



Policy and Priorities

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US Bilateral Free Trade Negotiations: Advancing on the WTO

As the Hong Kong WTO ministerial approaches, there has been considerable attention paid to the various and rather vague offers by the United States and the European Union to reduce agricultural subsidies and jump-start the moribund talks, as well as to developing country proposals insisting that the so-called Doha Development Round start to live up to its name. Meanwhile, the US government is engaged in a series of bilateral and regional talks that could serve to significantly alter the terms of the debate on trade. Once called “competitive liberalization” by the office of the US Trade Representative (USTR), these talks constitute a kind of “end run”⁽¹⁾ around resistance to key US proposals.

The negotiation of bilateral deals has accelerated over the past few years in the wake of the collapse of the WTO talks in Cancun and the subsequent stalemate in the Free Trade Area of the Americas talks in 2004. Since then, the United States has approved free-trade agreements with Chile, Singapore, Australia, Morocco, and Central America-Dominican Republic (which includes Guatemala, El Salvador, Honduras, Nicaragua and Costa

Rica). Agreements with Bahrain and Oman have been signed but have not yet been presented to the US Congress. The US government is continuing negotiations with several Andean nations (Colombia, Peru and Ecuador, with Bolivia participating as an observer), the Southern African Customs Union (SACU, which is composed of Botswana, Lesotho, Namibia, South Africa and Swaziland), Panama and Thailand and is discussing the possibility of entering into negotiations with Egypt, Switzerland and South Korea.

Many of the countries currently participating in trade negotiations receive unilateral trade preferences under programs designated for the Caribbean, Andean and African nations. Those programs are far from perfect, as they include conditions such as requirements that countries enforce US patent standards or participate in US drug eradication programs, but they do afford a degree of access to US markets that has become important to certain sectors. Each of these programs was also enacted for a defined period of time, with expiration dates ranging from 2006 to 2013. Although history shows that the US Congress has always voted to extend these programs, USTR and other government spokespeople have used the threat of the expiration of these benefits to pressure countries to continue negotiations for permanent free-trade agreements.

These agreements are all “WTO-plus” in that

they exceed commitments made in the global talks. In practice, this has meant that certain issues that are clearly off the table in the WTO are included in these bilateral negotiations, making it less likely that participating governments will oppose their extension to the WTO talks at some point in the future.

Investment

The North American Free Trade Agreement (NAFTA) established new rights for foreign investors, including prohibitions on performance requirements (conditions governments might place on foreign investment to ensure that it promotes local development) and the establishment of the “investor-state” provision, which allows foreign investors to sue governments over local laws or regulations that might impact on their future profits. More than 40 such cases have been brought against the three countries since NAFTA began in 1995, many against local public-health and environmental rules. The inclusion of an investor-state dispute mechanism provision, which effectively allows companies to bypass local judicial systems, was a key factor in the collapse of the

Multilateral Agreement on Investment in 1998. Nevertheless, it has been included in each of the trade agreements the US has negotiated since NAFTA, as well as in numerous bilateral investment treaties. While some modifications were made to increase the transparency of investor-state cases, the text in the newer agreements is virtually identical to – and in some respects goes beyond – NAFTA.

It would be a mistake to think, however, that these negotiations are based only on the NAFTA model. In fact, they have continued to evolve beyond what the US government was able to achieve in that accord. Starting with the U.S.-Chile FTA in 2004, the definition of investment protected under the agreements has been expanded to include sovereign debt, something that was specifically excluded from NAFTA. This means that countries signing on to such accords would be required to provide “national treatment” for the owners of foreign debt, thus prohibiting governments from prioritizing the payment of local wages or other social spending over the payment of foreign debt, and it extends coverage under the investor-state provision to private and public

Investor-State Challenges in Practice

In 2001, the US Metalclad Corporation received US\$15.6 million in compensation from the Mexican government over a municipal government’s refusal to grant it a permit to operate a toxic-waste dump. The site had previously been closed because it was leaching toxic chemicals into the local water supply, and the San Luis Potosí municipality had insisted that the company clean up the site and establish new safeguards before reopening it. Metalclad successfully argued that these requirements amounted to an indirect expropriation of its investment.⁽²⁾ In 2003, the US Harken Energy Corporation attempted to bring suit to an international arbitral panel demanding US \$57 billion in compensation from the Costa Rican government over its refusal to grant permission for offshore oil drilling when the company failed to adequately assess the environmental impacts. Since Costa Rica was not a party to any agreement with the US with an investor-state clause, it was able to insist that the issue be resolved in local courts. Under the provisions of DR-CAFTA, however, it would be forced to submit to international arbitration in any similar future cases.⁽³⁾



debt.⁽⁴⁾ The definition of investment in trade agreements with the US now also includes intellectual-property rights, making governmental assurances that countries would be able to continue to grant compulsory licenses for essential medicines virtually meaningless, since the pharmaceutical companies could bring those suits themselves. The Argentine government, which signed more than 50 bilateral investment agreements (BITs) during the 1990s, has faced numerous investor-state lawsuits over its 2002 devaluation. Governments that are already bound by such provisions in FTAs or BITs would be hard pressed to mount a vigorous opposition to their possible inclusion in global talks at some point in the future.

Intellectual Property Rights

After extensive pressure by public-health and HIV/AIDS activists, governments participating in the Doha WTO ministerial in 2001 affirmed the right to produce cheaper generic copies of medicines and authorized the import of those goods from third countries. The Ministerial Declaration on Trade Related Intellectual Property Rights (TRIPS) and Public Health (also known as the Doha Declaration) established the primacy of public health over private commercial interests. While the United States was a signatory to that declaration, it has

insisted on language in subsequent bilateral and regional accords that would substantially limit the ability to exercise that right.

According to Médecins Sans Frontières (MSF), provisions negotiated in CAFTA, the US-Singapore FTA, the US-Chile FTA and the US-Morocco FTA would: force national drug regulatory authorities to enforce patent rules; extend the life spans of certain patents; allow for patents for “new” uses of existing substances; restrict countries’ abilities to use compulsory licenses to produce generic medicines; and create new obstacles related to pharmaceutical test data that would delay the registration of generic medicines.⁽⁵⁾

These provisions have generated considerable opposition in the SACU and Andean regions. A report by the Pan-American Health Organization calculated that these proposals, if implemented, would cost Colombian consumers US\$4.9 billion in additional costs over ten years and would effectively exclude more than a million Colombian consumers from access to medicines.⁽⁶⁾

In September 2005, the Colombian intellectual-property rights technical team resigned in protest over the President’s plans to agree to the text the US had tabled since the inception of the negotiations. In their letter to the Minister of Health, the negotiators argued against signing the

provisions agreed to in CAFTA and the US-Chile agreement, which they said were extremely unsuitable for Colombia. In fact, the US negotiating text, which was leaked to the Colombian press over a year ago, goes well beyond those two accords to include patents on life forms and surgical procedures, two proposals the US was unable to include in previous accords.⁽⁷⁾ Pedro Francke, coordinator of the Peruvian Foro Salud (Health Forum) commented that, “The US has a TRIPS plus plus agenda in this agreement, pushing for much more than what developing countries are willing to accept. Later, other countries will say to us, if you accepted these provisions with the United States, why not us? It will really undermine our negotiating power.”

DR-CAFTA also requires the member countries to ratify ten additional treaties protecting intellectual property rights. These include the controversial 1991 Union for the Protection of Plant Varieties treaty (UPOV 91), which grants new protections to plant breeders and restricts the abilities of farmers to save and improve seeds. The provisions in the UPOV-91 treaty greatly restrict the flexibility governments have under WTO provisions on TRIPS to design and interpret enforcement mechanisms, UPOV-91. Environmentalists have also expressed concerns that the provisions in UPOV-91, which only provide protections for genetically uniform plant



varieties, would tend to reduce biodiversity, possibly leading to crop diseases such as corn smut, which is a product of the extreme homogeneity of US corn varieties.⁽⁸⁾ The Chile, Singapore, Bahrain and Oman FTAs also required ratification of UPOV-91, and it appears to be an issue in the Andean FTA and SACU talks as well.

Agriculture

Agriculture has become a lightning rod for criticism in the WTO talks. Family farmers in the South and North are suffering the effects of historically low commodity prices resulting from a combination of global overproduction and US and European farm subsidies. US subsidies, which are based on historic production levels, have led to growing concentration of US agricultural production among wealthy and corporate farms and overproduction of many commodities that further decreases global prices.

These goods are exported to many developing country markets at costs well below the price of production. In many cases, the importing countries have either already been compelled by World Bank and IMF structural adjustment policies to liberalize their markets or are in the process of doing so in order to comply with US demands under regional trade talks or the pending WTO negotiations. Some 1.3 million Mexican corn farmers have been displaced as a result of subsidized corn exports from the United States under NAFTA and similar results are foreseeable in other countries.

Opposition to U.S. agricultural subsidies, led by Brazil and other developing countries, was a major factor in the collapse of the 2003 WTO ministerial in Cancun. Those talks only restarted in July 2004 when the US and EU governments committed to reduce agricultural subsidies. While the United States has made some offers



along those lines in the lead-up to the Hong Kong ministerial, it has refused to even discuss agricultural subsidies in the context of the bilateral and regional talks. The only exception to that policy was the 1999 FTAA trade ministers' declaration, in which the United States successfully pressured other countries in the hemisphere to oppose agricultural export subsidies (although not other broader and more important issues related to domestic support to agriculture) as a bloc in the WTO talks.

Developing countries are also insisting on further definition of their right to special and differential treatment in the WTO, the idea that countries at lower levels of development should not have to liberalize trade to the same degree as rich countries.

In a November 2005 letter to WTO Director General Pascal Lamy, representatives of the G-33 (a coalition of developing countries) stated, "As a group of developing countries, the G-33 places great importance on the centrality of Special and Differential Treatment (SDT). The

G-33 also stresses the critical importance of food security, livelihood security and rural development, and for these issues to be fully addressed in the agriculture text to be presented to Ministers in Hong Kong."

The G-33 has also presented specific text on safeguard mechanisms and "special products," goods that would be excluded from liberalization due to their importance for national development needs.

While the US acknowledges the importance of special and differential treatment in various public statements on the WTO talks, in practice, it has sought to severely limit any such exceptions in bilateral and regional talks. Under the terms of NAFTA, DR-CAFTA, the US-Chile FTA and other accords signed to date, tariffs on virtually all agricultural goods are phased out over a period of 10 to 15 years, with many products scheduled for immediate liberalization when the agreement comes into force. Despite the extent of poverty and the importance of agriculture in Central America and the

Dominican Republic, the only exclusions in that accord were for white corn and potatoes, and in the latter case, only for Costa Rica.

The Andean Community of Nations, which includes Colombia, Ecuador, Peru, Bolivia and Venezuela, has established a system of price bands, a safeguard mechanism that allows for variable tariffs, so that when prices dip below predetermined certain levels, tariffs are applied to provide some degree of protection for local farmers. Given the fact that many key US agricultural goods are exported at prices varying from 10 to 47 percent below their cost of production, this mechanism has served as a last resort for local producers. Rice, for example, is exported from the US at 26 percent below the cost of production⁽⁹⁾, a fact that has inspired vigorous protests by Colombian rice farmers.

The Colombian Ministry of Agriculture has warned that if the price bands are removed and remaining protections are removed under the trade agreement, local farmers' incomes could fall by 57 percent and employment in agriculture by 35 percent, compelling farmers to migrate to cities or other countries, enter into drug production or affiliate with armed groups.⁽¹⁰⁾ Nevertheless, the U.S. government has refused to consider maintaining the safeguard mechanism. This issue, along with others related to access to essential medicines, continue to be key sticking points in the Andean FTA negotiations, as well as in the ongoing US-SACU talks.

Obstacles to the US Agenda

In fact, many of these bilateral and regional negotiations have extended well beyond the point that USTR had expected to conclude them. When the Andean FTA talks began in May 2004, USTR projected that it would be finished by the end of the year. The

US-Panama FTA talks have also dragged on for nearly a year beyond when USTR had hoped to complete it, in large part because of Panamanian resistance to provisions on agriculture and services. The Thai government has so far resisted US pressure on financial services, intellectual-property rights and investment.

During 2004, USTR urged countries to complete negotiations before February 2005, the deadline for the US Congress to allow an extension of Trade Promotion Authority (TPA) to 2007. After that so-called deadline passed without incident, pressure has increased to complete WTO and other talks before the new deadline in 2007. While it is entirely possible that Congress will refuse to grant the Administration authority to present trade agreements along the lines of past TPA legislation, that debate itself will hinge on the contents of the trade agreements and the process involved in their negotiations, issues that have become increasingly controversial in the US Congress.

On the other hand, all of the bilateral accords completed over the last few years have included provisions on investment, intellectual property rights, agriculture and other issues that are both NAFTA-plus and WTO-plus. They represent a concerted effort to redefine what is reasonable and expected in a trade agreement, raising the bar for future regional and global talks. They are also intended to create blocs of countries that are favorable to the US agenda. While that effort has not proceeded as planned in Latin America, the US has hailed the Bahrain and Oman agreements as first steps in an effort to create a Middle Eastern free-trade agreement.

These talks are also directed to retaking what the US government has been unable to impose through multilateral talks. At the Cancun



WTO Ministerial and the Miami FTAA Ministerial in 2003, developing countries refused to go along with proposals on investment, intellectual-property rights, services, government procurement and agriculture, both because of the US government's failure to make meaningful offers on dumping of agricultural commodities and because of growing popular resistance to this model of free trade, especially in the case of Brazil. Recent discussions leading up to the December 2005 ministerial meeting on the WTO in Hong Kong appear to be heading in the same direction, with United States Trade Representative Rob Portman issuing statements that expectations should be lowered for the Hong Kong meeting. He furthermore foresees that outstanding issues can still be resolved on time, in 2006.

In the meantime, the bilateral and regional negotiations continue to move forward, around the obstacles presented in the WTO talks, but with the same goals of achieving deregulated trade and investment. Whether those efforts result in a "touchdown" for the Bush Administration or a change in course for future talks will depend in large part on a growing recognition by legislators, governments and publics of the core elements of this agenda no matter where they appear and the need for a new approach to trade and development.

End Notes

[1] According to the American Heritage Dictionary, "end run" is a term in US football "in which the ball carrier attempts to run around one end of the defensive line. It is also defined as "a maneuver in which impediments are bypassed, often by deceit or trickery."

[2] "Investment Provisions Threaten Democracy in All Three Countries," Lessons from NAFTA: The High Cost of 'Free Trade', Hemispheric Social Alliance, Common Frontiers, Alliance for Responsible Trade, Mexican Action Network on Free Trade, 2003.

[3] Natural Resources Defense Council and Friends of the Earth US, "The Threat to the Environment from the Central America Free Trade Agreement: The case of Harken Costa Rica Holdings and offshore oil."

[4] Aldo Calieri, CAFTA's Debt Trap, June 2005, available at <http://www.fpif.org/papers/0506cafta.html>

[5] MSF Briefing Note, "Access To Medicines at Risk Across the Globe: What to Watch Out for In Free Trade Agreements with the United States," May 2004, available at <http://www.accessmed-msf.org/documents/ftabriefing-english.pdf>

[6] Ricardo Santamaría Daza, "Impacto en medicamentos por TLC sería US\$4.900 millones," La República (Colombia), November 22, 2004.

[7] Diario El Tiempo (Colombia), "Renuncian los miembros del equipo negociador colombiano en el tema de medicamentos en el TLC," September 24, 2005.

[8] Sylvia Rodríguez Cervantes, Red de Coordinación en Biodiversidad/Encuentro Popular, "Intellectual Property: The Case of Seeds," in *Why We Say No To CAFTA, Analysis of the Official Text*, Bloque Popular Centroamericano/Alliance for Responsible Trade/Hemispheric Social Alliance, March 2004. Available at <http://www.art-us.org/docs/cafta304.pdf>

[9] Institute for Agriculture and Trade Policy, WTO Agreement on Agriculture: A Decade of Dumping. United States Dumping on Agricultural Markets, February 2005.

[10] Ministry of Agriculture and Rural Development, Colombian Agriculture Before the Free Trade Agreement with the United States, July 2004.

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