

Bilateral Free Trade and Investment Agreements¹ and the US Corporate Biotech Agenda

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1) Introduction

From Seattle to Doha, Cancun to Hong Kong, and all points in between, World Trade Organization (WTO) negotiations have failed to deliver as much as many of the corporations and governments which dominate the world's economy want. So the US and a number of other governments, urged on by their big business lobbies, have increasingly turned to bilateral free trade and investment agreements. These negotiations are much less visible and can easily slip beneath the radar of NGOs and popular movements that oppose the WTO. The business coalitions that are the biggest driving force behind bilateral free trade and investment negotiations are quite open about their self-interest, and eager to keep upping the stakes and locking governments into ever tougher standards to ensure expanded profit margins and monopoly control. Through bilateral agreements, they seek to stitch up from below what they have been unable to achieve – so far - at the WTO.

Bilateral free trade agreements are seen by the agricultural biotechnology industry as an important conduit for spreading genetically modified organisms (GMOs) around the world. US agribusiness corporations are looking to bilateral and regional trade agreements "to expand foreign understanding and acceptance of US regulations and standards, particularly with respect to agricultural biotechnology."² Meanwhile, the US Administration sees these agreements as useful political instruments to further its broader geopolitical interests.

Bilateral free trade and investment agreements are now being used as a tool of choice, not merely as a default option in the face of slow WTO talks. They allow precise targeting of specific countries and their policies, allowing the pursuit of customised deals by the US Administration and others, like the European Union (EU).

Expanding the liberalisation agenda through bilateral agreements is a stealthy step-by-step approach that could prepare a multiple launch pad

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for more comprehensive regional or multilateral agreements. It is also a divide-and-rule strategy, to break up the kinds of alliances formed between Southern governments in multilateral forums like the WTO to resist US, Japanese, and EU demands.

Bilateral agreements can serve as templates for broader negotiations. Once countries are locked into bilateral free trade and investment agreements, with even higher standards than the WTO, it will be harder to resist the introduction of new issues (like investment) and new standards in WTO talks. Governments of smaller, poorer countries are struggling to find the necessary resources to simultaneously negotiate several complex deals. Meanwhile the US has a battery of experienced trade negotiators to draw upon, who are far better resourced for the war of attrition that they wage against their Third World counterparts on a number of fronts. The powerful always have the luxury to shop around from forum to forum, searching for the best deals to maintain and expand their power.

Strengthening intellectual property rights (IPR) is a central plank of bilateral free trade agreement (FTA) negotiations for the US. The Trade Promotion Authority, under which the latest FTAs are being negotiated, explicitly states as a negotiating objective to promote intellectual property rules that "reflect a standard of protection similar to that found in United States law."ⁱⁱ US corporations want countries to commit to obligations that go even further than those in the WTO Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS). Such obligations are called "TRIPS-plus".

Meanwhile, the elimination of existing tariffs on agricultural goods in FTAs threatens small farmers' livelihoods, unable to compete with floods of cheaper, often subsidised imports, some of which may well contain GMOs.

Bilateral strategies to promote biotechnology and "TRIPS-plus" intellectual property rights regimes are carried out in a number of ways. These include: FTAs; unilateral trade policies; Bilateral Investment Treaties (BITs); Trade and Investment Framework Agreements (TIFAs – a prerequisite to full FTA negotiations with the US); bilateral intellectual property agreements; bilateral scientific and technical cooperation agreements; development cooperation and partnership agreements, and WTO accession agreements.

In the Asia-Pacific region, a US – Singapore FTA is now in force, and Washington is currently in FTA negotiations with Thailand. It has bilateral trade agreements (BTAs) with Laos and Vietnam. The US has also signed bilateral TIFAs with Afghanistan, Brunei, Indonesia, Malaysia, Mongolia, Pakistan, Philippines and Sri Lanka. There is also a US-Central Asia regional TIFA with Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. US-Taiwan

TIFA talks have currently stalled, while in the case of Bangladesh and Cambodia, TIFAs with the US have been negotiated but are yet to be signed.

US policy stipulates the establishment of a Trade and Investment Facilitation Agreement (TIFA) prior to negotiations on a BIT or FTA. The TIFAs are platforms for discussing freer trade arrangements, stepping stones towards a fuller free trade agreement. They establish joint councils to expand and liberalise trade and investment. As the US Trade Representative's office puts it: "TIFAs can help focus attention on trade issues which often include barriers that the US faces, and, therefore, can help expand US access".³

In 2004, Monsanto urged US trade negotiators to seek an end to Thailand's moratorium on large-scale field trials of GM crops either "in a parallel fashion with the [US-Thai] FTA negotiations or directly within the context of the negotiations." Monsanto says that "In the context of free trade ... it is imperative that the US work with Thailand to eliminate the current barriers to biotechnology-improved crops and establish a science-based regulatory system – including field trials of new crops – consistent with their international trade obligations in order to bring the benefits of these products to market in Thailand and to further promote consistent access to American agricultural technologies and products."⁴

The spread of GMOs and the aggressive expansion of the biotech industry directly threatens the food sovereignty of millions of farmers, rural and indigenous communities throughout the Asia-Pacific region and beyond. Agricultural biotechnology moves the power and control over food and decisions relating to food and farming away from farmers and into the hands of those who control the seeds. Increasingly this means transferring control of the seed supply into the monopoly control of large corporations, who also own and control other required agricultural inputs necessary for cultivating their seeds. Meanwhile farmers' rights to save, use, sell or exchange their own seeds are undermined by new exclusive monopoly rights which are supported by the intellectual property rights regime enshrined in free trade agreements and other international instruments. There are serious concerns about the impact of GM crops and seeds on the environment, animal and human health, genetic contamination and the destruction of biodiversity, especially in countries where agriculture remains such an important part of life. Not surprisingly, small farmers and indigenous communities are at the forefront of opposing GMOs and neoliberal economic agreements around the world.

Millions of rural and indigenous peoples have communally used and cultivated resources for subsistence rather than profit. These practices are seen as threats to be eliminated, and knowledge and

ⁱⁱ *Bipartisan Trade Promotion Authority Act 2002*. <http://www.tpa.gov>

resources to be privatised and controlled for profit by industry.

Communities' rights to make decisions about food, agriculture, the environment and biodiversity based on their culture and traditions are being eroded by corporate agribusiness and neoliberal economic policymaking at the national and international level. It is vital that movements and activists fighting for food sovereignty and against neoliberalism are aware of the links between the corporate biotech agenda and the current onslaught of bilateral trade and investment agreements, and the grave threats posed by these relatively low-key deals.

2) *The WTO TRIPS: Setting the Stage*

To get the full picture about the new threats posed by bilateral free trade and investment agreements, we need to go back a few years, to the Uruguay Round of the GATT (General Agreement on Tariffs and Trade) which established the WTO, which in turn came into being on January 1, 2005.

The WTO TRIPS Agreement really has nothing to do with "free trade". It is a protectionist tool that requires all WTO members to guarantee the protection of patents for at least 20 years. During the Uruguay Round it was packaged as an anti-counterfeiting proposal for companies that wanted to stop fake brand name clothing, music and videos, but it prohibits measures commonly used to facilitate technology transfer such as compulsory licensing. This is when a government gives a manufacturer a license to produce something for which another company holds a patent or exclusive rights, in return for the payment of a royalty. Its goal is to introduce generic competition and to drive prices down. TRIPS also covers copyrights and related performance rights, layouts of integrated circuits, "geographical origin" indicators (as for wines and gourmet cheeses), trademarks, and industrial designs. Moreover, it sets the stage for broadening patent rights for GMOs and other products of biotechnology.

The concept of intellectual property rights itself has been strongly challenged, especially by peasant farmers and indigenous peoples. It is based on a Western scientific kind of reductionism – the tendency to reduce all phenomena to their component parts. Maori researcher Aroha Te Pareake Mead says: "[E]ach level of reduction presents an increased scientific opportunity. She explains that intellectual property laws "do not regard existent indigenous knowledge as being an intellectual property and deserving of protection, rather they consider such knowledge as 'common' and define human intervention based on what non-indigenous peoples 'add' to what has existed for generations."⁵

The notion of intellectual property arose from interlocking Western doctrines of commerce, science and the law, which were used to justify and expand colonisation. The idea that knowledge can be

created, owned, bought or sold by a single inventor conflicts with many indigenous and non-Western views that knowledge is inextricably linked to culture, spirituality, identity, and place, and is created communally over time. Intellectual property rights commodify and privatise knowledge for exclusive exploitation and private profit.

The Intellectual Property Committee (a coalition of 13 large US corporations, including DuPont, Pfizer, IBM, General Motors, Rockwell, Bristol-Myers, and Merck) worked with US trade representatives on a proposal to standardise global intellectual property laws along US lines, and make them enforceable under the WTO. This followed failed attempts during the 1980s to negotiate tighter rules and a global patent regime on intellectual property at the Geneva-based World Intellectual Property Organization (WIPO). There, Southern governments had claimed that they needed the same rights to access knowledge and technology that benefited richer, industrialised countries when intellectual property laws were weak. The TRIPS agreement ultimately discarded such claims.

Ninety-six of the 111 members of the US delegation negotiating on intellectual property during the Uruguay Round came from the private sector. Diplomats in Geneva say that the pharmaceutical industry drafted much of TRIPS, while the US government was its lead advocate. At the start of the Uruguay Round, the US negotiator appointed to head the delegation on what was to become the WTO Agreement on Agriculture was Dan Amstutz, former vice-president of agribusiness giant Cargill, who recently headed the USAID-driven "reconstruction" of Iraq's agriculture.

Robert Shapiro was chair of Monsanto while also leading the President's Advisory Committee for Trade Policy and Negotiations. Mickey Kantor, US trade representative (USTR) for much of the Uruguay Round, subsequently became a Monsanto board member. Marcia Hale, a former assistant to President Clinton and director for intergovernmental affairs, was director of international government affairs for Monsanto. Clayton K. Yeutter, a former secretary of agriculture and US trade representative, who led the US team in negotiating NAFTA and helped launch the GATT Uruguay Round, joined the board of directors at Mycogen Corporation. Mycogen's majority owner is Dow AgroSciences, a wholly owned subsidiary of the Dow Chemical Company.⁶ The web of interconnections between industry and successive US administrations' trade negotiators ensures that private (often monopoly) interests will trump those of people and the planet.

TRIPS strengthens the hand of private companies in claiming monopoly rights and securing huge benefits from biopiracy. Private sector researchers, agribusiness and pharmaceutical corporations are appropriating indigenous communities' heritage, while those who developed and nurtured them

receive no benefits. TRIPS forces all WTO member countries to comply with a minimum standard set of laws protecting the technological monopoly of transnational corporations (mostly from industrialized countries), which own most patents, including patents on seeds and genetic sequences.

TRIPS goes hand in hand with WTO commitments to "liberalise" agricultural trade, further expanding agribusiness control over food systems and biodiversity. It was the first international instrument to require intellectual property rights protection over life-forms.

Patent Power

The US case law set the international precedent for patenting genetic material. In 1980, the US Supreme Court allowed the patenting of microorganisms. In 1985, life patenting was extended to include plants. In 1987, the US Patent Office ruled that all animals, including human embryos and fetuses, were also patentable. TRIPS and similar – or even more radical – provisions in other regional and bilateral free trade (and investment) agreements are being used to extend and implement US-style patent law worldwide, along with pressure exerted through agencies such as the US Agency for International Development (USAID). According to the US, countries failing to adopt such laws are engaging in "unfair trading practice" using "non-tariff trade barriers", and deserve trade sanctions. Early TRIPS targets were Japan and newly industrialising countries in East Asia that had copied US technology, especially in the automotive and computer industries. But the ongoing plunder of the South's biodiversity, without any compensation or benefits for the communities from which the "raw material" originated, is not considered unfair.

Before the Uruguay Round, most nations chose not to recognise patents on food, pharmaceuticals, or other products considered basic human needs. The policies of many governments were shaped by specific ethical and socio-economic considerations. TRIPS requires governments to allow microorganisms and microbiological processes (as well as biological processes) to be patented. It requires governments to ensure that plant varieties be protected by patents or a *sui generis* system (i.e. some other form of plant variety protection) or a combination of the two. Many governments have

had to enact domestic plant variety protection laws based on the model of UPOV (International Union for the Protection of New Varieties of Plants). While under TRIPS a country may exclude from patentability plants, animals, and "essential" biological processes for the production of plants and animals, the outcome of a pending WTO review of TRIPS could change that. The integrity of life is now deemed to be a mere barrier to trade and scientific progress.

'Developed' WTO member countries were required to apply TRIPS by January 1, 1995. 'Developing' member countries had until January 1, 2000. 'Least Developed' country (LDCs) members were originally set a January 2006 deadline for TRIPS implementation, but in November 2005, this was extended by the WTO TRIPS Council by 7.5 years to July 2013. (Nothing in this recent decision protects LDCs from bilateral pressure; this "concession" can be understood as a largely symbolic gesture designed to give an impression that WTO negotiations are responsive to concerns raised by LDC governments in the lead-up to the Hong Kong WTO Ministerial Meeting in December.)

Current intellectual property systems reward individual "inventors" for products, processes, or innovations relating to genetic material derived from plants, animals, or organisms – but not communal knowledge, such as that shared and handed down in indigenous or rural communities. When genetic material is processed in corporate labs it is named, called an "invention," and usually patented, bestowing exclusive marketing rights on its "owner". Broad patents are being granted for plant varieties, covering ownership of "traits" and "characteristics". Seed companies stand to benefit greatly from this monopoly, while innovations in the use of such plants or trees by small farmers and indigenous peoples remain unrecognised and unrewarded. Increasingly, they will be prohibited from using and saving their

World's Top 10 Seed Companies + 1

No.	Seeds	Country	Millions
1.	Monsanto + Seminis (acquired by Monsanto 03/05)	(US)	pro forma = \$2,803
2.	Dupont/Pioneer	(US)	\$2,600
3.	Syngenta	(Switzerland)	\$1,239
4.	Groupe Limagrain	(France)	\$1,044
5.	KWS AG	(Germany)	\$622
6.	Land O' Lakes	(US)	\$538
7.	Sakata	(Japan)	\$416
8.	Bayer Crop Science	(Germany)	\$387
9.	Taiki	(Japan)	\$366
10.	DLF-Trifolium	(Denmark)	\$320
11.	Delta & Pine Land	(US)	\$315

Source: ETC Group¹³: Based on 2004 seed sales (US) millions

own seed and forced to buy them from companies like Monsanto, along with other agricultural inputs.

GRAIN (www.grain.org) points out that WIPO has played a key role in implementing TRIPS standards in the South. This has included drafting and recommending "TRIPS-plus" legislation. West African countries were advised to implement TRIPS well ahead of their extended compliance schedule as Least Developed Countries (LDCs), and advised against using the rather limited flexibilities TRIPS allows in compulsory licensing or parallel imports.⁷ For example, as a 2003 Médecins Sans Frontières report notes, WIPO did not inform Cambodia's government that, as an LDC, it was not obliged to grant patents on pharmaceuticals before 2016 and insisted that it adopt a 2007 deadline as part of its WTO accession process.⁸ GRAIN warns that WIPO is another arena for the fight over intellectual property rights; a new international patent treaty, the Substantive Patent Law Treaty, is currently being negotiated.⁹

A US proposal to establish a WTO Working Party on Biotechnology, and for the 1999 Seattle Ministerial declaration to accept the safety of GM products and recognise the future viability of GMOs was opposed by many Southern delegations and was not successful.¹⁰

Meanwhile, consolidation of the biotech industry has continued, creating mega-corporations with global tentacles. In 1996, Robert Fraley, then president of Monsanto's Ceregen Division, explained to the US magazine *Farm Journal* the company's strategy of taking over scores of plant-breeding institutes and smaller biotech firms. "What you are seeing is not just a consolidation of seed companies, it's really a consolidation of the entire food chain," he said.¹¹ According to the ETC Group, Monsanto's seeds and biotech traits accounted for 88% of the total area planted in genetically modified seeds worldwide in 2004.¹²

Owning a lifeform patent has a far greater reach than owning an individual sheep or tree. US researchers Hope Shand and Martin Teitel say that the distinction "can be likened to the difference between owning a lake and owning the chemical formula for water. A patent holder for water's chemical formula would have the legal right not only to decide who could

have access to a particular lake, but to water anywhere, and to the use of the chemical formula for any purpose."¹⁴

TRIPS and similar, even more radical, IPR provisions in bilateral and regional free trade agreements are all tools to expand, intensify, and lock in a regime of monopoly control over life itself. Since intellectual property rights are often included in the definition of "investment" in bilateral investment agreements, any perceived failure to comply with corporate demands for patent protection on genetic material in a signatory country could lead to an investor-state dispute. This is where a company can bring a claim against a government (in effect a corporate lawsuit) before a special dispute settlement body that meets in virtual secrecy but has enforceable powers. Threatened with such claims, governments can be pressured to change, drop or scrap laws or regulations that might be targeted by litigious corporations with profit and control their driving interest. We will return to this issue in the section on investment.

3) From TRIPS to TRIPS-Plus

TRIPS-plus provisions strengthen patent rules and facilitate the patentability of lifeforms and biotechnological inventions. TRIPS-plus goes even further than TRIPS towards the commodification and privatisation of food, agriculture and biodiversity, and the imposition of GMOs on communities throughout the world. Typically, TRIPS-plus provisions severely limit the grounds for allowing the use of compulsory licensing of medicines, and effectively extend 20-year drug patent monopolies for an additional five years, threatening access to

US Bilateral agreements imposing TRIPS-plus intellectual property rights on biodiversity in Asian developing countries. *Source: GRAIN¹⁵*

US-Cambodia IPR Agreement 1996: Cambodia must join UPOV

US-Korea IPR Agreement 1986: Korea must join Budapest Treaty

US-Laos BTA 2003: Laos must join UPOV (1978 or 1991 Act) "without delay". Laos must also provide for patents for inventions in all fields of technology, without exclusion for plants or animals.

US-Mongolia Agreement on Trade Relations 1991: No exclusions for plants or animals from patent law permitted.

US-Singapore FTA 2003: Singapore must join UPOV (1991 Act) within six months of entry into force or by end 2003, whichever sooner. Singapore must also allow patents on all forms of plants and animals ("each Party may exclude inventions from patentability only as defined in Articles 27.2 and 27.3 (a) of the TRIPS Agreement").

US-Sri Lanka IPR Agreement 1991: No exclusions for plants and animals from patent law permitted.

US-Vietnam BTA 2000: Vietnam must implement and make best effort to join UPOV. Viet Nam must also provide patent protection on all forms of plants and animals that are not varieties, as well as on inventions that encompass more than one variety.

affordable medicines, including HIV/AIDS drugs. Moreover, this "TRIPS-plus" approach does not allow for plants and animals to be excluded from the patent laws of signatory countries. While TRIPS sets a minimum standard for intellectual property protection, these bilateral agreements are imposing an industry-driven agenda through the backdoor, locking countries into even more stringent intellectual property standards.

For example, Article 16.7 on Patents of the US-Singapore FTA reads as follows:

"Each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application. For purposes of this Article, a party may treat the terms "inventive step" and "capable of industrial application" as being synonymous with the terms "non-obvious" and "useful" respectively. Each Party may exclude inventions from patentability only as defined in Articles 27.2 and 27.3 (a) of the TRIPS Agreement."¹⁶

TRIPS provides that members can establish a *sui generis* system of protection of plant varieties. In FTAs with the US however, the developing country is required to accede to UPOV, with many mentioning UPOV 1991 (the latest version of the treaty that has especially "high" standards of plant breeders' rights that severely restricts the farmers' rights to save and re-use seeds). UPOV is an international agreement which sets rules for patent-like monopoly rights over crop varieties. It is highly biased toward industrial agriculture. Two-thirds of UPOV's members are Northern countries. Thai intellectual property expert and law professor Jakkrit Kuanpoth notes that joining UPOV restricts government's options for protecting plant varieties and would prohibit the inclusion of provisions requiring applicants to prove that a plant variety is safe and does not cause any harmful effects to the environment.¹⁷

Jakkrit Kuanpoth also observes that US bilateral FTAs demand effective and adequate protection for inventions in all technological fields without any consideration of possible negative implications. "Under FTAs, developing countries are obligated to patent the by-products of genetic engineering and other biotechnological methods without linking the patentability issues to ethical, social, economic and environmental considerations."¹⁸

FTA intellectual property chapters usually also require countries to become members of WIPO treaties, and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure¹⁹.

US agribusiness and pharmaceutical corporations are both the scripters and cheerleaders of TRIPS-plus provisions. The Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3), in its April 2004 report on

the Intellectual Property Provisions of the US-Morocco FTA, states that it "welcomes the pledge made by Morocco to provide patent protection for plants and animals and the confirmation made by both Parties that patents shall be available for any new uses or methods of using a known product for treating humans and animals. This will make available patent protection for transgenic plants and animals that are new, involve an inventive step and are capable of industrial application. IFAC-3 notes that this is a significant improvement over the commitments made by Chile and CAFTA in their FTAs and urges US negotiators to insist in all future FTAs that patent protection be made available to both plants and animals."²⁰ It is very clear that this is a global, not merely a case-by-case strategy for US industry.

IFAC-3 is a veritable powerhouse of US corporate power. Its members include Pfizer, Merck, Eli Lilly, BIO (The Biotechnology Industry Organization), PhRMA (Pharmaceutical Research and Manufacturers of America – a coalition of leading US pharmaceutical research and biotech companies), Time Warner, Anheuser-Busch, and the private sector coalition for US copyright-based industries, the International Intellectual Property Alliance (IIPA).²¹

4) US corporate agendas and bilaterals

The US is using bilateral and subregional free trade and investment agreements to set tougher standards for future trade and investment negotiations. It wants maximum concessions from developing countries, because this will make it harder for governments to oppose US demands at the WTO. Once a number of countries are already committed to tougher trade and investment rules through a bilateral agreement, it will be more difficult to mount the kind of concerted opposition to US proposals which Brazil helped to lead at the WTO Ministerial in September 2003 in Cancun, Mexico. What impact will these bilateral deals have on opposition to the introduction of the "new issues" such as investment at the WTO, or critical positions taken with regard to the implementation and review of the TRIPS agreement? And what are governments being offered in terms of trade-offs for adopting US-style patent laws, patents on life and genetically-engineered (GE) imports– more empty promises of better access to the US market for exports, and cuts to subsidies to US agribusiness? After all, that is the kind of horse-trading and bullying that has characterised US tactics in the international trade arena for so long.

In a letter of support for the US-Chile FTA, the International Intellectual Property Alliance states that the agreement "builds on the standards currently in force in the WTO TRIPS Agreement and in NAFTA [North American Free Trade Agreement], with the goal to update and clarify those standards to take into account not only the experiences gained since those agreements entered into force, but also the

significant and rapid technological and legal developments that have occurred since that time."²²

The report of the US Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-15) on the US-Bahrain FTA states that: "Our goal in the negotiation of an FTA is to set a new baseline for all future FTAs, including the FTAA. This baseline is continually reflected in the model FTA agreements, which are constantly changing based on what we learn through negotiating each of the FTAs."²³

Industry places extremely high demands on BITs and FTAs. Corporations are demanding full national treatment²⁴ without exception in the intellectual property field²⁵, and they are pushing for extreme patenting requirements. As already mentioned above, the US-Morocco FTA already provides for patent protection for animals as well as plants and the US-Singapore FTA requires patenting of both transgenic plants and animals.

As the Monsanto/Thailand FTA case illustrates (see below), trade associations are correct in asserting that "free trade agreements can serve as an important vehicle for advancing US global interests in the field of agricultural biotechnology."²⁶

The Secretariat of the US-Thailand FTA Business Coalition comprises the US-ASEAN Business Council, representing US corporations with interests in ASEAN, and National Association of Manufacturers (NAM), the USA's largest industrial trade lobby group. NAM boasts: "Our voice is not compromised by non-industry interests."²⁷

FedEx, General Electric Company, New York Life, Time Warner and Unocal are US-Thailand FTA

Business Coalition corporate chairs. Steering Committee members include: AIG, Cargill, Caterpillar, Citigroup, Corn Refiners Association, CSI, Dow Chemical, Ford, National Pork Producers Council, PhRMA, PricewaterhouseCoopers, SIA, UPS, and the US Chamber of Commerce.²⁸ Missouri Republican Senator Christopher "Kit" Bond, who is a fervent advocate of biotechnology and whose election campaign was heavily supported by Monsanto, is a key US lobbyist for the US-Thai FTA.²⁹

The geopolitics of bilateral vs multilateral agreements

Bilateral negotiations are being used strategically to advance not only US corporate interests, but also the US administration's broader foreign policy, "security" and geopolitical goals. While Iraq and Afghanistan are being bombed and occupied into 'liberty' and free market economics, US allies in the war on Iraq and the 'war on terror' like Australia and Thailand have been 'rewarded' with promises of enhanced access to US markets through comprehensive bilateral free trade and investment agreements. The US uses these agreements to signal the policies that it expects from other countries economically, militarily and politically. As former US Trade Representative Robert Zoellick stated just after the September 11, 2001 attacks: "America's light and might emanate from our political, military and economic vitality. Our counteroffensive must advance US leadership across all these fronts."³³

Patrick Cronin, senior vice president of Washington-based Center for Strategic and

US Industry's dirty hands, FTAs and IPR

"In the case of agreements that relate to intellectual property the technical detail of these agreements is monitored by a third tier committee, the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC). The membership of IFAC is made up of 20 members drawn from Industry Sector Advisory Committees and another 20 drawn from the private sector areas who provide the committee with technical expertise in intellectual property.... Under its charter IFAC is to provide detailed technical advice on trade

agreements negotiated by the USTR.³⁰ In the case of the US-Singapore FTA, IFAC, in the words of its report, "advised U.S. negotiators on, and reviewed draft texts, of the U.S.-Singapore FTA intellectual property chapter".³¹ Importantly, IFAC reviewed the US-Singapore FTA in the context of other multilateral and bilateral agreements and initiatives that the US had achieved. In other words, IFAC is a committee that gets its hands dirty by reviewing and drafting specific agreements. It does this technical work across all US trade initiatives in intellectual property, whether bilateral, regional and multilateral. It is thus able to co-ordinate at a technical level the work it does

across these different fora, thereby ensuring that US trade negotiating initiatives push intellectual property standards in the direction that US industry would like. The technical expertise on IFAC, as well as the expertise available to it from the corporate legal divisions of its members means that, for example, it can evaluate a country's intellectual property standards in detail when that country seeks WTO accession and it can provide detailed assessments of the standards that USTR negotiators must bring home in a negotiation." Peter Drahos, Regulatory Institutions Network, Research School of Social Sciences, Australian National University, Canberra, Australia.³²

International Studies told the Daily Yomiuri: "With the setback to WTO reform at Cancun, the [Bush] administration is now focused like a laser beam on regional and especially bilateral trade accords."³⁴ Zoellick divided the WTO members into "can-do" and "won't-do"³⁵ countries — those who are serious about trade liberalisation and those who are not. Right after Cancun, he abrasively announced that the US would push ahead with free trade and investment agreements with "can-do" countries on a subregional or bilateral basis. Earlier that year Zoellick had explained that, "By pursuing multiple free trade initiatives, the US is creating a 'competition for liberalisation' that provides leverage for openness in all negotiations, establishes models of success that can be used on many fronts, and develops a fresh political dynamic that puts free trade on the offensive."³⁶

Through its bilateral agreements, the US secures commitments that overcome the deficiencies – from the point of view of its corporations – of WTO's TRIPS agreement. The EU is right behind. As Pascal Lamy, the EU's Trade Commissioner until late 2004 (now Director-General of the WTO), put it, "We always use bilateral free trade agreements to move things beyond WTO standards. By definition, a bilateral trade agreement is 'WTO plus'."³⁷ In this way, as Peter Drahos argues, a "global ratchet for IP" has been set up, consisting of "waves of bilaterals (beginning in the 1980s) followed by occasional multilateral standard setting (such as TRIPS or the WIPO Copyright Treaty)".³⁸

USAID a handmaiden to bilaterals and biotech agenda

USAID is a key promoter of biotechnology in the Third World and its work goes hand in hand with both US corporate agendas and Washington's international trade priorities. It offers "technical assistance" to countries engaged in bilateral free trade deals with the US. For example, legislative changes to Vietnam's IPR laws have been made under the USAID-funded STAR-VIETNAM technical assistance project which is supporting implementation of the Bilateral Trade Agreement with the US.³⁹

The USAID website states that the "principal beneficiary of America's foreign assistance programs has always been the United States. Close to 80% of the USAID contracts and grants go directly to American firms. Foreign assistance programs have helped create major markets for agricultural goods, created new markets for American industrial exports and meant hundreds of thousands of jobs for Americans."⁴⁰ So much for "foreign assistance"!

USAID functions to facilitate the introduction of GM crops in a number of countries, working with local officials and influencing the regulatory climate to make for corporate-friendly rules that US agribusiness needs to create global markets for GM crops, and building relationships with biosafety

officials. It also supports public relations campaigns to promote propaganda about the benefits of GM crops.

In a recent letter to the journal *Issues in Science and Technology Online*, Andrew Natsios, USAID Administrator, wrote: "USAID has already renewed its focus on agriculture programs, and ... biotechnology is fully a part of this focus. Our renewed emphasis includes a more than fourfold increase in support for biotechnology to contribute to improving agricultural productivity. USAID currently supports bilateral biotechnology programs with more than a dozen countries Tangible experience with biotechnology among more developing countries is a prerequisite to achieving [the] goals of global scientific regulatory standards and open markets. We will not succeed until developing countries have more at stake than acceptance of U.S. and European products and have the scientific expertise to implement technical regulations effectively."⁴¹

Investment

FTAs and BITs contain broad definitions of investment, which throw the door wide open for disgruntled corporations based in one signatory country to take a case against the other signatory government to a dispute tribunal. Perhaps most notoriously, such disputes have become one of the most controversial features of NAFTA, since coming into force in 1994. Chapter 11, NAFTA's powerful investment chapter provides foreign corporations with rights to sue governments for enacting public policies or laws which they claim to affect their profitability. Too bad if they protect the environment, health and safety, support local small businesses or jobs. All three NAFTA members have found themselves targeted by corporations under these provisions. To cite one example, US chemical corporation, Ethyl Corp, used NAFTA to sue Ottawa over a 1997 federal ban on imports of a fuel additive, MMT, because it was toxic and hazardous to public health. Canada backed down, removed the ban, paid the corporation US \$13 million (it had demanded \$250 million) and apologised. Meanwhile, several governments in Latin America, Asia, Europe, the Middle East and Africa have had investor-state dispute proceedings launched against them under bilateral investment agreements which hardly anybody knew about. The investment provisions of the latest wave of free trade and investment agreements promoted by the US go even further than the NAFTA model.

In the US-Morocco FTA, "investment" is defined as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk".⁴² Article 15.1 (13) of the US-Singapore FTA

text defines investment as: every asset owned or controlled, directly or indirectly, by an investor, that has the characteristics of an investment. Forms that an investment may take include: a) an enterprise; b) shares, stock and other forms of equity participation in an enterprise; c) bonds, debentures, other debt instruments and loans; d) futures, options and other derivatives; e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; f) intellectual property rights; g) licenses, authorizations, permits and similar rights conferred pursuant to applicable domestic law, and h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.⁴³

Thus far, investor-state disputes are often related to conflicts after the privatisation of state-owned enterprises and public utilities such as water. But with the inclusion of intellectual property in the sweeping definitions of "investment" in BITs, and its explicit application to biodiversity, it may not be long before an investor launches a dispute around IPR issues, be it a pharmaceutical corporation, an agrochemical firm, or a biotech seed company. National measures to prevent biopiracy or to promote public health could be open to potential dispute. For example, compulsory licenses on drugs or the enforcement of disclosure of origin rules on plant patent holders could become grounds for legal action by investors under these treaties, even if the host country's law is WTO-compliant.

In an August 2004 paper published by GRAIN, Carlos Correa, law professor at University of Buenos Aires, warns that grey areas in bilateral investment agreements leave "room for investment-related disputes to induce changes in national IPR legislation of developing countries, even if that legislation is TRIPS-compliant".⁴⁴ Bilateral investment treaties or the investment chapters in the US model bilateral FTAs which are being imposed on countries give corporations potentially far greater powers than those afforded them in IPR sections of trade agreements. Correa believes that under the broad definition of 'investment' contained in these agreements, biological materials collected under access permits or contracts (both forms of "investment" for the purposes of such agreements) may be viewed as the "property" of the collector, who could claim investor status and therefore protection as an investor in the event of a government requesting the return of samples. He also suggests that when a government declares a GE moratorium or prohibits the sale and cultivation of transgenic seeds, forcing the cancellation of a license to commercialise a transgenic variety, a company could claim loss of potential income and launch an investor-state dispute as an investor.

In a speech to the Inter-American Development Bank in October 2000, US lawyer William Rogers argued that investment treaties are "an open

invitation to unhappy investors, tempted to complain that a financial or business failure was due to improper regulation, misguided macroeconomic policy, or discriminatory treatment by the host government and delighted by the opportunity to threaten the national government with a tedious expensive arbitration."⁴⁵ The mere existence of such agreements likely has a chilling effect on governments as they consider policy amendments or new legislation.

Attacking biosafety – multilaterally and bilaterally

Some countries, especially the major biotech producers, say that labeling should only be required for biotech foods that are substantially different, arguing that any additional labelling requirements for foods that are composed of, contain, or are derived from GMOs were unnecessary and "substantially equivalent".

But the production of food using GMOs is fundamentally different to the production of non-GE food products, and could result in altered product performance. As with the WTO, US bilateral free trade strategy promotes a cavalier approach to serious human health and safety concerns. These trade rules do not allow importing countries to adopt a precautionary approach to the importing of GMOs.

Witoon Liamchamroon of the Thai NGO Biothai (www.biothai.org) notes how Thailand's GMO Labeling Regulation, which came into force in May 2003, allows for a threshold of 5% of GM material, not 1% or more as proposed by Thai consumer organisations, after official fears of US retaliation.⁴⁶ Even here, only the three main ingredients are covered, which means that even if the fourth ingredient is 100% GE, it will escape labeling.⁴⁷ Yet such weak labeling regulations could still be viewed as a barrier to free trade by the US industrial-political complex.

In complaints brought under the Agreement on Sanitary and Phytosanitary Measures (SPS – concerned with the protection of human, plant and animal life and health) – a business-oriented agreement aimed at deregulation – the WTO could compel a nation to choose between lowering its health standards for humans, animals, or plants, compensating another government whose exports are limited or blocked by the stricter standard; or permitting that country to impose additional trade restrictions on exports from the nation with the higher standard. Along with the WTO Technical Barriers to Trade (TBT) Agreement (which covers technical regulations, product standards, and testing and certification procedures), SPS opens the way for attacks on national measures that address consumer concerns, such as labelling products containing GMOs. Pressure for downward harmonisation is built into the agreement. Reliance on SPS or TBT by one

country is subject to the challenge that it is merely disguised protectionism.

SPS is at the heart of the high-profile WTO dispute which the US, Canada, and Argentina are taking against the European Union's de facto moratorium (and associated bans by EU member states) on GM food and feed. The US argues that EU actions are an unjustified regulation to thwart trade in "safe, wholesome, and nutritious products,"⁴⁸ in other words, untested GE food.

The preliminary judgment by a World Trade Organization panel concluded that the European Union had an effective ban on biotech foods for six years from 1998. The WTO has ruled that the EU broke international trade rules by stopping imports of genetically modified foods.

The report sided with a legal complaint brought by the United States, Canada and Argentina over an EU moratorium on approval of new biotech foods. The panel ruled that individual bans in six EU member states - Austria, France, Germany, Greece, Italy and Luxembourg violated international trade rules.⁴⁹

Free trade agreements – multilateral or bilateral ones - pose a threat to labelling laws on GM foods. They threaten the rights of countries to determine their own domestic regulatory approach. They threaten the rights of consumers to know what is in our food. They threaten the livelihoods and futures of farmers who are struggling for the right to food sovereignty.

The biotech industry and the US administration argue that GMOs are like their non-GM counterparts. There is a conflict over whether GM foods are "like products" to non-GM foods for the purposes of Article 2(1) of the TBT and Article III (4) of GATT 1994. SPS measures must have a scientific basis, based on "sufficient scientific evidence" and risk assessment, and be no more trade restrictive than necessary to achieve an appropriate level of sanitary and phytosanitary protection. Under TBT, there must be non-discriminatory treatment of like products, measures must be the least trade-restrictive, and they must fulfil a legitimate objective.

TBT is supposed to ensure that standards and procedures do not create "unnecessary obstacles" to trade. It commits WTO members to using appropriate international standards, largely set by industry, in their technical regulations. Under this agreement, governments must notify the WTO Secretariat of any proposed new measures, including information on the objectives and rationales behind the measures and on the products covered. This opens them up for comment and amendment by other WTO member governments. The US administration and industry have vigorously opposed the use of the "precautionary principle" which provides a more cautious basis for some governments' positions and policies, including the long-standing EU moratorium on approving new GE crop varieties. This principle

argues that precautionary measures should be taken when an activity raises a threat of harm to human health or the environment, even if some cause and effect relationships are not yet scientifically established. It also places the burden of proof on the proponent of the activity to prove its lack of harmful effect.

Under the US-Australia FTA, parties reaffirm their commitments to obligations under the WTO SPS Agreement, and set up an SPS committee. The US-Australia FTA SPS chapter also established a standing technical working group on animal and plant health, as well as an ad hoc group on SPS issues. The US-Chile FTA also set up an SPS committee on technical/regulatory requirements and procedures.⁵⁰ In its FTA negotiations with Bahrain, the US sought to have Bahrain reaffirm its WTO TBT commitments, including those relating to labelling requirements on US food and agricultural products produced through biotechnology, and help ensure that Bahrain's technical regulations, standards, and conformity assessment procedures do not serve as an unnecessary impediment to trade.⁵¹

So the FTAs provide another lever with which to pressure governments to maintain GMO-friendly regulations on issues like labelling even if it is couched in the seemingly innocuous language of getting governments to reaffirm commitments to TBT and SPS. Moreover, the US biotech industry views these two WTO agreements as the floor for future standards, not the final end goal, to be tightened and refined through FTAs and other mechanisms, in order to impose closer regulatory alignment with US standards.

Will Sri Lanka's recent moves on biosafety fall foul of US economic and corporate pressure? In November 2005, Sri Lanka's cabinet approved a national biosafety framework, established by the Ministry of Environment and Natural Resources, to regulate and control the importation of genetically modified organisms and food, as well as genetically modified feed and processed products into Sri Lanka.⁵² It is based on the precautionary principle, "guided by the principle that if there is any perceived threat of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation and health impacts. It thus implies shifting the burden of proof, requiring that modern biotechnology applications used in Sri Lanka are first proved to be harmless, instead of waiting to take action once they have been proven harmful."⁵³

Monsanto and the US-Thailand FTA

Under pressure from farmers and consumer groups, the Thai government banned the import of genetically modified (GM) seeds for commercial planting in 1999. In April 2001 it also called a halt to GM field trials, including Monsanto's ongoing

Caught between a rock and a hard place: Egypt, the promise of a US FTA, the EU and GMOs

Biotech, bilateral FTAs, geopolitics and US power came into play in the Middle East over Egypt, two years ago. Zoellick waxed lyrical about the country in May 2003, saying "Egypt is obviously the heart of the Arab world...It won't be easy but we'll use the incentive of a free trade

agreement to try to promote their reforms."⁵⁹ Weeks later - after Egypt's withdrawal from the US-led WTO complaint against the EU de facto moratorium on genetically modified organisms - Zoellick proclaimed that the US would not be negotiating an FTA with an Egypt that "had some work to do".⁶⁰ While denying that Egypt's WTO/GMO about-face was the reason, the US clearly made an example of the largest country in the region - a

warning to others not to displease Washington. Ahmed Ghoneim, a University of Cairo academic has warned that an "ant" like Egypt should try to avoid a US/EU "struggle between elephants from the outset. Both elephants got mad."⁶¹ An Egyptian official told a reporter that with the EU constituting 40% of Egypt's trade, Egypt could not go to "war" with it over the GMO ban.⁶²

cotton and corn experiments. But the US wasn't going to let the country off the hook that easily. Monsanto sees Thailand as "an important window to serve the growing Southeast Asian market for both conventional and agricultural biotechnology crops."⁵⁴ In November 2003, Monsanto announced that it wanted to make Thailand its regional base for GM Roundup-Ready corn and Bt corn by 2006, urging the government to lift its ban. Zoellick was immediately on the case and called on Thailand to eliminate "unjustified trade restrictions that affect new US technologies."⁵⁵

Monsanto urged US trade negotiators to seek an end to Thailand's moratorium on large-scale field trials of GM crops either "in a parallel fashion with the FTA negotiations or directly within the context of the negotiations." Monsanto says that "In the context of free trade ... it is imperative that the US work with Thailand to eliminate the current barriers to biotechnology-improved crops and establish a science-based regulatory system - including field trials of new crops - consistent with their international trade obligations in order to bring the benefits of these products to market in Thailand and to further promote consistent access to American agricultural technologies and products."⁵⁶

The pressure had an effect. Even before an FTA had been signed, the Thai Prime Minister Thaksin Shinawatra announced his intention to reverse the moratorium.⁵⁷ While he and his Cabinet were forced to uphold the moratorium after Thai farmers, Buddhist organisations, consumers and anti-GMO activists protested, US and Monsanto officials still have the moratorium in their sights in the context of the FTA talks.

Attempts to patent Thailand's fragrant jasmine rice met outrage and stiff opposition from farmers and others concerned at the apparent ease with which Thai biodiversity and traditional knowledge is being appropriated by others.⁵⁸ The US-Thai FTA would require Thailand to allow patents on animals and plants, further facilitating biopiracy by US companies and researchers.

Bilateral Biotech and Biodiversity Lessons from Latin America

a) Mexico GE corn contamination

Since NAFTA (between USA, Canada and Mexico) took effect in January 1994, the opening up of the agricultural sector has seen the dumping of millions of tons of subsidised corporate US corn and other agricultural imports in Mexico, displacing millions of farmers and causing an increase in rural poverty. NAFTA's agriculture chapter eliminated all tariffs on agricultural goods either immediately or in a 5, 10, or 15-year period. It established a duty-free quota system or a protection period for corn with a 15-year phase out. Every year since the implementation of NAFTA (with the exception of 1995) exports from the US have gone beyond the quota and tariffs were not applied.

Mexico maintained a moratorium on growing GM corn between 1998 and 2002, but thanks to NAFTA, there has been a very serious genetic contamination of corn. 30-40% of the corn coming from US to Mexico was found to be genetically modified. This constitutes serious contamination of the world's traditional homeland of corn, where corn is not only a staple food, but a way of life, and where diverse indigenous varieties of corn still grow. In 1994, 2.5 million tons of US corn entered Mexico. In 2001, 6.2 million tons was imported.

As S'ra DeSantis of the Biotechnology Project, Institute for Social Ecology (USA) puts it: "The apparent strategy of these corporations is to spread genetic contamination throughout the world through future free trade agreements, which force poorer countries to accept imports of genetically modified seeds and products. One of the main goals of these free trade agreements is to secure dumping grounds for US genetically engineered products, since numerous countries throughout the world continue to close their doors to GE imports."⁶³

b) Ecuador's Biodiversity Bill

United States Embassy representatives in Quito stated that if Ecuador wants to negotiate a bilateral free trade agreement with the US, it must agree to change a number of laws about the environment, biodiversity, intellectual property, and labour. The US-Ecuador FTA has been strongly opposed by social movements in Ecuador, with many thousands of people mobilising against it throughout the country.

USAID and the US Embassy, together with The Nature Conservancy (TNC), one of the biggest, wealthiest environmental NGOs in the USA (with strong links and financial support from the US administration and large corporations such as Chevron Texaco) and some of their Ecuadorian NGO partners or counterparts have worked together to pressure the Minister of the Environment and congress people to get them to adopt a pro-GMO, pro-biopiracy Biodiversity Bill. This Bill would allow privatisation of protected areas, disregarding collective rights of indigenous communities, enabling transgenic organisms to enter Ecuador's agricultural system and live organisms to be patented. Under this legislation TNC plans to take on the planning, coordination and control of protected areas, and to have access to concessions or delegation of goods and services in protected areas.⁶⁴

Resisting GMOs and the bilaterals agenda

The stakes are very high in the fight against bilateral free trade and investment agreements. But movements in a number of countries – often led by indigenous peoples and peasant farmers, have mobilised to challenge governments for entering into these behind-closed-door negotiations. In Korea and Thailand, there have already been strong fightbacks against these bilateral deals.⁶⁵ These agreements are being imposed on smaller, poorer and less powerful countries by governments such as the US, EU and Japan, rather than being negotiated between equals.

To overlook the global explosion of bilateral trade and investment agreements is to risk creating an achilles heel for movements against neoliberal globalisation. Lower-key bilateral negotiations have the advantage of attracting less publicity and attention conducive to creating international mobilisations that have been conducted against multilateral trade deals.

In tandem with our struggles against the WTO, we need to rapidly develop strategies that confront the growing web of bilateral agreements. We need to share our analysis and experiences of struggles against FTAs, not only within the Asia-Pacific region, but worldwide. What is imposed in Latin America now could be used as a model in Asia six months later.

La Via Campesina, the international peasant and small farmer movement has taken a clear position against GMOs and bilateral free trade agreements: "We totally oppose GMOs and we will fight it everywhere. We once again express our total opposition to genetically modified crops. We denounce and reject the recent FAO report "Biotechnology, addressing the needs of the poor?". This report only seeks to legitimise the imposition of genetically modified crops and the use of the technology of death — "terminator" or sterile seeds — with the single goal of ensuring the profits of transnational companies in the agricultural sector.

We reaffirm our complete opposition of neoliberalism and the policies of the WTO, IMF and World Bank. We totally reject their most important recent instrument - bilateral free trade agreements." Declaration of the Via Campesina's Fourth International Conference June 19th 2004, Itaci, São Paulo, Brazil.⁶⁶

Appendices

Appendix I

May 21, 2003 *

The Honorable Robert Zoellick
U.S. Trade Representative
Executive Office of the President
Washington, D.C. 20508

Dear Mr. Ambassador:

The undersigned organizations believe bilateral and regional trade agreements offer excellent opportunities to expand foreign understanding and acceptance of U.S. regulations and standards, particularly with respect to agricultural biotechnology. We urge you to take full advantage of these opportunities and seek inclusion of language that commits countries that are parties to Free Trade Agreements (FTAs) and Trade and Investment Framework Agreements (TIFAs) with the United States to the following key principles:

1. Decisions regarding approval of products of agricultural biotechnology must be based on objective risk analyses, not political pressures, and must be consistent with the requirements in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS);
2. Government mandated product labeling regimes for health and safety purposes must be science-based and consistent with the WTO SPS Agreement. Other product labeling, for informational or marketing purposes, must be truthful and not misleading to consumers, based on product attributes rather than methods of production, no more trade restrictive than necessary, and consistent with the WTO Agreement on Technical Barriers to Trade (TBT); and
3. Patents must be made available for products of agricultural biotechnology and such patents must be protected, and enforceable, according to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.

We believe that these basic principles should be advanced in all bilateral and regional free trade negotiations. We recognize that the specific text to be included in such trade agreements will need to be developed. We are prepared to work closely with U.S. negotiators to assist in that process, as well as in the negotiations themselves.

Free trade agreements can serve as an important vehicle for advancing U.S. global interests in the field of agricultural biotechnology. Such agreements would expand the number of countries that recognize the importance of adopting domestic regulations based on science and WTO rules. They would also help to promote a more positive dialogue in the various international forums that deal with these issues including Codex Alimentarius.

Countries that have adopted clear science-based regulatory systems for approvals and labeling of biotech products are generally those with the highest level of consumer acceptance of the technology. We believe that raising these issues with foreign governments in the context of free trade negotiations will expand the number of countries adopting such systems, and we urge you to make this a priority in all ongoing and forthcoming FTAs/TIFAs.

Sincerely,

American Farm Bureau Federation
American Meat Institute
American Soybean Association
Corn Refiners Association
Grocery Manufacturers Association
National Corn Growers Association
National Turkey Federation
USA Rice Federation
Wheat Export Trade Education Committee

* Retrieved at <http://www.wetec.org/FTABiotechletter.ivnu>

Appendix II

MONSANTO COMPANY **
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April 8, 2004

Ms. Gloria Blue
Office of the U.S. Trade Representative
600 17th Street NW
Washington, DC 20

By Electronic Submission: FR0415@ustr.gov

Subject: United States - Thailand Free Trade Agreement Written Comments

Monsanto Company appreciates this opportunity to submit written comments pertaining to the initiation of negotiations with Thailand on a Free Trade Agreement (FTA) as notified in the Federal Register (69 ER 9419, February 27, 2004). Monsanto supports the upcoming trade negotiations with Thailand, but believes that current barriers to agricultural biotechnology must be addressed.

Monsanto is a leading international provider of agricultural products and solutions. We use unparalleled innovation in plant biotechnology, genomics and breeding to improve productivity and to reduce the costs of farming. We produce leading seed brands, including DEKALB, and we develop biotechnology traits that integrate insect control and weed control into the seed itself. We make Roundup, the world's best-selling herbicide, which can be combined with our seeds and traits to offer farmers integrated solutions.

Our biotechnology traits have helped to positively change the face of global agriculture and adoption of biotech crops worldwide continues to grow. In 2003, approximately 167 million acres of biotech crops were grown by 7 million farmers in eighteen countries, which represents a 15 percent increase over 2002 estimates.

Established in 1968, Monsanto Thailand has been providing Thai farmers with conventional hybrid seeds and a variety of crop protection products for over thirty years. Monsanto Thailand is headquartered in Bangkok and maintains seed manufacturing and research facilities in Phitsanulok and Nakornrachasima. Monsanto's investment in Thailand operations is approximately \$7.6 million, and we retain about 5,000 contract production farmers throughout the country. Clearly, we view Thailand as a market with excellent growth potential and as an important window to serve the growing Southeast Asian market for both conventional and agricultural biotechnology crops.

Historically, Thai regulators have demonstrated leadership in the region in developing policies and regulations governing biotechnology. However, for the past three years, there has been no progress in government evaluation — through field trials — or approvals of agricultural biotechnology products, which jeopardizes any opportunities for the introduction and commercialization of biotech products in this market. Without access to these products, Thai farmers will lose the additional tools to enhance their efficiencies or address local environmental issues through the use of agricultural biotechnology. It is our hope that this situation might be addressed and resolved either in a parallel fashion with the FTA negotiations or directly within the context of the negotiations.

Field Trial Moratorium and the Need for Science-Based Regulations in Thailand

Thailand has well defined guidelines for the regulation of agricultural biotechnology, and it was the first country in Southeast Asia to begin conducting biotech field trials for Bollgard Bt insect-protected cotton in 1997. Those field trials were conducted in three stages as provided by the biosafety guidelines under the supervision of the Thai Department of Agriculture and were completed in 1999. Despite the completion of all required regulatory trials, the commercial use of Bt cotton in Thailand has yet to be approved by the Thai government.

In 2001, the Thai Cabinet imposed a moratorium on large-scale field-testing of biotechnology-improved crops in response to activist pressure. The moratorium has remained in effect for three years with no clear indication that it will be lifted. Public comments made by Thai officials seem to indicate that the moratorium does not prohibit government station field trials, which are smaller in scale, but was designed to only preclude larger commercial field trials.

In January 2003, Monsanto submitted an application to the Thai Department of Agriculture to initiate small-scale, government station field trials for Roundup Ready herbicide tolerant corn. Roundup Ready corn can help Thai farmers better meet demand by increasing productivity and to address pressing environmental concerns, including more efficient use of water resources through conservation tillage practices. Roundup Ready corn has been planted extensively in North America and has been delivering these benefits to US and Canadian farmers since 1997. Over a year has elapsed with no indication that this application will be approved, and no scientific justification has been provided for the lack of action on the application.

It would be a modest, yet important first step for ensuring that the Royal Thai Government is committed to a timely, transparent and science-based process to evaluate biotechnology crops, to resume the limited, government station field trials that are necessary to demonstrate the safety of the product and to build public confidence in the regulatory process.

The net result of the Thai moratorium on field trials is similar in many respects to the European Union moratorium on approvals of new agricultural biotech products. Without field trials to demonstrate the safety of agricultural biotech products, approvals cannot be obtained, therefore impeding the introduction and commercialization of these products.

Ultimately, the Royal Thai Government should be strongly encouraged to clarify and implement a science-based biosafety and regulatory system to guide the evaluation, approval and commercialization of biotech crops. In the context of free trade, we believe it is imperative that the U.S. work with Thailand to eliminate the current barriers to agricultural biotechnology-improved crops and establish a science-based regulatory system — including field trials of new crops — consistent with their international trade obligations in order to bring the benefits of these products to market in Thailand and to further promote consistent access to American agricultural technologies and products.

** Retrieved at www.us-asean.org/us-thai-fta/Monsanto_Comments.pdf

Notes

- ¹ For more information on bilateral free trade and investment agreements, and resistance, see <http://www.bilaterals.org>.
- ² Letter to Robert Zoellick on May 21, 2003, from seven food and agriculture trade associations: www.soygrowers.com/library/timelynews/zoellick-biotech-052303.htm (See Appendix I for full text).
- ³ USTR Press Release 10 May 2004, United States and Malaysia Sign Bilateral Trade and Investment Framework Agreement. <http://japan.usembassy.gov/e/p/tp-20040511-07.html>.
- ⁴ Written Comments Concerning the US-Thailand FTA submitted by Monsanto to the office of the US Trade Representative, 8 April 2004. http://www.us-asean.org/us-thai-fta/Monsanto_Comments.pdf (See Appendix II for full text).
- ⁵ Aroha Te Pareake Mead, "Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific", Workshop presentation, Inaugural Indigenous Peoples of the Pacific workshop on the UN Draft Declaration on the rights of Indigenous Peoples, September 2-6, 1996, Suva, Fiji.
- ⁶ Helena Paul and Ricarda Steinbrecher with Devlin Kuyek and Lucy Michaels, *Hungry Corporations: Transnational Biotech Companies Colonise the Food Chain*, London, Zed Books, 2003, p.149. See also <http://www.edmonds-institute.org/door.html>.
- ⁷ Parallel importing allows retailers, wholesalers, governments, and other parties to obtain goods subject to intellectual property rights directly from licensed or authorized overseas sources, rather than dealing with local suppliers, licensees, or agents. It allows the buyers to shop around for the lowest world price, and thus enables developing countries to get lower prices for consumers for pharmaceuticals and other goods. Although the WTO TRIPS does not prohibit parallel imports, many business lobbies like PhRMA and the US Trade Representative's office have aggressively opposed this practice, claiming that it will undermine intellectual property rights, and threatening countries that permit the practice.
- ⁸ "Doha Derailed: A Progress Report on TRIPS and Access To Medicines". MSF Briefing for the 5th WTO Ministerial Conference, Cancun 2003: http://www.accessmed-msf.org/documents/cancun_briefing.pdf.
- ⁹ "World Patents for Global Domination?" in *Seedling* (GRAIN publication) October 2003, pp.12-16.
- ¹⁰ "WTO Biotech Working Party Opposed by Majority". Martin Khor, Third World Network, 7 November 1999. <http://www.twinside.org.sg/title/biotech2-cn.htm>.
- ¹¹ Cited by Rural Advancement Foundation International (now the ETC Group), September 1996, *The Life Industry*, at <http://www.etcgroup.org/article.asp?newsid=198>.
- ¹² Global Seed Industry Concentration. ETC Group Communique: Issue 90, September/October 2005, <http://www.etcgroup.org/documents/Comm90GlobalSeed.pdf>.
- ¹³ Global Seed Industry Concentration. ETC Group, *ibid*.
- ¹⁴ Hope Shand and Martin Teitel, *The Ownership of Life: When Patents and Values Clash*, Institute for Agriculture and Trade Policy, June 1997, at http://www.sustain.org/biotech/library/admin/uploadedfiles/Ownership_of_Life_When_Patents_and_Values_Clas.htm.
- ¹⁵ September 2005. <http://www.grain.org/rights/tripsplus.cfm?id=68>.
- ¹⁶ Final text of the US-Singapore Free Trade Agreement http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.
- ¹⁷ Jakkrit Kuanpoth, "Current Developments and Trends in Intellectual Property Rights: Harmonisation through Free Trade Agreements" in *Free Trade Agreements and their Impact on Developing Countries: The Thai Experience*, FTAWatch, Bangkok, 2005.
- ¹⁸ Jakkrit Kuanpoth in FTAWatch, *ibid*, p.30.
- ¹⁹ See WIPO website. <http://www.wipo.int/treaties/en/registration/budapest/>.
- ²⁰ The US-Morocco Free Trade Agreement (FTA): The Intellectual Property Provisions. Report of the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3), 6 April 2004. http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/Reports/asset_upload_file164_3139.pdf.

- ²¹ IFAC-3 Report, 6 April 2004, *ibid*.
- ²² http://www.iipa.com/rbi/2003_May8_ChileFTA_ITC.pdf.
- ²³ http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Bahrain_FTA/Reports/asset_upload_file822_5528.pdf.
- ²⁴ This means that a WTO Member (or FTA signatory) government shall accord to the nationals of other Members (or of the other party, in the case of a bilateral FTA) treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property.
- ²⁵ In its submission on the US-Chile FTA the IIPA asserts: "No bilateral agreement entered into by the US should have any other rule than full national treatment". www.iipa.com/rbi/2003_May8_ChileFTA_ITC.pdf.
- ²⁶ Letter to Robert Zoellick on May 21, 2003, from seven food and agriculture trade associations: www.soygrowers.com/library/timelynews/zoellick-biotech-052303.htm.
- ²⁷ NAM At A Glance. NAM Website: www.nam.org/s_nam/doc1.asp?CID=53&DID=224181.
- ²⁸ US-Thailand FTA Business Coalition website. <http://www.us-asean.org/us-thai-fta/>.
- ²⁹ Witoon Liamchamroon, "As The TNCs Catch You: An Analysis of the Liberalization of Biotechnological Products in the Thai-US FTA", Free Trade Agreements and their Impact on Developing Countries: The Thai Experience, FTAWatch, Bangkok, 2005.
- ³⁰ Charter available at <http://www.ita.doc.gov/td/icp/Charter-23.html>.
- ³¹ The U.S. Singapore Free Trade Agreement (FTA). The Intellectual Property Provisions: Report of the Industrial Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3), February 28, 2003.
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