ASIAN REGIONAL WORKSHOP ON BILATERAL FREE TRADE AGREEMENTS (KUALA LUMPUR, 26-28 AUGUST 2005):

SUMMARY AND RECOMMENDATIONS

The Asian Regional Workshop on Bilateral Free Trade Agreements was held in Kuala Lumpur, Malaysia on 26-28 August 2005. It was organized by the Third World Network and attended by about 120 participants from many Asian countries, including Bangladesh, Cambodia, China, Indonesia, Laos, Malaysia, Pakistan, the Philippines, Singapore, Thailand and Vietnam. Resource persons and participants from international and regional agencies, including the World Health Organization (WHO), United Nations Development Programme (UNDP) and Association of Southeast Asian Nations (ASEAN) secretariat also took part. Other resource persons and participants were from Australia, Mexico and Lebanon.

The following are among the significant views, conclusions and recommendations expressed by participants during the Workshop.

GENERAL

Many Asian countries are pursuing bilateral trade and economic agreements. It is hoped by developing countries that bilateral free trade agreements (FTAs) can provide benefits such as preferential terms for exports for their products, and an improved investment climate for foreign investment.

It is however, generally recognized that bilateral agreements, especially between a developing and a developed country, are not the best option and that multilateral negotiations and agreements are preferable. Among the reasons are that bilateral agreements usually lead to "trade diversion"; there is weaker bargaining power of a developing country in a negotiation with a developed country in an FTA; and bilateral FTAs are on a reciprocal basis (with little or no special and differential treatment for the developing country) with both sides aiming to eliminate tariffs on "substantially all trade" in line with World Trade Organization (WTO) rules.

Another drawback is that FTAs involving a developed country usually requires the developing country to undertake WTO-plus obligations. They 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. Issues like labour standards and environment are also included, and have the potential to be used for protectionist purposes. Thus, new rules and obligations can enter "by the side-door" through the FTAs.

Even where issues are already in the WTO (e.g. intellectual property and services), the "flexibilities" and options open to developing countries in interpreting and in implementing obligations are often removed or reduced through provisions in the FTA that are proposed by developed countries. The "policy space" for developing countries to pursue development and socio-economic goals is significantly reduced.

The following are areas of concern which countries should pay attention to when negotiating FTAs or deciding whether to enter a specific FTA.

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 some better market access for some of its products, there are also several potential dangers and disadvantages.

Given the problems arising from FTAs, some developing countries decide to negotiate an FTA with a developed country because of the fear of being left behind by others who engage in FTAs, or because of the perceived preferential access to markets.

GENERAL RECOMMENDATIONS ON 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. Thus, before and while negotiating an FTA, the country should ideally have the following:

Firstly, a national development policy framework comprising an overall development strategy, with sectoral national plans (for agriculture, industry and services) and issue-based plans (policies 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. The positions of the country in the FTA can be formulated in light of the framework.

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 medicines, to knowledge, food security etc; (e) effects on technology transfer.

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, although this is likely to be constrained by onerous conditions such as rules of origin and be limited by safeguard measures. This has to be weighed against the market access to be gained by the partner to its own home market. The developing country can be expected to have costs arising from additional intellectual property rights (IPR) obligations beyond the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) obligations. Regarding investment, government procurement and competition, 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.

An example of a cost benefit framework is attached in the Annex.

When assessing the costs and benefits, some participants were concerned about the shortcomings in common economic models of the trade impact. There was a recommendation to identify centres of modeling excellence, for example in developing countries with experience in this analysis which would use new approaches, both quantitative and qualitative, to more realistically assess the likely impact of an FTA on a developing country.

Thirdly, the country should organize its resources and institutional base for assessing whether or not to enter negotiations for the FTA; and if so, to organize 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 those involved in health provision and environmental protection. This is especially because FTAs can have such wide-ranging effects on society. Transparency in the process with the public, and public participation in discussions on the FTA and its negotiation is thus important.

Eventually, national decisions have to be taken as to: (1) whether in principle to enter negotiations in 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.

MARKET ACCESS

A desire for expanded market access is usually the major reason why developing countries enter an FTA. In concluded FTAs between a developed and a developing country, the developing country has obtained some extra market access. However, in many cases there have been disappointing results. There are structural, legal and political impediments that limit the offers that a developed country can make, especially on the developed country's "sensitive products", which are the ones that are of export interest to the developing country.

This is so especially for agriculture. The developed countries are unable 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.

US negotiators are also constrained by their Bipartisan Trade Promotion Authority Act of 2002 which prevents FTAs from reducing the rate of duty below that applicable under the Uruguay Round Agreements, on "any import sensitive agricultural product." The Act also does not enable special and differential treatment as its negotiating objectives include 'reciprocal market access' and 'to obtain reciprocal tariff and non-tariff barrier elimination agreements'.

On textiles and apparel, the US typically wants the FTA partner to apply "rules of origin" that include the "yarn forward rule" where the products must be made from yarn sourced from the partner or the U.S. As developing countries usually do not have yarn industries or capability in this sector, this in effect means that US yarn has to be used, instead of cheaper yarn and fabric sourced from other, non-FTA partner, countries. There are also very cumbersome customs procedures to verify that textiles/apparel are made locally and additional safeguard measures that limit the possible market access gains.

On agricultural products, the gains can be limited. For example, Australia could not get any extra sugar quota in its FTA with the US, and on beef, it only obtained an 18.5% increase in its quota, confined to manufacturing-grade beef spread over 18 years, or an extra half a cow, per farm, per year. Non-tariff barriers (e.g. sanitary and phytosanitary measures) have also limited Mexico's expected exports of agricultural products to the USA under the North American Free Trade Agreement (NAFTA).

The developing country has to give reciprocal market access to the partner, which is likely to be greater proportionately and greater in value, since on average its industrial tariffs are significantly higher. Eliminating its tariffs on a wide range of products can . result in significant dislocation of local producers.

For example, under NAFTA, Mexico agreed to eliminate tariffs on agricultural products. Imports of corn (the most widely grown crop in Mexico and the main source of income

for subsistence farmers in the poor South) nearly tripled after NAFTA, and imports rose over five times for soybean, wheat, poultry and beef. This more than offset the increase in exports of fruits and vegetables (which largely accrued to multinational companies in the comparatively wealthy North – the only area which can support fruit and vegetable crops), and 1.7 million rural jobs have been lost since NAFTA.

Recommendations

1. The developing country should 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 market 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).

2. The developing country should request as much special and differential treatment as possible, not only in terms of longer implementation periods but also more exceptions and in more products that are sensitive for it.

3. Developing countries should propose the amendment of Article XXIV of the General Agreement on Tariffs and Trade (GATT), in order that FTAs can enable developing countries to enjoy non-reciprocity and thus obtain special and differential treatment in FTAs with developed countries.

SERVICES

Services are an important sector for developing countries. However many countries do not have a national services plan, and thus have difficulties in taking positions on requests and offers in services negotiations. It is important to develop domestic services enterprises which should be given the opportunity to survive and develop, especially in socially important sectors or economically strategic sectors. While foreign services enterprises can contribute, the participation of local (public or private) enterprises is crucial, especially in these sensitive and strategic sectors.

Developing countries are structurally disadvantaged in attempts to get a balanced outcome in services, because they have much weaker capacity to supply services than a developed country. They should thus demand the right to offer less sectors and less commitments within each sector. Their area of interest could include the movement of natural persons or obtaining work opportunities abroad for their citizens.

A major concern is that some FTAs that include services base the concessions on a "negative list" basis, i.e. all sectors are assumed to be fully liberalized, except those listed

in an annex. This tends to bind the developing country to commit faster and in more sectors, as compared to the "positive list" approach in the WTO (in which no sector or type of liberalization is committed unless specified in the schedule).

The FTA negative list approach also makes it difficult for the developing country to have the WTO principle followed, that it can choose the sectors to liberalise and the pace of liberalization. Such an approach reduces policy space for developing countries.

Some FTAs also oblige the partners to bind the current levels of liberalisation in the various sectors. This is different from the WTO practice, where the countries can liberalise autonomously but choose not to bind this in the WTO, or to bind at a lower level than the present practice, which allows the countries to have flexibility to change its policies if so needed, for example due to changing circumstances.

Recommendations

1. Developing countries should formulate a national services plan or strategic framework, which also includes a plan for each sector. Part of this should include the respective roles of domestic and foreign enterprises. The positions taken at trade negotiations should be taken in the context of this plan.

2. The developing country should decide whether or not to agree to include services in the FTA it is entering into, especially in view of the structural imbalances they face.

3. The developing country should conduct an assessment of the sectors and activities of export interest to it, as well as the sectors and activities which it can afford to make offers in. This should be done in accordance with the national services plan. Negotiations should not be conducted, nor should commitments be made, until such assessment is completed.

4. The "negative list" approach should not be adopted.

5. The developing country should make requests in areas and activities in which it can benefit (including in movement of labour), and unless these are agreed to, it should not agree to finalise offers.

6. Unless there are extraordinary extra benefits from offers from the partner, the developing country should be able to maintain the same level of offers that it does at the WTO.

INVESTMENT

Investment is part of the so-called "Singapore issues" in the WTO, the others being government procurement and competition. Many developing countries opposed the start of negotiations on 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, regulations on funds transfer etc. The WTO in July 2004 suspended any further discussion on investment.

The investment issue however is a central part of the agenda in many FTAs. The demands by developed countries in FTAs go far beyond what was proposed in the WTO discussions on investment. For example, the US-Singapore FTA has a broad definition of investors and investments, "high" standards for the right of establishment (i.e. the provision of strong pre-establishment rights), national treatment, prohibition of performance standards, freedom for funds transfer, an expropriation clause, as well as investor-to-state dispute settlement.

In FTAs involving the US, the expropriation clause typically has a broad definition of expropriation, which includes "indirect expropriation", or losses resulting from 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. The developing country could suffer heavy penalties under the expropriation and dispute settlement provisions.

The investment provisions would eliminate or drastically reduce the policy space of developing countries. They can result in adverse effects on government's ability to maintain or formulate social, economic and politically related policies that are required for economic development, social programmes and nation building.

Recommendations

1. Developing countries should be very cautious as to whether to agree to include an investment component in the FTA. They can argue that since this issue has been rejected as a negotiating issue in the WTO, and since it has serious adverse implications, this issue should not be in the FTA.

2. If the country decides to do so, it should confine the investment chapter to cooperation activities and not include binding rules on market access, investment protection and expropriation.

3. It should in particular ensure that the investment chapter does not commit it to standards and elements that may be detrimental to its investment and development policies. For example: (a) the definition of investor should not include those who "seek to invest", as this allows for pre-establishment rights; (b) the scope of investment should

only be confined to direct foreign investment, thus excluding portfolio investment, credit and intellectual property rights; (c) "indirect" expropriation should not be included; (d) there should not be an investor-to-state dispute settlement system.

OTHER "SINGAPORE ISSUES": COMPETITION, GOVERNMENT PROCUREMENT

These issues, like investment, 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.

In the FTAs involving the US, the chapter on government procurement goes far beyond what was being discussed in the WTO. The WTO working group had 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.

On competition policy, there was a move especially by some developed countries to introduce a competition agreement in the WTO that would enable foreign firms, goods and services to compete "equally" with local firms, through the removal of preferences and subsidization 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 hard core cartels and modalities for voluntary cooperation.

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 and framework now in place in the US and other developed countries are 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 globalization. The competition issue within trade agreements is thus extremely complex.

Recommendations

1. As in the case of investment, the developing countries can argue that these two "Singapore issues" have been suspended in the WTO as they were found inappropriate as

subjects for the trade system, and that they should also not be subjects in the FTA. For example, the African Union Trade Ministers' conference in Cairo in June 2005 declared that the Singapore issues should be kept off the agenda of their FTAs with the EU (the Economic Partnership Agreements) as it has been taken off the WTO agenda.

2. If the issues are to be included, they should be in the nature of cooperation arrangements, and not involve binding rules.

3. In particular, there should not be any market access component in the government procurement issue, should the latter be included in an FTA.

INTELLECTUAL PROPERTY RIGHTS

The introduction of IPRs in a trade agreement is very controversial, after the TRIPS Agreement was incorporated within the WTO. There is a growing realisation that high IPR standards, promoted by TRIPS to developing countries, are inappropriate for developing countries. Economists have estimated that the cost to developing countries of implementing TRIPS amounts to US$60 billion annually, and this more than offsets the gains they may expect to benefit from other areas, such as market access.

Developing countries now seek to clarify or amend some aspects of TRIPS to reduce adverse effects. For instance the Doha Declaration on TRIPS and Public Health has clarified that developing countries can make use of "flexibilities" such as compulsory licenses.

Developing countries are requesting that TRIPS be amended to counter "biopiracy", by requiring that patent applications involving biological resources be accompanied by disclosure of the countries of origin, prior informed consent and evidence of benefit-sharing arrangements with the countries of origin. Also, TRIPS requires some life forms to be patented (microorganisms and micro-biological processes) but allows the prohibition of patenting of other life forms (plants and animals), and gives countries the leeway to define what is an invention and thus what is patentable.

TRIPS requires that IP protection be granted to plant breeders for plant varieties; however, it 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.

The FTAs with developed countries typically include extensive provisions on IPRs. The developed countries attempt to establish TRIPS-plus measures, to remove or reduce the flexibilities provided for in the TRIPS Agreement, and establish even higher standards of IPRs in developing countries.

The FTAs threaten the use of TRIPS flexibilities, particularly 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; (c) the ability to ban patenting of some life forms; (d) copyright. [Note: Trademark and geographical indication provisions are also included in many FTAs although the Workshop did not cover these aspects].

For example the WTO TRIPS Agreement 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 in the approval of other applicants such as generic producers. Through bilateral FTAs, the US and EU seek "exclusive rights" over test data provided by the originator companies, which would prevent the registration and sale of generic medicines.

These FTAs also modify the role of the Drug Regulatory Authority (DRA) of a country. Traditionally the DRA's role was to assess the quality, safety and efficacy of a product, before the product is launched into the market. However the FTA provisions now require the DRA to take on the role of "patent police" by ensuring that no marketing approval is granted to generic products (while the patent on the originator product continues).

Through the FTAs, the US also seeks to extend the patent life span, to allow "evergreening" practices by originator pharmaceutical companies (by renewing the expiring patents through registering "new uses" of the same product) and limiting the grounds for which compulsory licences can be issued.

Some FTAs also eliminate or reduce TRIPS flexibilities in the area of intellectual property over plant varieties and other life forms. In some FTAs, the country has to allow patenting of plants and animals, and must become a Party to the 1991 Act of the International Convention for the Protection of New Varieties of Plants or UPOV 1991. The rights under UPOV 1991 are patent-like in nature with serious erosion of farmers' rights. Obliging a country to be Party to UPOV 1991 thus removes the flexibility of choosing a sui generis system of plant variety protection that can protect farmers' rights.

With regard to patents on life forms, the TRIPS Agreement allows countries to exclude plants and animals. The obligation to provide for patents on microorganisms (an area of vast commercial value) has also been interpreted by some developing countries to exclude naturally-occurring microorganisms. Some FTAs remove these flexibilities and obliges a partner country to change their national law to allow for patents over these life forms.

A rising concern is the granting of "broad" patents or patents that do not meet with the criterion of "new or novel". This has adverse implications for research and development in developing countries, as well as facilitates "biopiracy" of biological resources and associated traditional knowledge.

In copyright, FTAs involving the US contain TRIPS-plus obligations, including extending the copyright period from 50 years after the death of the author to 70 years after, and providing legal protection against circumvention of technological protection measures added to copyrighted works and expansion of enforcement measures and obligations for infringement of IP (including the criminalization of counterfeiting and non-commercial copyright infringements).

Some FTAs also require the developing country to become members of many IP agreements in WIPO, some of which contain TRIPs-plus provisions and standards.

These FTAs also contain detailed provisions on enforcement of IPRs, thus raising the level of obligation and resource requirements demanded of national governments.

Besides the above, there are many more aspects in the IP Chapter in FTAs that go beyond the TRIPS Agreement, of which developing countries should be cautious.

Recommendations

1. Developing countries should carefully consider whether to include IPRs as an item in FTAs, since there are already strict IP rules in the WTO as well as WIPO.

2. If it is agreed that an IP chapter is included, the country should try to ensure that it not include TRIPS-plus provisions. For example, there should not be restrictions on the grounds for compulsory licences, or extended protection periods for patents and copyright, or expansion of patents on life forms, or restrictions on the rights that least developed countries (LDCs) presently have in the WTO.

An example that could be followed is that of the Australia-Thailand Free Trade Agreement which only requires the parties to respect the provisions of the TRIPS Agreement and any other multilateral agreement relating to IP to which both are parties. It also provides for cooperation clauses.

3. Developing countries should only consider acceding to or ratifying international IP agreements particularly those administered by WIPO after undertaking in-depth cost benefit analysis and understanding the implications on development and society, of each of the agreements.

FOLLOW UP ACTIVITIES

1. Participants of the Workshop should continue to communicate with and exchange documents with one another, through email, websites and other means. The Workshop organizers will inform participants how they intend to coordinate it.

2. It was suggested that an advisory group on FTAs be established to provide technical advice and assistance on issues relating to FTAs and FTA negotiations. The group can for example receive questions or requests and attempt to provide responses relating to FTA negotiations. The Workshop organizers will follow up on this proposal and approach experts (including the resource persons of the Workshop) to be members of this advisory group.

3. Participants can communicate with the TWN secretariat in the meanwhile, if they would like to disseminate information and documents to other participants, and if they would like to receive more information on specific issues, or if they require assistance in other ways.

Annex

Example of FTA Cost-benefit Framework

Possible benefits	**Possible costs**
1. Market access in goods: a. Agriculture b. Industrial	1. Market access into country: a. industrial goods b. agriculture
2. Market access in services: a. commercial services b. labour	2. Market access into country Services
3. Possible concessions on SPS and TBT? 4. Possible aid mechanisms? 5.Possible investment and technology flows	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

NOTE: The Asian Regional Workshop on Bilateral FTAs was held in Kuala Lumpur on 26-28 August 2005. For further information, please contact the organizers, Third World Network, at twnet@po.jaring.my.