"Yes to water conservation, no to water commercialisation – stop the FTA" in Costa Rica
(Photo: Patricio, notlc.com)

Legal (un)certainty – over what?

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Legal (un)certainty is supposedly the cause and ultimate goal of regulatory reforms to protect investor interests. These reforms consist of the adoption of uniform, long-lasting and coercive standards that are supposed to ensure transparency. This is supposed to make laws reliable. In reality it takes them all in one direction.

These processes start with Bilateral Investment Treaties (BITs), extend their coverage through the World Trade Organisation (WTO) agreements and then spread through Free Trade Agreements (FTAs). In one extreme case, they can even guarantee that domestic law shall not submit to any bilateral obligations. US law reigns supreme over its own free trade agreement with Central America – article 102 of the United States' implementing legislation ensures that none of CAFTA's provisions shall override US law. These devices heavily favour the rights of investors at the expense of citizens' rights. Legal instruments developed through the United Nations – human rights, environmental legislation and labour standards – take a back seat. Paradoxically, security for one type of legislation results in insecurity for other types of law.

Multilateral environmental and human rights commitments are being weakened in the process, threatening people's quality of life. The logic follows a spiral, starting with the need to create a suitable climate for investment, which in turn will supposedly result in economic growth and ultimately improve people's welfare. The goals of any non-commercial law are turned upside down. Highly regulated free trade carries with it a full enforcement machinery – including dispute resolution, which is now becoming the ideal of any international law. Without this machinery in the other fields – such as human rights, environmental law and labour rules – it is unfair competition.

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Human rights

National constitutions in Latin America include collective human rights obligations, but the real exercise of these rights has been fragile and is now cut short with the signing of FTAs.

The right to health is infringed when the definition of services in an FTA includes all those, even mandatory ones, that the State is obliged to provide under its human rights obligations. Indeed, the notion that health is a service that only companies can provide, in a logic revolving around profit, prevents or hinders the delivery of basic services, which are already dwindling for the most disadvantaged. With nearly half the population of Latin America below the absolute poverty line, having to pay to receive a minimum of health care translates into a permanent lack of health care for them. FTAs prevent or hinder the ability of governments to grant compulsory licences, effectively denying access to treatments for serious illnesses at low cost. Either the use of generics is allowed, since what gets consolidated is a longer period of patent protection for drugs, or it becomes impossible during the patent period to produce generics, making it impossible to create drugs for deadly diseases like AIDS. Some FTAs make parallel importation of patented drugs illegal.

The same is happening with education. Third World governments must provide a universal basic education to the majority of the people, including adults, students with special needs and other priority sectors. But by accepting the privatisation of educational services, universal coverage gets minimised and educational costs

"Let's defend our resources. Let's say no to the FTA." Banner of the National Union of Bank Employees during a mobilisation in Bogotá, October 2005
(Photo: Indymedia Colombia)

soar, making access impossible. Thus, in a precarious economic environment, the recorded number of school dropouts goes up, because parents cannot afford the food and transport costs that students have to incur to continue their studies.

Environmental rights

The scope of environmental standards is declining because of government decisions to improve conditions to attract foreign direct investment, and pressure from the private sector. In recent years, the number and type of activities for which governments would require environment licences or environmental impact assessments have diminished. This has huge importance in Latin America, particularly Colombia, which has one of the highest rates of adherence to environmental treaties. A large portion of Colombia's laws and policies are geared toward compliance with the provisions of these agreements.[2] Countries that have signed and ratified most multilateral environmental agreements wear two faces when they deal with other states that are not signatories, such as the US: their multilateral face is broad in its nature, while their other face is restrictive. Compliance with obligations from a multilateral agreement results in non-compliance with a bilateral agreement, or vice versa.

After more than 15 years of the UN Convention on Biological Diversity, the intention of developing countries to achieve some benefit through the proper valuation of their genetic resources has been greatly weakened by the primacy of commercial notions such as intellectual property rights (IPR). This is either because trade law – especially FTAs – has redefined bioprospecting as a cross-border service,[3] or because IPR has been extended to naturally occurring life forms. Any so-called sovereignty over these resources has been effectively undermined, if not eliminated. A crucial part of the discussion is trade-related aspects of intellectual property rights, and the sovereignty over genetic resources that is expressed in national access regimes. It is asserted that biological and genetic resources in their natural state cannot be protected by IPR, since no innovation is involved. But in the US, biological material that has not been modified, such as a natural gene sequence which has been merely described, can comply with the basic requirements of patent protection.[4] In the Andean countries, this is not allowed. The dilemma is: do you have to repeal your own laws if they are contrary to an FTA? CAFTA makes the situation worse.[5] Now FTAs almost replace parliaments because international treaties and agreements on IPR have to be adopted directly, without the need for national ratification.[6,7,8,9,10]

Another concrete example of the application of concepts from international environmental law which should prevail against FTAs is the precautionary principle: countries should be allowed to pursue national exceptions for environmental reasons without being accused of restricting trade and without being forced to provide full scientific evidence for their concern, as trade rules would have it.[11] Precaution is a fundamental principle of Colombian environmental law. But trade law dictates that either one uses the precautionary principle through its basis in the GATT, which stipulates that absolute certainty is required for it to apply, or one stops using it altogether.

FTAs may state that each party can make its own environmental law and be sovereign and so on, but these agreements redefine the very notion of environ-

2 CEPAL, "La sostenibilidad del desarrollo en América Latina y el Caribe" [ECLAC, Sustainability of development in Latin America and the Caribbean], Chapter VII, Marco internacional, 2002, p. 181.

3 In the annex on scientific and research services (Article 11.5), under obligations regarding local presence, Costa Rica's Law No. 7788 of 30 April 1998, Biodiversity Law, Article 63, is cited. "Description: Cross-Border Services: Foreign nationals or enterprises domiciled abroad that supply scientific research and bioprospecting services with regard to biodiversity in Costa Rica shall designate a legal representative that resides in Costa Rica." See CAFTA, Annex 1, Schedule of Costa Rica.

4 According to some legal experts, the patenting of plants can occur through different forms and processes: isolated or purified proteins, isolated DNA sequences, seeds, methods to modify a plant genetically, etc. See Carlos Correa, "Access to plant genetic resources and intellectual property rights", Commission on Plant Genetic Resources for Food and Agriculture, FAO, 1998.

5 "Reflections on the free trade agreement between the United States and Central America: the case of Costa Rica." Chapter 6: Silvia Rodriguez and Camila Montecinos, GRAIN, February 2004. Documents compiled by Penamiento Solidario.

6 Art 15.1.2: by the date of entry into force of this Agreement: (a) the WIPO Copyright Treaty (1996); and (b) the WIPO Performances and Phonograms Treaty (1996)

7 Art 15.1.3: by January 1, 2006: (a) the Patent Cooperation Treaty, as revised and amended (1970); and (b) the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1980).

8 Art 15.1.4: by January 1, 2008: (a) the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974); and (b) the Trademark Law Treaty (1994).

9 Art. 15.1.5: by January 1, 2006, the International Convention for the Protection of New Varieties of Plants (1991) (UPOV Convention 1991). Costa Rica shall do so by June 1, 2007.

10 Each Party shall make all reasonable efforts to ratify or accede to the following agreements: (a) the Patent Law Treaty (2000); (b) the Hague Agreement Concerning the International Registration of Industrial Designs (1999); and (c) the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989).

11 Notice requesting public comment on proposed United States–Chile free trade agreement, presented on 15 February 2001 by Center for International Environmental Law, Defenders of Wildlife, Friends of the Earth, Humane Society of the United States, Natural Resources Defense Council, Pacific Environment and Resources Center, Public Citizen, Sierra Club, Section 1, Legal and regulatory issues, B. Precautionary principle.
http://www.ciel.org/Publications/ USChileFRcommentsRevised.pdf

12 "Free trade and the environment: the picture gets clearer", document of the Commission for Environmental Cooperation of North America, 2002, page 11. http://www.cec.org/files/PDF/ECONOMY/FreeTrade-en-fin.pdf. This publication accompanies and refers to the information contained in: "North American Symposium on Understanding the

Street theatre to educate the people about UPOV, a type of patent law specially designed for seeds that the government now has to adopt because of CAFTA, in Costa Rica, in November 2007. The introduction of this kind of corporate monopoly system means that Costa Rican farmers and indigeneous communities will no longer be able to freely save and exchange seeds.
(Photo: Bloque Verde)

mental law.[12] For Colombia, it has been said that "the commercial exploitation of natural resources can be excluded from the definition of environmental legislation".[13] This would put the use and development of renewable natural resources, and the sustainable use of non-renewable natural resources, including the mining code and the hydrocarbon law, outside the sphere of environmental law.[14] Thus, all sectors in Colombia would be stripped of any mandate to work towards the objective of "sustainable development".

Other implications emerge, even before signing the FTA, such as the obligation to repeal or amend existing laws or enact new ones. Legislation has been adopted to strengthen protection for investors even without signing the FTA. Even the possibilities of modifying laws have become restricted, since parliament may not change anything that does not display a degree of compliance with the obligations embedded in the FTA.[15] So a law can only be amended if it is not compatible with the FTA, but not the other way around. Any reform in the other direction, according to the theory of "legal certainty", could be considered a violation of FTA obligations.[16]

Investors' rights

NAFTA Chapter 11, upon which many FTAs build, endorses the right of investors to go to international arbitration if they consider that any part of the state is ignoring their rights. This replaces the state-state relationship, which is proper to international law, with an investor-state relationship, which allows an individual to make a claim directly against a state, leaving out the formality of diplomatic notes and other paraphernalia that has accompanied disagreements between countries, and facilitating a hailstorm of lawsuits regarding future obligations, i.e. without harm even being caused. A broad concept of investment – relating to acquisition, ownership and operation – has been established.

These investor-state arbitration proceedings are secret, with no public participation. In so far as the proceedings start from a private business interest and address public laws and policies, the process actually extends the rules of arbitration from private disputes to conflicts that should be processed in the public sphere. Private corporate interests are being placed above national sovereignty and independence.

A 2005 study of cases brought before the NAFTA tribunal argues that of the 45 cases, some lacked information because the proceedings are secret.[17] Governments were forced to pay penalties to the tune of about US$35 million, in most cases for reasons that would not have been accepted under national law. The outstanding claims amounted to about US$28 billion, to which should be added the cost of lawyers, which has had to be borne by public funds, i.e. by taxpayers/citizens.

[12] (cont.) Linkages Between Trade and Environment" (October 2000), CEC, 2000, p. 15, http://www.cec.org/symposium/2000/ index_2000.cfm?varlan=english&id=1

[13] Text of a communication sent in January 2005 by the Trade Ministry to an email list of which the author is a member.

[14] See: Decree 2811 of 1974 and its regulatory decrees, MAVDT, 2002; Law 99 of 1993, Ministry of Environment, 1994; International treaties signed and ratified by Colombia, Environmental and Sectorial Policies, 1998.

[15] Ibid. (CAFTA Art. 10.3.1 and 11.6.1), Chapter 2: The structure and powers of the social state of law.

[16] Ibid. The impact of this logic on national political processes, carried through WTO Agreements like the GATS has also given rise to strong questions that are equally applicable to the FTA, since "Wherever there is domestic multipartisan consensus, it is conceivable that country-specific exceptions [for services] will endure. But wherever there are serious ideological divisions on contentious issues, country specific limitations that protect [certain domestic services] are likely to endure on until a single government committed to a market-oriented approach eliminates them, binding all future governments. In this way, GATS interferes with the normal ebb and flow of policy-making in a democratic society." Citizen's Network on Essential Services, "Public services at risk: GATS and the privatisation agenda", Social Watch Report 2003 (emphasis in the original). http://www.socialwatch.org/en/informeImpreso/pdfs/publicservice-satrisk2003_eng.pdf

[17] Mary Bottari and Lori Wallach, "NAFTA Chapter 11 Investor-State Disputes: Lessons for the Central America Free Trade Agreement", Public Citizen, October 2005, http://www.issuelab.com/browse/ browse_pub.php?pub_id=249

Among the characteristics of the complaints, and the trials, we can see:

(i) Loss of the sovereign immunity of states, i.e. any private investor can call for arbitration demanding payment of compensation by the mere fact of a state having enacted any law or policy that the investor believes impairs his right. When Canada, acting under the Basel Convention, issued a rule prohibiting the import of a toxic substance, its government was sued by a private investor who, the arbitration panel ruled, "suffered a loss of business opportunity", i.e. likely and future uncertainty. In another case, Canadian farmers claimed that a US measure to close the border because of mad cow disease could have undermined their investments in Canada because they could no longer sell their cattle.

(ii) The use of a broader notion of rights as property, related to the possibility of expropriation. In this regard, policies and laws issued by the state can violate this "right" and compensation can be claimed for "risk taking", "expected gains", and so on.

(iii) Another aspect is the greater scope given to expropriation, going beyond what is permitted by national legislation, including in the US. NAFTA's view is that the impact of a measure described as expropriation must be "substantial" and "significant". Under US law, an expropriation must affect 100% of a property's value.

(iv) There is no protection for environmental standards under the investor-state dispute mechanism. In many cases, even though environmental rules existed and were examined, the rulings finally give in to the investor's right.

The purported legal certainty being created through FTAs and BITs creates legal insecurity for other types of standards, those of human rights and the environment.

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