FTA, that measure could also be challenged in a dispute case by the US if that measure nullifies or impairs the benefits of the FTA expected to be gained by an American company. The developing country would have to impose conditions on the designated monopolies so that their operations do not "nullify or impair" the benefits that would accrue to American companies.

6. Private or government monopolies designated by the developing country's government would also have to abide by many disciplines. The government would have to ensure these monopolies:
(a) act in ways that are not inconsistent with the FTA obligations when the monopoly exercises regulatory and administrative authority such as granting import or export licences, approving commercial transactions, or imposing quotas, fees or other charges;
(b) act solely in accordance with commercial considerations in their purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, etc;
(c) provide non-discriminatory treatment to covered investments, to goods of the other party, and to service suppliers of the other party in their purchase or sale of the monopoly good or service in the relevant market; and
(d) do not use their monopoly position to engage directly or indirectly in anti-competitive practices in a non-monopolised market in their territory that adversely affect covered investments.

7. The developing country would also have to adopt disciplines on government enterprises or GLCs. The government would have to ensure that government enterprises: (a) act in a manner consistent with its FTA obligations when they exercise any governmental authority such as the power to expropriate, grant licences, approve commercial transactions, or impose quotas, fees, or other charges; (b) act solely in accordance with commercial considerations in their purchase or sale of goods or services, such as with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, and provide non-discriminatory treatment to covered investments, to goods of the United States, and to service suppliers of the United States, including with respect to their purchases or sales; (c) do not, either directly or indirectly, including through their dealings with their parent, subsidiaries, or other enterprises with common ownership, enter into agreements among competitors that restrain competition on price or output or allocate customers; or engage in exclusionary practices that substantially lessen competition in a local market.

8. Based on the template of the US-Singapore FTA, the developing country would also be obliged to take no action or attempt in any way to influence or direct decisions of its government enterprises, including through the exercise of any rights or interests conferring effective influence over such enterprises. The country would also be asked to commit to reducing, with a goal of substantially eliminating, its aggregate ownership and other interests that confer effective influence in entities.

9. The developing country can also expect to be asked to make an annual report of details of each covered entity including: (a) the percentage of shares and the percentage of voting rights that the country and its government enterprises cumulatively own; (b) a description of any special shares or special voting or other rights that the country or its government enterprises hold; (c) the name and government title(s) of any government official serving as an officer or member of the board of directors; and (d) its annual revenue or total assets, or both. On top of this, the country shall also provide to the US (on request) the information listed above, for any enterprise that is not a covered entity or an excluded enterprise, and the information may be made public.

10. All these obligations will place heavy obligations on the developing country and its enterprises. It is beneficial for companies, especially monopolies and GLCs, to be more efficient, transparent and accountable. However this should be a nationally initiated and based process, to meet national goals. The obligations placed in the FTA have the goal of ensuring that American companies can reap the full benefits promised by the formal opening of market access, by (a) disciplining the business practices of the developing country's companies, (b) ensuring the monopolies and GLCs give "non-discriminatory treatment" (i.e. national treatment) to American investments, goods and service suppliers; (c) preventing GLCs from having relationships or agreements with their parent companies or subsidiaries that restrain competition or engage in "exclusionary practices." Although in an ideal situation the developing country's companies would be able to withstand and thrive in a totally free global environment, in reality the time for this has not yet arrived, as the developing country's companies are too small and not yet

sufficiently advanced in technology, management and marketing to be able to take on the full might of American companies. The companies receive certain advantages and preferential treatment from government, and government in return has some influence over the companies. The competition chapter's provisions, if implemented, would cause many problems to private as well as government-linked companies.

11. This is not an argument for complacency, as there is a great need for greater efficiency, transparency and accountability of companies in developing countries, whether in the private or public sector. However this process of corporate reform should be a national exercise with the aim of benefiting consumers, the public welfare as well as the companies themselves which should operate more efficiently and competitively, while expanding their social functions and responsibilities as well. However it would be a mistake to place such a comprehensive "competition policy" within an FTA where the main objective is to benefit the American companies that want to enjoy the advantages of market access and national treatment. Placing competition policy in this context would skew this policy in the wrong direction, and in ways that are likely to undermine rather than enhance the growth of enterprises and competitiveness in the developing country.

CHAPTER 11: INTELLECTUAL PROPERTY RIGHTS

Background

The introduction of IPRs as an issue with binding rules within a trade agreement was very controversial, and remains so, after the TRIPS Agreement was incorporated within the WTO. Since then, many economists ranging from Joseph Stiglitz to Jagdish Bhagwati have decried the inclusion of IPRs and TRIPS in the WTO. There is a growing realisation that high IPR standards, promoted by TRIPS to developing countries, are inappropriate to the development needs of developing countries. In particular, the former head of the World Bank's trade research department, Michael Finger, estimated that the cost to developing countries of implementing their TRIPS obligations amounts to $60 billion annually, and that this more than offsets the gains they may expect to obtain from expanded market access in agriculture and textiles in the Uruguay Round. (Khor 2005).

There is now a movement by developing countries to clarify some aspects of TRIPS or to amend them, to reduce the more developmentally-negative aspects. For instance, the Doha Declaration on TRIPS and Public Health has clarified that developing countries can make use of "flexibilities" such as compulsory licences to offset the monopoly privileges of patent holders.

Developing countries are also trying to have TRIPS amended to deal with the problem of "biopiracy", by requiring that patent applications involving biological resources be accompanied by disclosure of the countries of origin and evidence of benefit-sharing arrangements with these countries. Moreover, TRIPS requires some lifeforms to be patented (microorganisms and microbiological processes) but allows the prohibition of

patenting of other lifeforms (plants and animals), and gives countries the leeway to define what is an invention and thus what is patentable.

The TRIPS Agreement requires that intellectual property (IP) protection be granted to plant breeders for plant varieties, while previously this was an issue for each country to decide on. However, TRIPS allows countries flexibility to define their own "*sui generis*" system of protection for plant varieties. Countries can provide for farmers' rights to save and use seeds.

As WTO negotiators have become more aware of the development dimensions of IPRs, the developed countries have tried to introduce even higher standards of IP globally through the World Intellectual Property Organisation (WIPO). However, many developing countries have now started a movement to establish a "Development Agenda" within WIPO. They have also resisted attempts at harmonising patent and copyright laws at even higher standards.

Thus, there is now an attempt by the developed countries to seek the forum of the FTA to: (a) remove or reduce the flexibilities in the TRIPS Agreement and (b) establish even higher standards of IPRs in developing countries. IP is thus a major item in bilateral FTAs, and countries like the US and Japan are keen to have their interests furthered, beyond what is in the TRIPS Agreement. The FTAs threaten the use of TRIPS flexibilities in relation to (a) patents and access to medicines; (b) IP protection of plant varieties with respect to the *sui generis* system, and the rights of farmers; biodiversity; (c) the ability to ban patenting of some lifeforms.

There may also be a potential for FTAs to make it more difficult for countries to have disclosure requirements with respect to patent applications involving biological resources. Some FTAs also oblige developing countries to have tighter copyright legislation, with adverse effects on technology transfer or access to information and information technology.

Moreover, the FTAs involving the US, EU and Japan also require that developing countries join international IP-related treaties, including some (such as UPOV 1991) that have detrimental development effects.

Patents and access to medicines

Before the WTO's TRIPS Agreement, countries were allowed to exempt medicines from being granted patents. This made it easier for these countries to make or import generic drugs (i.e. drugs made by generic producers rather than the brand-name drugs made by "originator" companies) that are usually much cheaper. After the TRIPS Agreement, it was compulsory to allow for patents for medicines. This made it more difficult to promote the generics. But there are many "flexibilities" in TRIPS which countries can use (such as compulsory licensing). However the FTAs with the US erode or remove many of these flexibilities.

In the WTO's Doha Ministerial Conference, developing countries had their rights under the TRIPS Agreement reconfirmed, i.e. they are able to offset patents through compulsory licences, government use and parallel importing, including for medicines. The flexibilities available for policy measures to promote access to cheap medicines were spelt out.

However, US bilateral FTAs with several countries or groupings are limiting the flexibilities or measures that are permitted in the WTO. The result is that the developing country in the FTA would now find it more difficult or impossible to undertake measures such as compulsory licensing or government use to provide cheaper generic drugs to patients.

Examples of this include the following[6]:

(a) **Data exclusivity.** The WTO does not require "data exclusivity", i.e. that data submitted by a patent holder to drug regulatory authorities (to obtain marketing approval for safety) cannot be made use of as part of the drug regulatory approval process undertaken by other applicants. Thus, a generic producer (which is given permission, for example under a compulsory licence, to sell or produce a generic version of a patented drug) can make use of that data when it seeks safety approval from the drug regulatory authority. However, in bilateral FTAs the US seeks to establish or expand "exclusive rights" over test data provided by the originator companies to prevent generic companies from registering an equivalent generic version of the drug, thus preventing or making it difficult for a compulsory licence to take effect, and effectively curbing the supply of generic drugs. It should be noted that this "data exclusivity" applies even to generic versions of drugs that are **not** patented. This provision would seriously harm the domestic generic drug industry in the developing-country FTA partner and also severely affect the local consumers' ability to make use of imported generic drugs. (This limitation is in the US-Singapore agreement and all other recent US FTAs.)

(b) **Extending patent life span.** Patents on drugs last 20 years from the date of filing in most countries. This is the WTO requirement; before the TRIPS Agreement, many countries granted drug patents for fewer years. Through the FTA, the US is seeking to extend the life of the patent beyond the 20-year period. It says that drug companies need to be "compensated" for any "unreasonable" time a national drug authority or patent office takes to examine or approve an application. The life of the patent would be extended by the "unreasonable time" taken. This extension measure is in all the US FTAs since NAFTA.

(c) "**Evergreening" the patent**. Drug companies try to renew patents after they expire by applying for new patents for "new uses" of the same product. This practice has been described as "evergreening" the patent. Under TRIPS, members are not obliged to grant patents on new uses of existing substances. The US wants provisions in FTAs to allow

[6] The first four examples listed here are from the Médecins Sans Frontières paper, "Access to Medicines at Risk Across the Globe".

companies to apply for new patents for each "new use" of a product, thus allowing the patent protection to continue beyond the expiry date of the patent. Patents on new uses are required by several US FTAs.

(d) **Limitation to conditions for compulsory licensing.** TRIPS allows countries to issue compulsory licences (to companies or government agencies to produce or import generic versions of a drug that has been patented) and does not restrict conditions for their use. The Doha Declaration on TRIPS and Public Health confirms that countries have "the freedom to determine the ground upon which such licences are granted." However, the United States' FTAs seek to limit the circumstances under which compulsory licences on drugs are issued. For example, the US-Singapore FTA allows compulsory licences only for remedying anti-competitive practices by the patent holder; for public non-commercial use; and in the case of national emergency or circumstances of extreme urgency. Such limitations erode the policy space available to the government to issue compulsory licences. Limitations on compulsory licensing grounds are required by several US FTAs.

(e) **"Linkage" or making the drug regulatory authority (DRA) play the role of "patent police".** Before medicines can be sold, they need marketing approval from the Health Ministry's drug regulatory authority to confirm that the drug is safe and beneficial. The drug authority does not normally have jurisdiction over patents or the patent status of the drug. However, many FTAs with the US have changed the role of the drug authority by making it part of the "patent police." Some FTAs require that the DRA "shall not grant marketing approval to any third party prior to the expiration of the patent term unless by consent of the patent owner". This is not required by TRIPS.

This effectively prevents generic products from being available through the whole patent term. This means any compulsory licence or government use order would be ineffective for the whole patent term as any generic medicine produced or imported under such a licence/order would not be registered and so would not reach patients. This drastically curtails the ability of governments to ensure the health of their citizens, particularly in emergencies such as bird flu or SARS.

Furthermore, these provisions significantly alter the role of the DRA by requiring the DRA, on receiving a registration application for a generic version, to enquire: (1) whether there is a patent claimed in the developing country for that generic product; (2) whether the developing-country patent is in force (i.e. the fees have been paid); (3) whether the patent actually covers the generic medicine as generic manufacturers usually change their version enough to avoid infringing the patent. Ascertaining this can take the courts up to 10 years, expert witnesses, thousands of documents and millions of dollars. It is not an easy question which the DRA with no patent expertise can determine; and (4) whether consent has been granted by the patent owner if all of the above occur.

Historically, the duty of the DRA has been to ensure that a drug is safe, effective and of sufficient quality before it registers the drug. It is the patent office's task to ensure that

patents meet the criteria of patentability and ultimately the courts are the only authority that can determine if a patent is valid and has been infringed by a generic product.

This linkage of marketing approval to the patent term has been so controversial that countries such as the Philippines, the European Union and Australia have explicitly refused to do it. Australia was eventually pressured to do it in the FTA it signed with the US. The European Union's DRA argues that it does not have the training, skills, expertise or capacity to determine such questions of patent status. In fact the US Food and Drug Administration, which is required by law to do linkage, has also admitted that it does not have the capacity to do it. (This linkage is required by all recent US FTAs.)

(f) **Effective prevention of parallel importation**. Parallel importation is one of the key methods of keeping medicines affordable. It involves legitimately importing the branded product from another country where it is sold more cheaply (for example, because of price controls in that other country). TRIPS allows parallel importation as developing countries fought to retain that right.

Some US FTAs have effectively prevented parallel importation by requiring countries to prevent it if the patent holder has not consented to it. Since patent holders in practice will never consent, parallel importation will be made impossible.

However, the US Congress has recently refused to fund the inclusion in any new FTAs of the provisions restricting parallel importation that are found in some existing US FTAs. This decision by Congress should allow developing countries to reject any proposed restrictions on parallel importation in US FTA negotiations.

The effects[7]

The above FTA provisions result in the government taking on IPR obligations which exceed what the WTO requires. The World Health Organisation (WHO) has an economic model of the impact of these so-called "TRIPS-Plus" provisions on medicine consumption and a country's generic medicine manufacturers. The model predicts that the full impact of medicine price rises will not be felt until about 15 years after the US FTA begins because the stronger IP protection only applies to each new medicine so it will not affect all medicines in a country and the overall medicine price until about 15 years have passed.

The extension to patent terms has been calculated by the Korean National Health Insurance Corporation to cost 504.5 billion won ($529 million) for having to extend drug patents for three years and 722.5 billion won ($757 million) if it has to agree to a four-year extension in its FTA negotiations with the US.[8]

[7] The information in this section is mainly from Smith (2007).
[8] http://english.hani.co.kr/arti/english_edition/e_business/165065.html

It was recently estimated that eight years of data exclusivity alone in Canada would have added $600 million to prescription medicine costs alone in the last five years.[9]

Many have expressed their concerns about the way the intellectual property provisions found in US FTAs make medicines more expensive, including the United Nations Special Rapporteur on the Right to Health[10], the World Health Assembly[11], the WHO's Commission on Intellectual Property Rights, Innovation and Public Health,[12] Ministers of Health from ten Latin American countries,[13] the Ministers of Health[14] of the African Union, the African Union's Ministers of Trade[15], the UK government's Commission on Intellectual Property Rights[16] and Nobel Peace Prize-winning Médecins Sans Frontières[17].

The government of the state of Western Australia was concerned about the impact of the US-Australia FTA on medicine prices in Australia. It noted that "PBS [Pharmaceutical Benefits Scheme] data indicates that the prices of brand name (patented) drugs fall by an average of more than 30 per cent after patent expiration and the entry of generic medicines. Delays to the availability of generic pharmaceuticals will therefore significantly increase pharmaceutical expenditures in Australia over time particularly in hospitals where generic brands are used extensively… A rise in medicine costs through the PBS and any delays in the availability of generic equivalent medicines will have a direct impact upon the cost of medicines purchased by the public sector. Medicines are the second most expensive item after salaries in the health budget and a small increase in costs in addition to the implementation of new medicines in the market will have a significant impact upon the health budget."[18]

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[9] http://www.canadiangenerics.ca/en/news/nov_14_06.shtml
[10] Press Release, 5 July 2004, http://www.unhchr.ch/huricane/huricane.nsf/view01/35C240E546171AC1C1256EC800308A37?opendocument
[11] WHA56.27, May 2003, http://www.who.int/gb/ebwha/pdf_files/WHA56/ea56r27.pdf
[12] "Public Health, Innovation and Intellectual Property Rights", World Health Organisation, April 2006. For example, recommendation 4.21.
[13] Declaration of Ministers of South America over Intellectual Property, Access to Medicines and Public Health, Geneva, 23 May 2006. The Ministers of Health were from Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela, http://lists.essential.org/pipermail/ip-health/2006-May/009594.html.
[14] Gaborone Declaration, 2nd Ordinary Session of the Conference of African Ministers of Health, Gaborone, Botswana, 10-14 October 2005, CAMH/Decl.1(II), http://lists.essential.org/pipermail/ip-health/2005-October/008440.html.
[15] AU's Ministerial Declaration on EPA Negotiations, AU Conference of Ministers of Trade, 3rd Ordinary Session, 5-9 June 2005, Cairo, Egypt, AU/TI/MIN//DECL.(III), www.twnside.org.sg/title2/FTAs/General/AFRICAN_UNION.Cairo_Decl.doc.
[16] "Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights", Commission on Intellectual Property Rights, London, 2002. For example, pages 39, 49, 113.
[17] "Access to Medicines at Risk Across the Globe", Briefing Note, MSF Campaign for Access to Essential Medicines, May 2004, www.accessmed-msf.org/documents/ftabriefingenglish.pdf.
[18] Western Australian Government Submission to Senate Select Committee on the Free Trade Agreement between Australia and the United States of America.

Significant damage to the local generic medicine industry from US FTAs has also been predicted. For example, Korean Health and Welfare Minister Yoo Si-min said, "Under free trade talks, the damage to the South Korean pharmaceutical industry may total between 600 billion won to 1 trillion won ($629 million-1.05 billion) if the US proposal is accepted."[19] The World Health Organisation's model predicted that the US-Colombia FTA would cause the Colombian generic industry to lose 71% of its market share.

The developing country will be obliged to sign up to many international IP treaties

One of the key aspects of the IPR chapter in US FTAs is that the parties have to sign up to many international intellectual property treaties, some of them under WIPO. Many developing countries are members of WIPO, but they have signed only some of the treaties. In the FTA negotiations, the US is likely to insist that the developing country join many treaties which are beneficial to the US but may not be for the developing country. These treaties include:

- The Patent Cooperation Treaty (WIPO)
- The WIPO Copyright Treaty (WIPO)
- The WIPO Performances and Phonograms Treaty
- International Union for the Protection of New Varieties of Plants (UPOV 1991)
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure.

There are good reasons why some developing countries have been reluctant to join many of the treaties located in or administered by WIPO. For example, the Commission on Intellectual Property Rights in its report stated: "Developing countries should think very carefully before joining the WIPO Copyright Treaty."[20]

WIPO is "a firm advocate of stronger IP protection in developing countries. Indeed, the analyses in WIPO's various published policy documents pay little attention to the possible adverse consequences of such protection."[21] Furthermore, depending on the year, about 90% of its funding comes from patent applicants. According to the Commission on Intellectual Property Rights, "WIPO has always been responsive to the needs of the industrial sectors which make intensive use of IP. We are less persuaded that it is as responsive to the interests of consumers or users of IP-protected products."[22]

[19] http://english.hani.co.kr/arti/english_edition/e_business/165065.html
[20] "Integrating Intellectual Property Rights and Development Policy", report of the Commission on Intellectual Property Rights established by the British Government, http://www.iprcommission.org/graphic/documents/final_report.htm, page 109.
[21] Ibid, page 157.
[22] Ibid, page 159.

Due to a perceived bias towards stronger intellectual property protection in ways that may not have positive developmental effects, developing-country governments are trying to reform WIPO to make it more development-oriented via a "Development Agenda".

Given the concerns above about the impact of stronger IP protection on development, including access to knowledge, developing countries should be very cautious about entering any treaties that require stronger IP protection. Cross-sectoral consultations and detailed cost-benefit analyses should be conducted before any decision is made.

Analysis of the nature and effects of the above treaties is made in various sections below.

Effects on patenting of life, biodiversity, genetic resources, agriculture and farmers[23]

Background

FTAs with the US will have serious implications on an inter-related set of issues: patenting of lifeforms (especially microorganisms), biodiversity and traditional knowledge, agriculture and the income and interests of farmers (especially the saving, control and use of seeds). This is because:

1. At present, the WTO's TRIPS Agreement allows countries to exclude the patenting of plants and animals. However some US FTAs (for example, with Chile) oblige the country to make available "patent protection for plants that are new, involve an inventive step and are capable of industrial application."

2. The TRIPS Agreement makes it mandatory for WTO members to patent microorganisms and certain microbiological processes. However it is left to members to determine what types of microorganisms to allow for patenting. For example, some countries do not allow patenting of naturally-occurring microorganisms. The US FTAs usually require the parties to sign up to the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, which increases patenting of microorganisms.

3. The TRIPS Agreement allows WTO members the choice of patenting plant varieties or establishing a *sui generis* system of intellectual protection for plant varieties. This gives countries the freedom to choose their own system, and some countries have stressed the right of farmers to save and re-use their seeds. However the US FTAs oblige countries to be members of the UPOV 1991 treaty, which provides a lot of rights to plant breeders and companies, while the rights of farmers to save and re-use seeds are very limited.

[23] This section relies heavily on Smith (2007).

The developing countries have been striving to use international conventions such as the Convention on Biological Diversity (CBD) to establish the sovereign right of countries to their genetic resources and to prevent the misappropriation of their biological resources (biopiracy) through patenting. However, the FTA will eliminate or greatly reduce the ability of the country to protect its rights.

UPOV 1991, plant varieties protection and effect on farmers' rights

The US FTA obligation to protect new plant varieties (NPV) also raises concerns. The WTO TRIPS Agreement leaves it to members to protect NPV by patents or a *sui generis* system or a combination of both. Several developing countries have enacted their own *sui generis* law to protect NPV that balances the protection of commercial plant breeders with the protection of traditional farmers who also breed NPV.

On the other hand, the US is a party to the International Convention for the Protection of New Varieties of Plants which set up the International Union for the Protection of New Varieties of Plants (UPOV). Each revision of this agreement, which was adopted in 1961 and revised in 1972, 1978 and 1991, has led to more benefits for institutional/commercial plant breeders by according them higher and higher IP protection. The majority of developing countries have chosen not to be a party to UPOV and so, of the current 63 UPOV members, only a few are from developing countries and most of these are members of UPOV 1978. New members can only adopt UPOV 1991 which would disadvantage small farmers, who constitute the vast majority of farmers in developing countries. Pressures are increasing via bilateral FTAs with the US to join UPOV 1991. All the US FTAs since NAFTA (including the one with Singapore) oblige the parties to be members of UPOV 1991.

Plant varieties are types of the same plant. Plant varieties are often developed by multinational agriculture companies such as Monsanto. These "plant breeders" in laboratories want to maximise their profits by restricting what farmers can do with the plant varieties they develop. This means that like any other IP legislation, plant variety protection has to find the appropriate balance between the user (in this case the farmer) and the "creator" (plant breeder) of the IP. Even among plant breeders, there is a need to balance between public researchers in developing countries and foreign researchers in order to ensure that the fruits of research and the use of materials from those developing countries will primarily benefit the countries concerned.

The strongest type of IP protection would be a patent on the plant and/or plant variety as this would stop or restrict the farmer from being able to save seed from one crop to re-plant or exchange it with another farmer, as well as prevent or restrict the use of the patented materials for further research by others. TRIPS does not require WTO member countries to allow patents on plants, animals or plant varieties. However some FTAs with the US (e.g. Chile) require the parties to allow patenting of plants.

The second strongest form of intellectual property protection for plant varieties is via the 1991 version of UPOV. TRIPS does not require countries to join UPOV 1991. UPOV was "designed with the commercialised farming systems of the developed countries in mind."[24] UPOV 1991 favours formal plant breeders (in laboratories) and does not sufficiently safeguard the right of small farmers to breed and develop new plant varieties. The balance between farmers and formal plant breeders is more in favour of farmers in UPOV 1978, but countries can no longer join UPOV 1978.

Every country signing a US FTA since the NAFTA in 1994 has had to sign UPOV 1991. If a developing country has to join UPOV 1991, it may have to change its laws to be consistent with this treaty.

Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure

The Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (Budapest Treaty) is about microorganisms. Microorganisms are not defined in TRIPS and so could be bacteria, cells, enzymes, proteins, genes etc.

TRIPS does not require countries to join the Budapest Treaty. However, almost all US FTAs have required the countries signing them to join the Budapest Treaty.

The Budapest Treaty aims to make it easier for people to get patents in multiple countries, in this case for microorganisms. Countries may want to require people who apply for patents on microorganisms to deposit a sample of the microorganism with them. This is because microorganisms can be difficult to adequately describe on a paper patent application. Part of the quid pro quo underlying the patent system is that a monopoly is granted (for 20 years for WTO members) to the inventor in return for the inventor disclosing how to make the invention so that at the end of 20 years, anyone can make the invention.[25] This disclosure occurs in the patent application. To ensure there is adequate disclosure to justify getting a patent, countries can require the patent applicant to deposit a sample of the microorganism at a storage facility in the country.

Patent applicants say the cost and effort of posting microorganism samples to each country in which they want a patent make it procedurally more difficult for them to get patents in multiple countries. If countries have signed the Budapest Treaty, people seeking to get a patent in those countries only have to give a microorganism sample to an "international depositary authority". As of March 2006 there were 37 such authorities: seven in the United Kingdom, three each in the Russian Federation and in the Republic of

[24] "Integrating Intellectual Property Rights and Development Policy", report of the Commission on Intellectual Property Rights established by the British Government, http://www.iprcommission.org/graphic/documents/final_report.htm, page 61.
[25] UNCTAD-ICTSD Resource Book (2005), available online at http://www.iprsonline.org/unctadictsd/ResourceBookIndex_update.htm

Korea, two each in China, Italy, Japan, Poland, Spain and the United States of America, and one each in Australia, Belgium, Bulgaria, Canada, the Czech Republic, France, Germany, Hungary, Latvia, India, the Netherlands and Slovakia. The majority of the depositories are in developed countries and these hold the bulk of the deposits.

If a developing country signs the Budapest Treaty, as most US FTAs have required, it is likely to receive more microorganism patent applications due to the easier application procedure and if these are granted at the same rate, more microorganisms will be patented in the country. This is likely to raise the cost of inputs for the food, medical and agricultural industries[26], including the biotechnology industry.

For example, Thai industries rely on imported microorganisms. In the context of the Japan-Thailand Economic Partnership Agreement, the Khao-Kwan Foundation chairman, Day-cha Siripatra, said the country would lose several hundred billion baht a year if the government allowed Japan to patent microorganisms, because Thailand relied on Effective Microorganism (EM) imports from Japan to support many industries and solve the environment problem.[27]

There are also concerns that international depositary authorities may not be properly managed so it would be difficult for the country of origin or providing country to safeguard its interests and rights over the samples.

Data exclusivity and farmers

The "data exclusivity" requirements in US FTAs also apply to agricultural chemicals. This prevents suppliers of generic versions of these chemicals from being able to make use of the test data of the companies that first received registration of the chemicals in order to get the safety approval to market their generic products. Data exclusivity is not required by TRIPS.[28]

When a 10-year period of data exclusivity for agricultural chemicals was introduced in Australia as part of the US-Australia FTA, Australian farmers stated that: "These changes will have a devastating effect on the independent generic chemical companies which provide competitively priced chemicals to farmers… In the context of this submission we ask that (sic) the Senate Committee to consider taking the important issue of data protection out of the FTA agreement or set aside Chapter 17 [on intellectual property] of the FTA from the broader agreement. This will allow Australia to set our own laws which best serve our market and stakeholders."[29]

[26] http://nationmultimedia.com/2007/02/17/business/business_30027112.php
[27] http://nationmultimedia.com/2007/02/17/business/business_30027112.php
[28] "Protection of Data Submitted for the Registration of Pharmaceuticals: Implementing the Standards of the TRIPS Agreement", Carlos Correa, South Centre (from: www.southcentre.org/publications/ protection/protection.pdf).
[29] Submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America by the Pastoralists and Graziers Association of W.A. (Inc) and Generic Agricultural Chemical Association. (The members of the Pastoralists Association grow 2 million tonnes of wheat.)

Generic versions of agricultural chemicals are two to three times cheaper than their counterparts that are patented or have data exclusivity and the agricultural chemicals make up 10%-14% of total input costs for Australian farmers. Therefore the Australian farmers concluded that "Australian farmers have no subsidies to aid payment for input costs like chemicals, they survive in a distorted world market by keeping their input costs minimal. The competitive generic chemical market has evolved to meet the Australian farmers requirements and needs to remain for Australian farmers to stay internationally competitive… these laws if implemented in Australia, they have the potential [to] destroy the generic companies that exist in Australia and the beneficial competition that goes along with their presence in the market." The farmers asked that "data protection be taken out of the Intellectual Property Chapter or the entire Chapter be set aside for re-negotiation."[30]

Patent Cooperation Treaty[31]

TRIPS does not require countries to join the Patent Cooperation Treaty (PCT). However, all recent US FTAs have required the countries signing them to join the PCT.[32]

Patents are national in scope. It is not possible to apply for a worldwide patent. The PCT is designed to enable people to apply for a patent in multiple countries more easily. It does this by standardising the application procedures and requiring parties to the PCT to accept the standardised procedure. Applications can then be sent to multiple countries by basically "ticking a box".

The PCT is more beneficial for countries with inventors who wish to apply for patents in other countries. In most developing countries, most patents granted are to foreigners and thus the PCT will benefit mainly foreign applicants. By joining the PCT, the country can expect more patent applications. This was the experience of all but one of the countries joining the PCT, according to WIPO's data. For example, China's patent applications increased five-fold, Iceland's increased 12-fold and Vietnam's increased 15-fold.[33]

Scope of patentability[34]

TRIPS allows countries to decide not to give patents on plants, animals or diagnostic, therapeutic and surgical methods.[35] There can be ethical and cultural objections to

[30] Submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America by the Pastoralists and Graziers Association of W.A. (Inc) and Generic Agricultural Chemical Association.
[31] This sub-section is derived from Smith (2007).
[32] www.ustr.gov.
[33] The other countries registering significant increases in patent applications were Canada, Croatia, Israel, Mexico, New Zealand, Serbia and Montenegro and Turkey. Of the countries with sufficient data, only Algeria did not register a significant increase in patent applications when it joined the PCT.
[34] This sub-section is derived from Smith (2007).

patenting life.[36] Furthermore, medicines such as the last remaining effective malaria treatment in some areas are plants. Allowing patents on plants would grant monopolies on them and so make these medicines unaffordable.

However, US FTAs can require countries to allow patents on some or all of these items. One reason for this is that US national patent law already allows for patents for some of these. For example:

(1) There were 600 patents relating to rice issued in the US in 2000 and the rate of patenting is rapidly rising.[37]

(2) The US has introduced patents for surgical procedures. When the introduction was made, "a blizzard of lawsuits followed. This unhealthy circumstance was halted in 1996 by the American Medical Association and Congress, which decided that doctors couldn't sue other doctors for using patented surgical procedures."[38]

(3) US FTAs can also require countries to give patents for new uses of old medicines.[39] This may be because not many brand-new medicines are being invented. Instead, computerised testing now allows pharmaceutical companies which have thousands of existing medicines on the shelf to test them against different diseases very quickly. This is cheaper and faster than building a new medicine from scratch so is preferred by pharmaceutical companies. If patents on new uses are allowed, a medicine such as AZT which was used to treat cancer and received a 20-year patent for that, would get a second consecutive 20-year patent when it was found to be effective for HIV/AIDS. This delays generic competition and keeps medicine prices high.

The Commission on IPRs recommends that "maximum use be made of the possibilities under TRIPS of excluding such inventions from patent protection."[40]

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[35] Article 27.3.
[36] "Integrating Intellectual Property Rights and Development Policy", report of the Commission on Intellectual Property Rights established by the British Government, http://www.iprcommission.org/graphic/documents/final_report.htm, page 59.
[37] "Integrating Intellectual Property Rights and Development Policy", report of the Commission on Intellectual Property Rights established by the British Government, http://www.iprcommission.org/graphic/documents/final_report.htm, page 64.
[38] http://www.nytimes.com/2006/03/19/opinion/19crichton.html?ex=1172379600&en=66dcde5df677af77&ei=5070. Congress added subsection (C) to 35 USC 287 to fix the problem.
[39] For example, Art 15.8.1(b) of the US-Oman FTA.
[40] "Integrating Intellectual Property Rights and Development Policy", report of the Commission on Intellectual Property Rights established by the British Government, http://www.iprcommission.org/graphic/documents/final_report.htm, page 66.

Software patents[41]

TRIPS does not require patents on software either and many countries do not allow patents on software. However the US allows patents on software and some information technology lawyers are concerned that certain provisions in US FTAs could eventually lead to software patents.[42]

As for the effect on the open source software community in developing countries, the possible implications can be seen by how it is playing out in the US. "A single patent can ruin an Open Source project… With the USPTO [US Patent and Trademark Office] granting an estimated 45,000 software patents in 2003 and rising, it is not possible to audit software against the hundreds of thousands of patents."[43] Alleged infringement of one software patent alone resulted in the US court awarding damages of $521 million.[44]

Copyright[45]

Background

US FTAs require stronger copyright protection than TRIPS in several ways, some of which are discussed below.

According to a report by the UN Educational, Scientific and Cultural Organisation (UNESCO): "Copyright has emerged as one of the most important means of regulating the international flow of ideas and knowledge-based products, and will be a central instrument for the knowledge industries of the twenty-first century. Those who control copyright have a significant advantage in the emerging, knowledge-based global economy. The fact is that copyright ownership is largely in the hands of the major industrialized nations and of the major multimedia corporations placing low per capita income countries as well as smaller economies at a significant disadvantage."[46]

As a result of the successful lobbying of powerful US copyright markets, "the U.S. copyright regime sets one of the highest standards of copyright protection in the world but one which is not recognised as providing a balance between the interests of users and

[41] This sub-section is from Smith (2007).
[42] http://www.ilaw.com.au/public/softwarepatents.html cites Art 17.9.14 of the US-Australia FTA ("Each Party shall endeavour to reduce differences in law and practice between their respective systems, including in respect of differences in determining the rights to an invention, the prior art effect of applications for patents, and the division of an application containing multiple inventions. In addition, each Party shall endeavour to participate in international patent harmonisation efforts, including the WIPO fora addressing reform and development of the international patent system") as something that could lead to harmonisation with the US and therefore allow software patents in Australia.
[43] Submission to Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, from http://www.aph.gov.au/Senate/committee/freetrade_ctte/submissions/sub164.pdf
[44] http://www.imakenews.com/bakerbotts/index000036038.cfm
[45] The whole of this section on copyright is summarised from Smith (2007).
[46] UNESCO (1998), "World Information Report 1997/98", UNESCO, Paris, p.320.
Source: http://www.unesco.org/webworld/com_inf_reports/wirenglish/chap23.pdf

copyright owners… It is apparent however that many of the FTA provisions closely mirror those provisions already in the U.S. *Digital Millenium Copyright Act 1998* (DMCA) so that harmonisation equates to unilateral action to amend Australian copyright legislation to U.S. legislation."[47]

During the negotiations for the US-Australia FTA, many groups in Australia, including librarians and educational and IT-related groups, spoke against the tighter copyright provisions that would be required if the FTA was signed. One group, the Australian Digital Alliance (ADA), said that the IP chapter (Chapter 17) of the FTA "creates obligations to amend the Australian copyright regime in ways that will reduce access to materials, increase costs for institutions which provide public access to knowledge, and ultimately curb innovation. This neglect is disturbing and unsatisfactory given that a balanced intellectual property regime forms the research and resource base upon which our knowledge and creative industries depend. Overall, the provisions in Chapter 17 fail to provide a satisfactory level of balance. The ADA does not believe that the provisions pertaining to copyright serve the interests of Australians and does not support the ratification of the FTA on that basis."[48]

Copyright term extensions

TRIPS requires copyright protection for a period of at least 50 years from publication or making (when it is not calculated on the basis of the life of a natural person).[49] By contrast, US FTAs require copyright to last for 70, 95 or 120 years.[50]

Philippa Dee, a former Assistant Commissioner at the Australian Productivity Commission and trade expert now at the Australian National University, in a report that was commissioned by the Senate Committee looking at the US-Australia FTA, found that "Australia's net royalty payments could be up to $88 million higher per year as a result of extending the term of copyright" (from 50 years to 70 years).[51]

In addition to the increased royalty payments, much of which flows overseas, there are economic costs of seeking permission to reproduce a work when it is still copyrighted. For example, the Carnegie-Mellon study by US universities found that the cost of seeking

[47] Australian Digital Alliance (a coalition of IT companies, scientific and research organisations, schools, universities, consumer groups, cultural institutions, libraries and individuals) submission, from http://www.aph.gov.au/Senate/committee/freetrade_ctte/submissions/sublist.htm.
[48] Ibid.
[49] Article 12, TRIPS.
[50] The North American Free Trade Agreement was signed before TRIPS and it has a copyright term of 50 years. Jordan's FTA with the US does not specify a copyright period as it is a different style of FTA. The other USFTAs all have 70 years except for Oman's which requires 70, 95 or 120 years of copyright protection depending on which measurement system is used.
[51] It is also in her "The Australia-US Free Trade Agreement: An Assessment", Pacific Economic Papers No. 345, 2005, Australian National University.

permission to copy an out-of-print or commercially unavailable work is $150-200, without guarantee of a response.[52]

Universities were also concerned about the impact of extending the copyright term in Australia. For example, the executive director of the Australian Vice-Chancellors Committee, John Mullarvey, said that "Australian universities now paid $20 million a year in copyright fees and adding 20 years to the period of copyright protection would add to that sum. How much I couldn't even guess."

Anti-circumvention provisions

A technological protection measure (TPM) is a digital lock on digital material to stop access or copying. This can prevent even legal copying; for example, if the copyright has already expired on a movie or book, a TPM could stop a digital copy of the book from being able to be copied.[53] This is therefore an extra, potentially infinite, monopoly in addition to copyright. Other examples of legal copying could include a blind person using the software to read aloud a computer file[54], making a back-up copy of legitimate software in case the computer breaks down and the software has to be re-loaded, "region coding for DVDs, anti-copying music CDs that will not play in a PC, encrypted software requiring entry of a registration code before being installable, passwords and encryption used to prevent unauthorised access to online databases".[55]

TPMs can significantly restrict access to knowledge. "For developing countries, where Internet connectivity is limited and subscriptions to on-line resources unaffordable, it may exclude access to these materials altogether and impose a heavy burden that will delay the participation of those countries in the global knowledge-based society [and] could be very harmful to the interests of developing countries in accessing information and knowledge they require for their development. . . [therefore] it is premature at the present time for developing countries to be required to go beyond TRIPS standards in this area."[56]

Circumvention devices can get around TPMs. Circumvention devices are allowed under TRIPS. The WIPO Copyright Treaty has an anti-circumvention provision[57] but it allows

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[52] Australian Library and Information Association (ALIA) submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America.

[53] Although the US Government says that TPMs are only supposed to protect copyrighted material, things have not worked out this way in practice. For example, in 2003 when an exception was sought to circumvent movies that were already out of copyright protection on a DVD, the exception was not granted because it was joined to something that could be copyrighted such as a new introduction to the old movie.

[54] In the US, the publishing industry considers providing such software to be a violation of the anti-circumvention provisions.

[55] Australian Parliamentary Library Current Issues Brief No. 3 2004-5, http://www.aph.gov.au/library/pubs/CIB/2004-05/05cib03.pdf

[56] "Integrating Intellectual Property Rights and Development Policy", report of the Commission on Intellectual Property Rights established by the British Government, http://www.iprcommission.org/graphic/documents/final_report.htm, pages 106 and 108.

[57] Art 11 for copyright and Art 18 of the WIPO Performances and Phonograms Treaty for related rights.

room for national copyright exceptions, but US FTAs go further than the WIPO Copyright Treaty.[58]

All US FTAs since NAFTA have required countries to ban the act of circumventing a TPM (i.e. penalising the user; see below) and the manufacture, importation and distribution of circumvention devices, even if they would be legal under national copyright law for non-copyright-infringing uses, like the examples given above.

Because US FTAs require a ban on circumvention by consumers, the end user of a circumvention device may be liable even when s/he did not know they were circumventing a TPM, for example when playing a DVD on a DVD player that can play DVDs from multiple parts of the world.[59] This is because if the person had reasonable grounds to know that they were circumventing a TPM, they can be liable.[60] The US-Australia FTA also makes distributors of circumvention devices liable even if they did not know it was a circumvention device. Since circumvention devices can be physical or computer programs, this was stated as being inappropriate for Australians who do not understand the technology so cannot be expected to know when they are circumventing a TPM.[61] If this is the case for Australian consumers, it should be even more true for a developing country.

Although there is a provision which says that additional exceptions to the ban on the act of circumvention may be allowed for users if they can credibly demonstrate in an administrative/parliamentary review at least every four years that there is an adverse impact on their non-infringing use, there are many problems in having the exceptions put into effect.

The FTA obliges the developing country to join WIPO 1996 Internet Treaties

Many of the FTAs signed between the US and other countries require the ratification of the WIPO Internet Treaties, i.e. the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

The treaties, which entered into force in 1996, draw their texts upon studies submitted by national governments, in particular the US, European Community and Japan, thus

[58] Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Bruce A. Lehman, Electronic Frontier Foundation Briefing Paper on Technological Protection Measures Prepared for the WIPO Inter-Sessional Intergovernmental Meeting on the Development Agenda Proposal & Fourth Session of the Permanent Committee on Cooperation Related to Intellectual Property Development, April 2005. This is because the WIPO Treaty would still allow fair use exceptions.
[59] http://www.eff.org/IP/FTAA/?f=tpm_implementation.html. Most films released on DVD now can only be played in one region of the world, http://www.eff.org/IP/DMCA/copyrightoffice/DMCA_rulemaking_broken.pdf
[60] The US-Chile FTA at least limits the liability to when the user actually knew that s/he was circumventing a TPM.
[61] Kimberlee Weatherall's submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America.

reflecting the lobbies in those countries. The treaties facilitate worldwide implementation of strong IP standards. The US, in response to the WCT, legislated the Digital Millennium Copyright Act, which goes beyond the WCT.[62]

The US-based digital civil rights organisation, Electronic Frontier Foundation, documents how the anti-circumvention provisions of the DMCA have been used to stifle a wide array of legitimate activities, rather than to stop copyright infringements. It illustrates how they are being invoked against consumers, scientists, and legitimate competitors, rather than pirates.[63]

Of these two treaties, the WCT has been very strongly criticised as it goes beyond what is required under TRIPS and the Berne Convention for the Protection of Literary and Artistic Works. It provides copyright holders exclusive rights over material in the online environment and specifically calls for countries to provide effective legal remedies against the circumvention of the TPMs.

Some of the concerns raised by the Electronic Information for Libraries (eIFL) are as follows:

(i) TPMs cannot distinguish between legitimate and infringing uses. The same copy-control mechanism which prevents a person from making infringing copies of a copyright work may also prevent a student or a visually impaired person from making legitimate copies under fair use/fair dealing or a legal copyright exception.

(ii) Long-term preservation and archiving, essential to preserving cultural identities and maintaining diversity of peoples, languages and cultures, must not be jeopardised by TPMs or digital rights management (DRM). The average life of a DRM is said to be between three and five years. Obsolescent DRMs will distort the public record of the future, unless the library has a circumvention right.

(iii) The public domain must be protected. TPMs do not cease to exist upon expiry of the copyright term, so content will remain locked away even when no rights subsist, thereby shrinking the public domain.

The UK Commission on IPRs, in its report, states that “more analysis needs to be undertaken about the best means of protecting digital content and the interests of right holders whilst at the same time honouring the principles that ensure adequate access and ‘fair use’ for consumers. More specifically policy makers need to gain a better

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[62] S. Musungu and G. Dutfield, “Multilateral agreements and a TRIPS-plus world: The World Intellectual Property Organisation (WIPO)”, available at http://www.quno.org/geneva/pdf/economic/Issues/Multilateral-Agreements-in-TRIPS-plus-English.pdf

[63] “Digital Rights Management: A failure in the developed world, a danger to the developing world”, Cory Doctorow, http://www.eff.org/IP/DRM/drm_paper.php, and Electronic Frontier Foundation, “Unintended Consequences: Seven Years under the DMCA”, April 2006, http://www.eff.org/IP/DMCA/unintended_consequences.php

understanding of the impacts of the trend towards on-line distribution and technological protection of content on developing countries".

The report adds that it is "not clear how reasonable requirements of 'fair use' will be guaranteed in such an environment". It goes on to caution: "Developing countries should think carefully before joining the WIPO Copyright Treaty and should not follow the lead of US and the EU by implementing legislation on the lines of the DMCA."

Some implications of the copyright section for developing countries

The developing country entering an FTA with the US would have to change its laws and policies on copyright in many ways, including:

(a) Extend the length of copyright from 50 to 70 years.

(b) "Lock in" technological protection measures through the FTA.

(c) Join the WIPO Internet Treaties which would in turn lock the country into the treaties' obligations.

(d) The balance between the privileges of the copyright holder and the public interest would shift significantly away from the public interest. An important point is that users of libraries will be much more constrained. There would be a negative effect on access to knowledge.

Enforcement of IP[64]

General

The enforcement part of TRIPS (Article 41.5) very clearly states that "It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general." This was added to TRIPS to address the concerns of developing countries.

However, the enforcement chapter of US FTAs can specify that a decision that a US FTA country makes on the distribution of enforcement resources shall not excuse that party from complying with the IP chapter.

US FTAs (such as the one with Australia) can have 11 pages of detailed enforcement prescriptions. Some of these specify how a TRIPS level of enforcement should be carried

[64] This section on enforcement is mainly taken from Smith (2007).

out, others involve much stronger levels of enforcement than TRIPS. The enforcement part of IP chapters in US FTAs is particularly detailed about Internet service provider liability.

Internet service provider liability

Some Internet service providers (ISPs) merely provide access to the Internet, while others provide people with space online to host their webpages. People place materials on these webpages without getting permission from the ISP. So the webpages may contain materials that infringe copyright such as copyrighted books, articles, music or movies. In many countries, ISPs are not liable for the copyright-infringing material that people have posted on the websites they host.

However, in the US, there were conflicting court decisions about whether ISPs were liable for copyright-infringing behaviour by their end-users, including having copyright-infringing items on the websites they host. For this reason, ISPs wanted legislation to give them "safe harbours" so that they could carry out their normal business activities with only limited liability, if they complied with certain conditions. These safe harbours have been criticised as being too narrow and procedurally burdensome to use.

TRIPS does not require Internet service providers to be liable for copyright-infringing material put on websites they host by others. This is because TRIPS does not require secondary liability or temporary reproductions to be copyrightable.

US FTAs contain these ISP safe harbours. By doing so, the US FTAs may create ISP liability in countries where none previously existed because:

- Recent US FTAs require temporary reproductions (for example, in the memory of the computer while accessing a webpage) to be a copyright infringement. Since digital communication involves serial reproduction and distribution of temporary reproductions of digital works, ISPs may face increased liability if temporary reproductions are considered infringing and there is no corresponding limitation on copyright.
- In addition, the existence of safe harbours may imply the existence of liability where none previously existed in domestic law, and has been used to create a de facto liability standard in the US, where copyright owners have sued ISPs for failure to comply with safe harbour conditions as evidence in itself of copyright infringement.

According to the lawyer who is the Associate Director of the Intellectual Property Research Institute of Australia, the ISP liability provisions in the US-Australia FTA "will impose significant costs on Australian ISPs."[65]

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[65] Kimberlee Weatherall's submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America.

The impact on a developing country's ISPs of a standard US FTA can be seen from the effect of this system in the US. The enforcement agent of one copyright industry association sent one ISP over 16,700 arguably invalid takedown notices.[66] One small US ISP had received over 20,000 notices in 2003 and all were invalid.[67] Another US ISP received over 30,000 notices from January to April 2004 alone, only two of which were legitimate takedown notices. In the previous 12 months, the same ISP received over 90,000 invalid peer-to-peer notices.

CHAPTER 12: GMOs and FOOD SAFETY

Another demand by the US in some of its FTAs is the prohibition of policies or laws that require food and other products containing genetically modified organisms (GMOs) to be labelled as such.

This is a problem for some countries which have or are planning to have national regulations on food safety or agriculture and biosafety that require such labelling. For them, there are several reasons why such labelling is important:

1) Labelling is important for consumer choice, so that consumers can choose whether or not they want to eat GM food.

2) There may be unintended effects of GMOs, such as potential allergenic effects (i.e. they can cause certain people to have allergies). Labelling would let consumers know of the GMO content of the food, and would serve to warn those who have legitimate health concerns. For example, a gene from a nut may be used in a GMO; since many people have potentially fatal nut allergies, they need to know the content of the food and labelling could meet this need.

3) Labelling informs consumers about GMO content, particularly those who may have religious, ethical or moral concerns. For example, if a pig gene was used in the making of a GM food product, Muslim consumers could be informed by an appropriate label. Likewise, if there are fish genes in GM tomatoes, vegetarians would need a label informing them that the food has a non-vegetarian GM gene.

4) Labelling would also push GMO-exporting countries to segregate their GM and non-GM crops, shifting the burden to exporter countries, rather than to importing countries, to detect and identify GMO shipments.

More than 40 countries around the world, including China, Japan, Australia and most European nations, already require mandatory labelling of GM foods. Under the Codex Alimentarius Commission, the joint WHO/FAO body regulating international food

[66] *Pacific Bell Internet Services v. Recording Industry Association of America, Inc et al* (US District Court, Northern District of California, San Francisco Division, Case No. C 03-3560 SI).
[67] http://www.eff.org/IP/FTAA/ISP_june05.pdf

standards, the Committee on Food Labelling has been discussing a global standard for mandatory GM food labelling. The draft standard on GM labelling has support from a majority of the Committee.

The US Bipartisan Trade Promotion Authority Act 2002 which grants the US Trade Representative negotiating authority (i.e. the "fast track" legislation), in Section 2102 "Trade Negotiation Objectives", clearly states that:

"*The principal negotiating objective of the United States with respect to agriculture is to obtain competitive opportunities for United States exports of agricultural commodities .... by .... (viii)* ***developing, strengthening, and clarifying rules and effective dispute settlement mechanisms to eliminate practices that unfairly decrease United States market access opportunities*** *or distort agricultural markets to the detriment of the United States, particularly with respect to import-sensitive products, including— (II) unjustified trade restrictions or commercial requirements,* ***such as labeling, that affect new technologies, including biotechnology***" (emphasis added).

In the FTA negotiations between Malaysia and the US, American companies have urged the US Trade Representative (USTR) to use the FTA against Malaysian measures including a legislative bill to introduce mandatory labelling of food containing GMOs. The Biotechnology Industry Organization (BIO) and the AMCHAM Malaysia/US Chamber of Commerce, in their public submissions to the USTR, stated their opposition against the mandatory labelling of GM products or foods. They urged the USTR to take advantage of the FTA negotiations to forward their position against labelling of GM products or foods.

The US biotech industry says that "…labelling of biotech foods will often mislead consumers by implying biotech foods are either different from conventional foods or present a potential risk." (Amcham Malaysia/US Chamber of Commerce submission on the US-Malaysia FTA, p 95, May 19, 2006).

CHAPTER 13: THE EUROPEAN UNION'S ECONOMIC PARTNERSHIP AGREEMENTS

Although at a lower frequency than the United States, the European Union has also signed bilateral FTAs with a few developing countries. More importantly, it is engaging in negotiations for a regional FTA with countries of the Southern Common Market (Mercosur) and, more intensely at present, with the ACP countries in what is termed "Economic Partnership Agreements" (EPAs).

At the end of 2006, the EU Commission also announced its intention to pursue FTAs with several Asian countries, including South Korea, India and the countries in the Association of South-East Asian Nations (ASEAN).

The FTAs that the EU has been negotiating (and intends to negotiate) with developing countries basically have the same scope as the FTAs of the United States. For example,

the chapter headings of the EU's EPAs with the ACP countries include trade in goods, services, investment, competition policy, government procurement, intellectual property as well as labour standards and the environment.

The background to the EPA negotiations is as follows. The EPA is the follow-up to previous trade agreements between the EU and ACP countries. Between 1975 and 2000, the EU-ACP Group relations were determined by five-year Lome Conventions, in which the EU provided trade preferences and aid to the ACP countries, while the ACP countries did not have to reciprocate. This non-reciprocal arrangement continued in the Cotonou Partnership Agreement. Since the arrangement is non-reciprocal, it had to obtain a waiver from WTO members, and this was obtained at the WTO Ministerial Conference in Doha in 2001.

However the Cotonou Agreement is scheduled to come to an end at the end of 2007, to be replaced with new Economic Partnership Agreements. The EU is in the process of negotiating separate EPAs with six regional groupings (four in Africa, one in the Caribbean region and one in the Pacific region). The EPAs are supposed to be WTO-compatible in that they are to be reciprocal, and would cover "substantially all trade." While the EU would keep its market open to ACP products, it is understood that the ACP countries would also have to provide duty-free access for EU products for "substantially" all products, although the length of the period of implementation can be negotiated. There is a divergence on the meaning of "substantially all trade", with the EU arguing that this means the ACP countries will have to eliminate tariffs on about 90% of their products, while some ACP countries or groupings have argued that the scope can be as low as 60%.

Leaders of many of the ACP countries have expressed concerns that the EPA negotiations may lead to outcomes that adversely affect their country's economic and social development, as well as their regional integration plans.

At the African Union's Conference of Trade Ministers in Nairobi in April 2006, the Ministers adopted the Nairobi Declaration on Economic Partnership Agreements. The Ministers reiterated that EPAs with the EU should be tools for economic development of Africa and expressed "profound disappointment" with the European Commission for not adequately addressing development concerns in the negotiations. They urged the EU to fully respect the aims and process of economic integration in Africa and to refrain from pursuing negotiating objectives that would adversely affect this process.

The African Ministers made it clear that "trade liberalisation together with the accompanying liberal policies may not by themselves deliver economic development." They also clarified that the EPAs should not open up African countries' markets in ways that go beyond what the WTO requires of them, through the following statements in the Nairobi Declaration:

- Article XXIV of GATT (that regulates the relation between regional trade agreements and GATT) needs to be appropriately amended to allow for necessary

special and differential treatment, less-than-full-reciprocity principle and explicit flexibilities that are consistent with the asymmetry required to make EPAs pro-development. Conclusions of the market access aspects of the EPAs should take place upon completion of the amendment.

- Noting the EU's intention to seek extensive opening of African services sectors, the Ministers asked the EU to agree to a positive list approach in services, and underscored the "absolute need for a carefully managed sequencing of services liberalisation in line with establishment of strong regulatory frameworks. We therefore shall not make services commitments in the EPAs that go beyond our WTO commitments and we urge our EU partners not to push our countries to do so."
- On intellectual property, the African Ministers asked the EU to refrain from seeking obligations that exceed those under the TRIPS Agreement. They rejected "any attempt to introduce any TRIPS plus provisions on any intellectual property rights issues in the EPA negotiations."
- On the issues of investment policy, competition policy and government procurement, the Ministers reiterated the concerns they had raised at the World Trade Organisation, leading to these issues being removed from the Doha work programme, and they reaffirmed that these issues be kept outside the ambit of EPA negotiations.

As the EPAs have not yet concluded, it is not possible to analyse their provisions and their development effects. However a review of draft texts prepared by the European Commission of the EPAs with some of the regional groupings of the ACP countries shows that despite the appeal of the African Ministers of Trade, the EU intends to adopt EPAs that require the ACP countries to take on obligations much more significant than those under the WTO.

The features of the EPA proposed by the European Commission, in its draft text of the EPA with West Africa, include:

1. On trade in goods, the customs duties on exports between the parties shall be eliminated from the date the EPA comes into force. The EU will import West Africa's products duty-free. Duties on imports from the EU shall be reduced or eliminated according to provisions set out in an Annex.

2. A competition chapter which agrees that the following practices are incompatible with the EPA insofar as they affect trade between the parties: (1) agreements and practices between undertakings that prevent or lessen competition; (2) abuse by undertakings of market power. The parties will adopt laws addressing restrictions on competition within five years. There are also provisions regulating the behaviour of public enterprises, including subjecting them to competition rules, and that state monopolies cannot discriminate regarding conditions under which goods are procured and marketed in relation to nationals of EU member states and West African states.

3. On intellectual property, the draft EPA requires West African states to comply with many provisions of international treaties, including the WIPO Copyright Treaty 1996, the WIPO Performances and Phonograms Treaty 1996, the Patent Cooperation Treaty 1984, the Patent Law Treaty 2000 and the Budapest Treaty (on Deposit of Microorganisms), and to accede to UPOV 1991. It also contains many provisions on enforcement of IPRs. According to CIEL (2007) and South Centre (2007), the draft EPAs of the EU contain many TRIPS-plus provisions, especially in copyright (affecting access to knowledge) and in enforcement.

4. The draft EPA has a chapter on public procurement, with the scope that procuring entities covered in an Annex would treat any eligible supplier of either party equally in ensuring the principle of open and effective competition. There are many provisions pertaining to transparency, methods of procurement, selective tendering, limited tendering, negotiations, opening of tenders and awarding of contracts and bid challenges.

5. There are also chapters on social standards and on the environment.

6. The draft chapters on services and investment were not yet available.

A review of the draft EPA text as proposed by the European Commission shows that the EPAs have a similar structure as that of the US FTAs, in that they contain a range of issues and content similar to that of the US FTAs. The direction is also similar in that the EU's EPA partners have to undertake many obligations that are heavier than what they have in the WTO.

CHAPTER 14: NEED FOR POLICY FRAMEWORK AND ASSESSMENT OF COSTS AND BENEFITS

Negotiating an FTA is a serious exercise as the outcome can have major implications for development policy and for social, economic and development outcomes. While it can result in some export gains, it can also: (a) result in increases in imports, with implications for the trade balance and the debt position; (b) facilitate import surges as tariffs decline or are eliminated, and this can adversely affect the local industries and farms; (c) reduce tariff revenue, with consequences for the government budget; (d) restrict and in some cases remove policy space, or the options and instruments available to a country to institute certain social, economic and development policies.

Thus, before negotiating an FTA, a country needs to have three things in place.

Firstly, a national development policy framework comprising an overall development strategy, with sectoral national plans (for agriculture, industry and services) and issue-based plans (policy towards foreign investment, local participation in the economy, intellectual property, etc).

The proposals put forward by the FTA partner or potential partner can then be assessed within the context of such a framework. Similarly, the positions of the country in the FTA negotiations can be formulated in light of the framework. In the absence of such a framework, it would be difficult to determine the objectives of entering an FTA negotiation, or the advantages or otherwise of the proposed FTA.

Secondly, there should be a framework to assess the benefits and costs of the FTA, in terms of its various components and of the various proposals and provisions, and the overall balance.

The benefits and costs can be assessed in terms of: (a) gains and losses in trade terms: e.g. increase in exports, imports; (b) gains and losses in terms of jobs; (c) effects on the degree of policy space and flexibilities available to the country as a result of the FTA; (d) social effects: on access to health, to knowledge, food security etc; (e) effects on technology transfer. Other items can be added.

The costs and benefits can be applied to the various aspects of the FTA, including market access (to the other country, and the partner country's access to one's own market) in goods; services; intellectual property; investment, competition and government procurement; and labour and environment standards. The cross-cutting social and environmental costs can also be assessed.

In general, a developing country can expect (or hope) to benefit from some market access in goods from an FTA with a developed country. This has to be weighed against the market access to be gained by the partner to its own home market. If the country lacks production and export capacity, or if the partner does not offer significant concessions, then it is possible that there may be a net cost rather than benefit, especially if the FTA is on a reciprocal basis (with no SDT for the developing country).

The developing country can be expected to suffer costs in additional IPR obligations beyond the already onerous obligations in TRIPS. These costs are losses to the nation since most patents, copyright and other forms of IP are owned by foreigners. The costs can be in terms of increased royalty and IP licence payments (with resulting loss in foreign exchange) or higher prices of the protected products, and in terms of the social costs of decreased access to medicines, decreased access to knowledge, decrease in farmers' rights to seeds and other resources, and decrease in food security possibilities.

Regarding investment, there can be expected to be major costs to the developing country in terms of loss of policy space and the use of policy instruments such as regulation of entry of foreign investment, performance requirements, regulation of the flow of funds, etc. The threat of expropriation cases being taken by investors can also have a real or chilling effect on national policies. The ability to use investment policy as a means to increase local participation in the economy, or to nurture local firms and farms, will also be severely restricted.

Regarding government procurement, the loss of policy space will be immense as procurement policy is a major social and economic instrument for boosting the domestic economy and to redress social imbalances. The requirement to give national treatment for foreign goods, services and firms can also result in loss of market share of local firms, and loss of foreign exchange. There can be loss of effect of fiscal policy, e.g. an increase in government spending to boost economic growth will have reduced effect if there is higher "leakage" through increased imports of goods and services procured by government.

Example of FTA Cost-benefit Framework

Possible benefits	**Possible costs**
1. Market access in goods: (a) Agriculture (b) Industrial 2. Market access in services: (a) Commercial services (b) Labour 3. Possible concessions on sanitary and phytosanitary measures and on technical barriers to trade 4. Possible aid mechanisms 5. Possible investment and technology flows	1. Market access into country: (a) Industrial goods (b) Agriculture 2. Market access into country: Services 3. Intellectual property (a) Access to medicines (b) Lifeforms (c) Plant varieties (d) Biodiversity and disclosure requirements (e) Copyright and access to information (f) Broadcasting 4. Singapore issues (a) Investment (b) Government procurement (c) Competition policy 5. Labour, environment standards 6. Environmental costs

There can also be considerable loss of policy space and options with regard to the other non-trade issues such as competition policy, labour and environmental standards, as well as in terms of effects on the competitive position of local enterprises.

An example of a simple cost-benefit chart is given above. It can be made more complex, reflecting the realities of the country concerned.

Thirdly, the country should establish or organise the resources and institutional base for assessing whether or not to enter negotiations for the FTA; and if so, to organise the negotiating teams, objectives, and conduct of the negotiations. As part of the process, different agencies of the government should be consulted and should be part of the process of the formulation of policy and positions. It is equally important to involve stakeholders such as local firms, trade unions, farmers, consumers, groups representing patients and involved in health provision and environmental protection. This is especially because the FTA can have a wide-ranging effect on society.

Eventually, national decisions have to be taken as to: (1) whether in principle to enter negotiations on the FTA; (2) how to conduct the negotiations; (3) what issues to include and exclude from the FTA; (4) putting positions forward; (5) assessing the other party's position; (6) continuously assessing the costs and benefits of proposals and provisions; (7) whether or not to conclude the negotiations, if there are many sticking points and outstanding issues.

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