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FREE TRADE AGREEMENTS AND HUMAN RIGHTS

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CONTENTS

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Editor's Note ... ...

The proposed Comprehensive Economic Partnership Agreement (CEPA) between Sri Lanka and India is currently the subject of much commentary in the public sphere. In this background, the Review publishes an evaluation of the India-Sri Lanka Free Trade Agreement (ISLFTA) during ten years of its operation, (i.e. between 1998-2008), engaged in by the **Economic, Social and Cultural Rights programme** at the **Law & Society Trust** during the course of 2009.

The evaluation is published in the expectation that lessons learnt from the ISLFTA would enable serious and critical thought on the proposed CEPA. The findings of the evaluation raise a crucial question of the non-availability of data of critical importance to the general public, and the unreliability of trade statistics that are publicly available. The LST report breaks this concern down to four sets of problems: namely, (1) the unreliability of trade statistics; (2) the partial or selective provision of information on trade; (3) the non-analysis of trade statistics; and (4) the unavailability of credible data on employment generated and lost as a direct and indirect result of the ISLFTA.

The researchers pinpoint several challenges to the accuracy of the publicly available data in assessing the benefits and risks of the ISLFTA, foremost among which is the absence of data and analysis of the impact of the ISLFTA on employment creation or displacement. As is observed;

> *The number of overall jobs created or lost; whether new jobs created were a result of jobs lost at another location; who occupied those jobs i.e. Sri Lankans or Indians; and the types and quality of employment are important parameters in assessment of the ISLFTA. However, for ten years, no such information has been gathered or presented.*
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> *Instead, what is available at times is a selective presentation of jobs created or lost in a few selected companies or sectors, which may or may not be an outcome of the ISLFTA in particular, but rather of trends in the international economy and trade liberalisation in general.*

Credible data on working conditions of jobs generated as a result of trade under ISLFTA and the number of net new jobs is therefore yet pending.

There is moreover a lack of focus on the impact that the ISLFTA has had on the policy space at national and provincial levels, in particular reference to the sharing of power among ethnic communities and between the centre and provinces. Critiques of the ISLFTA from a human development and social justice perspective by non-trade specialists are rare to find on the ground. A specific question is posed by the researchers, i.e., how far have the commitments on liberalisation of trade decided exclusively by trade experts at the national-level, impacted on powers vested with provincial governments and their development plans to strengthen their own agricultural and industrial sectors and to provide livelihood opportunities for people living within provincial boundaries?

This is a core concern of the report, relating as it does to the lack of general public as well as official consultations on the existing and proposed agreements. It is pointed out as follows in a quotation from the research which is emphasized here due to its central importance;

> *A broader issue is that consultations are within and decisions are made by a small network of trade policy specialists who share the same disciplinary tools and the same ideological convictions, and often the same disdain for the opinions of the citizenry. For instance, even representatives of the Central, Southern and Western provincial governments when contacted in the course of field research were reluctant to offer their opinions on the ISLFTA through lack of information on it.*
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> *They also confirmed that no attempt had been made by central government to consult with them in the design and operation of the ISLFTA. A section of the local business and industrial community also complained of their exclusion from the ISLFTA (and now CEPA) negotiation process and in its monitoring. It transpired in the course of investigation that only a handful of central government officials from the Finance Ministry and Department of Commerce had been engaged in the finalisation of the bilateral agreement.*

The report suggests that the relevant state agency, namely the Department of Commerce should revisit its role and responsibility. Rather than considering itself as the defender of government policy at all costs, the Department should evaluate trade agreements including the ISLFTA and the proposed CEPA

against the overall goal of the extent to which these agreements contribute to raising the standard of living and achieving a higher quality for life for Sri Lankans as measured by increase in total domestic production, rise in income levels, and increase in total employment.

Alongside this evaluation of the ISLFTA, the Review is also pleased to publish a reflective paper on *Free Trade Agreements and Human Rights* by **Sandra Paola Quintero,** written on the request of LST. Quintero posits the examination of Free Trade Agreements (FTAs) within a wider context of a Human Rights Based Approach. She makes a persuasive case for her argument that FTAs have had negative impact on the economic, social and cultural rights or marginalised communities, in particular regarding the right to water and the right to education.

She illustrates by well known cases, the dangers in considering these basic human rights as commodities rather than as available as of right based on the legal framework of international trade regarding these rights as possessing commercial value. This shift results in countries being compelled to privatise such services with inevitable deleterious effect on poor people. Quintero argues instead for a reinforcing of the States' obligation to protect, respect and fulfil these rights for all their citizens.

The final paper that we publish relates to a submission made by a non governmental organisation, **FTA Watch Thailand,** March 2005, in a submission before the 84th Session of the United Nations Human Rights Committee which examines some of the problems arising from bilateral and free trade agreements where Thailand's people are concerned. Here too, what is identified is the absence of proper public consultations between the public and implementing policy makers. The Review publishes this submission since its observations remain relevant still, not only to Thailand but also, from a comparative perspective, to Sri Lanka.

Kishali Pinto-Jayawardena

'AN ACT OF FAITH'? TEN YEARS OF THE INDIA-SRI LANKA FREE TRADE AGREEMENT (ISLFTA)

Law & Society Trust[*]

"The signing of the Free Trade Agreement between us was an act of faith in our joint economic potential"
(Pranab Mukherjee, Indian Finance Minister, Colombo, 2009).

1. Introduction

The India-Sri Lanka Free Trade Agreement (ISLFTA) was signed in 1998 and became effective in March 2000. After almost ten years of operation, the Law & Society Trust (LST) undertook an evaluation of the ISLFTA over the course of 2009; made more urgent and relevant in view of the strong lobby on both sides of the Palk Straits for its expansion and deepening into a Comprehensive Economic Partnership Agreement (CEPA).

2. Methodology

As detailed in the findings, difficulties in accessing reliable data and lack of awareness about ISLFTA among the general public make it extremely difficult to evaluate its consequences through field research among producers and consumers at community-level as initially envisaged in this study. The general lack of information on the ISLFTA was evident when consultations in the early stage of research with a wide range of stakeholders – to gather hard evidence on its beneficial or detrimental impacts – yielded few results. This experience highlights important and interesting aspects of the non-transparency of policy-making processes in Sri Lanka. Therefore this research paper is based on the limited literature available on the ISLFTA and a series of face-to-face and over-the-telephone interviews as well as periodic round-table consultations with stakeholder representatives. The initial findings were circulated to several stakeholder representatives in November 2009, and the comments received were helpful in the revision and finalisation of this report.

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[*] The lead-researcher and writer was Mr. Dileepa Witharana, Senior Lecturer in the Faculty of Engineering Technology at the Open University of Sri Lanka (OUSL) in Nawala; Ms. Anushaya Collure was the primary investigator and the report was edited by Mr. B. Skanthakumar (both of the Economic, Social and Cultural Rights programme at the Law & Society Trust in Colombo). Ms. Harini Amarasuriya's contribution in the conceptualisation of this study is also recorded with appreciation.
The Law & Society Trust (LST) gratefully acknowledges the grant in support of research received from Diakonia (Sweden) under its global political and economic structures (GLOPES) theme, and the interest and encouragement of Ms. Ankin Ljungman and Mr. Frank Stephen in particular. The opinions expressed here do not necessarily reflect those of Diakonia, nor of any individual or institution interviewed in this study.

3. India-Sri Lanka Free Trade Agreement

The World Trade Organisation (WTO) that was established in 1995 introduced rules for international trade and all local measures affecting such trade. These rules are valid for multilateral trade as well as bilateral and regional trade conducted among the member countries. The WTO, in fact, does not endorse regional or bilateral trade agreements among countries unless they allow "substantial" levels of trade liberalisation over "reasonable" periods of times that go well beyond the commitments of trade liberalisation made by countries at the WTO. The 'free trade' approach requires countries to give up various measures they use to safeguard interests of the local farmers and industrialists, convert all such measures to an imposable duty and then reduce that imposable duty to zero over a period of time. Therefore the WTO allows bilateral and regional trade agreements only if these agreements result in accelerating the process of duty elimination.

The ISLFTA[1] which follows the trade liberalisation rules set by the WTO is considered to be a relatively strong agreement in the Asia-Pacific region with substantial product coverage (about 80 percent of tariff lines coming under the HS[2] product classification code at 6 digit level), significant tariff cuts and relatively simple Rules of Origin[3] (Abeysinghe 2007). Consequent to the economic sanctions imposed following nuclear tests in 1998, it was India that was keen to sign this agreement to counter its short-lived international isolation. From Sri Lanka's perspective, political and economic objectives such as: reducing prevailing political tensions between the two countries; India's support on the North-East conflict; attracting foreign direct investment from third countries through gaining an effective position in the Indian market; strengthening trade relations with South Asia's leading economic power; promoting the transformation of local exports from low value added to high value added goods; and supplying low-income groups with cheap consumer goods from India, appear to have been significant considerations (Kelegama and Mukherji 2007: 2).

Both countries were in agreement that the ISLFTA should offer more than that offered in the SAARC Preferential Trading Arrangement (SAPTA) signed in 1995. Though bilateral trade agreements in general are formulated using the 'positive list' approach, ISLFTA was formulated on the 'negative list' approach to expedite the negotiations. A timetable to streamline the free trade process was also adopted (Kelegama and Mukherji 2007: 3). Application of a 'negative list' is convenient when the product coverage of a trade agreement is substantial. While the 'positive list' identifies the list of products offered to be freely traded by removing tariff barriers, the 'negative list' identifies the products that are to be protected. By placing sensitive products on a no-concessions list, it allowed tariff protection for identified products subject to review at a later date.

Concerning the asymmetry between the economies of the two countries, Sri Lanka was to have special and differential treatment with regard to the conditions of the Agreement.

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[1] Department of Commerce, India website http://commerce.nic.in/ilfta.htm. The text is no longer available on the Sri Lankan Department of Commerce website.

[2] The Harmonised Commodity Description and Coding System is an international commodity classification system developed by the World Customs Organisation in Brussels.

[3] Criterion by which the product's origins are determined as goods may be processed, assembled, packaged or finished in more than one country or shipped via a third country.

Accordingly, Sri Lanka had a larger negative list, which identifies local products that are to be protected and on which the concessions are not given. It enumerated 1,180 items (or tariff lines) which are mainly agriculture or livestock items, rubber products, paper products, iron and steel, machinery and electrical items. India's negative list contained 429 tariff lines that include garments, plastic and rubber products among other items. Sri Lanka was given a longer period – eight years – for the phasing out of tariffs and also was accorded the liberty to reduce its negative list at her comfort level. Therefore, on the Sri Lankan side 3,932 tariff lines were made zero duty for Indian exporters over eight years. On the other hand, India's 4,150 tariff lines were made zero duty over a period of three years. Under the ISLFTA, India and Sri Lanka by 2009, offer duty free access to 4,233 and 4,024 tariff lines respectively (Department of Commerce website 2009).[4]

In addition, flexible criteria for Rules of Origin (ROO) were accepted for Sri Lanka, as the exclusion of a product from the negative list is not the only criterion on which it receives duty concessions. In order to receive ISLFTA duty-free benefits, a product needs to comply with ROO criteria that specify a minimum local content. Wholly obtained products (produced solely from the material of either Sri Lanka or India) such as tea, fish, spices etc., will be allowed duty-free benefits provided that those products are not on the negative lists of the respective countries. Products which are not wholly obtained or produced have to comply with the Domestic Value Addition (DVA) rule of having not less than 35 percent of the Free on Board (FOB)[5] value of the finished product. Further, if the raw materials needed for a product are obtained from each other, then an exporter has to show a DVA of 25 percent of the finished product. However, when quotas are offered for products that are not covered by the negative list, matters become further complicated. Products that are traded above the quota limits may still not come under the ISLFTA even if the products do qualify under the Rules of Origin stipulated by the ISLFTA. At the same time Sri Lanka retained import duties imposed on high duty imports such as automobiles.

By 2008, the ISLFTA entered into full force. Both governments are pleased with the results achieved through the Free Trade Agreement and proclaim that it has facilitated the expansion of two-way trade between India and Sri Lanka. India, which was once the second largest exporter to Sri Lanka pre-ISLFTA, has now become the island's largest source of imports. Meanwhile India has become the third largest export destination for Sri Lankan products (after the United States of America and the European Union). The argument is that, given the asymmetrical proportions of the economies of the two countries, if not for the ISLFTA, Sri Lankan exports would not have been able to achieve their current level of market penetration. The bilateral import-export ratio that had been 10.3:1 in 2000 had improved in Sri Lanka's favour to 5.3:1 by 2007. According to the then Indian High Commissioner to Colombo, the ratio may have been as skewed as 40:1 (in India's advantage, of course) had the ISLFTA not been in operation (Prasad 2009).

[4] Department of Commerce (http://www.doc.gov.lk/web/index.php). Accessed on 13 September 2009.
[5] Goods are shipped on either Free on Board (FOB) terms or Cost, Insurance, Freight (CIF) terms. FOB means that the cost of freight and insurance has not been added by the exporter. The CIF value is the landing value of a good, with insurance and freight already added on to the cost.

Over the ten years in which the ISLFTA has been in operation, Indian foreign direct investment in Sri Lanka has also expanded exponentially, most recently in telecommunications (Bharti Airtel) and glass-manufacturing (Piramal Glass), and biscuits and sweets (Britannia). In 2009, India was the island's third largest foreign investor (after China and the United Kingdom) with inflows of US$78 million and largely attracted to the telecommunications, energy and power sectors (Central Bank of Sri Lanka 2010: 114). The Institute of Policy Studies (2008: 47-48) has estimated that Indian foreign direct investment has expanded from a cumulative total of LKR165 million in 1998 (1.3 percent of total FDI) to LKR19.5 billion in 2005 (8.3 percent of total FDI). However, the causal connection between the commencement of the ISLFTA and the spiral in inward foreign direct investment from India is asserted rather than demonstrated, and may have more to do with aggressive Indian investment strategies since that country's economic boom, than the existence of the Free Trade Agreement.

4. Comprehensive Economic Partnership Agreement

No sooner was the ISLFTA operational, than both governments began drawing plans to convert the Free Trade Agreement into a Comprehensive Economic Partnership Agreement (CEPA). India has pronounced through its Finance Minister that "CEPA can only be a win-win situation for both India and Sri Lanka"; and that common economic prosperity will "fortify peace, security and development in the region" (Mukherjee 2009). Therefore, with the aim of attaining the objectives such as deepening of existing trade integration through reductions in the 'negative list', and the expansion of trade integration with the inclusion of the liberalisation of trade in services as well as the liberalisation of investment, a Joint Study Group was created in 2003 to pursue the conversion of ISLFTA to the Comprehensive Economic Partnership Agreement (CEPA). Their report was released in October 2003. Newly elected governments in both India and Sri Lanka affirmed their support for CEPA in 2004. In 2005 there were five rounds of negotiations on services, financial markets, trade facilitation, economic cooperation and investment (Kelegama 2006: 299). However, trade-related disputes arising from ISLFTA adversely affected the negotiation process of CEPA (Lanka Business Online 2006).

Indian business interests protested that the ISLFTA was being abused. Kelegama (2006: 297) observes that, "about half of the increase in Sri Lankan exports to India—from one per cent to seven per cent of overall exports—was the result of trade diversion, not trade creation". Palm oil was imported duty-free into Sri Lanka by Indian-owned enterprises, processed into *vanaspati* (a vegetable oil substitute for ghee) and exported duty-free into India as a Sri Lankan product, thereby avoiding an 80 percent duty on direct imports. Likewise, copper products were also imported into Sri Lanka, smelted into copper ore by Indian-owned enterprises, and exported to India taking advantage of the ISLFTA. Another anomaly was the enormous growth in the volume of pepper exports to India which was unsupported by any comparable level of growth in domestic pepper production. Indian businesses charged that pepper and cloves were being imported from South-East-Asia into Sri Lanka, mixed with locally grown pepper and cloves and exported as wholly Sri Lankan product into India, again exploiting duty-free concessions.

Following the *vanaspati* controversy in 2006, negotiations only resumed again after 2007. Both governments appearing to be optimistic that the trade disputes that arose through abuse of the ISLFTA could be ironed out in the negotiations for an expanded agreement on trade in services. Sri Lanka identified 75 items to be removed from the negative list. India agreed to consider 118 items. At Sri Lanka's request India also agreed to ease rules of origin criteria for 346 items such as apparel items, jewellery, furniture, machinery and electrical and other appliances; to inclusion of Mode 4 (movement of natural persons) in liberalisation of services; at the same time elimination of non–tariff barriers were to be explored. India also agreed to strengthen economic cooperation in the areas preferred and chosen by Sri Lanka such as energy, manufacturing, services, transport and infrastructure, science and technology, human resource development, and small and medium enterprises.

In July 2008 both governments declared the Comprehensive Economic Partnership Agreement to be "fully negotiated and ready for signature" (Prasad 2009). The South Asian Association for Regional Cooperation (SAARC) summit in Colombo that month, hosted by Sri Lanka in its capacity as Chair of the regional grouping, was to provide the occasion and venue. However, vigorous opposition from a section of the Sri Lankan business community with close ties to government, as well as several political parties of Sinhala nationalist ideology within or supportive of the government, scuttled these plans.

The opposition stems from the lack of transparency in the negotiation and the drafting process of CEPA, and doubts and anxieties of a section of the local business community with regard to the costs of the proposed Agreement given the asymmetrical economies of the two countries, as well as their belief that it would open the floodgates to the entry of Indian professionals and service-sector firms into Sri Lanka. The advocates of CEPA counter that these fears are unfounded (De Mel 2009). CEPA will accord special and differential treatment to Sri Lanka in recognition of its economic weakness relative to India. Sri Lanka will be able to determine which services sectors it chooses to liberalise. Finally, Indian labour will only be able to enter Sri Lanka on a temporary or contract basis and subject to the work-permit regime. The difficulty is that the text of CEPA has never been disclosed to the public. Individuals involved in its negotiation have discussed purported provisions in the draft agreement, which are also published on the website of the Indian High Commission in Colombo[6], but regrettably not on that of any Sri Lankan state agency. However, in the absence of a public official document there is no way of objectively assessing the claims and counter-claims.

One of the key findings of this report is that lessons from the operation of the India-Sri Lanka Free Trade Agreement have yet to be drawn, in the haste towards its expansion and transformation into a wide-ranging Comprehensive Economic Partnership Agreement that will have consequences in sectors and among communities thus far unaffected by the current Free Trade Agreement. Therefore the section below isolates certain issues that illustrate the

[6] "Facts about Comprehensive Economic Partnership Agreement (CEPA) between India and Sri Lanka", http://www.hcicolombo.org/ccserv_economic_partership.cfm. Last accessed on 31 March 2010.

shaky empirical foundations on which positive claims are made for the ISLFTA. These issues are framed to generate discussion and for further investigation.

5. Poverty of Trade Statistics

Although now into its tenth year of operation, the assessment of impacts of the ISLFTA is not an easy or a straightforward task. The first hurdle is the non-availability of data of critical importance to the general public, and the unreliability of trade statistics that are publicly available. There are at least four sets of problems here: (1) the unreliability of trade statistics; (2) the partial or selective provision of information on trade; (3) the non-analysis of trade statistics; and (4) the unavailability of credible data on employment generated and lost as a direct and indirect result of the ISLFTA.

1. The Unreliability of Trade Statistics

It is important to observe from the outset, that in the course of consultations on the ISLFTA, we were repeatedly warned by some trade experts of the possibility of arriving at wrong conclusions if currently available data is used for analysis. This warning was made on the basis of the common approach of many, especially enthusiasts for the ISLFTA, which is to conflate the volume of trade between Indian and Sri Lanka in general with the trade that is attributable solely to the operation of the Free Trade Agreement. As described above, the negative lists, conditions of Rules of Origin and concessions offered on the basis of quotas, allow only a percentage of overall trade between the two countries to come under the ISLFTA. Therefore, bilateral trade between India and Sri Lanka cannot be reduced to the ISLFTA.

The Department of Commerce itself (DoC), the institution officially responsible for the ISLFTA, seems to reinforce this methodological mistake when it does not provide disaggregated and reliable trade statistics for ISLFTA on its web-portal.[7] For example some of the items – subcategories of which come under the Indian negative list and hence not traded under the ISLFTA – are displayed under "major items, which recorded export growth". Thus, "rubber and articles thereof" (HS Code 40), "articles of paper pulp, paper and paper board" (HS Code 48) and "articles of apparel" (HS Code 61-62), all of which belong to the category above, still occupy 3rd, 13th and 19th place in the list of "major items, which recorded export growth" in 2007. The website also does not provide reasons for the appearance of "articles of apparel and clothing accessories" (HS Code 392620) in the list of "export items, which recorded export decrease" which also appears as an item in the Indian negative list (Department of Commerce website 2009).[8]

[7] The initial findings of this report were shared with the Department of Commerce (DoC), among other institutions and individuals on 06 November 2009 and comments invited, although none were received from the DoC. When the DoC website was last accessed in March 2010, all references to the India-Sri Lanka Free Trade Agreement had been removed from the trade statistics on bilateral trade between the two countries.

[8] Accessed on 29 November 2009.

The Rules of Origin (ROO), however, is the most serious challenge to the accuracy of data provided on the ISLFTA. As described above any item traded has to fulfil the ROO for the item to receive duty concessions and hence to fall under the ISLFTA. Surprisingly trade statistics (e. g. export volume and export earnings) of items presented by the DoC in reference to the ISLFTA is similar to the overall trade statistics of the same items presented under the general trade between India and Sri Lanka. This leads us to arrive at two conclusions: either all items exported have satisfied the criteria of ROO or the figures provided under the ISLFTA are not accurate and do not incorporate ROO. However, considering the controversies involved with value addition, which led India to introduce quotas for some Sri Lankan exports, it is not logical to arrive at the first conclusion and to assume that all Sri Lankan products now satisfy the condition of ROO.

Confusion also arises on items that are subject to quantitative restrictions that impose duties on amounts traded above the quota. A classic example of this is pepper, one of Sri Lanka's main agricultural exports to India. The Department of Commerce declares the value of pepper traded under the ISLFTA for 2006 and 2007 to be US$13.2 million and US$18.3 million respectively. When compared to the overall statistics on Indo-Lanka trade also presented by the same source, we learn that these export earnings correspond to 6,544 and 4,948 MTs of pepper respectively (Department of Commerce website 2009). However, since the duty-free concession for pepper is limited to 2,500 MT under the quota system established in the ISLFTA, it is not at all correct to state that the gross export earnings are identical to the export earnings that are attributable to the operation of the ISLFTA.

2. *The Partial or Selective Provision of Information on Trade*

One measure of the ISLFTA is to investigate the degree of impact of Indian exports on the sectors of agriculture and small and medium scale industries in Sri Lanka. However, when looking for statistical evidence in these sectors, the partial nature of the data and analysis available on imports covered by the ISLFTA is all the more apparent. For instance, the website of the DOC provides the income earned by 35 exported items for the years 2006 and 2007. Curiously, no such data on foreign exchange outflow is made available for any of the imported items entering under the ISLFTA. Again the website indicates that 37 from the top 100 imports from India received duty free concessions in 2007. However, it is surprising that trade statistics with respect to these imports are not explicitly presented.

This omission of data for imports may be explained as follows: Firstly, it is shown that most of the Indian imports do not receive duty free concessions and hence do not fall under the ISLFTA. Secondly, almost all the sensitive agricultural products are said to be in the Sri Lankan negative list and hence protected from adverse impacts of the ISLFTA. For example, all of the agricultural imports for 2007 in the list of imported items from India and displayed under general imports, "onions and shallots" (HS code 070310), "other maize (corn)" (HS code 100590) and "lentils" (HS code 071340), are in the Sri Lankan negative list and hence are not imported under the ISLFTA.

The purpose of the negative list should be to achieve the dual objective of protecting the existing local agriculture and industries as well as to leave the space open for future development avenues suggested by the sectoral policies of the state. For example, an industry that does not exist presently could still be in the negative list by incorporating the future targets of sectoral policies at national and provincial levels. It is worth noting that there has been a trend where the products under Sri Lanka's negative list such as automobile/transport items and mineral fuels/oils have recorded maximum growth in the initial years of ISLFTA's implementation. Therefore, it is imperative to investigate impact of imports under the ISLFTA from a broader perspective.

The distinct significance given to exports raises legitimate concerns among the public regarding whose interests the agencies and actors associated with the ISLFTA represent: Are they the interests of the few big players with the capacity to produce for the export market or the interests of the many small players who produce for the local market and for their own consumption? Consultations in the course of field research with representatives of the local business community and industrialists in general consistently highlighted these concerns, and underpin their criticism of the ISLFTA and opposition to the CEPA.

3. *The Non-Analysis of Trade Statistics*

State agencies such as Ministries of Finance and Planning, Export Development and International Trade, Enterprise Development, Investment Promotion, Labour Relations, the Department of Commerce, the Export Development Board, Customs Department are, or ought to be involved in the implementation process of the ISLFTA. However, we found that no attempt has been made by any of these institutions having a stake in the ISLFTA to investigate the wide ranging impacts either of imports and exports coming under the Free Trade Agreement or even of the overall imports from and exports to India. As a result, what is normally available for the public is a rather understated description of increase or decrease in trade between the two countries (and sometimes trade deficit), over time. A causal link is then drawn between those trends and the duty concessions offered by the ISLFTA and statistics are provided for a selected number of items that top export or import lists based only on the generated revenue.

4. *The Absence of Data on Employment*

At the same time, data and analysis of the impact of the ISLFTA on employment creation or displacement – surely an important dimension of the ISLFTA from a national perspective as well as from the perspective of affected sectors – is absent. The number of overall jobs created or lost; whether new jobs created were a result of jobs lost at another location; who occupied those jobs i.e. Sri Lankans or Indians; and the types and quality of employment are important parameters in assessment of the ISLFTA. However, for ten years, no such information has been gathered or presented.

Instead, what is available at times is a selective presentation of jobs created or lost in a few selected companies or sectors, which may or may not be an outcome of the ISLFTA in

particular, but rather of trends in the international economy and trade liberalisation in general. These snapshots often present contradictory pictures. Thus De Mel (2009: 24) cites another study that estimates as of the end of 2007, some 6 747 individuals received employment as a result of Indian investment in 70 projects. However, most of these projects appear to be in the services sector that is excluded by the ISLFTA, and therefore cannot be assumed to be jobs created as a result of the Free Trade Agreement, and in any case the number of jobs is meagre in comparison to the quantum of investment. An earlier study on impacts of trade liberalisation on food security and farmers livelihoods quotes the United Nations Food and Agriculture Organisation (FAO) to estimate that some 300 000 jobs in the agricultural sector were lost following the drop in the production of onions and potatoes alone as a result of past trade liberalisation measures (Indikadahena 2008: 65).

Concerns over the quality of jobs created, and the reliance on Indian management and skilled labour, came up in the course of field interviews. For example, the harsh working conditions in factories producing copper products were frequently mentioned. It was also noted that the quality of specific professional expertise that was brought under ISLFTA through Indian investment was not particularly monitored by the relevant government authority. Therefore, a detailed assessment of working conditions of jobs generated as a result of trade under ISLFTA is awaited, as is credible data on the number of net new jobs.

6. TRADE EXPANSION AS AN END IN ITSELF

The problem with the literature on the India-Sri Lanka Free Trade Agreement is that it often reads as if the expansion of trade is both means and end. Even within the narrow boundaries of mainstream economics, the disciplinary background of most commentators and analysts on the Free Trade Agreement, issues that ought to be at the forefront of developing countries are marginal or invisible.

What consequences has the ISLFTA on domestic agricultural production and food security or the environment for future industrial development or government revenue for essential services are among the many crucial questions unaddressed in the literature. How far the ISLFTA has contributed in bridging the gap between the rich and poor – one of the most important indicators of balanced development – is not discussed at all as attention to income and wealth inequality is now unfashionable and in some quarters unpalatable.

Issues such as the lack of capacity of Sri Lankan exporters to export large scale to exploit duty free concessions to the maximum; the outright exclusion by the Indian negative list of many of the major sectors where Sri Lanka has comparative advantage; the lack of export diversification and erosion of marginal preferences as a result of trade liberalisation in India (Bandara and Yu 2009: 14) appear as 'additional notes' after concluding ISLFTA to be beneficial rather than appearing as a part of the main text influencing the conclusion. The issues appear in the main text, if they appear at all, only as justification of further liberalisation of trade. This suggests that inconvenient data that controverts the pro-liberalisation argument is secreted away as 'additional notes', when it has a direct and critical bearing on the main argument and conclusions.

Another crucial facet in any appraisal of the ISLFTA is the impact that it has on the policy space at national and provincial levels. Particularly in a post-war context where strengthening of the 13th Amendment on the sharing of power among ethnic communities and between the centre and provinces has been in debate, it is vital to know how far the commitments on liberalisation of trade decided exclusively by trade experts at the national-level, impact on powers vested with provincial governments and their development plans to strengthen their own agricultural and industrial sectors and to provide livelihood opportunities for people living within provincial boundaries.

There is a serious lack of analysis of the overall performance of the ISLFTA as well as all other measures of trade liberalisation such as the unilateral liberalisation of trade post-1977 and other bilateral agreements. Even the limited literature available analyses the Free Trade Agreement within the narrow focus of trade as discussed above. Whether this is a result of the non-availability of data or whether data is not available as a result of disinterest in the broader analytical questions is a matter for conjecture. In any event, the analysis of the ISLFTA from a human development and social justice perspective by non-trade specialists is hard to find.

Lack of Stakeholder Participation

A broader issue is that consultations are within and decisions are made by a small network of trade policy specialists who share the same disciplinary tools and the same ideological convictions, and often the same disdain for the opinions of the citizenry. For instance, even representatives of the Central, Southern and Western provincial governments when contacted in the course of field research were reluctant to offer their opinions on the ISLFTA through lack of information on it. They also confirmed that no attempt had been made by central government to consult with them in the design and operation of the ISLFTA. A section of the local business and industrial community also complained of their exclusion from the ISLFTA (and now CEPA) negotiation process and in its monitoring. It transpired in the course of investigation that only a handful of central government officials from the Finance Ministry and Department of Commerce had been engaged in the finalisation of the bilateral agreement.

With the increasing awareness on the range of impacts of the strong regimes of trade liberalisation the list of stakeholders who should be consulted in the process of drafting trade and services agreements has lengthened. Any exercise to liberalise trade affects a range of stakeholders from large traders and state officials to representatives of the interests of thousands of small and medium scale traders and producers, representatives of the private sector, peoples' representatives at all governance levels, civil society groups, organisations representing various professional groups and trade unions. Sector-wise the ministries of policy-planning, environment, social services, small and medium scale industries, consumer affairs, constitutional affairs and justice are also vital stakeholders of free trade agreements (Witharana, Amarasuriya and Uvais 2007: 21-23). Currently, the consultations on CEPA are conducted behind closed doors and within a closed circle of institutions and individuals who promote the ideology of trade liberalisation.

Poor Design, Coordination and Monitoring of the ISLFTA

Though there is a powerful lobby to ideologically promote trade liberalisation, the ISLFTA is poorly coordinated, monitored and implemented. Consequently, there is no central institution that provides data, statistics and analysis of the ISLFTA at the moment. Even though the Department of Commerce (DoC) is mandated to play the above role, different functions are seen to be exercised by different institutions. In the absence of an information hub where all relevant information may be gathered, trade statistics have to be collected from a range of locations such as the DoC, the Export Development Board, the Customs Department, the Department of Census and Statistics, the Central Bank, the Board of Investment among others. The Department of Commerce, the Ceylon Chamber of Commerce, and the Institute of Policy Studies, it is observed, conduct analysis from a trade perspective on the bilateral India-Sri Lanka Agreement. However, analysis of the ISLFTA and CEPA from a human development and social justice perspective are few and far between. The absence of a central authority with the capacity to sufficiently engage with these diverse approaches and to convert such analysis into policy prescriptions can also be noted in this respect.

Several other gaps in the process of designing, coordinating and monitoring were highlighted in the course of investigations for this report. For example the actual benefit of some of the items that occupy the top positions of the list of exports to India in 2007 (e.g. insulated wire and cable – HS Code 8544) among *vanaspati* and copper were questioned by some of those interviewed. Others interviewed identified the lack of investigation on trade regulation and taxes (especially at state-level within India) as a lacuna. The unavailability of basic statistics of trade under the ISLFTA is further proof of this lack of coordination and monitoring. The uneven communication between State agencies and business groups was also noted in the course of the research. Some Ministries linked to agricultural and small and medium industrial sectors and Provincial Council administrations seem to be ignorant of the existence of the ISLFTA, and unaware of its consequences for their own sectoral policies and economic targets. The absence or at least inadequacy of monitoring mechanisms on the implementation of the ISLFTA, and the dissemination of information on the operation of the ISLFTA, is patently clear.

7. MISSING EVIDENCE

What stands out from this research study is the weak relationship between the findings of the literature and the policy conclusions derived. The literature on the ISLFTA is overwhelmingly supportive of the Free Trade Agreement and approving of its expansion but the predilection for trade liberalisation and integration with the Indian economy is skimpily supported by the evidence. Apart from the growth of trade between the two countries there is either hardly any detailed substantiation to make the case for the ISLFTA; and in fact the available evidence appears to contradict their conclusions. Nowhere is there a major Sri Lankan 'success story' of the significant benefits realised by local communities or in terms of national development as a consequence of the Free Trade Agreement. The case of *vanaspati* and copper that were the major new exports to India were actually examples of the manipulation of duty

concessions offered under the ISLFTA, as discussed above, and provided minimal gains to Sri Lanka.

Between 2005 and 2007 *vanaspati* was the main single agricultural product responsible for the increase in Sri Lankan exports to India and often cited in accounts of the 'success' of the ISLFTA. However, *vanaspati* was neither a genuine Sri Lankan product with backward or forward linkages to the domestic agricultural sector, and nor did it provide large-scale skilled employment to Sri Lankan nationals. The *vanaspati* industry was an investment of a few Indian manufacturers to exploit the duty-free access of palm oil (one of its main ingredients) to Sri Lanka, and the duty-free access from Sri Lanka into the Indian market. Almost all the initial workforce was Indian. Most of the income generated by *vanaspati* therefore would have been repatriated to India. As a result of protests by manufacturers in India – alleging inadequate value addition and unfair competition – *vanaspati* exports were discontinued in 2008.

Until 2005 Sri Lankan industrial exports to India were dominated by copper and copper products. Even by 2007 copper, copper alloys, and insulated wire and cables, all of which are copper products were the main industrial export to India. The story of copper is very similar to that of *vanaspati*. The copper ingots were manufactured mainly by Indian companies established in Sri Lanka and operated entirely by Indian labour. It was said that Sri Lankans were not willing to work under the conditions of extreme heat in the factories. The Indian copper industry challenged these exports from Sri Lanka for not meeting the required level of value addition that should be maintained under the ISLFTA. The initial practice of some in the industry, as disclosed to the Law & Society Trust, was to import copper pieces from India, reduce the size in Sri Lanka, and re-export to India. The Sri Lankan Board of Investment finally introduced tougher regulations on value addition and refused to grant approval for new Indian investment in this industry. Out of the 14 companies that were in operation, 10 are now out of business.

The hope for a better future seems to dominate the current analysis on ISLFTA. It is common practice by many of the proponents of ISLFTA to propose CEPA which is not yet implemented as the solution for the shortcomings of ISLFTA. However, CEPA is not testable and justifying CEPA requires far more detailed analysis of the ISLFTA which is simply not available. Simulation tools[9] are used sometimes to predict impacts of different trade scenarios. The results, however, are confined to a few indicators of trade and how these tools can be used to facilitate decision making from a development perspective is rather questionable. Likewise the critics of the ISLFTA reproduce the same methodological error as their opponents. Their arguments are based on a critique of the overall trade and economic relationship between India and Sri Lanka, as well as ideological hostility to trade liberalisation, with little detailed analysis of the Free Trade Agreement.

[9] Such as Global Trade Analysis Project (GTAP) model used in Perera (2009).

8. RECOMMENDATIONS

Following the discussion above, this report makes two modest recommendations:

1. Investigate the Impact of the entire Trade Liberalisation process

When it comes to imports the protection provided by the negative list is minimal mainly as a result of several reasons. Firstly, the maximum imposable duties were drastically reduced as a part of tariff reforms in several stages during the last three decades. By the time the ISLFTA was implemented, some of the agricultural and industrial products were already wiped out in the face of cheap imports (Indikadahena 2008). Those tariff reforms, hence, limit the protection provided by the negative list of the ISLFTA. Secondly, Sri Lanka has committed to further tariff reductions under multilateral trade mechanisms, in particular under the Agreement on Agriculture (AoA) and Non-Agricultural Market Access (NAMA) of the World Trade Organisation. This further restricts the maximum imposable tariff, making the protection offered by ISLFTA extreme marginal. It would be more meaningful therefore – when investigating the impacts on communities of producers and consumers involved with agriculture and industries – to look at the entire trade liberalisation process including the multilateral commitments, rather than to study the ISLFTA in isolation.

2. Reorient the Role and Mandate of the Department of Commerce

The Department of Commerce (DoC) is the focal point within the Government of Sri Lanka for all trade negotiations and is therefore mandated to collect data and information, generate statistics and conduct analysis of all trade mechanisms. Its mission statement is to "to develop and promote Sri Lanka's foreign trade relations at bilateral, regional and multilateral levels by the effective implementation of government trade policy, with a view to raising the standards of living and realising a higher quality of life through the increase of total production, income and employment levels, thereby actively contributing to the overall economic growth of Sri Lanka". However, in practice the DoC appears to have interpreted its role to be the defender and promoter of trade liberalisation within the Government of Sri Lanka. Unless it is assumed without evidence that any and all free trade measures will automatically enhance the welfare and prosperity of society, the prime responsibility and obligation of the DOC is to evaluate all trade agreements including the ISLFTA against its own objectives in its mission statement, which is to what extent these agreements contribute to raising the standard of living and achieving a higher quality for life for Sri Lankans as measured by increase in total domestic production, rise in income levels, and increase in total employment.

9. CONCLUSION

This report concludes that an objective assessment of the overall impact of the India-Sri Lanka Free Trade Agreement on the developmental goals of Sri Lanka is not possible due to serious problems with the existing data. The macro-level trade statistics that are available do not even permit us to systematically analyse the ISLFTA as a result of issues concerning the accuracy of data; the inadequate attention to statistics on imports; and the narrow focus with

which data is collected. These issues disallowed field investigation to document the experiences of communities directly affected by the implementation of the ISLFTA, in the absence of clear connections between macro-level trends and micro-level impacts on producers and consumers.

Given the paucity of information and confusion regarding available data, the strength of claims that are made by protagonists of the ISLFTA and now CEPA are questionable and appear to be founded on ideological supposition rather than scientific evidence. Indeed, similar concerns are in fact valid for any other trade liberalisation measure whether it is unilateral, bilateral, regional or multilateral. The findings of this study indicate that the basis on which decisions are made on the relevance and value of these agreements and measures to the developmental needs and goals of Sri Lanka are unclear at best, and unsound at worst. If trade liberalisation is to be promoted as a necessary instrument of economic development, then there is a need for more critical engagement on the basis of this argument. In order to do so, relevant data, information, statistics and analysis need to be gathered at least by the respective state institutions responsible for handling trade agreements, and shared transparently with the people of Sri Lanka.

How is it that these policy initiatives and agreements are being implemented without debate? Why is concrete evidence not being demanded when far-reaching decisions on trade are made? Several reasons can be advanced in this regard. The hegemonic position occupied by free market ideology for several decades at least since the election of Margaret Thatcher in the United Kingdom and Ronald Reagan in the United States of America in 1979 and 1980 respectively is one reason. The lack of awareness and understanding in civil society that the implications of the neo-liberal trade regime extend well beyond the traditional issues of trade policy, is another significant reason. Ignoring the adverse impacts of liberalisation of trade in a *quid-pro-quo* for foreign aid and balance of payments support; and securing international support for the war against the Liberation Tigers of Tamil Eelam (LTTE) can also be another reason.

However, the context described above has now changed. The global financial crisis, climate change crisis and the depletion of oil reserves have posed serious challenges to the hegemonic status occupied by free market ideology. The war that absorbed almost the entire attention of Sri Lankan civil society is over. 'Development' is being peddled as the cure-all to the underlying grievances that fuelled the conflict and to issues of poverty and unemployment in general. Therefore it has never been more opportune for civil and political society to critically engage with the instruments of trade liberalisation – such as the India-Sri Lanka Free Trade Agreement and the Comprehensive Economic Partnership Agreement – and its political and economic ideology, in contestations over the pathways of development in Sri Lanka.

Interviewees (In Alphabetical Order)

The individuals and institutions named below are not to be implicated in the arguments and perspectives of this report.

Abeysinghe, Subhashini, Economist, Ceylon Chamber of Commerce, Colombo

Chandrakumara, Prasanka, Promotional and Development Officer, Spice Council, Colombo

Dassanayake, Madhusha, Economist, Ceylon Chamber of Commerce, Colombo

De Mel, Deshal, Research Economist, Institute of Policy Studies, Colombo

De Silva, Ranjith, Executive Director, Gami Diriya Foundation, Kandy

Hettiaarachchy, Ranjith, Director, D Samson Industries, Colombo

Kodikara, Nalika, Deputy Director, Export Development Board, Colombo

Kularatne, R. S., Senior Deputy Director, Economic Research Unit, Department of Agriculture, Kandy

Kumar, Jagath, Department of Commerce, Colombo

Perera, Bandula, Past Additional Director, Board of Investment and currently Managing Director, Samson Rajarata Tiles Ltd, Colombo

Samarappuli, Nihal, Head of the Research Division, Board of Investment, Colombo

Thilakaratna, Renuka, Regional Economic Development Authority, Central Province, Kandy

Weerakoon, Dushni, Deputy Director, Institute of Policy Studies, Colombo

Wickramanayake, Ariyaseela, Convener, Mawbima Lanka Foundation, Colombo

Wilson, Shanthi, Industrial Technology Institute, Colombo

Wijewickrema, Nilanthi, Executive Officer, Spice Council, Colombo

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FREE TRADE AGREEMENTS AND HUMAN RIGHTS

Sandra Paola Quintero[#]

Introduction

Globalisation and neo-liberal economic theory have made Free Trade Agreements (FTAs) more and more popular around the world in the last few decades. According to the WTO the number of FTAs has increased from 60 Regional Trade Agreements (RTAs) in 1996 to almost 170 in 2005 (Abrahamson 2007). Free trade has permeated the economic dynamics of international relations to the point that "today almost every country on earth belongs to an RTA" (Duina and Buxbaum 2008). It is not surprising then to see FTAs taking a primary place in the global agenda.

The economic and political implications of FTAs have been widely analysed. Their impact on development and on poverty reduction in particular has been a central topic of discussion and research. Even their relation with human rights is starting to be a subject of relevant matter (Harrison and Goller 2008). However, the vast majority of the literature dealing with this last subject tends to focus on the economic perspective of such relationship. The perspective is usually a neo-liberal one endorsing results in which "trade will be positively related to improved human rights conditions" (Harrelson-Stephens and Callaway 2003). Nevertheless, a different position on this subject is presented by some scholars, social and human rights activists, NGOs representing indigenous people, farmers, peoples' movements, and by trade unions which have highlighted the negative impacts of FTAs on human rights.

This paper attempts to make a critical assessment from a Human Rights Based Approach (HRBA) of the impact FTAs have on human rights. The first section of the paper will review some of the arguments in favour of free trade and FTAs and their argued positive effects on human rights. The second section will discuss why an HRBA is fundamental when assessing FTAs and how it can be done using the tripartite typology of the obligation of States. The third section will briefly address the impact of FTAs on the *right to education, right to water*[2], *agriculture and right to food security, labour rights* and the *right to health,* by reviewing

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[1] Although the right to water is not explicitly recognised under the International Covenant on Economic, Social and Cultural Rights, the United Nations Economic and Social Council has recognised it as a fundamental human right implicit and directly related with articles 11 and 12 of the ICESCR (E/C.12/2002/11, 20 January 2003).

[2] Although the right to water is not explicitly recognised under the International Covenant on Economic, Social and Cultural Rights, the United Nations Economic and Social Council has recognised it as a fundamental human right implicit and directly related with articles 11 and 12 of the ICESCR (E/C.12/2002/11, 20 January 2003).

specific cases and trade agreements. The fourth section will discuss how the most vulnerable and specially protected groups of the population – *children, women* and *indigenous people* – are directly affected by FTAs. Finally we will draw some conclusions.

1. Free Trade: Economic Growth and Welfare for Whom?

In the US, the Republicans and some social scientists referring to the Central American Free Trade Agreement (CAFTA) claim it to be: "beneficial for trade and thus, promotes production and economic growth, which eventually leads to welfare gain for all involved parties; [and] that the implementation of CAFTA obliges the governments to strengthen institutions and practices of labour law and good governance" (Abrahamson 2007). In sum, the popular argument sustains that free trade and FTAs have positive effects (Abrahamson 2007) as they will trigger economic welfare, essential for enjoying human rights (Petersmann 2004).

Some scholars argue that there is evidence demonstrating that FTAs often motivate better protection of Human Rights when they have high standards. Various studies found that free trade helps to reduce human rights violations by exercising pressure and imposing economic sanctions to those countries which do not respect their human rights obligations. Accordingly, they claim FTAs provide instruments of coercion that the human rights regime lacks (Hafner-Burton 2005). Other scholars assert that trade is itself a human right (Dorn 1996) and that it protects security rights and promotes democracy (Blanton and Blanton 2007). Furthermore, some research presents results showing how "a higher level of [trade] openness is associated with lower levels of human rights violations" (Harrelson-Stephens and Callaway 2003).

Although the outcomes of these studies are based on serious research and analysis it is easy to observe that these findings are generally constructed on liberal theories focusing merely on certain rights, e. g. security rights, considering that any negative effects are a short-term consequence. Furthermore, one conclusion that is often left out is the fact that the positive effects FTAs have are frequently only for a small, privileged section of the population. Somewhere between trade openness and free market policies, some groups gain and others lose; and those who gain as was recognised by the World Bank, are "groups and individuals with economic capacity and political influence [who] are in the best position to take advantage of the opening up of the market" (World Bank 2005).

Middleton in her study on the impact of globalisation and free trade on the artisans of Quito in Ecuador, states that the free market does not protect the rights of those who don't have the economic capacity or political influence. Instead "they generate xenophobia, racism and the pre-conditions for a violent backlash" (Middleton 2007). Moreover, there are some defenders of FTAs who recognised the counterproductive impact these may have on particular vulnerable groups, such as the effects CAFTA will have on farmers and rural poverty in Nicaragua, but reduce their importance to the fact that they will be short term effects (Bussolo and Niimi 2009). Yet, there is no further research on the dimension of such negative effects nor has it been specified how "short" this term might be.

A final issue worth highlighting within this section is the big gap existing between the different country signatories of FTAs. The patron consists of one or two developed countries negotiating FTAs with other 'less developed' countries, giving as a result great disparities among them. The mere imposition by developed countries of free market principles which they themselves often do not follow, places developing countries in an unequal relationship within FTAs around the globe.

2. FTAs from a Human Rights Based Approach and the Obligations to Protect, Respect and Fulfil

The impact international trade and Free Trade Agreements have on economics and politics has been extensively studied and the different economic and trade bodies like the World Bank and WTO have rules and jurisprudence that deal with such matters (Harrison and Goller 2008). However, when it comes to how trade and its agreements could affect rights, a wide gap is found. The different agreements and rules of these international bodies do not make any reference to human rights, and when any discussion on the subject has been taking place, no concrete results have been visible. All the above occurs in spite of the public call by the UN Secretary General for mainstreaming human rights into all activities and programmes of the UN system (Mukhopadhyay and Meer 2008) and of several reports[3] of the UN High Commissioner for Human Rights (UNHCHR) highlighting the need of a Human Rights Approach (HRA) to be introduced into international trade (Petersmann 2004).

The above request echoed in NGOs and civil society in general (FTA Watch Group 2005). Even governments themselves have made such recommendations. The Canadian Parliament's House of Commons Standing Committee on International Trade, for example, proposed a HRA of the Canada-Colombia Free Trade Agreement (Harrison and Goller 2008). Nevertheless, the situation remains largely unchanged, as shown by the fact that there is no reference to human rights and public health in the Doha Declaration of 2001 on Trade-Related Intellectual Property Rights (TRIPS). The reason given by trade experts relies on the fear they have that a 'Human Rights Approach' may become a 'stone in the shoe' for WTO negotiations, taking into consideration that more than 30 WTO member countries have not even ratified the UN Covenant on Economic, Social and Cultural Rights (ICESCR) (Petersmann 2004).

There are a few studies within the literature which have reviewed the impact of free trade on human rights. The conclusions of those tend to argue that human rights encourage trade and that the latter is essential for the promotion and protection of the former (Blanton and Blanton

[3] Office of the High Commissioner for Human Rights (OHCHR), *Report of the High Commissioner on Human Rights, Trade and Investment*, 2 July 2003, E/CN.4/Sub.2/2003/9 (Report on Investment) at para. 12; OHCHR, *Report of the Commissioner on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, 27 June 2001, E/CN.4/Sub.2/2001/13 (Report on TRIPS) at para. 61; OHCHR, *Globalisation and its Impact on the Full Enjoyment of Human Rights*, 15 January 2002, E/CN.4/2002/54 (*Report on AoA*) at paras 46 and 49; and OHCHR, *Liberalisation of Trade and Services and Human Rights*, 25 June 2002, E/CN.4/Sub.2/2002/9 (Report on GATS) at 12, 67 and 72.

2007), (Harrelson-Stephens and Callaway 2003). They are nevertheless partial and not comprehensive, for they do not focus their research and analysis on all sets of human rights.

This issue raises the need of an impact assessment on trade and specifically FTAs guided by a HRBA. Such approach implies the use of codified human rights obligations found in the different international human rights instruments (Powell 2005); the use of common principles which are focused on rights, accountability, participation, empowerment and non-discrimination; and finally, it holds the people affected by FTAs as agents and subjects, rather than objects of the agreement (Mukhopadhyay and Meer 2008). Thus, when any FTA is being discussed, drafted or implemented, a human rights impact assessment must be done in which all of the above elements must be consciously addressed in order to achieve positive impacts for *all* within the free trade and human rights dynamics. Just to give an example, the elements of accountability and participation mentioned above come to play a relevant role particularly in the first stages of an FTA as participation will imply the fulfilment of the right to information and will assure greater transparency in any FTA negotiations.

Finally, for a Human Rights Impact Assessment of FTAs to be complete, the obligation of the states must be reviewed carefully and thoroughly. The UN report on *Liberalisation of Trade and Services and Human Rights* underlines that States are not only negotiators of trade law and trade policy, but also the primary duty-bearers of human rights (25 June 2002, E/CN.4/Sub.2/2002/9). States have the obligation to avoid the deprivation of their citizen's rights (i.e. *respect*), to not allow others to violate their rights (i.e. *protect*), and to *fulfil* the rights of everyone who could otherwise not enjoy their basic rights (Quintero 2007). Therefore, any FTA signatory State must meet those obligations from the negotiations and drafting of the agreement to its implementation. Even States that have not ratified human rights treaties like the US are, according to article 18 of the Vienna Convention on the Law of the Treaties 1969, "bound by a good faith legal obligation to refrain from acts that could defeat the object and purpose of human rights" (Ovett 2006).

3. Addressing the Impact of FTAs on Education, Water, Health, Agriculture - Food Security and Labour Rights

As will be shown in this section FTAs have an undeniable impact not only on the economic and political domain of a country but also on the social and cultural ambits. Such effects are different for the various countries signatories of an FTA and for the different groups within each society. Those differences increase the already existent gap between developed and developing countries in the world, where the majority of the developing countries have major economic difficulties, enormous foreign debts, and depend significantly on the economic support of the developed countries. It is within this unequal relationship, that any FTA negotiation involving developed and developing countries usually takes place.

Due to the above mentioned situation "it is in developing countries where trade law obligations are more likely to lead to human rights issues" (Harrison and Goller 2008) and although civil and political rights violations are a constant "it is with regard to economic, social and cultural rights impacts that the strongest potential has been identified for violation

to occur" (Harrison and Goller 2008). Such statement is corroborated by the literature, declarations of groups affected by FTAs and even by UN reports which address the impact of FTAs on five specific economic, social and cultural rights: the right to education, the right to water, agriculture and the right to food security, the right to health and access to medicines, and finally labour rights. In this sense, the various UN reports dealing with trade, FTA and human rights "underline that, what are referred to [...] as rights of WTO Members to regulate, may [actually] be duties to regulate under human rights law (e.g. as to protect and fulfil human rights of access to *water*, *food*, *essential medicines*, basic *health care*, and *education* services at affordable prices" (Petersmann 2004).

Right to Education

Education has already been affected by the liberalisation of the economy and by the trend of governments to privatise public services. According to the UN such right is being marked by retrogression rather than progressive realisation (UN CESCR Special Rapporteur on the Right to Education 1998, UN CESCR Special Rapporteur on the Right to Education 1998) whereby States have the obligation to take all the necessary measures to protect, respect and fulfil this right. These measures needed to "ensure availability, adaptability, acceptability and quality are the same measures that constitute barriers to trade under GATS [General Agreement on Trade in Services]" (Devidal 2004), the main body of rules on trade and services and therefore legal framework for most of the FTAs. Under GATS, education is defined as a commercial activity and not as a right. Such a way of envisaging education puts this right under risk when free trade comes into play in countries where the States due to economic restraints cannot provide public services and has to privatise them. The risk is then that education starts to be perceived as a commodity and not as a right.

Privatisation of education normally means higher fees making education accessible to only those who have the means to afford 'the commodity of education', thus depriving poor people from this right. This situation contravenes international law. The ICESCR recognises the right to education and the obligation of states under article 10. Additionally the UN has underscored the importance of education for the development and the wellbeing of the individuals and of the countries. Furthermore, the Special Rapporteur on the Right to Education has expressly remarked that "the raison d'être of economic and social rights is to act as correctives to the free market. Governments have human rights obligations because primary education should not be treated as a commodity" (UN CESCR Special Rapporteur on the Right to Education 1998).

Right to Water: The Case of Cochabamba

According to the UN Economic and Social Council "water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights"(UN.E/C.12/2002/11, January 20, 2003). In this and other statements, the UN has underscored its concern with regard to the widespread denial of the right to water in developed and developing countries. However, several FTAs have contributed to deprive

many from their right to water in developing countries where privatisation of public services is becoming a trend as a solution to economic restraints. The case of Cochabamba in Bolivia helps illustrate this situation.

Bolivia is among the poorest countries in Latin America. It has a high foreign debt and it is subject to water privatisation as a condition for borrowing money from the World Bank and IMF. Regardless of the poverty and record of human rights violations, Bolivia has been congratulated by both institutions for their "solid trade record since 1985" (Public Citizen). In 1999 the Bolivian Government granted the contract to run Cochabamba's water system to a private international consortium (English and US consortium). The negotiation of this contract lacked transparency and participation of the citizens of Cochabamba who eventually were the direct affected by price hikes. As a result massive protests, strikes and violent incidents took place in Cochabamba and in other cities of Bolivia. Thanks to the public protests against the evident violation of their rights and the abuse they were being subjected to, the Bolivian government finally terminated the water contract with the international consortium. The control of the water system was handed over to the leader of the protesters who created an organisation named *Coordinadora de Defensa del Agua y la Vida* or Coalition for the Defence of Water and Life (Public Citizen).

The Cochabamba case is a successful example of organised civil resistance against the negative consequences of liberal trade on a basic human right: water. In this case the lack of a human rights based approach is evident; participation was not granted to the public, hence transparency was non-existent impeding accountability. The citizens were not treated as subjects affected by the government decisions; the State did not consider its obligations to protect, respect and fulfil the right to water and consequently the right to health and adequate standard of living of their citizens (Article 11, ICESCR). The threat that Cochabamba will not be the only case in which a trade agreement leaves "services currently regulated by the government open to foreign investment and control" (Australian Nursing Federation 2004) is imminent and spreading already to vital services as health and education.

Agriculture and Right to Food Security: The Cases of Latin America, South Asia and the EU-ACP Lome Agreement

According to the literature, the experience on FTAs' negotiations shows that agriculture is the sector which is often placed in most difficulty (Maasdorp 1998), (Rodriguez-Pose and Gill 2006). This deduction corresponds to the close relation between agriculture and fundamental human rights like the right to food, water and work. The right to food is at special threat when states cannot "protect the livelihoods of small farmers, enabling them to produce food for their local community and ensuring that they gain a fair share in the commodity chain if they are engaged in production for the export market" (Plahe 2007). The impossibility of state parties to protect their farmers' rights is reinforced by the numerous provisions contained in most of these FTAs. Elimination of tariffs on agricultural goods, the imposition of unfair sanitary, phytosanitary standards and dumping are some of the elements found in these FTAs that affect several groups, in particular many poor farmers whose livelihoods are directly

affected (Trade Union Declaration on the Free Trade Agreement between the United States of America and Colombia 2004)

In the case of Latin American countries the majority of FTAs are signed with the US or Canada (Cardenas and Vyborny 2005). As already illustrated throughout this paper, the power imbalances mark the majority of these FTAs locating Latin American countries in a subordinated position in which they are almost obliged to accept nearly all the conditions imposed by developed countries. In the case of agricultural provisions these FTAs are characterised by a high level of protectionism on agricultural products by the US and Canada while the same is expressly forbidden for Latin American countries (Duina and Buxbaum 2008). These kinds of provisions undermine the right to food of countless farmers in the region. As a matter of fact it has been shown by various studies that "some coffee, cocoa, horticultural and fruit farmers from Latin American countries have lost their livelihood because of the concentration in agents further downstream [...] and due to structural adjustment and deregulation of agriculture in their own countries" (Plahe 2007).

Another element worth underscoring regarding FTAs in Latin America is the lack of participation of the public in the decision making process; this tendency can be seen in almost all of these agreements and clearly contravenes international law. During negotiations the agreement is usually not available to the public, hence there is no sufficient consultation and participation of civil society groups (FTA Watch Group 2005); even farmers themselves have no access to the agreement as was acknowledged for example by the US Congressman Sander Levin with regard to the agreement the US was negotiating with Peru (Levin 2006).

In Asia the story is not that different from Latin America. In the region FTAs are also a trend while power imbalance too is a feature within the regional trade dynamics. Several countries are now signatories of FTAs and the adverse impact in agriculture and food security is becoming more and more visible. In 2003, Thailand signed an agreement with China that completely eliminated tariffs on 116 types of fruits and vegetables. According to FTA Watch Thailand "within a year, imports from China surged by 180% resulting in a plunge in prices of most temperate fruits and vegetables in the domestic market by 30-50%. It is estimated that 100,000 farming families or 500,000 people have been negatively impacted by this surge in cheap imports, thereby affecting their access to food and nutritional input" (FTA Watch Group 2005). Nevertheless an excellent example of how to prevent harmful consequences of free trade is provided by Indonesia which did not fall into the unrestricted free trade in rice in 1997 and avoided the increase of rice prices which "may well have caused famine in the world's fourth largest country" (Dawe 2001).

Finally, the case of the Lome Agreement between the European Union and the ACP (African – Caribbean – Pacific) countries shows how FTAs tend to implement the same type of actions and restrictions in those poor countries with significant agricultural potential and food resources. This agreement presents a problematic situation for ACP countries due to the EU subsidised products which pose a threat to sugar-related industries, beef, wheat-farming, rice-milling and chicken production in these countries. Moreover, "ACP countries enjoy non-reciprocal, duty-free and quota-free access to the EU market for most of their exports"

(Maasdorp 1998). Thus, the farmers and producers of those products in ACP countries who do not have subsidy are the main victims of an unfair agreement. They will not be able to compete with highly subsidised products and their livelihood and food security will be jeopardised.

The detrimental effects FTAs have on agriculture and the right to food security is a major concern of labour unions and organisations working in developing countries. A variety of these groups have presented statements and declarations when a specific FTA is being negotiated in their countries and in most of these declarations the common denominator is the demand for the consideration and protection of "the rights of small and medium producers and landless rural workers... and the right to agricultural self-determination, understood as the ability to provide food supply for their own people through domestic production" (Trade Union Declaration on the Free Trade Agreement between the United States of America and Colombia 2004).

Labour Rights: The Cases of Ecuador and Colombia

Free trade affects labour rights again in various ways and to diverse groups of society. For numerous NGOs representing farmers, popular movements, trade unions and indigenous people, FTAs and Free Trade often means job losses, deterioration of worker rights and violations of international labour law (Abrahamson 2007).

Tucker in his study has estimated that the implementation of FTAs, most notably with China, has meant a loss of more than 2.5 million jobs over the nine-year period of 1994 to 2002 (Tucker 2005). In Ecuador for example free trade agreements with China are drastically impacting the livelihood of artisans like tailors, shoemakers and carpenters. According to Middleton's research on FTAs and artisans in Quito these artisans have to compete with extremely low prices of China's products which they claim are of bad quality: "Who is going to repair shoes for eight dollars when you can buy new ones for five dollars?" (Middleton 2007). Quito artisans have tried by all means to compete; however, given the drop in the demand for their local products, their income is reduced and they can no longer even buy new tools to continue working. Therefore "as incomes and employment decline amongst their clients, their markets disintegrate further" (Middleton 2007).

Those workers who do not lose their jobs also are negatively affected by FTAs. Trade Unions and several NGOs have repeatedly denounced serious violations to the rights of workers by the implementation of FTAs. The Alliance for Responsible Trade has alleged for example that labour rights have decreased substantially in each FTA negotiated by the US (Alliance for Responsible Trade 2007). These agreements do not treat equally labour provisions and commercial provisions (Abrahamson 2007). Furthermore, in several of them there is no provision for one of the foremost principles of the ILO Declaration of 1998: non-discrimination.

Workers and activists have actively protested against the new Free Trade Agreements between the US and Colombia. Their complaints rely on the meagre labour provisions and the

fact that the sections related to non-discrimination, rights to equal pay for men and women, the right to strike and the protection of migrant workers have been excluded from the agreements (Alliance for Responsible Trade 2007). All of these issues are highly problematic for Colombian workers where discrimination on the basis of race, religion, gender and age is frequently seen in the labour realm. Women are significantly underpaid and frequently hired to perform exploitative work during which they are exposed to dangerous conditions.

In the case of migrant workers the Alliance for Responsible Trade stated that "the US has refused to negotiate around the labour rights of immigrants and has put up every type of barrier against the mobility of labour" (Alliance for Responsible Trade 2007). For a country like Colombia which has a large working migrant community particularly in the US and constantly growing as a result of violence and poverty at home, such gaps in the agreement are extremely worrisome. In addition, migration can easily increase whenever the levels of unemployment rise, when there is lack of alternative employment opportunities, and when the working conditions increasingly deteriorate.

Trade Unions are one of the usual critics of Free Trade Agreements. They draw attention to the serious effects an FTA can have when it does not recognise labour rights and on the contrary enhance the violation of labour laws. Currently in Latin-America a range of FTAs are being negotiated and it has been reported that there are no provisions to include the rights of association, strike and collective bargaining. In Colombia, trade unionists have released a number of declarations, requests, and denunciations regarding the violation of worker rights and are claiming for the protection of these rights within those FTAs that Colombia is negotiating particularly with Canada and the US (Trade Union Declaration on the Free Trade Agreement between the United States of America and Colombia 2004). The lack of protection of the rights of the unionist – mainly the right to strike – is a major concern in Latin-American countries where there have been reports of numerous cases of persecution, abduction, torture and murder of trade unionists. Not to give special consideration to the protection of labour law thus, leads to reinforce discriminatory labour practices, migration and violence.

Right to Health and Access to Medicines: The Cases of CAFTA and US-SACU Agreements

The right to health is one of the biggest concerns within economic, social and cultural rights. HIV and the limited access to affordable medicines raise the importance of considering the right to health within the international trade debate. According to the Committee on ESCR, "States are required to respect the right to health by refraining from impeding access to affordable medicines. States must protect the right to health by adopting measures that will ensure that third parties do not threaten such access. Lastly, the obligation to fulfil the right to health requires States to implement national policies and legislative measures that ensure access to affordable medicines for all without discrimination" (Ovett 2006).

Notwithstanding the above mentioned obligations of States, in numerous FTA agreements trade impositions present relevant constraints to their realisation. The perfect example of such

constraints is related to Trade-Related Intellectual Property rules (TRIPS) in FTAs. For the purpose of this paper two particular FTAs provide us with the elements to understand the impact such rules have on the right to health and access to medicines: the Central American Free Trade Agreement (CAFTA) and the agreement between the US and the South African Customs Union (SACU): Botswana, Lesotho, Namibia, South Africa and Swaziland.

The relation between the US and the rest of the countries in America is marked by a huge power imbalance. The US has always imposed their foreign policies over Central and South American countries which are highly dependent on US economic support. Such unequal relationship is reflected on the CAFTA provisions, vis-à-vis the intellectual property matters in particular. Numerous scholars, human rights activists and even trade unionists have publicised their concerns that the intellectual property rules of this agreement will undermine the right to health by increasing the prices of medicines and limiting access to medicines to only those who can afford them (Abrahamson 2007, FTA Watch Group 2005, Ovett 2006, Harrison and Goller 2008).

The worrisome issue relies on the requirements imposed by the US that will delay countries from undertaking compulsory licensing (Weissman 2004). Without such licenses Central American countries will surrender to multinationals monopoly and the access to medicines will not be affordable for all (Russel 2003, Health GAP 2009). Amnesty International reviewing the impact of CAFTA in Guatemala stressed that if Guatemala ratifies the FTA it will accept the restrictions on the production of generic medicines, and as a result the access of poorer sections of society to medicines will be reduced (Amnesty International 2005). This fear is echoed by NGOs and trade unions in El Salvador and other Central American countries where the same situation will take place if CAFTA enters into force (Abrahamson 2007).

In the case of the Agreement between the US and SACU all the nations belonging to the latter are developing countries with elevated indices of poverty and HIV/Aids. In the agreement, the US requires SACU nations to meet the same standards of protection of US law. In order to do so SACU countries will have to limit compulsory licenses to non-commercial use or to national emergencies. Furthermore, they cannot serve as suppliers of generic medicines to other SACU nations. These types of restrictions in Southern African countries will have disproportionate effects in the health of its citizens, particularly to those infected by the HIV/AIDS virus. For them, the medicine to treat it will also be monopolised by the international pharmaceutical industry whose prices are out of reach for the majority of the population of these countries (Health GAP 2009).

Both CAFTA and US-SACU provisions on TRIPS clearly contravene the "obligation of states to respect the right to health in other countries, to give due attention to the right to health in international agreement and to take steps to ensure those agreements do not adversely impact the right to health" (UN CESCR 11 August 2000). These FTAs even violate the WTO Agreement on TRIPS. Consequently, the provisions and restrictions of these agreements on access to medicines comprise a failure of the countries to meet their human rights obligations (Morgan 2008).

4. Specially Protected Groups

The special vulnerability of certain groups of society and the obligation of States regarding these groups has been recognised by the United Nations in the 1989 Convention on the Rights of the Child (CRC), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and recently in the 2007 Declaration on the Rights of Indigenous Peoples. Yet, the rights of all these specially protected people are still undermined and the way FTAs can impact the most disadvantaged persons is under-explored and marginalised. Hence, an impact assessment of FTAs from a human rights perspective with regard to the rights of women, children and indigenous peoples is required (Harrison and Goller 2008).

Child labour is the main issue that emerges when assessing the impact of FTAs on the rights of the child. The ILO has reported an estimated 246 million child labourers worldwide, 73 million of whom are under the age of 10 (de la Barra 2006). In South Asia for example cheap labour is endemic. In India and Pakistan children are used by their parents to pay the debts they owe to the landlords or factories where they work (Tsogas 1999).

According to some neo-classical economists it is better to permit child labour than let children starve. A common argument is that child labour is a "'necessary evil' that all industrialised countries have gone through and, inevitably, all industrialising countries will have to go, or are currently going through" (Tsogas 1999). Under the Convention on the Rights of the Child, States are responsible for the development of children and as such they are accountable for their education and wellbeing. Nevertheless when States negotiate and sign FTAs that do not make explicit the prohibition of child labour and instead impose high standards of competition which will encourage the use of cheap labour (and thus, child labour), in flagrant violation of international law and human rights.

Women as well are particularly hit by FTAs especially with regard to their labour rights. Women "tend to be already poor when they join the industries, and as a consequence more directly feel the effects of discrimination, inflation and cutbacks in health and education" (Liberato and Fennell 2007). Women's labour, particularly in developing countries, is largely unskilled labour which translates to cheap labour. Some theories argue that women will benefit from Free Trade and FTAs (Arman 1996) since cheap female labour is a main asset to increase international trade which will result in the increase of the demand of female labour. Such theories completely disregard the human factor. It is possible that more women would be recruited and the levels of employment increase; still the working conditions will be poor, their wages will remain extremely low in comparison to male wages and due to the type of required unskilled labour women will be exposed to great risks to their health and life.

In the case of CAFTA in the Dominican Republic it is argued that it will not alter the poor working conditions of women in the *maquilas* (free trade zones) where the female workforce is fired when they become pregnant and are subjected to regular pregnancy tests (Abrahamson 2007). The same situation can be observed in Colombia where women working in the cut-flower industry are made to work extensive hours and are continually exposed to toxic pesticides that result in chronic diseases (Alliance for Responsible Trade 2007). None of the

Agreements Colombia is negotiating with the US contemplate mechanisms of protection of women, including the ILO non-discrimination principle. These cases support the view that States in their export-oriented policies "might not be interested in adopting a policy that invests in the human capital of women: the economy is interested in them as cheap workers" (Bussmann 2009).

Finally, free trade and FTAs have generated harmful conditions for indigenous people in different countries. Indigenous people are the keepers of traditional knowledge and culture. Yet, traditional or intellectual knowledge is not recognised by TRIPS, giving FTAs the legal framework needed to undermine indigenous people's cultural rights. In Africa for example due to the lack of legal protection for their traditional knowledge, they have been obliged to place their 'secrets' in the public domain where it's easy for the unscrupulous to exploit the knowledge by patenting them (Oloka-Onyango 2005).

In addition, because of the fact that indigenous people are usually located in places where the main products of the free market grow, their right to land, cultural heritage and more likely livelihoods are also under threat (Abrahamson 2007). Indigenous land is usually rich in agricultural and mineral products – oil, timber, diamonds, copper, etc. (Oloka-Onyango 2005). The strategic location of indigenous groups makes them target of many multinational companies interested in dispossessing indigenous people from their land in order to exploit it. Thus, many communities are subjected to displacement and violence undermining their rights to land and livelihood.

Conclusion

Free Trade Agreements can have both positive and negative effects on human rights. This statement is based on two positions presented by on the one hand different studies made by scholars, liberal economist and some governments; and on the other hand by the declarations, reports and research of civil society, NGOs, and trade unionists among others. Those arguing for the positive effects of free trade and FTAs assert that they will contribute to economic welfare and poverty reduction (Blanton and Blanton 2007, Dorn 1996, Petersmann 2004). Yet the positive effects presented by these studies have three main criticisms: they are restricted to a specific section of the population, they consider only certain type of rights and they estimate only short term negative effects. In sum, they lack a comprehensive approach that allows them to address the real impact FTAs have on Human rights.

Such an approach has been introduced by the UN's recommendation for the implementation of a Human Rights Based Approach in Trade. In this sense, a Human Rights Impact Assessment is proposed by some scholars (Harrelson-Stephens and Callaway 2003). Such assessment will follow a rights based approach taking into consideration all people affected by FTAs, treating them as subjects of the agreements; it will review the role and obligations of stakeholders and demand accountability, transparency and the participation of those affected.

In this paper we utilised a rights based approach by using case studies and particular FTAs to explore some of the impacts they have on the right to education, water, food, work and health. As a result we found that FTAs have had serious consequences in countries worldwide where these economic social and cultural rights are threatened. The right to *water* and *education* are starting to be considered as commodities instead of basic human rights and services for all. The legal framework of international trade do not regard them as fundamental rights and instead it gives them a commercial value allowing and, in many cases, forcing countries to privatise them. Thus, those agreements contribute to the violation of the States' obligation to protect, respect and fulfil these rights for all their citizens. The cases of Cochabamba and the concerns raised by the UN regarding the problematic provide us with real examples of the world's fear that soon these basic human rights will turn into mere commercial services depriving thousands of poor and vulnerable people of their enjoyment.

FTAs and the rights to *food* and *work* are also key cases demonstrating the adverse effects trade agreements have had and could potentially create on human rights. The power imbalances between the signatory countries enable the imposition of unfair provisions forcing less developed countries to renounce their obligations to their citizens. This imbalance widens the gap between developed and developing countries and even within the developing countries themselves due to the inequalities in wealth distribution enhanced by free market policies.

The cases of Latin American and Southern African FTAs, discussed in this paper, show how protectionism is usually not permitted to developing countries. This is not the case however for the US, Canada or EU. Subsidised products, high quality standards which farmers and small workers cannot compete with, non-existent labour provisions, among others, are the main features of these FTAs. All of them clearly violating human rights and international law and thus, challenging the alleged contribution of free trade to poverty reduction and welfare (O'Connell 2007).

The situation concerning the right to health poses one of the biggest criticisms of the impact of FTAs on human rights. The consequences FTAs dealing with TRIPS have had in particular on this right is related to the high levels of HIV and the lack of access to affordable medicines in the majority of the developing countries. In the cases of CAFTA in Central America and the US-SACU Agreement in Africa these agreements enshrine provisions whereby the powerful country – in these cases the US – have restricted the production of generic medicines and have delayed countries from undertaking compulsory licensing. As a result the prices of medicines have increased limiting their access to only those privileged ones who can afford the high prices of the international pharmaceutics industry (Cohen-Kohler JC and Forman L et al. 2008). Thus, these FTAs contribute to create disproportionate effects on the right to health of the people by preventing States from taking all measures needed to protect the rights of their citizens and in this case specially of those infected with the HIV-AIDS virus.

The effects of FTAs on the rights of vulnerable people have been largely under-explored. The way free trade and FTAs affect women, children, and indigenous people vary considerably

and extends to all range of rights e.g. civil, political, social, economic and cultural rights. Children and women are considerably harmed by various FTA provisions – and in some cases, the lack of provisions – related to labour standards and agriculture. Child labour is a common consequence of the high standards of competition imposed on developing countries which are 'forced' to look for cheap labour force. There is almost no explicit provision forbidding the implementation of child labour or acknowledging the rights of the child within FTAs. The same situation occurs for women whose labour is considered largely unskilled and therefore cheap. It might be true that due to a wide range of FTAs the levels of female unemployment has been reduced (Bussmann 2009); still the poor working conditions of numerous women remains unaltered and in many occasions tend to deteriorate.

With regard to indigenous people their livelihoods and cultural rights are the most affected. Their traditional knowledge is constantly under threat due to the imposition of intellectual property rules frequently enshrined within the FTA. And their livelihood is undermined due to the strategic location of their land which faces them with displacement and violence.

As Oloka-Onyango observes, "The challenge that faces human rights activists is to critically reflect on the most appropriate manner in which to enhance the positive and to confront and eliminate the negative aspects of globalisation" (2005). The implementation of a Human Rights Based Approach on FTAs is an important first step in this approach. If an FTA undergoes a transparent process where accountability is possible and participation is granted to the main subjects affected by it, States will be able to respect, protect and fulfil the rights of their citizens.

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THAILAND'S FREE TRADE AGREEMENTS AND HUMAN RIGHTS OBLIGATIONS

Prepared by FTA Watch Thailand, March 2005, for Submission to the 84th Session of the UN Human Rights Committee

Introduction

Since 2002, the government of Thailand, under the leadership of Pol Lt-Col Thaksin Shinawatra, has made considerable efforts to initiate and expedite bilateral and regional trade agreements (FTAs). The Prime Minister announced clearly that his government would "employ free trade area negotiations as Thailand's economic tactics in the areas of international trade and investment" (keynote address, 18 February, 2004). At present, agreements have been signed with China, India, Bahrain, and Australia. Negotiations are currently in progress with the United States of America (US), Japan, Peru, New Zealand, BIMSTEC (members consisting of Bangladesh, India, Myanmar, Sri Lanka, Bhutan, Nepal and Thailand) and the European Free Trade Association (EFTA includes Switzerland, Norway, Iceland and Liechtenstein).

FTA negotiations with developed countries in particular have an agenda that goes beyond trade in goods. They almost without fail include deregulation of investment measures, liberalization of trade in services, and implementation of competition policies. Also, trade-related intellectual property rules in FTAs risk undermining Thailand's ability to take measures to ensure access to affordable medicines. Moreover, the elimination of tariffs on agricultural goods in FTAs may have an affect on the livelihoods of small farmers, thereby affecting food security of rural communities.

This would undermine Thailand's ability to comply with its obligations under the International Covenant on Civil and Political Rights, especially the right to life (article 6, as interpreted by HRC General Comment No. 6 (1982)) and the rights of the child (article 24, as interpreted by HRC General Comment No 17 (1989). These obligations include the need to "take all possible measures to reduce infant mortality and to increase life expectancy, especially by adopting measures to eliminate malnutrition and epidemics."[1]

Moreover, FTA negotiations have been conducted secretively, without sufficient consultation and participation of public-interest civil society groups. Even though the government claimed to consult with people through several organised meetings, only limited groups of people have opportunities to participate. There was a lack of access to the draft negotiating texts in all sectors, which created difficulties for people to assess the potential impacts from the negotiations. Particularly, in the negotiations with the US, the Thai government had a verbal agreement, demanded by the US, to keep the process of negotiations secret. The conducts of

[1] Human Rights Committee, *General Comment No. 6 (1982), The right to life*, 30 April 1982.

the Thai government and the US negotiators in relation to FTA negotiations are inconsistent with their human rights obligations. These include the obligation to respect access to information (article 19, as interpreted by General Comment No. 19 (1983)); to ensure every citizen's right to participate in the conduct of public
General Comment No. 25 (1996); to encourage public p
and monitoring the state's exercise of power (article 7
obtain wider and broader transparency in the negotiati
US's Bipartisan Trade Authority Bill 2002[3]).

FTA Watch is a coalition of public-minded academics, i
under the constitution, and non-government organizati
concern for the non-transparent manner in which FTA
the government. Its aim is to provide the public with in-
FTAs, particularly on their potentially adverse effects o
society, i.e., small farmers, small businesses, people liv
general.

This submission to the Human Rights Committee's 84th
concerns relating to the impacts of FTAs on the enjo
Thailand. The first part outlines our concerns relating
on Thailand's ability to comply with its human rights o
The second part delineates our concerns with regards
participation in FTA negotiations (Part II).

I. Real and Potential Impacts of FTAs

Intellectual Property Monopoly, Access to Medicines and the Right to Life

Thailand has a dramatically high rate of HIV/AIDS. The Bureau of Epidemiology, Ministry of Public Health has estimated that there are 700,000 persons currently infected by HIV.

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[2] Section 76 of The Constitution of the Kingdom of Thailand says "The State shall promote and encourage public participation in laying down policies, making decision on political issues, preparing economic, social and political development plans, and inspecting the exercise of State power at all".

[3] In the US's Bipartisan Trade Authority Bill 2002, Section 2102 (b) (5) TRANSPARENCY says: The principal negotiating objective of the United States with respect to transparency is to obtain wider and broader application of the principle of transparency through

(A) increased and more timely public access to information regarding trade issues and the activities of international trade institutions;

(B) increased openness at the WTO and other international trade fora by increasing public access to appropriate meetings, proceedings, and submissions, including with regard to dispute settlement and investment; and

(C) increased and more timely public access to all notifications and supporting documentation submitted by parties to the WTO.

Among these, 170,000 are AIDS patients. Moreover, there are now 50,000 HIV-infected people who get anti-retroviral drugs and the estimated numbers for 2006 is 100,000. Each year, there are 25,000 newly infected persons.

The government of Thailand has an obligation under international human rights law to ensure access to affordable medicines for all.[4] The initial report of Thailand to the Human Rights Committee underlines the fact that the government of Thailand has taken measures to limit the spread of HIV/AIDS and increase access to ARV treatment.[5] However, measures taken by Thailand to ensure access to medicines to treat epidemics such as HIV/AIDS risk being undermined by trade-related intellectual property rules in FTAs. This could put Thailand in a situation where it is unable to comply with its obligation to "take all possible measures to reduce infant mortality and to increase life expectancy" according to the right to life (article 6, as interpreted by General Comment No. 6 (1982) and its obligations under the rights of the child (article 24, as interpreted by General Comment No. 17 (1989).

Of greatest concern are the intellectual property rules in the US-Thailand FTA negotiations. The biggest threats are in the area of expanded patent protection and protection of undisclosed information concerning medicines. These rules will increase the monopoly rights of patent owners that render medicines unaffordable for the poorest and most vulnerable groups.

The US successfully used unilateral trade sanctions against Thailand to the tune of 165 million dollars in 1989 to force the government to amend and expand the coverage of patent law even before the Trade Related Intellectual Property Rights (TRIPs) negotiations were concluded in the WTO. There is every reason to believe that the US will try its best to extract from Thailand further commitments beyond what is stipulated in the WTO TRIPs agreement, since the US has already achieved this in FTAs with Morocco, Singapore and Chile.

In these FTAs, the US successfully negotiated a number of measures to increase the level of IPR protection. Access to medicines in Thailand would be limited by such measures, which go further than current provisions under Thai law. These include:

- Restriction of parallel importation by giving patent holders the means to block it, thereby limiting the government's ability to shop around for cheaper medicines in foreign markets;

- Restriction of the grounds for compulsory licensing, making it more difficult for governments to increase access to affordable medicines when necessary;

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[4] See also the UN Commission on Human Rights, Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria, Resolutions 2004/26, 2003/29, 2002/32, and 2001/33, http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN

[5] United Nations Human Rights Committee, *Initial Report of Thailand*, CCPR/C/THA/2004/1 at paragraphs 537-539.

- Extension of patent protection beyond 20 years, thereby delaying the introduction of more affordable generic medicines;

- Prevention of the use of clinical trial data by generic producers with 5-10 years of data exclusivity protection, thus delaying or even preventing generic competition.

The Letter of Notification from the US Trade Representative to Congress makes clear that these measures are part of the objectives of the US. The Thai government must therefore be well aware of the intention of the United States to bring patent protection up to the standards set in previous FTAs, which will inevitably lower the domestic standards of protection of the people's right to access medicines.

Proposed recommendations:

Thailand should undertake an assessment of the impact of strict intellectual property rules on its ability to protect the right to life before making any new commitments under an FTA.

Thailand should also take into account its international human rights obligations under the Covenant when negotiating and implementing trade-related intellectual property rules.

Small Farmers' Right to Livelihood

The elimination of tariffs on agricultural goods imported from countries that are parties to the FTAs, which is the main feature of all bilateral FTAs, can have a devastating effect on the livelihoods of small domestic producers. This may undermine Thailand's ability to "take every possible economic and social measure" to "eradicate malnutrition" under the right to life (article 6, as interpreted by General Comment No.6 (1982) and to "eradicate malnutrition among children" (article 24, as interpreted by General Comment No. 17 (1989)).

A case in point is the agreement with China to eliminate completely tariffs on 116 types of fruit and vegetables. This came into effect on October 1, 2003. Within a year, imports from China surged by 180% resulting in a plunge in prices of most temperate fruits and vegetables in the domestic market by 30-50%. It is estimated that 100,000 farming families or 500,000 people have been negatively impacted by this surge in cheap imports, thereby affecting their access to food and nutritional input. Some, like garlic and onion growers, have suffered especially severe effects with their livelihoods threatened. Despite warnings by academics, the government had chosen not to take any safeguard measures.

Another 100,000 dairy farmers are being threatened in the same way by the FTA with Australia. Though the government has argued that tariff reductions and quota increases for dairy imports from Australia will be gradual and spread over a period of 20 years, farmers

know that their livelihoods have been written off. It took many protests by the farmers before the government promised some assistance for them to adjust to the change. Corn and soybean farmers, however, have already been affected by market liberalization under the WTO and consequent dumping by the US agri-businesses in the last ten years with average prices decreasing by over 10%; it is anybody's guess how much further they will be affected by the FTA under negotiation with the US.

Proposed recommendations:

> Thailand should undertake an assessment of the impact of trade rules on its obligation to protect the right to life and its ability to take measures to eradicate malnutrition before undertaking any new commitments under FTAs.
>
> Thailand should also take into account its international human rights obligations under the Covenant when negotiating and implementing agricultural trade rules.

II. Access to information and participation in the conduct of FTA negotiations

The High Commissioner has, on several occasions, encouraged States to undertake human rights impact assessments (HRIAs) of trade-related rules and policies systematically (E/CN.4/2004/40, paragraph 55). HRIAs would require not only participatory methodologies - to ensure assessment quality as well as to implement the right to participate - but also comparing the real and potential impact of trade policies against a range of comprehensive indicators based on internationally recognized civil, cultural, economic, political and social rights. Significantly, the principle of non-discrimination as a core human rights principle promotes the disaggregation of impacts between men and women, different national, ethnic and racial groups and so on, promoting participation of a broader range of views and experiences within any assessment.

However, Thailand has conducted FTA negotiations in a secretive manner, without sufficient consultation and participation of public-interest civil society groups. The conduct of the Thai government in relation to FTA negotiations is inconsistent with its human rights obligations. These include the obligation to respect access to information (article 19, as interpreted by General Comment No. 19 (1983)); to ensure every citizen's right to participate in the conduct of public affairs (article 25, as interpreted by General Comment No. 25 (1996); to encourage public participation in policy decision making and monitoring the state's exercise of power (article 76 in the Thai Constitution); and to obtain wider and broader transparency in the negotiating process (Sec. 2102 (b) (5) in the US's Bipartisan Trade Authority Bill 2002).

This has been reaffirmed by the Senate Standing Committees on Foreign Affairs; Economic, Commercial and Industrial Affairs; Agriculture and Cooperatives; and Finance, Banking and Financial Institutions. These Committees conducted studies of relevant documents and interviews with responsible government negotiators in the Ministries of Foreign Affairs and

Commerce and held consultations with business organizations, NGOs and academics, including members of FTA Watch. As a result, the Committees issued a statement dated October 10, 2003, raising the following concerns over the nature of the negotiations.

1. The negotiation processes had been conducted in a rushed manner. Framework agreements had been concluded with 6 countries within 2 years and several more were expected to be completed without any clear information on their long-term impact.

2. There was no evidence of systematic, comprehensive studies on the impact of the FTAs, especially from the social, environmental, and cultural perspectives. A great number of questions and concerns were raised by the private sector on the economic studies that were available and the lack of clear answers from officials.

3. There was a lack of participation by all stake-holders in determining the country's position in negotiations; consultation was limited to private businesses. Negotiating positions had been determined on the basis of an assessment of levels of competitiveness in the private sector alone without regard to the overall social, cultural and environmental impacts.

4. Many commitments made in the signed framework agreements would necessitate prior approval by Parliament according to Article 224 of the constitution, which governed the signing of international treaties that affect the country's sovereignty. In particular, these commitments implied changes to or restrictions on domestic legislation.

5. There was insufficient preparation to mitigate the impact of the FTAs. The only response stated was for those affected to change occupation or for farmers to change crops. This could lead to a major problem of food security if farmers were forced to abandon food crops due to cheaper imports as a result of the FTAs.

Consequently, the statement called for the government to undertake several measures to address the above mentioned concerns. The most significant recommendations concern

- a submission for parliamentarian scrutiny and approval of any commitments made in any FTA negotiation which would result in any infringement on state sovereignty or require the passing of laws,

- and the establishment of a consultation process, which would include all sectors of society, prior to the signing of any agreement.

Moreover, a House of Representatives Sub-Committee on FTAs recommended in November 2004 that the government consult all stakeholders by means of public hearings organized under the existing guidelines of the Office of the Prime Minister.

In addition, the National Human Rights Commission, an agency established under the Constitution and independent of the government, has repeatedly voiced concerns over the lack of transparency and participation in the process of FTA negotiations, and on the negative impact of FTAs on the poor.

Until now the government has responded to none of these proposals, recommendations and concerns. Nor has there been any significant change in the government's method of conducting negotiations. The Department of International Trade Negotiation, Ministry of Commerce, put more effort into publicizing progress reports on the negotiations and set up "suggestion boxes" on their website and at a call centre.

More significantly, the government went ahead with signing the Free Trade Agreement with Australia and New Zealand without the involvement of Parliament and without disclosing the content of the agreement to the public until after the pact, and there is also no translation of the agreement into Thai language.

There are good grounds for questioning the transparency of the ongoing negotiations over the Thai-US FTA. An official negotiator from the Ministry of Foreign Affairs publicly admitted that the US had requested that the Thai chief negotiator sign a confidential agreement before the start of negotiations. (No details or context of the negotiations is accessible to the public so the content of the proposed agreement is not known.) At that time the chief negotiator reportedly did not sign but gave a 'gentleman's agreement' to what the US had requested.

Proposed recommendations:

> Thailand should ensure access to information to government studies and government negotiating positions under FTAs.
>
> Thailand should ensure greater consultation and participation of public-interest civil society groups in FTA negotiations.

Conclusion and Recommendations

The bilateral Free Trade Agreements that the Thai government has already signed or is in the process of negotiating with several countries invariably have a significant impact on millions of Thais. In some cases, FTAs infringe on the human rights of Thai citizens, such as the right to the enjoyment of the highest attainable standard of health and the right to livelihood.

Moreover, the Thai government has repeatedly failed to take heed of the concerns voiced by various sectors and institutions, or to provide all the stake-holders with the opportunity to

participate meaningfully. It has refused to disclose the details of negotiations and neglected to undertake due parliamentary process recommended by the Senate before signing FTAs. Such processes are violations of the rights to freedom of information and to participate in public affairs.

FTA Watch calls on Parliament and the Thai people to demand that the Thaksin Shinawatra government take into accounts its obligations under the International Covenant on Civil and Political Rights and international human rights law when negotiating and implementing FTAs.

Moreover, FTA Watch requests that the Thai government:

1. Remove intellectual property rights from Free Trade Agreement or other trade negotiations or agreements.

2. Undertake detailed impact assessments of the effects of all proposed trade liberalization measures on each sector of the economy, including the overall impact on the economy, human rights obligations, society, culture, the environment and sovereignty. These impact assessments must be conducted by inter-disciplinary groups of independent, impartial and non-partisan researchers.

3. Grant access to results of studies and government negotiating positions must be made public and public hearings must be conducted, involving stake-holders in all regions of the country.

4. Grant access to negotiation frameworks and maximum negotiating positions that reflect research results and public responses must be submitted to Parliament for approval at least 90 days prior to the start of negotiations.

5. Ensure that the Thai Senate and the House of Parliament each appoint an official committee to monitor closely the negotiation processes.

6. Institute a mechanism to ensure that the people, not only from the business sector, have access to information and the opportunity to express their opinions at all stages of the negotiations.

7. Ensure that the results of negotiations must be submitted to both the Senate and the House for approval at least 90 days prior to the signing of any agreement.

8. Ensure that all documents related to the negotiation, including the resulting agreements, must be available in Thai.

In review with the Thai government, FTA Watch proposes the Human Rights Committee the following questions:

1. Does the Thai government have a concern on its people's access to medicines at all? If yes, why has it not immediately implement the WTO's Decision of 30 August 2003 on "IMPLEMENTATION OF PARAGRAPH 6 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH", considering that there is a severe shortage of anti-retroviral Efavirenz?

2. Does the Thai government consider a demand for TRIPs-Plus, which is likely to result in a longer period of monopoly, whether from data exclusivity or patent extension, as a problem of human rights?

3. How can the Thai government assure that in all trade negotiations rights to access to medicines will not be violated?

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