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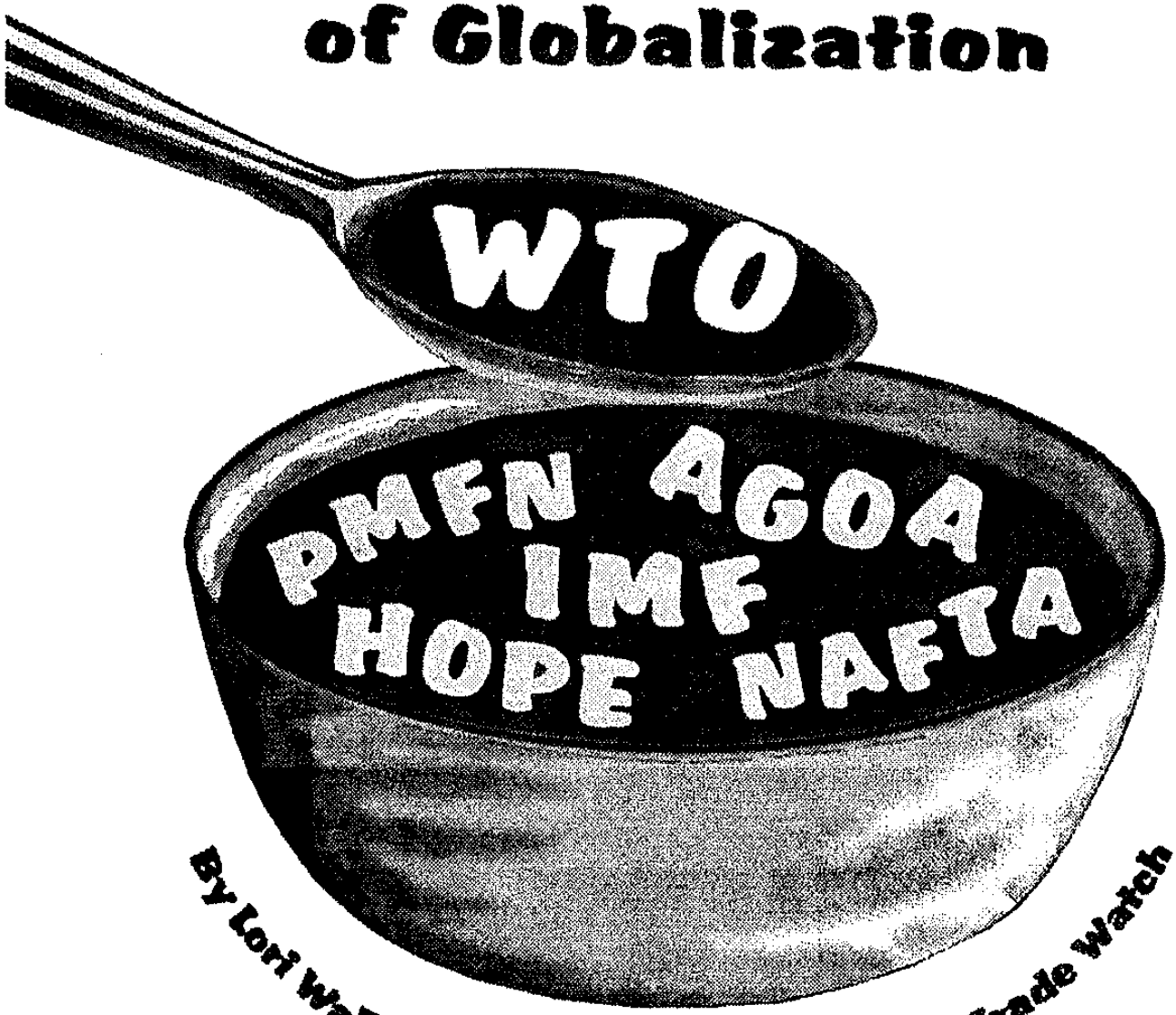
The Alphabet Soup of Globalization



By Lori Wallach, J.D., Director of Global Trade Watch

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Globalization is a defining phenomenon of our time. The current model, corporate economic globalization, is a version of globalization which is being implemented by a new array of international commercial agreements. While these pacts are called "trade" agreements, today's international commercial agreements no longer focus solely on traditional trade matters, such as reducing tariffs and quotas. Instead, the main mechanisms of globalization, such as the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA), contain a comprehensive set of one-size-fits-all policies to which signatory countries are required to conform their domestic laws and regulations. These pacts prioritize commerce over other goals and values, in part by setting constraints on what environmental, food or product safety, social justice and other policies our national, state and local governments may implement.

Yet, while institutions and agreements like the WTO, NAFTA and a whole alphabet soup of other globalization mechanisms and institutions have deep and direct impacts on many facets of the daily lives of people everywhere, the meaning and implications of their terms are often unintelligible. First, the agreements are written in a technical trade jargon which we have dubbed "GATTese." In GATTese, words with a clear meaning in common usage have entirely different meanings or implications. In some cases, one or two words are shorthand for entire twenty-year bodies of trade law jurisprudence that simply are not evident on the face of the term.

Second, words used in trade and investment agreements have extremely precise legal meanings which can turn on the slight difference in a verb's tense. Since the text of these agreements are often only available in English (or perhaps also French), non-native speakers are put at a disadvantage from the start. Third, there are certain basics of legal interpretation that most non-lawyers simply do not know which can mask completely the meaning of trade agreement language.

The actual provisions of some of the key mechanisms of globalization -- such as the WTO and NAFTA -- are so drastic that simply being able to understand what they mean for our environmental, food safety, social justice and other laws and policies is one of critics' strongest arguments. Meanwhile, innocent errors in interpretation made by critics are often used by proponents of corporate-managed trade to undermine the credibility of legitimate criticisms. This guide is intended to help people go to the legal sources with an understanding of some of the most essential specialized terms, language and legal quirks of globalization's instruments. Its goal is to empower the maximum number of people to be able to make their own informed decisions about the often intentionally murky provisions hidden in policies and agreements promoting corporate globalization.

I. Globalization Mechanisms: Agreements and Institutions

AGOA: The so-called *African Growth and Opportunity Act* extended NAFTA-like trade terms -- but with additional International Monetary Fund (IMF) conditionalities -- to the 42 sub-Saharan African nations. Pushed by a coalition of U.S.-based oil and other multinational corporations, AGOA was strongly opposed by Non-governmental Organizations (NGOs) in Africa and the U.S. because it undermines African interests in sovereign, equitable development in order to promote U.S. corporate control of African economics and natural resources. The use of threats of withdrawing AGOA status from African nations has been used since AGOA's 2000 implementation to leverage governments to implement domestic policies and support WTO expansion over the opposition of African civil society. Meanwhile, the proposed benefits for African countries from AGOA have not materialized**.**

AoA: The *Agreement on Agriculture* is one of the agreements implemented by the WTO. It sets rules on international food trade and also on member countries' domestic agricultural policies. These rules have accelerated the rapid concentration of agribusiness and undercut poor countries ability to mainain food sovereignty and security through subsistence agriculture.

APEC: The *Asian Pacific Economic Cooperation* first met in 1993 to negotiate a NAFTA-style trade and investment agreement binding eighteen Pacific Rim countries, including the U.S., China, Monaco, Malaysia, Indonesia, Thailand, Korea and Australia. The countries had committed to signing final treaty in 2001. But agreeing to terms has proven elusive, particularly after the Asian financial crisis, which proved most devastating to the countries that had been following the NAFTA-APEC model. The heads of state still meet annually in an APEC summit; however, lower level officials negotiated smaller deals, for instance, on accelerating timber trade which is then pushed multilaterally at WTO.

BITs: *Bilateral Investment Treaties* are bilateral agreements typically between a rich and poor country, which establish rights and protections for investors and a system to enforce those rights. There are currently more than 1,000 BITs in effect or under negotiation. Some of these BITS contain NAFTA-style investment provisions, such as the right for corporations to sue government directly if they feel their profits are being undermined. For example, a U.S. - based company Bechtel Corporation (which is also incorporated in Holland) is currently using a BIT between Holland and Bolivia to demand $25 million in compensation from Bolivia over alleged "future lost profits." The company claims that when residents of a Bolivian city demanded that their water system be returned to public control (after Bechtel's World Bank-facilitated privatization of the Cochabamba water system resulted in prices increase up to 300%), Bolivia violated Bechtel's investor rights under the Bolivia-Holland BIT.

CAFTA: The *Central America Free Trade Agreement* is an agreement that expands NAFTA to five Central American nations (Guatemala, El Salvador, Honduras, Costa Rica and Nicaragua) and the Dominican Republic. It was signed by President Bush on May 28, 2004, and was passed by the U.S. Congress by one vote on July 27, 2005. The passage of CAFTA took 14 months because of bipartisan congressional unease over NAFTA's record and public backlash over trade. Passage required the expenditure of enormous amounts of political capital, including weeks of the president's personal attention, a rare presidential visit to Congress (the first in two years) and months of pork-barrel deals for votes offers and promises by GOP leadership and

corporate lobbyists. CAFTA's narrow passage indicated a shift Congress's attitudes towards agreements that promote trade liberalization. While 102 Democrats voted for NAFTA, only 15 voted for CAFTA. While CAFTA was supposed to be implemented on January 1, 2005, Central American governments have delayed implementation due to heavy public official resistance and political backlash. *(See FTAA)*

CBI: The *Caribbean Basin Initiative* was a cold war "anti-communism" commercial program which was extended in 1999 through the "CBI NAFTA parity" Act. This program is not a full trade pact. It provides special access to the U.S. market for textile, apparel and certain other goods made in the 26-country CBI region, which includes Central American countries from Guatemala to Venezuela and Caribbean island nations, including Haiti, but not Cuba. Then-President Reagan created the program as a perk for nations which sided with the U.S. in Cold War politics and demonstrated commitment to "free market" principles. Because NAFTA gave Mexico access to the U.S. market on terms yet more favorable than CBI, U.S. clothing manufacturers who relocated to Haiti and Guatemala to avoid unions and pay rock-bottom wages demanded parity to NAFTA for their imports from CBI countries. To qualify for the CBI program, countries are reviewed on several criteria, including a modest labor standard.

CUFTA: The 1988 *Canada-U.S. Free Trade Agreement* was the model for NAFTA. It was fought vigorously by Canadian citizens' groups as a massive instrument of environmental deregulation, downward pressure on wages and labor standards and weakening of social programs. This agreement was the first of the comprehensive international commercial agreements that have replaced traditional trade agreements.

EU: The *European Union* was established in 1992 as a result of the Maastricht Treaty. The Maastricht Treaty transformed the European Community into a political and economic union which shares a single currency (the Euro), has a common policy in trade negotiations and requires the "harmonization" of budgetary, environmental and other domestic policies. There are currently 15 countries in the EU, with agreement in late 2002 to add 10 more countries (primarily Eastern European nations). The EU's governing bodies are located primarily in Brussels, Belgium. The EU includes the powerful EC Commission that runs day-to-day operations for the EU, the Parliament (which consists of elected delegates from each EU member country and has very limited powers) and the Council (which consists of the heads of state from each member country and meets biannually). The EU negotiates bilateral and multilateral trade agreements as a block. Approval of the Maastricht treaty was controversial in many nations; Denmark voted no and remains outside the EU because the treaty required "harmonized" environmental and other regulatory terms.

Fast Track: *Fast Track trade authority* is an unusual procedure through which the U.S. Congress delegates the President constitutional authority to set the terms of trade for the purpose of negotiating trade agreements. The Fast Track mechanism also provides special rules which strictly limit Congress's role regarding such trade pacts to a yes or no vote on a completed deal, with no amendments allowed and only 20 hours of debate. Fast Track causes an extraordinary shift in power with the White House empowered to sign and enter into trade deals before Congress ever votes on them. Fast Track was established by President Richard Nixon in 1974 when trade agreements covered narrow tariff and quota issues. Fast Track lapsed from 1995-2002 and was only passed by a tiny margin because members of Congress believe the system is

outdated given the scope of today's international commercial agreements. The current Fast Track did remove certain authority from negotiators regarding agriculture.

FTAA: The *Free Trade Area of the Americas* (or *Area de Libre Comercio de las Americas - ALCA*- in Spanish), an agreement heavily promoted by the U.S., was launched at the "Miami Summit" in 1995 to expand NAFTA to cover all western hemisphere countries (except Cuba). The draft FTAA text includes disastrous NAFTA provisions, such as investor rights allowing corporations to sue governments for regulatory takings in secret tribunals and a "top-down" approach to service sector liberalization (i.e. all service sectors are automatically covered unless a country obtains an exemption). December, 2004 was the target date to complete negotiations, with December 2005 as the target date to implement the agreement. However, these deadlines were not met, and FTAA negotiations continue to fall far behind the original schedule. An FTAA Ministerial was held in Miami, Florida in November 20-21, 2003, where no concrete movement was made towards meeting the December 2004 deadline. Most recently, an attempt by U.S. President George W. Bush to revive the FTAA talks at the Summit of the Americas, held in Mar Del Plata, Argentina in November 4-5, 2005, almost a year after the initial deadline for the completion of negotiations, also proved unsuccessful, making it clear that the December 2005 implementation deadline would not be met. Moreover, no date for the next FTAA meeting has been set. Civil society opposition to FTAA is strong and increasing in the Americas and the Caribbean. Ten million Brazilian citizens voted against Brazil's involvement in the FTAA in a popular referendum held in 2002, and nearly 50,000 people marched in the streets against the FTAA in Mar Del Plata. *(See NAFTA)*

FTAs: *Free Trade Agreements* are pacts between two countries or a grouping of countries. The recent agreement negotiated between the U.S. and Chile is an example of a bilateral FTA. The U.S. has completed a series of bilateral negotiations with countries such as Jordan, Israel, Chile and Singapore and is in the process of launching negotiations with Australia and Morocco. Some regional FTAs now being launched include CAFTA (the Central American Free Trade Agreement) and a U.S. FTA with a group of Southern African countries including South Africa, Botswana, Losoto, Nambia and Swaziland. These agreements are often sweeping in their scope and go beyond multilateral agreements like the WTO to include some of the extreme provisions on intellectual property and investment rights contained in NAFTA and proposed in the FTAA.

GATS: The WTO's *General Agreement on Trade in Services* is one of the agreements implemented by the WTO. GATS sets rules for who controls or owns services and limits government regulation in the service sector. GATS covers all services including health care, education and utilities such as water, data management, energy, banking, transportation and insurance. Only a small part of GATS is about trade. GATS is often called a "backdoor Multilateral Agreement on Investment (MAI)" because it creates rights for foreign investors to set up service business inside other WTO countries. GATS allows some flexibility for countries to determine which service sectors they want to subject to GATS full privatization and deregulation pressures. However, some GATS rules apply even to sectors countries haven't committed. Plus, the text of GATS commits all countries to "progressive liberalization." Expansion of GATS scope and the sectors it covers is now underway in the "GATS 2000" negotiations. Currently, GATS 2000 negotiations are in the "Request/Offer" phase, where WTO countries engage in bilateral negotiations requesting other countries open up service sectors and offering sectors they themselves will put on the negotiating table. For example, the U.S. has

requested that Brazil open for ownership by U.S. corporations elements of public higher education services and the EU has requested that countries liberalize their water service. Once a sector is committed to GATS it is virtually impossible for the public to reinstall control over it because GATS rules require financial compensation to every WTO country to do so.

GATT: The *General Agreement on Tariffs and Trade*, signed in 1947, is one of the three mechanisms for global economic governance established at Bretton Woods institutions put in place World War II, (also the International Monetary Fund (IMF) and the World Bank). For almost fifty years, GATT focused exclusively on trade in goods --cutting tariffs and quota through "rounds" of negotiations. GATT set terms for countries who wanted to trade with each other. GATT signatories were called "contracting parties." The Uruguay Round, completed in 1995, replaced the GATT contract with the World Trade Organization, a global commerce agency with binding enforcements of comprehensive rules expanding beyond trade. Now GATT has become one of the eighteen agreements enforced by the WTO.

GSP: *Generalized System of Preferences* refers to special preferential trade terms given to developing countries. Through GSP programs, the U.S. and EU provide duty-free market access for the poorest countries.

HOPE for Africa Act: The *Human Rights, Opportunity, Partnership and Empowerment* for Africa Act was introduced as a progressive alternative to the AGOA by Representative Jesse Jackson, Jr. (D-IL) and Senator Russ Feingold (D-WI). HOPE contained expansive access to the U.S. market, but also included labor, environmental, and human rights and other provisions to ensure that the benefits of trade between the regions would be enjoyed by average citizens in both places, rather than by transnational corporate interests. The bill was supported by a broad coalition of African and U.S. NGOs and leaders, and had 100 House cosponsors. However, despite this support, it was never permitted a vote in the U.S. Congress and died in 1999.

IDB: The InterAmerican Development Bank is a regional version of the World Bank, providing loans for large infrastructure projects in the Americas (such as PPP). IDB is a key FTAA negotiations advisor.

IMF: The *International Monetary Fund's* original Bretton Woods-given role was to help nations with short-term cash crunches relating to trade financing and to manage the gold-standard currency valuation system. In recent decades, the IMF has morphed into providing long-term loans to developing countries on the condition that these countries reorganize their laws and economies to prioritize servicing debt, for instance, by cutting government budgets, such as education and health spending, liberalizing trade and investment policies and providing new intellectual property and investor protections. One after another, countries which followed the IMF policy formula --and who were touted as poster children of success -- have collapsed economically and socially, including recently Argentina.

Lomé/ACP/Cotonou: The *Lomé Convention* was a treaty between the EU and former European colonies in *Africa, the Caribbean and the Pacific islands (ACP).* Lomé provided trade benefits that went beyond the *GSP* program, including setting aside small portions of the EU market for certain ACP goods, such as bananas. In what is called "Bananagate," the U.S. brought a case against the EU on behalf of U.S.-based Chiquita corporation (although the U.S. itself does not

produce bananas for trade) to declare the Lomé Convention's banana trade rules WTO-illegal. The WTO tribunal ruled for the U.S., forcing ACP countries to compete against multinational, large-plantation producers such as Chiquita. As a result of the WTO ruling, the EU used the regular "Lomé" review and negotiation process which started in 2000 to replace the Lomé Treaty with the Cotonou Agreement, representing a dramatic shift in EU-ACP trade policy. Instead of granting non-reciprocal preferential access it calls for negotiations between the EU and ACP countries to establish reciprocal free trade agreements which would require ACP countries to grant new trade concessions to the EU.

Maquiladoras/Maquilas: *Maquiladoras* or *Maquilas* generally refers to factories set up in export processing zones and typically owned by foreign corporations where imported components are assembled by low wage workers for re-export to consumer markets One well-known *maquiladora* zone is along the U.S./Mexico border, but *maquiladoras* exist throughout the hemisphere and workers there typically face extremely long hours, low wages and horrible labor conditions.

MAI: The *Multilateral Agreement on Investment* aimed to set strict global rules limiting governments' rights and abilities to regulate currency speculation and set public interest policies regarding investment in land, factories, service sectors, stocks and more. This proposal, dubbed "NAFTA on steroids," would have expanded worldwide key, extreme NAFTA investment provisions, including investor rights not included in the WTO. These included the right to establish an investment in another country, the ability for corporations to sue governments for cash damages over any regulatory action affecting profits, and an expansive definition of investment beyond what WTO recognizes. MAI was negotiated in secret for two years at the OECD, a club of 29 of the world's richest countries, it had been pushed by transnational corporations and major business lobbies worldwide. Ultimately, MAI was killed in 1999 after public exposure via an international NGO campaign. While the MAI itself was stopped, its agenda has been renewed in a variety of fora. *(See GATS and FTAA.)*

MercoSur: The *Mercado Comun del Sur (MercoSur)* or *Common Southern Market* was formed in 1991 as a regional common market agreement between Argentina, Brazil, Paraguay and Uruguay with Chile and Bolivia as associate members**.** Mercosur is based on a common market, like the EU, not an FTA model like NAFTA. It includes common immigration, labor and other policies, as well as special trade and investment preferences.

NAFTA: The *North American Free Trade Agreement* was a radical experiment in rapid deregulation of trade and investment among the U.S., Mexico and Canada. In effect since 1995, NAFTA is considered the symbol of the failed corporate globalization model because its results for most people in all three countries have been negative: real wages are lower and millions of jobs have been lost, farm income is down and farm bankruptcies are up, environmental and health conditions along the U.S.-Mexico boarder have declined, and a series of environmental and other public interest standards have been attacked under NAFTA. NAFTA's agricultural provisions have been so extreme that Mexican family farmers are demanding a re-negotiation or nullification of the treaty, after its first phase of initial implementation led to displacement of millions of Mexican *campesinos*. NAFTA represents the "gold standard" of corporate rights in trade and investment agreements because it includes hitherto unheard of corporate privileges, including "investor-to-state" dispute resolution which is the right to sue governments for cash

compensation in closed trade tribunals over regulatory costs. This right, contained in NAFTA's chapter 11 on investment, has been used by numerous multinational corporations to seek financial compensation for public health and safety or environmental regulations that corporations argue amount to "expropriation" of their current or "future lost profits." NAFTA chapter 11 corporate suits have resulted in the lifting of a Canadian ban on a toxic chemical as well as an attack on a similar California state toxic chemical ban and the payout of 16 million by the Mexican government to a U.S. multinational toxic waste company for refusal to allow a toxic waste dump to be built on ecologically protected land.

New Issues: The so-called *New Issues* (also referred to as the *Singapore Issues*) are Competition Policy, Government Procurement, Investment and Trade Facilitation. These are subjects for which the EU and other G7 countries continually have pushed to start WTO negotiations to create new WTO rules or agreements. Developing countries, many of whom are struggling to implement the Uruguay Round agreements, are opposed to this WTO expansion. As a result, at the Singapore WTO Ministerial in 1997 no new negotiations were agreed. These issues being pushed again as part of the "Millennium Round" that the U.S. and EU sought to launch at the 1999 Seattle WTO Ministerial were a major contributing factor to that ministerial's implosion. At the 2001 Doha WTO Ministerial, with the political landscape shaken by the recent 9-11 attacks in the U.S., extremely coercive tactics were employed in an attempt to force countries to sign off on launching new negotiations to add these issues. Instead, the Doha Ministerial text required countries to agree by "explicit consensus" at the next WTO Ministerial whether or not to launch such talks. Over 80 developing countries arrived at the 2003 Cancun WTO Ministerial unified in opposition to including new issues in the WTO. European, Korean and other countries' intransigent demands that the majority of WTO countries' positions be ignored and the new issues be added ultimately led to the Cancun Ministerial's collapse.

OECD: The *Organization for Economic Cooperation and Development* describes itself as "an intergovernmental organization comprising 29 advanced economies from Europe, North America, and the Pacific Region." Prior to the MAI talks, which took place under the auspices of the OECD and which would have resulted in the creation of a binding treaty, the OECD only had served as a think tank for rich countries and a place for them to plan their WTO strategies.

***Plan Colombia*:** In July 2000, the U.S. Congress approved Plan Colombia, a funding package for Colombia totaling $1.3 billion, mostly for Colombian security forces, but also for aerial fumigation of coca crops to fight the "War on Drugs." This aid package has done little more than inflame a complicated conflict that already places civilians in the crossfire and destroys huge quantities of legitimate subsistence crops.

PPP: The *Plan Puebla Panama* is a $20 billion, 25-year industrial development and transportation project that runs from the state of Puebla, Mexico south to Panama (covering the entire Mesoamerica region.) It includes plans for new highways, ports, power and gas grids, hydroelectric projects/dams, telecommunication lines, agricultural modernization and up to six new maquiladora (assembly plant) free trade zones. The project will create the physical infrastructure necessary for corporations to take maximum advantage of proposed free trade agreements such as CAFTA and the FTAA by allowing easy access to the region's natural resources and cheap labor pool. PPP's displacement of indigenous and rural communities and

foreseeable environmental havoc has resulted in strong popular opposition to the plan throughout Central America and Mexico.

SOA: The School of the Americas (better known as the School of the Assassins) is a U.S. government-run, taxpayer-funded combat training facility for Latin American and Caribbean military and police forces.

SAPs: *Structural Adjustment Programs* are packages of neoliberal economic and social policy conditions imposed on developing countries by international financial institutions such as the World Bank and the IMF as a condition for a loan. These programs are designed to restructure a country to serve the international financial institutions' needs - interest payments - versus public needs for livelihoods and basic services. They frequently require the privatization of public services, as well as cuts in government social spending and promote export-led economies (requiring, for example, growing of cash commodity crops, such as coffee or flowers, for subsistence farming of grains) and trade investment and finance liberalization. In Latin America and Africa, both regions where SAPs have been heavily implemented, per capita income growth has stagnated (Latin America) or plummeted (Africa,) while basic social services have been gutted and literacy and immunization rates fallen.

SPS: Both the WTO and NAFTA and the proposed FTAA have *Sanitary and Phytosanitary Standards* agreements which set constraints on government policies relating to food safety (bacterial contaminants, pesticides, inspection, labeling) and animal and plant health (imported pests, diseases). SPS rules undercut countries' use of the "Precautionary Principle," which calls for policies to err on the side of health and safety when there is not yet scientific certainty about potential threats to human health and the environment. Instead, SPS rules err on the side of protecting trade flows at all costs. The SPS agreement also calls for countries to harmonize domestic standards to the international standards of an industry-influenced body called the Codex Alimentarius. The U.S. is poised to attack the European ban on GMO foods under WTO SPS rules.

TBT: Both the WTO and NAFTA and the proposed FTAA have *Technical Barriers to Trade* agreements which require that countries only maintain or establish least trade-restrictive product standards, including environmental, worker, and consumer health and safety rules. To meet TBT rules, such domestic standards must also be based on international standards, including some named standards set by industry groups without any public participation.

TEP: The *TransAtlantic Economic Partnership* is the name given to U.S.-EU commercial negotiations launched in late 1998. The goal of this process is to harmonize and deregulate regulatory standards and to provide a larger role of U.S. and EU companies in policy regarding potential U.S.-EU trade frictions. This includes an "early warning" system and companies get the U.S. or EU to list the other's policies which must limit of trade. The U.S. and EU initiated a 1995 Trans-Atlantic Dialogue which included an array of issues such as health, education and security. The TransAtlantic Business Dialogue was then launched on the invitation of the then U.S. commerce Secretary and his EU equivalent. The business coalition then succeeded in having the trade agenda prioritized above all others.

TRIMs: The WTO's *Trade Related Investment Measures* agreement sets certain rules relating to foreign direct investment (FDI). The TRIMs rules forbid countries from maintaining performance requirements on investors. These are government policies regulating investment, for instance, requiring local content. TRIMs does not contain the expansive definition of investment or the extensive new investor rights which exist in NAFTA and were proposed for global application through the MAI. However, expanding the scope of WTO's investment rules and the nature of investor rights granted by WTO were part of the push by the EU to launch new negotiations at the Cancun WTO Ministerial on the "New Issues." *(See New Issues*).

TRIPs: Both the WTO, NAFTA and the proposed FTAA include new intellectual property rules which require signatory countries to establish specific patent, copyright and trademark protections in their domestic laws. The WTO agreement is called *Trade Related Intellectual Property Rights* or TRIPS. The pharmaceutical industry exercised heavy influence on NAFTA and WTO negotiations and these pacts require countries to adopt US-style intellectual property laws, such as granting monopoly sales rights to individual patent holders for extended time periods and including seeds, medicines and other traditionally excluded items as those for which countries must provide patent protections. The WTO TRIPs rules have been the subject of a major international fight regarding poor countries' rights to issue compulsory licenses for essential medicines.

TRIPs PLUS: Given the relative power dynamics, NAFTA's intellectual property rules are considerably more extreme than the WTO TRIPs rules. This TRIPs-plus model stands to get yet more extreme if FTAA drafts are ever enacted. FTAA would enforce corporate monopoly control over seeds, medicine and technology with criminal penalties, cash fines, trade sanctions and more as punishment for both countries. Examples of the pharmaceutical corporations' key demands include bans on private manufacture of generic medicines (under FTAA proposals, only governments could produce generics even though most developing country governments don't have the capacity) and language to constrain the export of generic drugs. This would mean that the vast majority of countries who do not have pharmaceutical manufacturing capacity could not import generics from the few countries, such as Brazil and Argentina, that can produce medicine. This FTAA proposal would undo modest gains in the WTO Doha "Declaration on the TRIPS Agreement and Public Health".

WTO: The *World Trade Organization* is a new global commerce agency that was established through the GATT Uruguay Round Agreement signed in 1994. The WTO provides dispute resolution, administration and continuing negotiations for the 17 substantive agreements it enforces. Taken as a whole, the WTO and its underlying agreements set a system of comprehensive governance that goes far beyond trade rules. The WTO system, rules and procedures are undemocratic and non-transparent. The WTO's substantive rules systematically prioritize commerce over all other goals and values. Countries are required to ensure "conformity of their laws, regulations and administrative procedures" to the WTO's substantive rules. National policies and laws found to violate WTO rules must be eliminated or changed, or the violating country faces trade sanctions. The WTO sets its forward agenda at summits occurring every two years. A Ministerial text squeezed out of the 2001 Doha WTO Ministerial set an agenda of negotiations that rich countries call the "Doha Development Agenda" and poor countries call the "Everything but Development Round." Because major divides exist among WTO signatory nations regarding what the WTO's future agenda should comprise, the Doha

Ministerial text put off all of the major decisions until the next WTO Ministerial. That was in Cancún, Mexico in 2003. There, the WTO's ever-growing crisis of legitimacy burst into public view again as the Ministerial collapsed when the United States and Europe stubbornly rejected the demands of the majority of the organization's signatory nations to make global trade rules fairer. The only decision taken at Cancun was to meet again at the WTO's Geneva, Switzerland headquarters on December 15, 2003 to assess the situation. Unfortunately, instead of focusing on the WTO and its failed globalization model, following Cancun major corporate interests and their client governments scrambled to lay blame anywhere else: the majority of WTO member countries that defended their publics' interests at Cancun, the Mexican diplomat who chaired the summit, and even global civil society groups and social movements. The future of the WTO is uncertain, as the most substantial achievement of the negotiations at the most recent WTO Ministerial, which took place in December 2005 in Hong Kong, was avoiding yet another collapse. The economic, social and environmental upheaval being suffered by many countries which have lived under the WTO rules for the past ten years means that business-as-usual at the WTO is over. It remains to be seen if the handful of powerful countries who have dictated WTO policy in the past will adapt to the new situation. It also is unclear whether countries demanding changes to the existing WTO rules that are damaging their interests may begin to withdraw if those changes are not forthcoming. Per only one thing is clear: the January 1, 2005 deadline for completing the "Doha Round" of negotiations cannot be met. However, negotiations on some WTO issues – including the highly controversial service sector/GATS-2000 talks continue. *(See AoA, GATS, TRIPS, New Issues.*)

II. Concepts of Globalization

Equivalence: Under this concept, significantly different, and often lower, standards from other countries can be declared equivalent to a country's domestic standards. NAFTA and the WTO require *equivalence* determinations based on subjective comparisons without clear procedural guidelines or enumeration of factors to consider. Once countries declare each other's standards *equivalent,* then products meeting the exporter's standards even if they don't meet the importing country's must be allowed into the domestic market, which is called "free passage" of goods. *(See "harmonization.")*

FDI: *Foreign direct investment* means transfer of foreign funds into a country to purchase a service or manufacturing business or to open a new factory or service company.

Harmonization: Harmonization is the name given to the effort by industry to replace the variety of product standards and other regulatory policies adopted by nations in favor of uniform global standards. The harmonization effort gained a significant boost under NAFTA and the WTO. These pacts require or encourage national governments to harmonize standards to a single international standard or accept different, foreign standards as "equivalent" on issues as diverse as auto, food and worker safety, pharmaceutical testing standards and informational labeling of products. (*See "equivalence.")*

Investor-to-state dispute resolution: Typically international agreements are enforced country-to-country. Under this system, corporations and investors are empowered directly to sue governments before trade and investment tribunals outside a country's domestic court system for

cash compensation for government actions the investor believes violates rights and privileges granted to them by NAFTA. This mechanism exists in NAFTA where it has been used to enforce NAFTA rules that provide for compensation for any government action undermining an investment's value. The combination of this enforcement mechanism, which overcomes sovereign immunity protections and NAFTA's broad investor protections means non-discriminatory environmental laws come under attack. For instance, a Canadian gas company, Methanex, sued the U.S. under NAFTA for $970 million because the state of California passed a law phasing out the use of MTBE, a gasoline additive, because of environmental and public health concerns**.**

LDCs: The *least developed countries* are the 47 poorest nations in the world, often disproportionately experiencing the negative effects of corporate globalization.

MFN: *Most favored nation* treatment means a country commits to offering all of its MFN trade partners the same best packages of tariff and other trade terms it provides any of them. MFN is the core principle of the NAFTA and WTO agreements. Some U.S. trade partners get MFN on an annual basis, but most have been granted permanently. During a congressional battle over eliminating China's annual reviews and MFN grants in favor of permanent MFN treatment for China, the U.S. corporate trade lobby got congress to change the term "most favored nation" into *"normal trade relations"* (NTR).

National treatment: The *national treatment* concept requires countries to treat domestic and foreign goods serves and/ or investors the same for regulatory, tax, and other purposes. This is also sometimes called "non-discriminatory" treatment.

Non-tariff barrier: This is how NAFTA and WTO characterize any law or policy that is not a tariff, but has the effect of limiting trade. For instance, a law that prohibits import of food containing carcinogenic pesticide residues could be considered a *non-tariff barrier* to trade, as it restricts trade in food. The WTO sets very narrow rules for which non-tariff barriers are permitted. That a regulation that effects trade is aimed at health or environmental protection or is applied equally to domestic goods and imports doesn't necessarily mean it is a permissible NTB under WTO and NAFTA rules.

PNTR: *Permanent normal trade relations* is the latest U.S. statutory lingo for a permanent grant by the U.S. of MFN treatment to a country. Once PNTR has been granted, Congress ceases annual reviews conducted on "non-market economies" human and worker rights, environmental protection, religious freedom and democracy records and gives unconditional access to the U.S. market typically according to the MFN "schedule" of benefits in the WTO. China was granted PNTR with the U.S. in 2000 and Russia is lobbying for that treatment to be granted in 2003. (*See MFN.)*

Precautionary Principle: This principle calls for action to avoid uncertain and possibly irreversible harm by requiring industry to prove a product's long-term safety before it is approved for the market (versus the government having to prove a product is dangerous to keep it off the market). The WTO subverts this by placing the burden of proof on governments to show scientifically that a risk exists prior to taking action, and exposes laws based on precaution to WTO attack as NTBs.

III. Legal Tricks of the Trade

A. Preambular Language: Preambular language in trade and investment agreements. It does not create obligations or privileges that are enforceable through dispute resolution. Thus, Preambular language is not legally binding. The only legal effect of such language is for use in disputes to guide interpretation of binding clauses, but even this light weight use is that discretion of a trade tribunal. Pro-human rights, development, employment, health or environment language is often contained in the preamble of trade and investment agreements. This is a way to include the language that citizens demand for public relations purposes without creating binding obligations on such issues as labor rights or environmental protection.

B. "And" versus "Or": How sentences or phrases are connected often determines their meaning. When "and" is used, it connotes that all of the clauses or provisions connected must be satisfied. Thus, the NAFTA investor-to-state expropriation language says that a country may only take an action if it is for a public purpose *and* on a non-discriminatory basis *and* done according to due process of law *and* compensated (NAFTA Article 1110). The use of "and" means that each and every one of these requirements must be met. The term "or" means that any one of the clauses or requirements must be satisfied. Thus, if the NAFTA expropriation clause were connected by "or," it would allow countries to take such action if any of the four conditions were present. Indeed, many countries' domestic laws generally forbidding expropriation specifically allow such government actions when taken in the public interest and with due process. Such laws, including U.S. laws, do not require compensation for such expropriation.

C. Latest in Time: A key rule of treaty legal interpretation is that "later in time rules the line." That means that provisions in the most recent treaty trump those of past existing treaties unless a specific measure in the later treaty provides otherwise. For instance, NAFTA contains a provision declaring that some aspects of three major environmental treaties which precede NAFTA should be given precedence to the extent they are in conflict with NAFTA terms although cynically NAFTA also requires that compliance with the environmental agreements be done in the manner "least inconsistent' with NAFTA). Even this limited "hold harmless" clause is missing in the WTO context. Thus, any provision of a WTO agreement or ruling that conflicts with even the most major multilateral environmental agreement (MEA) that was signed before WTO could be overruled in priority by WTO requirements. That is especially a concern in situations where one country is implementing an environmental agreement and another country that does not belong to the MEA challenges the first country's actions at the WTO. The later-in-time rule is one reason why environmental NGOs have called for an international agreement negotiated outside the WTO to make sure that MEAs and their domestic enforcement are not subordinated to WTO rules. Worryingly, the WTO initiated its own negotiations on the relationship between WTO and MEA rules at the 2001 WTO Doha Ministerial. Having the WTO decide it relationship with another set of important agreements creates a scenario wherein the WTO declares its role is to oversee implementation of MEAs.

D. "Hold harmless" or "savings" clauses: A legal construct used to safeguard provisions in an earlier treaty from one coming later in time is called a "savings" or "hold harmless clause." This language means that certain named existing treaties are not to be affected by otherwise

conflicting language in a later treaty. The model language in this regard is usually: "To the extent of conflict, X treaty's provisions shall be given precedence over the terms of Y treaty."

E. Brackets versus parentheses: When reading *proposed* agreement text (for instance, in reviewing the draft text of the FTAA agreement released after the 7th FTAA Ministerial in Quito, Ecuador), one must look carefully to see if language is set off by square brackets "[ ]" or is in parenthesis "( )". Square brackets mean that the language is only proposed, and has not been agreed. Parentheses, on the other hand, are generally used for clarification or simply punctuation in binding text.

F. The Vienna Convention on the Interpretation of Treaties: This is a multilateral treaty setting forth standard procedure for interpretation of treaties. Think of it as the global rules of international agreement procedure and interpretation. The terms of the Vienna Convention, such as the types of votes (majority, consensus, etc.) that must be used to take certain decisions, are generally binding on all treaties unless other specific rules are explicitly set forth in that treaty. Both the WTO and NAFTA contain many of their own operational rules. Interestingly the draft MAI text didn't contain separate procedural rules, meaning had it come into effect the Vienna Convention was the default operational system.

IV. Words with Special Globalization-Related Meanings

A. Operative Verbs: One must scrutinize both the precise verb and that verb's tense to determine if a clause in an international commercial agreement is binding or not. A classic example that many of the most fluent English-as-a-second-language speakers often miss is the drastic legal difference between "shall" and "should" and between "must" and "may." "Shall" and "must" are binding and mandatory but "should" and "may" are non-binding and permissive. These distinctions become crucial in determining what requirement an agreement establishes and whether language on public interest issues is only window dressing or is binding.

> **Shall:** If a clause in an international commercial agreement uses the verb "shall" it is almost always binding with the exception being provisions that use the formulation: "a contracting party shall *strive* to do X, Y or Z." In that instance, the binding commitment is only to try to do X, Y, or Z, not to actually do X, Y or Z.
> **Must:** "Must" is almost always binding unless it is used in the construction noted immediately above.
> **Should:** The subjunctive tense in this verb makes it not binding, but advisory, i.e., a country ought to try to do X, Y or Z.
> **May:** "May" is never binding. It is entirely permissive and discretionary. Thus, a clause that says: "a country may take into consideration..." creates no obligation for a country to do so.

B. Maintain: This seemingly innocuous word is one of the most important and most underestimated in the NAFTA and WTO agreements' texts. An example of this is in the WTO agreement, which says that countries shall not establish or maintain laws, regulations or procedures inconsistent with WTO rules. This language means that a country is committing specifically to eliminate existing laws or policies that do not comply. Generally, past

international commercial pacts have applied only to future laws, i.e., a country is bound not to establish new non-conforming policies.

C. Necessary: Under jurisprudence developed in numerous cases over the past decade, the term "necessary" is code for application of what is called the **"least trade restrictive"** test. Thus, there is a potential exception for WTO rules allowed for "measures necessary to protect animal, plant or human health or life." A series of GATT and WTO cases has interpreted "necessary" to require that a country must prove that no less trade restrictive means for obtaining an objective could exist. (In addition, the legitimacy of the objective, not only the means used to obtain it, must separately stand up to a legal test.) It is important to be aware of the use of the term "necessary," as it can in effect eviscerate otherwise binding provisions. For instance, NAFTA's limited "hold harmless clause" for three specific Multilateral Environmental Agreements is rendered largely meaningless because it includes the requirement that only policies necessary to implement the MEAs are covered. To date, no GATT or WTO tribunal has ever accepted a country's defense on the **least trade-restrictive** test, ruling all but one time that the country failed to prove the negative: the non-existence of a less trade-impacting policy. (The only invocation of the necessity exception accepted by a panel was in the asbestos case which survived on very convoluted and unrelated jurisprudence.)

V. Reservations, Exceptions and Carve-outs

Each of the terms "reservation," "exception," and "carve-out" means something entirely different. It is important to carefully choose the legal term that expresses your intent and also to understand the precise meaning of these different mechanisms in international commercial agreements in regard to their ability to safeguard laws and policies that conflict with the terms of the agreements.

A. Reservations: Reservations are exemptions for individual laws or policies that violate the terms of international agreements. Each country puts forward lists of laws for which it would like to take a reservation and then these lists are negotiated among trade/investment partners. Once agreed upon, reservations are annexed to the completed agreement. In U.S. investment agreements such as the NAFTA and BITs, two types of reservations have been utilized: narrow or closed reservations (Type A) to protect existing laws and open-ended reservations (Type B) to enable legislatures to adopt new laws in a certain policy area or make current laws stronger.

> **Type A reservations** would normally enable a government to maintain a law that conflicts with an agreement, but governments cannot expand the law or adopt it in other contexts. Here's an example: a state has a law banning foreign ownership of real estate above a certain number of acres. The government has decided to claim a Type A reservation for this law. While the law may be able to stand, the legislature will not be able to promulgate new laws in the future along these same lines. For example, it would be unable to impose a ban on foreign ownership of agricultural land. It would also not be allowed to make the law more restrictive. For example, it would be unable to reduce the amount of land that a foreign firm could own.

Type B reservations would enable a legislature to violate the terms of the agreement when formulating public policy in certain areas after the agreement is signed. The United States could claim an open-ended reservation for "minority affairs." This reservation would enable the U.S. government to continue to make laws addressing the economic effects of institutionalized discrimination against minority populations, even if such laws involve, for instance, favoring minority businesses over other investors in the awarding of contracts and loans -- practices that would clearly violate the investment provisions of the proposed FTAA.

B. Exceptions: Exceptions are binding provisions on all signatories built into the core text of an agreement that list the circumstances when a country may violate a term of an agreement without penalty. Exceptions only come into play as a defense when a country's law or policy has been challenged in dispute resolution as a violation of an agreement. GATT Article XX lists the exceptions to that agreement, allowing countries to take some otherwise GATT-illegal actions necessary to protect human, animal or plant health or life, for national security reasons, or in relation to preservation of a national treasure or public order or morals. Unfortunately, neither of the GATT exceptions that might apply to the environment or public health have been used with success under the GATT or WTO.

Past trade dispute panels often have not respected exceptions as a legitimate protection for nations choosing to elevate valued social objectives above commerce. Countries have unsuccessfully invoked both of the GATT Article XX exceptions relating to the environment in the two GATT Tuna-Dolphin cases, the CAFE standards challenge and the WTO challenges on Beef Hormones, Reformulated Gasoline Cleanliness and Turtle/Shrimp, only to be ruled against in each instance. The latest Turtle-Shrimp ruling goes so far as to disqualify use of the Article XX exceptions for any laws or policies that conflict with the WTO's primary goal of trade liberalization. This interpretation would gut the exceptions altogether, as protecting just such laws is precisely their intent. The long string of GATT and WTO rulings voiding exception claims highlight the problem of such decisions being made in tribunals without due process, openness, balanced judges or other safeguards.

C. Carve-outs: A carve-out removes an entire economic sector or industry or topic from coverage under an agreement. A full carve-out essentially serves to narrow the scope of the agreement by declaring some matters off-limits. For instance, Canadian public interest groups fought for health and education to be carved out of NAFTA's service sector terms, but failed. However, as with reservations, it is vital to ensure that anything less than a complete carve-out applies to all necessary provisions. For instance, Canada took a reservation under the 1988 CUFTA's agreement on Trade in Goods for its laws banning the export of raw logs. The U.S. then successfully challenged that very law by using provisions under the CUFTA's Subsidies Agreement, arguing that even though the raw log export policy was not covered by trade-in-goods rules, the raw log export ban was an illegal subsidy for Canadian furniture, home building and other industries.

D. Some Other Key Facts About Reservations, Exceptions and Carve-outs: None of the mechanisms described above prevent a corporation or country from challenging a law or policy under the WTO or NAFTA. Nations must bear the expense of defending any and all challenges before WTO or NAFTA tribunals. The WTO and NAFTA place the burden on the defending country in many instances. The right to challenge laws in international court would even include

legal challenges arising out of a disagreement as to the scope of a carve-out (i.e., would often-proposed cultural carve-outs include the computer industry?). Given the considerable expense of defending a law at a NAFTA or especially a WTO tribunal, the threat of a suit alone often discourages a government from promulgating or enforcing a certain law.

After eight years of WTO operations in which the challenger has won almost every case, a new pattern of threats by governments -- and now also corporations -- is resulting in governments preemptively dropping new proposals or weakening existing public health and environmental laws. This trend is most evident in cases where rich countries challenge developing countries; however, WTO threats have had a chilling effect on several EU humane animal treatment and environmental proposals. In addition, sub-federal governments will have to rely on their federal governments to defend their laws should they be faced with a legal challenge under the WTO. There is no guarantee that the federal government will have supported the law in the first place, and thus no guarantee that it will put up a real defense.

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