



trade as if people
and earth matter

A Working Document on Alternatives

The **Interfaith Working Group** is a Washington, DC-based working group with representatives from a range of faith-based organizations committed to asserting a strong presence of communities of faith in public policy discussions on international trade and investment.

contents

1	Preface – Elements for Fair and Just Trade Policies
2	Introduction
4	Intellectual Property Alternatives
6	Agriculture Alternatives
8	Ecological Alternatives
10	NAMA (non-agricultural market access) Alternatives
12	Government Procurement Alternatives
14	Investment Alternatives
15	Services Alternatives

preface

Elements for Fair and Just Trade Policies

International trade can be one engine of economic progress for developing countries. But the United States and developing countries alike need fair and just trade agreements that are genuinely shaped to meet the goals of sustainable development and poverty reduction.

This statement, *Elements for Fair and Just Trade Policies*, enumerates the key elements we believe must be part of a new framework for U.S. trade policy.

The Elements statement is followed by a text, *Trade As If People and Earth Matter: A Working Document on Alternatives*. This text, proposed by the Interfaith Working Group itself, contains more detailed recommendations built upon the Elements. The document seeks to contribute to the emerging dialogue on a new framework for trade that holds the promise of promoting just and sustainable development.

Trade policies and agreements must put people first! They should further genuine social and economic development for our neighbors around the world while preserving and creating good jobs here at home. They must support – not hinder – governments in adopting policies to protect public health and the natural environment. Trade policies must strike a balance between creating a predictable structure for international trade and preserving the policy space necessary for governments to foster and secure economic, social and human development for all their citizens.

A new trade framework should include the following key elements:

- Ensure that trade agreements are formulated with full democratic accountability and citizen participation both in the United States and U.S. trading partners.
- Require (pre and post) country impact evaluations to assess the effects of provisions in trade agreement on key issues such as poverty eradication, job growth, food security and achievement of the Millennium Development Goals.

- Respect the right of peoples and nations to democratically determine their own agricultural and food policies.
- Fully respect the right of developing countries to safeguard and nurture their own domestic economies and the livelihoods of their people through the implementation of trade policies, regulations and mechanisms which promote and protect their own small-holder farmers, urban workers, and domestic manufacturers.
- Prioritize long-term ecological sustainability and the stability of the climate, and protect and conserve the richness and diversity of the natural world.
- Exclude provisions that require the liberalization or deregulation of essential public services, such as water, health care and education.
- Reject intellectual property rights restrictions which make it more difficult for people in developing countries to have access to affordable essential medicines, as well as intellectual property provisions involving patents on seeds and other life-forms.
- Exclude the undemocratic provisions known as “investor-state” law suits, in which international investors are able to sue host governments in unelected international tribunals over actual or potential loss of future corporate profits resulting from democratically enacted domestic policies and regulations.

Crafting trade policies that will foster the wellbeing of our global neighbors and the natural environment will also improve America’s well-being. We call on the new President and Congress to look to long-term U.S. interests in a more secure, stable and just world, in which poverty and inequality are declining and all people have the resources needed for lives of dignity, sufficiency and community participation.

Introduction

Trade as if People and Earth Mattered

Trade liberalization, as many commentators have noted, produces both “winners” and “losers.” But the abstract economic modeling used in support of free trade ignores the negative effects of liberalization on many people in real life, particularly in weak and vulnerable economies around the world. For too many people, globalized trade, market deregulation and privatization have led to greater poverty, job insecurity and environmental degradation. These are the “losers” in the advancement of trade liberalization. There are also “winners”: those who by geographic location and access to financial resources, education and health have made fortunes under the current economic and trade arrangements. But the balance between “winners and losers” is hugely asymmetrical within and among countries and many people are denied the hope of living lives of dignity.

The Interfaith Working Group on Trade and Investment (IWG) is a coalition of religious and faith-based organizations, many of whom have members living and working with the poorest communities in Africa, Asia and Latin America. The IWG has critiqued the current U.S. trade agenda because it sees the failures of multiple trade agreements to foster just and sustainable development, livelihood security (jobs and work) and environmental sustainability. We evaluate trade agreements by what we see happening in the U.S. and among local partners in Africa, Asia and Latin America, collectively referred to here as the “global South”. This document hopes to open a dialogue on alternatives to current agreements that would hold promise of promoting just and sustainable development in the countries and areas where it is most needed.

Inequalities based on gender, and exacerbated by class, ethnic and racial divisions, are pervasive features of all societies. They are the product of socially constructed power relations, norms and practices. Differential power relationships influence economic and productive activity and are often determining factors in winning or losing in the global trading system. Gender persists as a variable



Photo by: Linda Panetta, www.opticalrealties.org

of inequality and the majority of women have not benefited from the gains of trade. Women represent more than half the world population and are engaged in all aspects of production and social reproduction. However, economic liberalization continues to view women as a source of cheap, pliable labor. Women and other minorities as defined by race, ethnicity, and class remain “losers” in this economic model. In contrast, a new economic model could be developed to allow for greater participation of marginalized groups and more just distribution of access to decision making and of the gains of economic growth.

While the world is becoming more and more aware of the harmful impact of the existing configuration of globalized industrial and agricultural production on the environment, trade agreements and negotiations continue to advance even further this same model of development. Global warming is exposing the serious problems and shortcomings of this model. Current trade patterns that move goods, services and agricultural products around the globe leave behind massive carbon footprints. The whole process of production and distribution calls for a reevaluation of the trade liberalization model and a movement toward more local and regional production and trade. It calls for changes that reject the current one-size-fits-all agreements to a more flexible model that promotes new forms of local and green development that is just and sustainable.

Development cannot be measured in economic terms alone (GDP, GNP) but must be judged by whether it fosters the possibility of every man, woman and child to achieve his/her full potential in current and future generations. It must show progress in moving people out of less human conditions to those which are more human, just and sustainable. The IWG bases its judgments of trade agreements on moral foundations arising from our faith commitment. These foundations include, but are not limited to, the following:

1. The dignity of every human person who is endowed by his/her creator with human rights, including the right to development, which must be respected and protected by governments;
2. The principle of subsidiarity which demands participation of people in decision that directly affect them; this principle also applies to the right of nations to full participation in global decision-making;
3. The global common good includes a global environment—physical, political, economic, sociological and cultural/religious - which make it possible for all persons to achieve their potential.
4. Global solidarity which moves us beyond the empirical reality of economic interdependence to the ethical reality of human interconnectedness;
5. A preferential option for people in poverty, who are marginalized, excluded and rendered powerless; and
6. The recognition that earth is limited and must be protected from human exploitation for the sake of profit.

The IWG, in developing alternatives, has applied these moral criteria to key trade issues that research has shown to have a negative impact on development. The alternatives include but go beyond the inclusion of labor and environment language in trade agreements and seek to reshape the economic principles driving trade today: economic efficiency,

economic rationality and profit maximization. These alternative policies put human development and human rights at the center of trade policy, with an emphasis on sustainability and livelihoods. The IWG seeks first of all to change the current discourse on trade and ultimately to move trade in the direction of just and sustainable development.

The IWG is not alone in raising these issues and alternatives. It is part of a growing international chorus of voices including social movements, NGOs, women's groups, labor, environmentalists, economists and trade specialists. The IWG brings the voices of faith communities in the U.S. and of partner communities abroad.

The issues addressed in this document are based on typical trade negotiating groups including: agriculture, environment, industrial tariffs/NAMA (non-agricultural market access), intellectual property, investment, procurement and services. For each issue we offer a brief analysis of the anti-development dimensions in the current policies, a section of the new directions we seek and the alternative policy directions we advocate.

alternatives

Intellectual Property Alternatives

Key problems

Two areas of intellectual property (IP) rights of special concern to the IWG are the areas of public health and biotechnology. With regard to health, during the WTO negotiations in Doha, Qatar in 2001, almost 150 countries agreed that IP laws “should not prevent Members from taking measures to protect public health,” and that every country has a “right to promote public health and, in particular, to promote access to medicines for all.” Despite this agreement, trade and investment agreements are being used to override this international consensus. Under WTO rules, patent protections are driving up prices of medicines, making life-saving treatment inaccessible for millions of people in the global South. Patent extension, through data protection rules and other mechanisms included in bilateral trade agreements, threaten what flexibility currently exists for countries to protect public health.

A key problem with bilateral trade negotiations is that few, or often no public health experts are involved in the negotiation process, while representation by pharmaceutical and health care firms is strong. This creates a bias toward industry and away from public health considerations in the agreements, which negatively affects the public in all signatory countries. One result has been rules that extend monopoly-creating patents that increase the price of medicines and delay the creation of more affordable generic medicines.

In relation to biotechnology, we see the patenting of various forms of life from cells to plants and even animals. We also see that trade agreements facilitate the piracy of native knowledge of medicinal plants, when corporations use local knowledge to patent plants and processes without acknowledging or paying for the original information. Finally, despite an agreement on mandatory labeling under the Cartagena Protocol on Biosafety, the United States continues to insist that labeling of genetically modified organism (GMO) products is illegal. Because of laws governing the ownership of seeds, the entire spectrum of seed varieties is in danger of shrinking and becoming privatized which can limit public access to food in the future.

Medicine Prices Escalating

According to Oxfam, medicine prices have increased 20 percent in Jordan since 2001, the year it began an FTA with the U.S. New medicines to treat diabetes and heart disease cost anywhere from two to six times more in Jordan than in nearby Egypt, that has no FTA with TRIPS-plus barriers.

Doctors Without Borders estimates that it pays 12 to 36 times more for second-line anti-retroviral medicines covered by patents or data exclusivity than for generic first-line medicines.

A Northwestern University study showed that in the countries receiving the President’s Emergency Plan for AIDS Relief (PEPFAR’s), costs for second line drugs will increase from roughly \$333/patient year to \$1700, and raise total costs per patient year from \$1000 to \$2366, a 500% increase in medicines costs and a 240% increase in total treatment costs. Medicines will escalate from 33% of treatment costs to 72% of treatment costs. This means that as patients transfer to second line drugs, each such transfer will mean that only one patient can be treated for the same cost that 2.4 patient were treated previously.



Objectives

- There needs to be better representation of diverse actors in making decisions regarding IP.
- Governments should be able to guarantee access to life saving medicines for all their citizens.
- Governments should be able to regulate unhealthy products.
- People have a right to know if their food is made from genetically modified organisms.
- Governments should have the right to prohibit the use of products which have not yet been proven to be safe.

Policy Recommendations

- All relevant trade advisory committees should include adequate representation from public health organizations, and all their proceedings and documents should be open and available to the public.
- There cannot be a one size fits all IP regulation for all countries. Countries must be able to adjust their IP provisions to prioritize public interests over profits. Ideally, alternative forms of compensation will be used for inventions so that there would be no monopolies on important technologies and medicines
- There should be no patenting of life forms.
- The protection of native varieties of food must be a priority.
- IP provisions should not make it more difficult for people in developing countries to have access to affordable essential medicines
- Genetically Modified Organisms should be so labeled.
- Governments should retain the right to use the precautionary principle¹ to avoid the importing of products that have not been proven to be safe.

¹ The 1998 Wingspread Statement on the Precautionary Principle summarizes the principle this way: “When an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.”

Agriculture Alternatives

Key Problems

Food and the right to decide on food policy is a basic human right, however, the inclusion of agriculture in world trade has vastly changed the way of life for hundreds of millions of people. This has had adverse effects on small farmers around the world, especially for those in the global South.

While farming is a way of life for many of the world's poor, trade in agriculture is dominated by multinational corporations that control and distort the market. Most agricultural sectors are dominated by a few corporations and in many rural areas around the world; there are only one or two buyers.

Food and agriculture is seen as a tradable commodity and small farmers have no voice during trade negotiations and policy design. This diminishes their right to food sovereignty, market access, access to good livelihoods and rural development. Over two-thirds of women in the global South are employed in agriculture and so women are especially affected by unfair trade policies. The priorities of women are ignored when policies are written.

Trade liberalization in the form of import deregulation and dismantling of other national protections has devastated small holder farms in terms of pricing and crop selection. Import deregulation is especially devastating for local agriculture due to dumping practices and market control by big business.

“Food sovereignty is the right of peoples to define their own food and agriculture; to protect and regulate domestic agricultural production and trade in order to achieve sustainable development objectives; to determine the extent to which they want to be self-reliant; [and] to restrict the dumping of products in their markets...Food sovereignty does not negate trade, but rather, it promotes the formulation of trade policies and practices that serve the rights of peoples to safe, healthy and ecologically sustainable production.” – Via Campesina



Photo by: Eric Wheeler, courtesy of Maryknoll Fathers and Brothers

Dumping is the practice of selling a product below the cost of production. This drives down the market price leaving small farmers at a loss. In Mexico, for example, many farmers have lost their livelihoods over the years due to a drop in corn prices. Jorge Vasquez Martinez a Mexican corn farmer who migrated to the United States says, “ten years ago, I could go to the plaza and sell my corn at my price, now you have to sell to the bodegas there, and they set the price that’s not enough to live on.” (Miami Herald, 2003)

More recently in 2007 and 2008 ten of thousands of Mexican farmers have protested the lifting of tariffs on corn imported from the United States as a result of the North American Free Trade Agreement (NAFTA). These farmers were hit hard due to cheap, subsidized corn imported from the United States. The free trade model never played out as promised. NAFTA's phase out period was supposed to give farmers a chance to

adjust to the new market, but instead many went into extreme poverty and many others like Martinez were forced to migrate to the United States.

Policies that promote overproduction and result in dumping are a problem. Even though nations can take anti-dumping measures, smaller countries are often severely disadvantaged in the dispute and the enforcement process against big players such as the US and EU due to the high legal costs involved.

For many policy makers, agricultural trade is seen as a means to economic growth and profits. As a result preferences are given to large corporations and agribusiness that are themselves involved in forming the current trade model. Governments and policy makers strongly promote cash crop production, which mainly benefits corporations and adversely affects food sovereignty.

Increased demand for bio-fuels is threatening food security and crop diversity. Lands that are traditionally used for food crops are being converted to crops that can be used as fuel.

U.S. food aid plays a role in distorting the market. Food aid can save many lives in an emergency; however when it is used as a market development tool and interferes with international trade; many people are adversely affected.

Objectives

- Reform the agricultural trading system to take small farmers into account.
- WTO rules must be reformed so that poor nations have the ability to protect their markets with real enforcement mechanisms. Refer to the proposals from countries in the global South in the Doha Development Agenda framework to meet this objective.
- U.S. farm policy must be reformed so that farmers can earn a fair price from the market.

Policy Recommendations

Agriculture should only be minimally included or fully removed from world trade rules. However, since it is now a major part of trade, reform in the trading system should at least include the following recommendations:

- Gender interests and equality must be a core part of trade rules and agreements.
- Countries in the global South should be allowed full flexibility to address issues of food sovereignty, livelihood and development. Special protections proposed in the WTO are insufficient.
- Countries should be allowed the policy space to use effective import governance measures such as price bands, quantitative restrictions, automatic safeguards and other measures that would allow countries to protect their markets and their farmers. This could help mitigate the impact of dumping.
- Countries in the global North providing domestic supports under the different WTO support categories (including the Green Box) should ensure that these commodities are not exported since they invariably lead to dumping. The primary objective for international trade rules in agriculture should be the curtailment of dumping.
- Incorporate stronger antitrust enforcement in the food and agriculture industry.
- Recognize the right and sovereignty of countries in the global South to protect their markets against artificially lowered prices and to help their farmers.
- Move toward untied, cash-based food aid.

Ecological Alternatives

Key Problems

Humankind is dependent on the health and stability of the ecosystems that surround us for our own wellbeing, subsistence, livelihoods, and spiritual nourishment. The increasingly urgent reality of climate change is forcing the global community to recognize as never before that the world we inhabit is finite and limited. To avert the most grim of future scenarios, we must take concrete measures to protect the natural world and minimize our impact upon it. Yet even as this becomes more evident, trade rules are clashing with international environmental standards and shrinking the policy space available to national and local governments to address critical environmental issues. Meanwhile the hidden consequences of increased trade, including emissions from the transport of goods over long distances, generation of waste in the process of production, and over-consumption of scarce natural resources, are contributing to an ecological crisis that is rapidly spinning out of control.

While the May 10th deal struck between the administration and Democratic leadership attempted to address some of these issues, it offered only small fixes to the environmental chapter rather than looking at broader picture of how the current trade model is undermining environmental sustainability. Although some of the changes are laudable, the agreement when taken as a whole continues to prioritize the rights of investors over all other development, conservation and human rights goals, and as such will only encourage a “race to the bottom” in terms of environmental standards as countries compete to attract investment.

Important international agreements such as the Kyoto Protocol and Convention on Biological Diversity have been subsumed under the mandate of trade liberalization, while national conservation and environmental protection laws and policies are ignored, weakened or overturned when conflicts arise. This is particularly true in the case of investor protection provisions which permit private investors

Insufficient Commitments

Environmental concessions gained in the May 10th deal between Congressional Democratic leadership and the administration facilitated the passage of the US- Peru Free Trade Agreement in late 2007, despite serious concerns as to whether the changes went far enough to prevent a race to the bottom in terms of environmental standards.

Those voicing concern as to how seriously Peruvian President Alan Garcia took his environmental commitments proved to be prophetic. Shortly after approval of the FTA, he proposed new draft legislation that would facilitate private investment and expansion of extractive industry activities within ecologically sensitive zones of Peru. The vagueness of the draft law leaves open the possibility that plots of land with primary forest could also be sold. Furthermore, lack of a functional land registry or regulatory institution to oversee such investments leaves open a strong possibility of abuse. The Peruvian Agriculture Ministry estimates that there are 9.5 million hectares within the Amazon that could potentially be sold under the draft law.

to sue national governments for infringement of potential profits. While the May 10th deal upholds common commitments to certain such Multilateral Environmental Agreements (MEA's), it does not resolve complications that may arise when only one party of an FTA is signatory to a specific MEA, and leaves tenuous the status of future MEA's such as may be needed to address the crisis of climate change.

Yet, even where recognition of the value of conservation and care for the natural world exists, the funds and capacity necessary to do so are

often lacking. The government of Ecuador's offer in April 2007 to leave oilfields within the Ecuadorian Amazon undeveloped in exchange for compensation from the international community highlights the difficult choices faced by many countries in the global South, whose economies are heavily reliant on extractive industries and primary commodities. Trade agreements further increase the pressure to overexploit natural resources, with consequent negative impacts on biodiversity, as short-sighted global market demands and corporate profits are prioritized over long-term sustainability.

The pollution and long-term damage done to our atmosphere, waterways and local ecosystems are not factored into the costs of production or terms of trade. This leaves local communities who can least afford it and who, by and large, will see none of the benefits of trade, to deal with the negative repercussions for human health, livelihoods and long-term sustainability. Particularly as climate becomes an increasingly urgent issue, already impacting the poorest and most vulnerable members of our world community, we will be forced to come to terms with the ecological limits of our world, and rethink trade through the lenses of conservation, sustainability and localized economies.

Objectives

- Reconsideration of trade agreements must go beyond mere tweaks of the environmental provisions, to fundamentally reassess trade in order to prioritize long-term ecological sustainability, and prevent a race to the bottom to attract investment.
- The richness and diversity of the natural world should be protected and conserved, and stability of the climate prioritized.
- Trade agreements should not undermine domestic environmental policies, existing national commitments or prevent future engagement in Multilateral Environmental Agreements.
- Trade agreements should encourage progress on conservation and sustainability.

- Governments should have the right to establish national policies that protect local ecosystems, the public interest and ensure the sustainable use of resources without threat of trade sanctions or costly investor suits.
- Trade policies should minimize environmental impacts of exporting products to other countries and help develop local and regional economies.

Policy Recommendations

- Trade agreements rules must be bound by and defer to important current and future Multilateral Environmental Agreements.
- Trade agreements should include capacity-building and funding to enhance environmental protection institutions, policies and objective monitoring.
- Trade agreement rules should permit use of the precautionary principle when scientific data is inconclusive.
- Trade agreements should establish minimum levels of corporate accountability and transparency, including disclosure of basic information regarding environmental impact assessments, waste disposal, toxic substances, emissions, and adherence to national and international environmental policies.
- Trade agreement rules should curtail the rights of private investors to sue national governments over environmental, health and public interest policies (for more detailed information, see section on Investment Alternatives).

NAMA (non-agricultural market access) Alternatives

Key Problems

The current direction of trade liberalization to dramatically reduce tariff rates on industrial products (called NAMA - non-agricultural market access - in the WTO and industrial tariffs in FTAs) will erode already weak industrial sectors in many countries in the global South. Without a growing and vibrant industrial sector, many countries with weak and vulnerable economies will become trapped in a development cycle dependent upon primary commodity production, cheap labor, growing unemployment and deepening poverty.

Historical evidence shows that the industrial nations of the North, and more recently, the newly industrializing nations in Asia, such as Taiwan, South Korea and China, used many promotional and protectionist policy tools, such as subsidies, performance requirements for foreign direct investors, technology transfer and quotas, to foster a sustainable development of their fledgling industries. These tools have been highly circumscribed by recent trade liberalization agreements at the WTO, in FTAs and in bilateral investment treaties (BITs) as well through the restrictions placed on countries by the stabilization and structural adjustment programs (SAPs) of the World Bank and IMF.

Tariffs now remain the key policy instrument for countries to protect infant industries and to support industrial development as a fundamental strategy for expansion into more dynamic opportunities for a new generation of workers. Forcing premature liberalization of industrial and manufacturing markets through NAMA and FTA negotiations threatens to undermine a country's development and increase poverty levels, exposing domestic producers to overwhelming competition from foreign imports, leading to deindustrialization, job loss, underemployment and for many workers, particularly women, a shift to the informal sector.

While women and men are both adversely affected by deindustrialization, women tend to experience more severe effects due to the particular restraints and discriminations that shape their realities. Gender

As a result of the stabilization and structural policies of the World Bank and IMF over the past 25 years and the impact of trade liberalization agreements, millions of workers have lost their jobs and consequently their livelihoods.

Examples abound:

- Senegal lost one third of all manufacturing jobs as a result of a two-stage liberalization program in the second half of the 1980s.
- Ghana's liberalization of consumer imports saw manufacturing employment plunge from 78,700 in 1987 to 28,000 in 1993, as large swathes of the manufacturing sector had been devastated by import competition (African Development Bank).
- In Latin America, liberalization of manufacturing markets has also led to dramatic increases in unemployment and underemployment in Brazil, Ecuador, Nicaragua and Peru.
- Kenya's beverages, tobacco, textiles, sugar, leather, cement and glass products have all struggled to survive import competition since its major liberalization program in 1993 (UNDP 2003).

Source: John Hilary (2005), *The Doha Deindustrialization Agenda: Non-Agricultural Market Access Negotiations at the WTO*

biases and gender inequality in access to resources, training, technology and credit structures constrain women's opportunities to participate in the labor market as well as entrepreneurship. In particular, women's businesses tend to be relatively less capitalized than men's and they suffer from lack of access to credit in most countries. The influx of imports from a liberalized tariff structure into local markets, leave women entrepreneurs and women workers vulnerable.

Objectives

The development of industrial capacity in developing countries requires temporary protection from foreign competition.

- Trade and investment policies that leave adequate policy space for countries to advance their industrial development, sustainability and job creation.
- Flexible tariff structures which fit a country's particular needs to ensure industrial development.
- Tariff structures which will ensure a stable and anticipated revenue for development needs.
- Trade policies should reflect the principle of “less than full reciprocity” between developed and developing economies in negotiating tariffs and other trade rules.
- Foreign investment policies that foster industrial development and technology transfer.

Recommendations

- Trade policies for developing countries that reflect a “pattern of optimal tariff” - a system that allows a country to set tariffs according to the particular development agenda for different industries, setting high tariffs levels on labor intensive (job producing) industries, low tariffs on products not produced in the country; high tariffs on value-added products to provide incentive for local production, etc.
- Disciplines against tariff escalation (escalating the product tariff with the degree of value added) and tariff peaks (tariff rates more than three times the national tariff average) need to be included in trade agreements.
- Establish clear and transparent procedures to protect against the abuse of non-trade barriers (NTBs), such as safety, environmental and health standards.



Photo by: American Friends Service Committee

- Apply “less than full reciprocity” and “special and differential treatment” principles to tariff formulas, tariff disciplines, flexibility measures and implementation and sequencing of liberalization measures.
- Restore policy space in trade agreements that promote incentives in developing countries for industrial development both within and across sectors, such as, direct subsidies, performance requirements for Foreign Direct Investment (FDI), tax rebates, access to duty-free importation, tariff protection, special safe guard mechanisms and technical assistance.
- Promote joint ventures with domestic producers through FDI that promote job creation, sustainability, technology transfer, technical training, national content in products, local leadership and ownership.

Government Procurement Alternatives

Key Problems

The adoption of international free trade agreements since 1994 has had a significant impact not only on local-level economies but also on the authority of state and local governments. Governments often use rules for purchasing goods and services (otherwise known as government procurement) as a way to promote important public policy goals such as consumer protection, human rights, economic development, environmental protection, public health, and gender and racial equality. Good examples include “buy local” campaigns or living wage legislation, which mandates that a municipality can only hire suppliers that pay their employees a living wage—higher than minimum wage and determined locally. The purchasing power of governments should not be underestimated as it represents anywhere from 10 to 20 percent of global GDP, depending on your source.

The Agreement on Government Procurement (AGP) within the WTO and the government procurement chapters in FTAs contain policy obligations that trump federal, state and local laws, regulations and commitments. Commitments made in the AGP and government procurement chapters apply to most of the federal government and also to those states which authorized the US Trade Representative to include them.

Under the AGP, technical specifications for purchase of goods and services cannot have the effect of creating “unnecessary obstacles” to trade. Conditions must be limited to those essential to fulfillment of the contract. Same rules apply at FTA level. Any technical specifications can only be about performance requirements, not “design or descriptive characteristics.”

Government procurement policies in particular highlight a larger trend that trade rules are written with little to no public input and are taking away the authority of elected governments’ decision-making powers, subverting the democratic process and meaningful development and human rights policies.

Limiting Creative State Policies

The Massachusetts Burma (Myanmar) Law, modeled on anti-apartheid legislation of the 1980’s, prevented state contracts from being awarded to companies doing business in Burma. Like South Africa divestment efforts, the law was designed to stop the use of public money from indirectly supporting the Burma military dictatorship.

In 1997, Japan and the EU filed a complaint at the WTO, arguing the Massachusetts law was in violation of the WTO Government Procurement Agreement (GPA). The complaint accused the state of imposing conditions that were not essential to fulfill the contract. Behind the complaint was the experience of Japan’s Mitsubishi Heavy Industries and Sweden’s Ericsson loss of contracts worth millions when San Francisco passed a similar Burma law. This caught Massachusetts officials off guard, having not been consulted when the previous governor committed the state to the WTO agreement.

The WTO complaint was suspended, waiting the outcome of a federal lawsuit filed against the state by the National Foreign Trade Council (NFTC)—a group of large US multinational corporations—in U.S. District Court. The NFTC case went all the way to the U.S. Supreme Court and their claim that the Massachusetts law “unconstitutionally infringed on the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by the federal Act,” was upheld.

For this reason the WTO case was dropped, however this example demonstrates how the GPA can be used to intervene in state level procurement policies established to accomplish important human rights goals.



In the U.S., many state-level governments are reclaiming this authority. As it became public that governors were committing their states to AGP and FTA rule without consulting state legislators, citizens and policymakers demanded that their state be removed from future trade agreement commitment lists. As a result, only eight states¹ plus Puerto Rico were included in the 2006 U.S.-Peru FTA compared to 21 states plus Puerto Rico in the 2005 DR-CAFTA deal and 37 states under the 1994 WTO AGP. However, investment compensation rules make reversing existing commitments impossible and, more importantly, comprehensive commitments are being demanded of developing countries before such policies are even considered.

Objectives

- Procurement measures should not undermine the ability of governments at any level to enforce important government purchasing policies meeting development goals.
- Governments should be able to use procurement policies to place limits on foreign contractors.

Policy Recommendations

- Trade agreements should strengthen democratic practices in the U.S. and abroad, and not undermine democracy by allowing such agreements to over-rule the decisions of elected bodies.
- Trade agreements should allow government procurement policies that give preferences to domestic suppliers
- Trade agreements should allow the use of government procurement measures to promote public policy goals such as development of locally owned small businesses, protection of the environment and public health, and support for human rights.
- No state or provincial governor should be allowed to commit their state or province to be bound to trade agreements' restrictive government procurement provisions without consultation of local government bodies likely to be impacted.
- Support and bolster state-level trade oversight committees that involve different branches of the state government like those found in New Hampshire, Maine and Vermont.
- Allow state, local and provincial governments to opt-out of future and past procurement agreements.

¹ States included in Peru FTA procurement annex 9.1 include AR, CO, FL, IL, MS, NY, TX, & UT.

Investment Alternatives

Key Problems

At the global level, agreements on investment have been firmly opposed by countries in the global South and left out of the WTO negotiations. However, beginning with NAFTA, US trade agreements gave international investors the ability to sue foreign governments over their domestic policies that interfere with their investments. Called investor-state processes, these cases are decided in closed tribunals operating outside the nations' domestic court system, yet millions in taxpayers dollars can be demanded and awarded. What began as a solution to legitimate concerns has expanded to include reimbursing corporations even for future profits "lost" because of government policies. Foreign corporations are now given more rights than national businesses through their access to these trade tribunals that can overrule government decisions. Meanwhile, governments at all levels have to compensate corporations in order to regulate things like water allocation, land use, mine cleanup, gasoline additives, or groundwater protections.

Investor-state tribunals often take place without any public access or input. The deciding panels consider only trade law without any consideration of public health or safety effects.

Investor-state processes are undemocratic as we see decisions made by democratic bodies are being overruled by unelected and arbitrary trade panels, usually composed of business experts from the U.S. and Europe. The result has been a severe restriction in development policy options for governments and a fundamental threat to democracy.

Objectives

- Trade rules should not be used to overrule democratically-made decisions regarding public health and safety, environmental protections or human rights.
- Governments should be able to place performance requirements, for example using

Future Lost Profits

In the NAFTA case of Metalclad vs. Mexico, the government stopped the company from disposing radioactive waste in a sandy area directly above a large aquifer that provides water for nearby communities. The tribunal, ignoring the tremendous public health effects, ruled that the policy interfered with the profits that Metalclad would have made in the future, and forced Mexico to pay almost \$16 million to Metalclad.

local workers or requiring service providers to serve poor neighborhoods, on corporations in order to assure universal access to services or any other development goal.

- Trade tribunals should be transparent.

Policy Recommendations

- Governments should be able to favor domestic over foreign investors in order to meet development goals.
- Only actual physical expropriations – not "actions tantamount to expropriation" like future profits, regulatory takings – should be reimbursed.
- Governments should have the right to use performance requirements if they are clear and transparent.
- No investor-state processes should be allowed. Legal challenges should be state-state where one government would sue another.
- Trade tribunals should only be used as a last resort after passing through national legal systems and diplomatic efforts.
- All trade tribunals should be open to the public and allow for amicus briefs and other inputs from civil society.

Services alternatives

Key Problems

According to the WTO, services now represent 60% of global output, 30% of global employment, and 20% of global trade. Of particular concern to trade justice advocates is the impact of trade liberalization on services such as health, water and education which are not only human rights but are also services essential to survival. Regulations and agreements under General Agreement on Trade and Services (GATS) and FTAs that liberalize the service sector increasingly undermine individuals' ability to access these services and governments' ability to ensure their provision. Human rights and government responsibilities are usurped by the quest for profit.

In the current model, government-provided services are excluded only if they are provided neither on a "commercial basis" nor "in competition with one or more service suppliers." After decades of World Bank and International Monetary Fund (IMF) mandated policies, few sectors remain entirely public and therefore are vulnerable to trade rules. Furthermore, liberalization under trade agreements has allowed transnationals to enter into economies of the global South, using their wealth and power to create monopolies or oligarchies in service industries, forcing the relaxing of domestic regulations, stifling domestic supply capacity, and displacing local firms. As a result, small and medium enterprises (SMEs) suffer.

Among areas covered under GATS is the "temporary movement of natural persons" across borders to provide services, known as Mode 4. Because of the current framework, Mode 4 allows for only temporary movement of workers across borders to provide services, but their visa and right to stay are contingent on employment within the firm, or on the contract under which the worker entered the country. The WTO is basically negotiating a global guest worker program.

The absence of mechanisms to safeguard the right to development and lack of clarity in trade agreements regarding the exclusion of essential services, signal the need for a new approach to trade in services.

Human Right to Water

The erosion of essential services through liberalization schemes under World Bank and IMF mandated policies led to loss of access, particularly by the poor; loss of affordability for most of the population, particularly in the global South; increased burden on families; and increased burden on women's time and labor. Bolivia is a case in point: the municipal government of Cochabamba followed a World Bank mandate and contracted water service delivery to a consortium that was led by Bechtel, an American transnational. Riots ensued after prices increased by over 50%. Bechtel withdrew from Cochabamba and subsequently used a Bilateral Investment Treaty between the Netherlands and Bolivia, similar to agreements found in the investment chapter of FTAs, to sue the Bolivian government for \$50 million for the loss of their investment and future lost profits. In January 2006, Bechtel dropped the suit after global public outcries, accepting a token settlement from the Bolivian Government.

Shrinking Local Banks

Upon the implementation of NAFTA, Canadian and American banks were able to access the Mexican financial services sector. After 14 years of NAFTA, all but one Mexican bank has been acquired by foreign entities who view SMEs as a risky investment. Consequently, SMEs have been effectively denied access to credit necessary for their start up and maintenance, further concentrating the benefits of globalization into the hands of multinational corporations.

Objectives

- Trade in services situated within a human rights framework (i.e. the rights to equal treatment, to non-discrimination, to organize and collective bargaining, to education, to work, to an adequate standard of living, etc.) that includes the right to development.
- Trade agreements that support the building of human development through the safeguarding of essential services, the promotion of safe work environments and labor practices and the encouragement of knowledge and technology transfer to promote development.
- Trade agreements with greater legal and semantic clarity regarding which services are included and excluded from the agreements.
- Trade agreements that support dynamic domestic regulations, enabling states to harness the economic profits and social benefits from trade in services to support local development.
- Trade agreements that recognize the dignity and rights of all humans rather than treating labor as a commodity or factor of production to be managed like a faucet that can be turned on and off and harnessed for profit maximization.

Policy Recommendations

- Prior to any new liberalization of services, the WTO Council for Trade in Services or negotiating parties in the case of an FTA, should conduct country specific social and gender impact assessments of service liberalization on development.
- Domestic regulatory frameworks and other supportive related policies should be developed as essential pre-conditions to the liberalization of service sectors. Trade agreements should support, not erode, these regulations to ensure that the rights of the people are respected and countries retain the tools necessary to realize their right to direct their own development and harness the benefits of trade in services.

- Future trade agreements should embrace a positive list approach to services negotiations such as the WTO model, which provides countries the opportunity to list which services they wish to liberalize and to add other sectors at different points in time.
- Essential human services such as water, health and education should be excluded from any agreements on service liberalization.
- GATS Mode 4 expansion to manage the movement of temporary low- and medium-skilled workers should not be expanded. To date, labor standards rules remain firmly outside WTO rules—leaving the responsibility to the International Labor Organization (ILO), which lacks meaningful enforcement mechanisms.
- Countries should have policy space to exclude key strategic industries important to their development.
- Trade agreements should allow country-specific pacing and sequencing of services reform over a lengthy period of time. Furthermore, trade agreements should preserve the policy space for future regulation—including possible re-nationalization of service industries by limiting the magnitude and duration of any investor liabilities or trade sanctions.
- Necessity tests and objectivity tests in regulatory decision making which inhibit the right and responsibility of governments to regulate in the public interest should be eliminated
- Regional trade agreements should allow for national treatment exceptions in order to provide countries with policy space for targeted domestic economic and social development policies and programs.¹

1 National treatment provisions in trade agreements require member state to extend the same treatment to foreign service providers as to domestic service providers. This may seem fair, but in practice this often unfairly inhibits developing countries in particular from increasing domestic supply capacity in these services and from supporting small and medium service enterprises to promote broad social and economic development and the elimination of poverty



**Interfaith Working Group on
Trade and Investment**

1225 Otis St., NE
Washington, DC, 20017

202 635 2757 x 128
202 832 9494 fax

iwg@coc.org
www.tradejusticeusa.org