bombarded by Bilateral Trade & Investment Agreements

a research paper
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Front cover graphic designed by Jen McKinlay

Bilateral Trade And Investment Agreements
an introduction

Bilateral agreements are made between two countries, or a grouping of countries (like the European Union) and another country. Throughout the world, many governments have signed, are negotiating, or contemplating new bilateral free trade and investment agreements.

But these agreements must be seen in a global context as stepping-stones towards full integration into a global free market economy. They are another way to ensure that governments implement the liberalisation, privatisation and deregulation measures of the corporate globalisation agenda. They are based on assumptions that free trade and the removal of regulations on investment will lead to economic growth, the reduction of poverty, increased living standards and employment opportunities.

Graphic by Jen McKinlay
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There is ample evidence to show that on the contrary, these kinds of agreements only allow transnational corporations (TNCs) more freedom to exploit workers and to shape the national and global economy to suit their interests.

These binding international agreements severely constrain future governments in their policy options and help to lock in existing economic reforms, which may have been imposed by the IMF, World Bank or Asian Development Bank, or pursued by national governments of their own volition. Like other free trade and investment agreements, they work towards removing all restrictions on business.

Some bilateral trade agreements deal with a narrow range of traded goods, such as the US-Cambodia bilateral textile trade agreement, which was extended in January 2002 for a further three years.

In December 1998 India and Sri Lanka signed a free trade agreement, with India agreeing to a phase out of tariffs on a wide range of Sri Lankan goods within 3 years, while Sri Lanka agreed to remove tariffs on Indian goods over eight years. One of its stated objectives was to contribute, by the removal of barriers to bilateral trade "to the harmonious development and expansion of world trade".

Others are much more comprehensive and cover other issues including services and investment. These agreements usually take existing WTO agreements as their benchmark. They often strive to go further than what is set out in the WTO rules.

Now that it has secured fast track authority (a procedure whereby US Congress gives the president authority to negotiate trade agreements, which severely limits the time Congress can debate and consider the agreements) the US seems set to wrap up negotiations on bilateral free-trade pacts with Chile and Singapore, similar to agreements already in place with Canada, Mexico, Israel and Jordan.

Vietnam and the USA recently concluded a comprehensive bilateral trade agreement. In 2000, Singapore and New Zealand signed a "closer economic partnership" - a free trade and investment agreement which covers textile, clothing and footwear as well as services. In January 2002 Singapore signed a bilateral trade and investment agreement with Japan, as has Australia and Mexico.

Since the failure in 1998 to launch the Multilateral Agreement on Investment (MAI) at the OECD, an expansive bill of rights and freedoms for TNCs, global capital has continued to seek other ways to protect investors' rights, including bilateral investment agreements.

Bilateral investment agreements

The South Korean government recently concluded a bilateral investment treaty (BIT) with Japan and is negotiating a similar deal with the USA. Between 1987 and 1996, according to the International Centre for the Settlement of International Disputes (ICSID - which operates under World Bank auspices), over 800 bilateral investment treaties alone were signed. UNCTAD estimates that there are now nearly 2000 BITs.

BITs set out the scope of application of the treaty, defining the investments and investors covered by it. Nearly all modern BITs include provisions dealing with disputes between one of the parties and investors having the nationality (or registered in the territory of) the other party.

Bilaterals - building blocks or stumbling blocks for free traders?

Bilateral agreements have sometimes been building blocks for regional agreements, which are now found in every continent. The Canada-US free trade agreement was the forerunner to NAFTA (North American Free Trade Agreement), which binds Canada, USA and Mexico, and covers both trade and investment. NAFTA in turn has greatly influenced the nature of negotiations for the proposed Free Trade Area of the Americas, covering 34 countries.

Some governments like Australia and New Zealand argue for bilateral agreements as circuit breakers towards faster liberalisation because of what they see as slow progress in WTO negotiations. They say they are catalysts towards wider regional trade agreements and that they add momentum to global free trade.

Some also claim that bilateral agreements can achieve binding agreement on contentious issues like labour standards and the environment which are more difficult to get at the WTO. Governments generally make deeper and faster commitments to free trade and investment in bilateral and regional agreements than they do at the WTO. However, some governments fear that the current wave of bilateral negotiations will undermine the "predictability and cohesiveness" of the multilateral trading system.

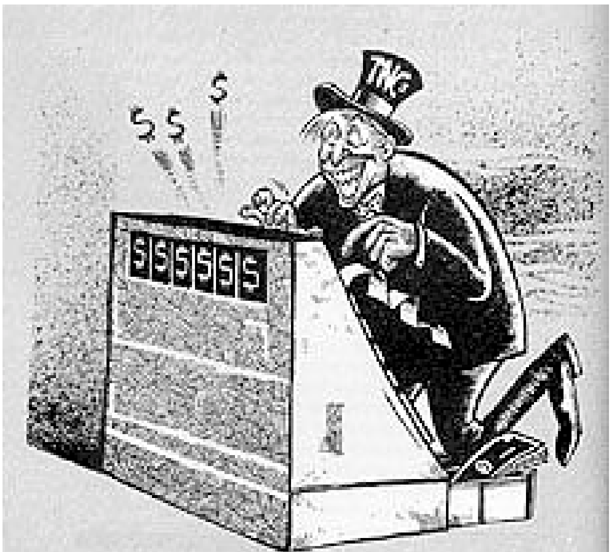
Many governments are simultaneously involved in multilateral trade and bilateral/regional negotiations. The World Trade Organisation (WTO) with 144 member governments, oversees the multilateral trading system. But according to the WTO, around three-quarters of world trade is conducted under bilateral and plurilateral trade deals. WTO rules say that the purpose of bilateral or regional trade agreements should be to facilitate trade between the constituent countries and not to raise barriers to the trade of other WTO members who are not parties to the agreement. Preferential trade arrangements on goods between developing-country members are regulated by an Enabling Clause, the provisions of which are less restrictive than the ones applying to industrialised countries.

Opposing bilateral free trade & investment deals

In several countries, social movements and trade unions have launched campaigns opposing the bilateral agreements. The Korean Confederation of Trade Unions (KCTU) and the Federation of Korean Trade Unions (FKTU) told RENGO unionists in Japan that they opposed the Japan-Korea BIT because it seeks to protect Japanese investors and disadvantage Korean citizens and workers. They said it strengthens the dominance of Japanese firms, that common Korean labour practices would not be respected, and that it would lower environmental standards. Korean activists denounced the BITs as “MAI-clones”.

A common concern about investment agreements is that they subject countries to a risk of litigation by corporations from or based in another country, which is a signatory to the same agreement. This might be based on a company’s objections to environmental, health, social or economic policies which it claims interferes with its “right” to enjoy its investment and profit.

Opponents of New Zealand’s bilateral agreements with Singapore and Hong Kong have raised concerns that the rules of origin in these agreements allow for the tariff-free import of goods that may have been largely produced in Indonesia or China, but are merely labelled as “made in Singapore” or “made in Hong Kong”. How the global web of bilateral agreements is being used by TNCs both for maximizing profits through accessing lower production costs including cheaper labour and for increased market access is of great concern.



Graphic taken from *‘TNCs in the Thick of Everything’*, IBON publication

Meanwhile a critical analysis of the Vietnam-USA bilateral trade agreement (which does not cover textiles and textile products) pointed out that any benefits for Vietnam are vague, unassured and largely depend on factors beyond Vietnam’s control. But under the BTA, US firms get wide market access to Vietnam’s market for financial, telecommunications, distribution, audio-visual, legal, accounting, engineering, computer, market research, construction, educational, health and tourism services. Local competitors are likely to be forced out of business. US companies will also get enforceable protection against expropriation. Local content and export performance requirements will be eliminated, while US firms will get full trading rights.

Bilaterals and the labour linkages debate

The debate over linkages between trade and economic agreements and issues of labour standards also exists around some of the bilateral agreements. Former US Trade Representative Charlene Barshefsky claimed that the US-Jordan free trade agreement was a model for how bilateral deals could protect the environment and ensure labour standards are followed. AFL-CIO President John Sweeney backed US government claims about the US-Jordan agreement, saying that it represented the "inclusion of real workers' rights".

In January 2002, US Trade Representative, Robert Zoellick claimed that the renewal of the bilateral textile agreement with Cambodia (which links textile import quota increases to "substantial compliance" with internationally recognised core labour standards and provisions of Cambodian labour law) is "an excellent example of the way trade agreements lead to economic growth and promote a greater respect for workers' rights". But Malaysia, for example, is critical of "the tendency to include in bilateral FTAs issues objected to in the WTO, such as labour and environmental standards. Malaysia's Ministry for International Trade and Industry says this "represents a back-door entry of these non-trade issues into trading rules." Many see the labour standards/trade linkage as a disguised form of protectionism for the industrialised countries. Other trade unions and labour rights organisations argue that free trade and investment is fundamentally anti-worker and so cannot be made more "worker-friendly" by the inclusion of wording about labour standards.

With the removal of tariff barriers and protections for local industries, and of remaining regulations on investment and labour, workers are increasingly at the mercy of global capital which views trade and investment liberalisation as key to increasing its profits.

With the privatisation and liberalisation of service sectors, which may be accelerated through bilateral agreements, workers also stand to lose out as local service providers are forced out of business because they cannot compete with bigger, more powerful overseas companies. Education, healthcare, water and other basic services are further exposed to international competition and run solely for profit.

Bilateral Agreements and the Phaseout of the MultiFibre Agreement

from MFA to ATC…

From its establishment in 1974, the MultiFibre Agreement (MFA) set the rules for international trade in textiles and garments made from cotton, wool and synthetic fibre.

The MFA was a framework of bilateral agreements negotiated country by country, or unilateral actions that set quotas limiting the amount of imports of textiles and clothing from “developing” to “developed” countries whose domestic industries were facing serious damage from rapidly increasing imports. It was supposedly a temporary set of arrangements while the industrialised country producers adapted to the competition from the South. (For more detail, see *Unravelling the MultiFibre Agreement (MFA), Kelly Dent and Matthew Tyne, TIE-Asia, May 2001*)

> **During the Uruguay Round negotiations of the General Agreement on Tariffs and Trade (GATT), which resulted in the creation of the WTO, it was agreed that a new interim agreement, the Agreement on Textiles and Clothing (ATC) would replace the MFA on 1 January 1995. This was supposed to mean that over a ten-year period, the MFA would be phased out. After that textiles and clothing would no longer be subject to quota restrictions**.

One of the main objectives of the governments of many developing countries in the Uruguay Round had been to achieve improved terms of trade in areas of their most important exports – including textiles and garments. The MFA had largely kept this area outside the scope of the normal rules of the multilateral trading system.

Essentially, the MFA was designed to safeguard developed countries’ industries, controlling the level of market access for developing country imports in textiles and clothing. Each year, the countries agreed on the quantities of specified items to be traded between them. The government of the exporting country then allocated licences to companies to export a certain proportion of each quota.

But the phaseout of the MFA and its quota system was packaged as if it were a major sacrifice on the part of the powerful economies which have always dominated the GATT/WTO talks. At the same time, the phaseout was used as leverage to force developing countries to make commitments to other WTO agreements such as TRIPS (Trade-Related Aspects of Intellectual Property Rights), GATS (General Agreement on Trade in Services) and TRIMs (Trade-Related Investment Measures) and to agree to lower tariffs.

“The MFA merely ensured that garment TNCs [transnational corporations] retained control over their markets and that foreign buyers were assured of supplies. Quota restrictions have made it convenient for garment TNCs to dominate and control the global garments trade.

They did this by securing quotas, through their subsidiaries, allotted to developed countries. Because of this, many small and medium scale garment firms either integrate to the TNCs' production process (e.g. subcontracting) or close shop."

With the phaseout of MFA, "the global garment market will be up for the taking by the best suppliers. But it will essentially remain a buyers' market"(*The Philippine Garment and Textile Industries, IBON primer, 2001*). Larger suppliers will also benefit.

The ATC set up a ten year timeframe for the integration of textiles and clothing products into WTO disciplines in four stages. It allows importers to liberalise mainly in lower value sectors, but maintains discrimination against value-added imports, protecting their own value-added industries. It is also end-loaded – for the first six years of its operation only 33% of the sector would be liberalised, with most important items only covered in the last stage. Abolition of the quota on 49% on total volume of imports will not phased out until the last day of the transition period, 1 January 2005.

Thus far, the phaseout period has been characterised by tardy implementation, especially by the EU and the USA, and the replacing of quantitative restrictions on imports with what many in the South see as disguised anti-import measures like the use of anti-dumping measures, new unilaterally imposed rules of origin requirements and transitional safeguard measures against textile and garment imports from the South. The ATC also commits developing countries to open up their own markets for textiles and clothing.

Indian trade expert Bhagirath Lal Das has dubbed the ATC and the way in which it is implemented by the industrialised world as a fraud perpetrated on developing countries in the Uruguay Round. (*EC's 3rd stage Integration of ATC Products into GATT, SUNS, July 2000*)

Pakistani analyst Farzana Noshab points out the extensive misuse by importing countries, notably the USA, of the "transitional safeguard mechanism" in the ATC to protect domestic textile industry by curbing textile imports. She also warns of the more restrictive rules of origin being imposed on textile imports. (*World Trade Organization: Critical Issues For Pakistan's Agriculture and Textile Industry, Institute of Strategic Studies Islamabad, 2000)*

What about the workers?

In many developing countries, the garment and textile industry grew due to export-led industrialisation strategies which were viewed as a good way to earn foreign exchange, the internationalisation of production through the relocating of labour-intensive production to low-wage countries, and the imposition and locking in of the export-oriented model by IMF/World Bank structural adjustment programmes.

The majority of workers in this sector tend to be women from rural areas. Such employment has long been insecure and characterised by poor wages and conditions. But now many fear that the changes in international rules governing trade in clothing and textiles will lead to serious job losses and plant closures.

The growth of textile and garments industry in many countries has been heavily dependent on the quota allocations under the MFA. Survival of those industries – and the jobs that they provide – is uncertain, especially where domestic industries have remained limited to producing a limited range of products, for a relatively limited range of markets, and where there has been little real investment in building up either the textile and garment sector or diversification of the economy for the long-term. For displaced workers in countries which have focussed on a narrow range of export-oriented production, especially women workers, alternative employment opportunities are extremely limited, if not non-existent.

"Phasing out of the MFA is inadvertently resulting in unhealthy competition among the SAARC countries. This may result in opportunistic shifting of production bases within countries. This in turn may result in further reduction in wages of workers and nose-diving of labour standards." (*Statement of Trade Unions and Labour Support Organisations in South Asian countries as a part of South Asian Labour Forum (SALF) on the Phasing out of the Multi Fibre Agreement, January 2002, Kathmandu*)

Graphic by Jen McKinlay
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Angela Hale writes: "The phase-out of quotas will enable transnational companies to become even more flexible, with fewer constraints governing their movement between countries and suppliers. Suppliers can be played off against each other and the countries that succeed are likely to have the 'advantage' of a 'disciplined' low-cost labour force. In this way, workers' lives can be held ransom to the vagaries of the international market and the increased mobility of capital." (*Trade liberalisation in the garment industry: who is really benefiting?, Development in Practice, Volume 12, Number 1, February 2002*)

Many apparel exporting countries fear that they will now lose more of their market share to China which has joined the WTO, and a small group of other low-cost, bigger labour market countries. Fear and uncertainty about China's limitless supply of cheap, skilled labour abound. South Korean Economic and Finance Minister Jin Nyum said that China is “turning itself into the world’s manufacturing plant, which will suck all manufacturing facilities into it like a black hole.” (*Even winners worry over world’s workshop, Mark O’Neill, South China Morning Post*, 30/10/01)

In turn, some unions and workers’ organisations have pointed out that in order to be competitive within and among exporting countries this will increase downward pressure on wages and conditions.

Some argue that if the market is determined by quotas countries with better working conditions and wages are not at a disadvantage. But in the post-MFA scenario, with labour costs forming a large percentage of production costs, countries with lowest wages and weakest labour and environmental standards are likely to out compete areas with stricter regulations and more rigorous enforcement.

Liberalisation has marched hand in hand with the restructuring of work and especially casualisation and flexibility. This has led to the erosion of full time jobs, the growth of casual and contract labour positions and intensification of work. Industry strategies of contracting out and outsourcing work, and the casualisation of the workforce, have also eroded the unionised workforce

Bilateral Agreements

> **Some exporting countries argue that participation in bilateral or regional trade agreements with their major trading partners is vital, especially because of their exclusion from existing preferential treatment arrangements such as the way for example that Mexico has tariff free access to the USA and Canada, and Turkey has tariff-free access into the EU. Exporters in countries not part of such agreements fear that they may be handicapped in competing for sales when they have to face sizeable tariffs and their competitors do not.**

Others are concerned about the imbalance of power between parties to a bilateral agreement. Concerns have been raised that bilateral agreements may create over dependency of a weaker nation on a stronger one, that the bargaining power lies with the stronger party, and that many developing countries are at a disadvantage because they do not have a sufficient number of expert trade negotiators to engage in such negotiations (see, for example, *Beware of the new FTA bandwagon, Editorial, The Nation, Bangkok, 21/01/02*).

It is difficult to say with any certainty how important bilateral and regional trade agreements will be in determining which countries will have the greatest export opportunities in a post-MFA world. Arguably, improved market access is not dependent on concluding such agreements. Government commitment to support research, development, marketing, lobbying and implementation of workers rights and improved training opportunities for better market access may be better strategies.

Indeed in the bilateral and regional agreements being forged between industrialised countries and textile and garment exporting countries in the South we can often see the same double standards as have attached to both the MFA and the MFA phase-out. US textile and apparel industries, which are concentrated in southeastern states, are backed by powerful members of Congress, and the White House has often been reluctant to cross them on trade issues.

The newer agreements have much in common with the MFA regime. What is different is their relationship to other agreements or other provisions in the same agreement - designed to advance liberalisation of other sectors, including investment.

1) AGOA

AGOA, The "African Growth and Opportunity Act" was implemented as part of the two-part US Trade and Development Act 2000. "Opportunity" for whom? It was initially dubbed an "Asia beater" by a US industry spokesperson. This was because imports from Asian suppliers into the USA have a very low US yarn and fabric content. (*AGOA: A Flash in the Pan? Or A Real Opportunity for Economic Development in Sub-Saharan Africa?, Textiles Intelligence Press Release, 12/06/02*)

AGOA essentially promotes exports from suppliers in Sub-Saharan Africa which use US materials. It is a bilateral agreement between the USA and a group of 48 African countries. While it includes a special apparel provision which allows for apparel from those countries to be made from any materials, this is due to expire on September 30 2004, three months before the MFA phase-out, eliminating quotas on exports from the rest of the world, including China.

After September 30 2004 apparel makers in the countries covered by AGOA will have to start using US or local fabrics, which tend to be more expensive or lacking the variety and quality required for international markets. So in spite of the claims that this agreement would boost the economic development of some of the world's poorest countries, it does little or nothing to develop viable industries in the region. Third World Network's Africa secretariat described AGOA as offering "illusory benefits": "The requirement for US raw materials to be used will work against the ability of African countries to develop, either individually or together, their own domestic raw materials base to textiles, and therefore undermine the development of integrated textile industry in Africa. Moreover, importing US raw materials for use in textile production may turn out to be expensive in view of transport and other costs, which means in the end African textiles products exported to the US may not be competitive after all." (*Africa: NGOs start campaign against US AGOA, Chakravarthi Raghavan, SUNS 4754, 2000*)

Just as the MFA phaseout must be seen in the context of a broader trade and economic strategy by the major economic powers – countries and companies - seeking deeper and broader liberalisation commitments by developing countries, so too AGOA was used by the US as a sweetener to try to overcome African opposition to issues like investment, TRIPs, TRIMs and agricultural support at the WTO.

AGOA demands that African countries eliminate barriers to all US trade and investment in Africa, including that US firms be given equal treatment to African firms, and demands further privatisation, the liberalisation of service sectors, the removal of government subsidies and price controls. It also links AGOA to participating countries' guarantee of international labour standards, and demands that African countries not engage in any act that undermines US national security and foreign policy interests.

Especially since the September 11 attacks, the political dimension of such agreements cannot be ignored. The US and the EU clearly view bilateral, regional and multilateral trade negotiations as important ways to achieve their other political and foreign policy goals.

(Despite rapid growth of sub-Saharan African countries imports into the US, it supplied under 1% of total US textile and apparel imports in 2001. The EU has also granted preferential concessions to exports of the Sub-Saharan Africa and the Caribbean)

2) Indo-Lanka Free Trade Agreement

Similar criticisms have been made in relation to a bilateral agreement between two countries in the South, namely the Indo-Lanka Free Trade agreement. The agreement permitted 8 million pieces of garments to be exported to India at concessionary rates of duty, but of these only 2 million could be manufactured from fabric of any origin – the rest were required to be made of Indian fabric. Sri Lankan apparel industry and other export sectors have complained that this agreement has only exacerbated the existing imbalance of trade between Sri Lanka and India. Sri Lanka Garments stated: "The quota restriction, the stipulation of the use of Indian fabric, the high and complex duty structures prevailing in India and the introduction of "specific duties" on specified apparel products, after the signing of the agreement have contributed to this Agreement being viewed as a "non-starter" for the Sri Lanka apparel export industry". (*Progress and Problems of Garment Exports, Kanes, The Island, Colombo, 03/03/02*. See also *www.indolankafta.org*)

3) US- Cambodia bilateral textile agreement

In addition to, and subsequent to the start of the phaseout of the MFA, a number of bilateral textile and clothing trade agreements have been signed – eg Cambodia – one with Vietnam is in the pipeline after the signing of the 2001 US-Vietnam Bilateral Trade Agreement (which did not cover textiles and clothing).

Cambodia and Vietnam are not yet WTO members, so are not bound by the MFA/ATC. For both countries, textile bilateral agreements are seen as steps towards full WTO membership.

In 1999, the US and Cambodia signed a Bilateral Textile Agreement which will remain in force until December 31 2004 after being renewed for a further three years. It links an increase in quota for many textile exports from Cambodia to labour standards. US Trade Representative Robert Zoellick announced: “Cambodia will be eligible for future quota increases if garment industry working conditions substantially comply with internationally recognised core labour standards.” (*US, Cambodia Extend Bilateral Textile Agreement, Washington Grants Quota Increase, Business Alert – US, 14/01/02, Hong Kong Trade Development Council*)

While the US government has hailed this as evidence that workers’ rights and free trade go hand in hand, others are less impressed with the agreement.

The bilateral textile agreement is based on the MFA. Andrew Wells-Dang argues that the bilateral agreement cannot take credit for growth in Cambodian imports of textiles and clothing into the USA. “Two-thirds of the specific clothing items that the US imports from Cambodia, such as nightwear and women’s dresses, are not covered by quotas at all. Without quotas on other items such as shirts, trousers, and sweaters, Cambodia might be able to export even more. At best, the argument can be made that the quotas contained in the textile agreement have not impeded Cambodia’s trading relations with the US.” (*Cambodia: Linking Textiles to Labor Standards, Foreign Policy In Focus, Asia Times, 5 June 2002*)

Third World Network’s Chakravarthi Raghavan says that the textile agreement is highly inequitable and puts Cambodia at a great disadvantage (*US-Cambodia Textile Pact Abounds in Inequity, SUNS, April 1999*). While Cambodia was asked to reduce and bind its tariffs on fibres, yarns, fabrics, made-ups and apparel over two years, the US tariff reductions will be phased in over a ten-year period starting January 1 2005.

US brands such as Gap, Polo Ralph Lauren, Dress Barn, Anne Taylor Loft and Sag Harbor are using Cambodian workers to make their product. But during the first two years of the agreement, US companies exported around 225% more textiles and apparel to Cambodia, thanks to increased access to the market. (*Lawyers Committee For Human Rights, letter to Robert Zoellick, 26/11/01*)

There are concerns as to who determines whether working conditions in Cambodia meet the agreement’s requirements, and what the role of independent Cambodian unions and workers organisations will be in this.

The AFL-CIO’s American Center for International Solidarity, funded by the US State Department runs a “solidarity center” in Phnom Penh and has been working to build and support unions in Cambodia. Their activities have led to criticism that this represents US organised labour’s attempts to protect jobs in the USA by thwarting lower-cost competition from overseas. (e.g. *The AFL-CIO Organises in Cambodia, Wayne Arnold, New York Times, 12/07/01*) The US holds the power to use the issue of labour standards in Cambodia’s textile and garment industries as a pretext for denying an increase in quota to Cambodia. The agreement also provides that when Cambodia joins the WTO the provisions of the bilateral agreement on labour standards and tariffs will remain in force. (*Raghavan, April 1999*)

An EU bilateral textile agreement with Cambodia came into force on 1 July 1999 and expires at the end of 2002

In 1999 the Philippine Department of Trade and Industry entered into an agreement with Cambodia. It allows the Philippines to tap the quota allocation of Cambodia to the US and Europe which it was not fully able to use after being given most favoured nation status.

4) Hong Kong-New Zealand "Closer Economic Partnership"

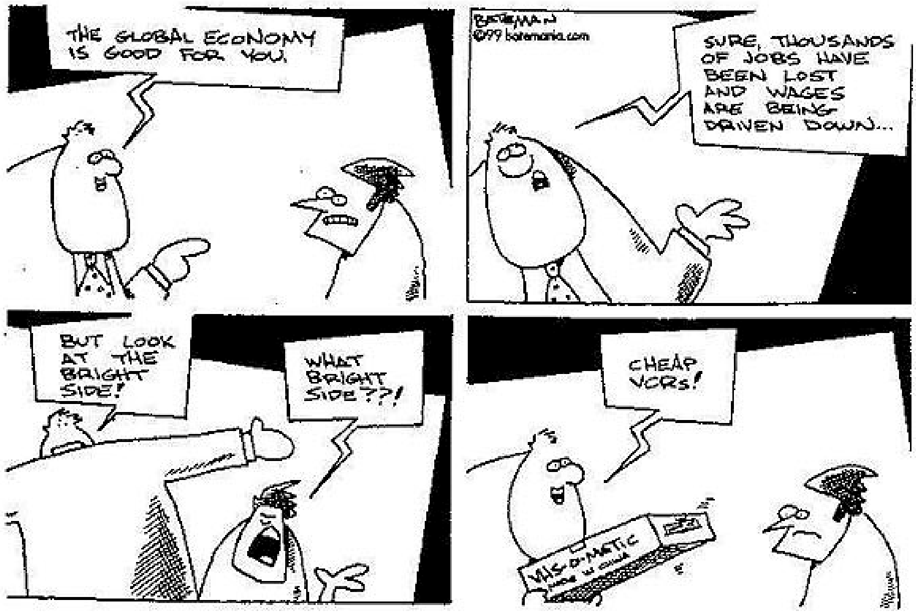
Other, more comprehensive bilateral free trade agreements have included sections on textiles and clothing.

Negotiations on a wide ranging free trade and investment agreement between New Zealand and Hong Kong stalled in early 2002. One of the most controversial trade-related areas in the agreement was the removal of tariffs from textile clothing and footwear imports from Hong Kong. A number of New Zealand trade unions, industry groups and NGOs expressed particular concern that Hong Kong is engaged primarily in intermediation – ie organising production on behalf of buyers, especially from mainland China. Hong Kong firm Li and Fung has offices in over 20 countries and oversees the entire fabrication of a product, from purchasing raw materials and planning production to monitoring manufacturing among 7,500 independent plants to which it subcontracts orders.

By 2000, 88.5% of Hong Kong's exports were "re-exports" – imported goods that underwent no further processing or only simple processing in Hong Kong. Opposition to the agreement included concerns that the close integration between companies in Hong Kong and China meant that the HK-NZ CEP was essentially a deal between China and New Zealand by any other name, and there were challenges to the robustness of and capacity to meaningfully police the rules of origin requirements. Hong Kong's inability to guarantee rules of origin was cited as a major reason for the failure to conclude the agreement.

New Zealand investment analyst Dr Bill Rosenberg wrote: "58% of Hong Kong's "domestic exports" were still "articles of apparel and clothing accessories" and textiles in the year ended November 2000. While these are in theory produced in Hong Kong, the move of Hong Kong out of manufacturing and its high and increasing integration with external subcontractors – especially in China – implies that the "manufacturing" of these items in Hong Kong is likely to be minimal. A large part of the value is likely to be markup, with just enough processing to satisfy "Hong Kong origin" requirements of the importing country." (*Globalisation by Stealth; Action, Research and Education Network of Aotearoa, 2001*)
While undoubtedly powerful industry lobbies have pressed importing countries like the US to insert rules of origin requirements in recent agreements to protect their

interests, it is important for unions and workers' organisations to be aware of other ways in which rules of origin requirements may be open to abuse.



Graphic taken from Z Magazine

The New Zealand Manufacturing and Construction Workers Union highlighted a New Zealand Customs Department report on the first six months of operation of the Singapore New Zealand Closer Economic Partnership (on which the stalled Hong Kong-New Zealand agreement was modelled). Customs' sampling of shipments of textiles clothing and footwear from Singapore which claimed duty free status under the terms of the bilateral agreement found that some 75% did not have adequate documentation to prove that the goods actually came from Singapore. A TCF industry spokesman said that Chinese textiles and clothes are being sent to New Zealand via Singapore to try to get duty free status. (*Singapore goods falsely claim tariff free status, M & C Workers News, December 2001*)

Where to for the garments and textiles sectors?

It is hard to predict the future or assess the relationship between the phaseout of the MFA, the implications for the textile and clothing sector – including workers' rights - under the "new crop" of bilateral (and regional) free trade and investment agreements, the location of industries including all stages of the subcontracting chain.

While on the one hand UNCTAD studies suggest that bilateral investment agreements themselves do not necessarily succeed in attracting overseas investment, it seems likely that bilateral trade agreements may have some influence on the location of industry if there is a real or perceived advantage in terms of tariff-free access into a market under the terms of the FTA.

With a number of these agreements explicitly leading to the removal of tariffs on textiles clothing and footwear, subject to ROO (rules of origin) agreements, it is possible that companies operating in a third country may move operations or at least set up a business presence in country B to avail itself of tariff free benefits under a bilateral trade agreement between country A and B.

Investors from China, Taiwan, Hong Kong and Singapore set up plant in Cambodia to take advantage of the improved market access into the US under the first US-Cambodia bilateral textile agreement.

> **By late 2001, some 16 textile factories had been set up by Pakistani companies in Jordan, to take advantage of duty-free and quota-free access into the US under the US-Jordan Free Trade Agreement, and Jordan's Qualifying Industrial Zones. (*Jordan: Foreign Textile Firms Benefit From Qualifying Industrial Zones, www.bharattextile.com, October 31, 2001*)**

A Thailand – Australia free trade agreement as envisaged in the recent scoping study says: "An FTA would make Thailand a more attractive destination for Australian companies wishing to invest in overseas textile facilities. Preferential access to the Australian market could encourage investment from third-country companies looking to take advantage of this access." (*Australia-Thailand FTA Joint Scoping Study, May 2002, Australian Department of Foreign Affairs and Trade website, www.dfat.gov.au/trade/negotiations/australia_thailand.html*)

The US industry's traditional offshore manufacturing locations remain Mexico and Caribbean countries. Mexico enjoys duty free access into the two other NAFTA countries, closer proximity and therefore lower transportation costs into the North American markets, and shorter lead times than many of its Asian competitors. However, Mexican workers have not benefited from NAFTA, and increasing trade liberalisation throughout the world. Real wages have dropped dramatically, union organisers attacked and conditions in many of the factories are appalling.

In more comprehensive bilateral (and regional) trade agreements lie other dangers. A Halifax Initiative report, *Globalisation, Garments and Governments: The Impact of Globalization on the Canadian Garment Industry* (www.halifaxinitiative.org/hi.php/WB/210) discusses the impact of the Canada-US FTA (the forerunner of NAFTA) on the Canadian garment sector:

"More significant to the Canadian garment industry than the loss of tariffs have been the provisions of the FTA, granting US companies "secure access" and "national treatment" in the Canadian market, with guarantees that they would be treated on the same basis as Canadian companies. "With virtually iron clad assurances – in virtually all manufacturing sectors – that the Canadian market would be available to them even if all production was shifted to the US, many US companies clearly decided to significantly rationalise or completely close their Canadian branch plants". (See section on Bilateral Investment Agreements for more on this).

To the extent that any bilateral trade and investment agreement goes further than economic reforms and WTO obligations in advancing commitments to structural adjustment, privatisation and free trade, it can be seen as one of a number of instruments to advance this agenda.

> **Just as the phaseout of the MFA will have different impacts on different countries, it is difficult to draw hard and fast conclusions about the way in which the new wave of bilateral (and regional) trade and investment agreements will impact on textile and garment workers and the industries.**

The Northern-dominated industry has always played a major role in shaping international trade policy in this sector, and the rights and conditions of workers have always been subjected to the continual drive towards higher profit margins, which has meant massive restructuring, the complex chains of subcontracting which have developed, casualisation, job insecurity and exploitation. As well as being aware of developments in the WTO, trade unions and workers' organisations need to be alert to the range of threats posed by bilateral and regional agreements to workers rights.

Bilateral Investment Agreements – Protecting Capital, Not Workers

In 1997-8 workers, communities, peoples' movements and NGOs around the world organised in opposition to the Multilateral Agreement on Investment (MAI). Designed to protect the rights and interests of investors, and severely restrict the rights and authority of host governments and countries, the MAI was negotiated in secrecy at the "rich nations' club", the Organisation for Economic Cooperation and Development (OECD).

Attempts to forge such an agreement within the World Trade Organisation (WTO) had been blocked mainly by the efforts of governments in the South, which had questioned the benefits of unregulated foreign investment. Many were concerned about the constraints it would put on their ability to set policies for national development and regulate foreign investment.

Under such a legally binding and enforceable agreement how could countries create obligations on an investor to deal with social or environmental problems which might be created? How could they ensure employment generation from an investment? How would they be able to determine national policies and ensure that such international agreements would not deprive present and future governments of some important policy options?

An international campaign against the MAI helped to defeat it for the time being, although many campaigners now point out that the current negotiations on service liberalisation (General Agreement on Trade in Services - GATS) at the WTO could deliver similar results.

Structural adjustment programmes imposed by multilateral financial institutions like the IMF, World Bank and Asian Development Bank, often backed by the overseas development assistance policies of donor governments have already forced many economies open.

Graphic by Jen McKinlay © TIE-Asia

Liberalised trade and investment policy regimes are also being accelerated and locked in by bilateral, regional and multilateral trade, investment and economic agreements.

> **Indeed it is often explicitly stated that commitments to such agreements are important precisely because they lock in such reforms, and demonstrate to the "market" that a government is committed to maintaining a "favourable investment climate", i.e. deregulation, privatisation and policies that guarantee minimal interference with foreign investments and market access.**

Workers bear a double burden as jobs are lost and wages and conditions further undermined. Privatisation and contracting out of public sector jobs leads to unemployment, underemployment, job insecurity and poorer wages. Meanwhile "investment" in the form of takeover of existing industries is almost always accompanied by restructuring the workforce. Such international agreements further extend the privileges of investors in other arrangements such as export processing zones (EPZs) and regional growth triangles, so that they are free to pack up shop, move and repatriate their profits unhampered by domestic regulation.

Outside of the workplace, workers' lives are affected by the corporate takeover and commercialisation of essential services such as water and power privatisations for private profit. With privatisation and deregulation have come price hikes in basic commodities and services, and frequently, a decline in quality of service.

The threats that the MAI posed existed years before in the form of little-known bilateral investment agreements. Some people call them “mini-MAIs” or “MAI clones”. MAI-style rights for investors have become increasingly common. The number and geographical spread of these have grown in recent years.

According to UNCTAD, the number of bilateral treaties for the promotion and protection of foreign investments increased from 385 at the end of the 1980s to a total of 1857, involving 173 countries, by the end of the 1990s. By the end of 1999, there were 842 BITs involving countries of the Asia-Pacific region (*Bilateral Investment Treaties Quintupled During the 1990s, UNCTAD Press Release, 15/12/00).* We are also seeing what some Singaporean commentators dub “new age” FTAs which go beyond traditional agreements to lower tariffs or non-tariff barriers, and include provisions on investment (*Singapore’s RTA Strategy, Linda Low, Associate Professor, National University of Singapore, 06/09/01*).

Investors, Investments, National Treatment and MFN

The scope of application of each agreement is determined by the definition of investments and investors covered by their provisions and therefore which enjoy their protection. New forms of transactions are covered and a more diverse range of investors.

At the heart of these agreements are the principles of “national treatment” and “most-favoured nation treatment” (MFN).

> **“National treatment” means that a foreign investor/investment must be treated on equal or better terms (“no less favourably”) than a local investor/investment. So this could mean that a government would be prevented from granting more favourable treatment to a local firm.**

MFN holds that the best treatment given to a domestic or a foreign investor/investment (of a third country or countries) in the territory of the signatory countries must be accorded to investors/investments from the other party to the bilateral agreement.

And what exactly is an “investment”? Again, definitions tend to be very broad.

Many BITs refer to “every kind of investment”, or “every kind of asset”.

These can include:
movable and immovable property and any related property rights, such as mortgages, liens of pledges (i.e. rights to keep property until a debt due in respect of it is paid), shares, stock, bonds or debentures or any other form of participation in a company, business enterprise or joint venture, money, claims to money, claims to

performance under contract having a financial value, and loans directly related to a specific investment; intellectual property rights, including rights with respect to copyrights, patents, trademarks as well as trade names, industrial designs, goodwill, trade secrets and know-how, rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.

The Singapore-New Zealand Closer Economic Partnership definition of "investor" includes "any company, firm, association, body, with or without legal personality, whether or not incorporated, established or registered under the applicable laws in force in a Party, making or having made an investment in the other Party's territory". To enjoy rights under such an agreement, a company can be merely established or registered under the laws of one of the countries. It does not need to be owned by one of the countries which are a party to the agreement.

Such treatment can offer very broad protection to foreign investors.

For example, the US-Vietnam Bilateral Trade Agreement (Chapter IV) says that this applies to "the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments". The Singapore – New Zealand Closer Economic Partnership (Article 29) covers the "establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer (or other disposition), protection and expropriation (including any compensation) of investments". So this protects an investor's rights of establishment and entry as well as its operations and exit. By including "establishment" this opens up the possibility of investor disputes if an overseas company can claim less favourable treatment than that which received by local or third country investors while in process of financing and acquiring permits for an investment project.

> **An investor can freely repatriate and transfer funds related to foreign investments, which in turn can contribute to serious foreign exchange outflows and balance of payments difficulties. Investment agreements frequently prohibit compulsory exchange restrictions, transfer of capital, interests, and dividends.**

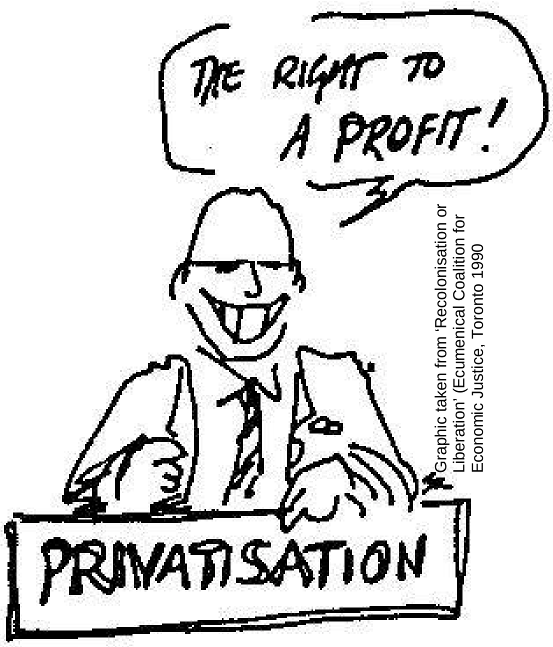
Investors also typically seek guarantees of the free movement and employment of key personnel in these agreements. For example, the US-Vietnam bilateral trade agreement says that "Each Party shall permit nationals and companies of the other Party to engage, within the territory of that Party, top managerial personnel of their choice, regardless of nationality, subject to the Party's laws relating to the entry and sojourn of aliens.

With many bilateral investment agreements all sectors of the economy are covered unless explicit reservations are made in the agreement annexes. So laws, policies or other government measures (including provincial, state and municipal ones) which limit the entry and operation of foreign companies in certain sectors such as banking, insurance or telecommunications, perhaps through equity or ownership restrictions, unless specifically exempted from the agreement, could be effectively prohibited.

Many BITs specify that no performance requirements (for example, to achieve a particular level of local content, hire a certain proportion of local workers, to limit imports and sales, and to transfer technology) shall be mandated or enforced as a condition for the establishment, acquisition, expansion, management, conduct or operation of a covered investment.

UNCTAD describes bilateral investment agreements as "the most important protection of international foreign investment" to date (cited in If Not Multilateral, Then Bilateral, www.cornerhouse.icaap.org/briefings/23.sidebar_12.html). Initially BITs were mainly signed between a developed and developing country, with the former seeking high standards of legal protection and guarantees for the investments of their firms in the latter's territory. More recently, BITs have also been concluded between developing countries and transition economies.

Powerful corporations are already using these agreements to strike down laws, which they say interfere with their rights to make profit. Now, investment agreements are also being incorporated in "Closer Economic Partnership" or free trade agreements such as the ones being struck in the Asia-Pacific region. According to an UNCTAD study, in January 2001, China (94), Malaysia (63), South Korea (60), Turkey (59), Indonesia (52) and Pakistan (39) were among the top 25 countries in terms of the numbers of BITs concluded (numbers in brackets) (*UNCTAD Press Release, 15/12/00*)



Graphic taken from 'Recolonisation or Liberation' (Ecumenical Coalition for Economic Justice, Toronto 1990

A US - Bangladesh bilateral investment treaty entered into force in 1989. The US and Sri Lankan governments signed a bilateral investment treaty and a bilateral agreement for the protection of intellectual property rights in 1991, and in July 2002 signed a trade and investment "framework agreement", which lays out principles for the expansion of bilateral trade and investment.

An EU-Mexico agreement which entered into force in 2000 has a wider scope than any other agreement the EU had previously signed, exceeding the services, investment and intellectual property provisions in NAFTA.

Obviously there is also a geopolitical dimension to the signing of such agreements, especially in the post-September 11 environment, with major powers cynically equating "security" with open trade and investment regimes.

George Bush claimed that he must have "fast track authority" in order for the USA to negotiate new trade deals. "Fast track", or "trade promotion authority" is a procedure whereby US Congress gives the president authority to negotiate trade agreements, which severely limits the time Congress can debate and consider the agreements. Now he has narrowly secured fast track US Trade Representative Robert Zoellick appears set to capitalise on this swiftly by wrapping up negotiations on bilateral free-trade pacts with Chile and Singapore, similar to agreements already in place with Canada, Mexico, Israel and Jordan. The Singapore deal is expected to be a model for future deals between the USA and Asian countries. While the US is particularly interested in opening up Singapore's economy in the interests of US companies in the areas of services and government procurement, the US-Singapore FTA will also include provisions on investment, dispute settlement and intellectual property. (*Draft Environmental Review of the proposed US-Singapore Free Trade Agreement, www.ustr.gov.environment/2002singapore.PDF*)

The Japan-Singapore Economic Partnership Agreement (JSEPA) signed in January 2002 covers investment promotion and protection and includes provisions on national treatment, prohibition of performance requirements, expropriation and compensation, transfers of profits and other funds, and investor-state dispute mechanism and procedures. Commitments made by both countries under this agreement to services liberalisation go well beyond those agreed to at the WTO. The agreement allows for investors and professionals from both countries to enter and stay in the other country to work and administer their investments. Steps are also being taken towards the mutual recognition of professional qualifications.

Under the JSEPA, foreign subsidiary companies based in Singapore are to be treated the same as local companies with respect to all provisions, and so it is anticipated that it will attract foreign companies to be based there so that they can gain favourable access to the Japanese market, especially in the service sector. The agreement also takes steps to put in place a set of procedures and regulations regarding government procurement and to promote mutual recognition of and cooperation with regard to competition policies (*Japan-Singapore Economic Partnership Agreement, Ramkishan S Rajan, Rahul Sen, EPW Commentary, 29/06/02*)

“Investor-friendly” or anti-worker?

> **Governments seeking to be “investor-friendly” frequently move to deregulate the labour market and ensure a submissive and unorganised workforce.**

During the three years of talks leading to the bilateral investment treaty with Korea, Japan has demanded special treatment for labour disputes at Japanese companies operating in Korea. In the draft of the Japan – Korea bilateral investment agreement, an explicitly anti-worker provision was included. In the face of a well-organised militant labour movement in Korea, Japanese companies sought a way to protect their investments in Korea from industrial action. In one draft of the BIT, the Korean government was called on to “sincerely deal with labour-management disputes” – ie to crush unions and settle disputes by force if deemed necessary. Korean and Japanese workers mobilised and demanded that the Japanese government remove this clause. This provision was amended to a paragraph requiring South Korea’s government to “maintain good relations between management and labour”. Moreover Japan has put concerted pressure on Korea to legislate to revise labour laws, further protect management rights and increase trade unions’ responsibility for labour disputes deemed to be illegal. (*Labor Discord and True Merits of the Korean-Japanese Investment Treaty, Korea Times, 10/01/02; Resolution No 20 – Resolution Opposing Anti-worker Bilateral Agreements on Investment, Kilusang Mayo Uno (KMU, Philippines; PICIS Statement Against the Korea-Japan Bilateral Investment Treaty www.picis.jinbo.net/english/kjbit.htm).*

Government procurement

Government procurement is another controversial area, which is being addressed at a more rapid pace in bilateral agreements than at the WTO. Many TNCs want the right to have a large share of the highly lucrative business of providing supplies to and winning contracts for public sector projects. Many local and national governments in turn have supported local companies and local employment by favouring them. In the Singapore-New Zealand Closer Economic Partnership, for example, all government procurement of goods and services over the equivalent of NZ $125,000 were opened to Singapore on an equal basis to local companies. This impacts on central and local government’s ability to favour local service suppliers in areas such as rubbish collection, sewerage, and perhaps services related to water supply. It also threatens the livelihoods of workers employed by local companies, which provide goods and services to different levels of government.

Culture under attack?

Established in 1967, Korea's screen quota system requires local cinemas to screen Korean films at least 146 days a year. But under US pressure, the government considered relaxing or dropping the protective quota to find leverage for other trade issues and speed up talks with the US on a bilateral investment treaty. This would allow more imported movies into the market, mainly from Hollywood. This move has sparked widespread protest over the impact on Korean culture and the local film industry. Korean film actors and directors said that the films shown in Korean cinemas "should not be judged only by market principles" and that the quota system maintained Korea's cultural identity and diversity. Ahn Sung-ki, a high profile actor said: "Any drastic reduction of the screen quota system will destroy the budding infrastructure of the local film industry. The Korean film industry is again in danger of being the sacrificial lamb" (*Film industry leaders protest gov't bid to ease screen quota regulations, Choe Yong-shik, Korea Herald, 29/01/02;*)

North American model imposed on rest of the world

"Canada has the dubious distinction – along with the United States – of having ushered in the new age of multilateral agreements with the Canada-US Free Trade Agreement (FTA). The FTA broke new ground in a number of important areas. It extended the scope beyond border trade to include other areas of public policy, most notably, energy policy. It also dealt with: investor rights; trade in services; intellectual property rights; trade-related investment measures; and, government procurement. It also added the element of enforcement through a binding disputes resolution process." (*Canadian Labour Congress Policy Statement, 23rd Constitutional Convention, Trade and the Economy, 10-14/06/02*)

Key provisions of the proposed MAI were based on the investment chapter in NAFTA (North American Free Trade Agreement) and the US model of bilateral investment agreements. These have become a kind of blueprint for investment provisions in many subsequent bilateral and regional trade and investment agreements. For example, in Chapter IV ("Development of Investment Relations") of the US-Vietnam bilateral trade agreement, we can see the "NAFTA" approach in the broad definition of investment, expropriation and dispute settlement. The current US administration's trade negotiating objectives also show a continued insistence on protecting US investors against performance requirements, restrictions on transfers and expropriation.

Expropriation

> **Expropriation literally means "taking away" but the term has been interpreted to apply to a wide range of actions, omissions and circumstances in international investment negotiations.**

Bilateral investment agreements generally prohibit the expropriation of investments. A common formulation refers to "expropriation, nationalisation or measures which have a similar effect." A 1995 New Zealand – Hong Kong Investment Promotion and Protection Agreement (IPPA) defines expropriation thus: "Investors of either Contracting Party shall not be deprived of their investments nor subjected to measures having effect equivalent to such deprivation in the area of the other Contracting Party except lawfully, for a public purpose related to the internal needs of that Party, on a non-discriminatory basis, and against compensation".

Under NAFTA "equivalent effect" has been interpreted as including loss of investment's value through loss of profitability. So any change in environmental regulations, for example, by central or local government which reduced the profitability of an enterprise (and hence the value of a permit or asset) could result in awards of compensation and maybe the law or regulation being changed or reversed.

In addition to provisions protecting foreign investments with guarantees and compensation in respect of expropriation, there are usually provisions, which cover losses relating to investments in the territory of the other contracting party due to war and civil disturbances.

Bilateral Vs Multilateral?

Some argue that it is better for developing countries to negotiate agreements on investment in a multilateral forum like the WTO because the inequality of power puts them in a very weak position, with unequal bargaining power in bilateral negotiations vis-à-vis industrialised countries and TNCs which are able to wring major concessions from the weaker nation. Others say that by comparison to multilateral or regional agreements, BITs can be better tailored to the specific situations of the two countries.

Supporters of liberalisation, including the Asian Development Bank are concerned about the lack of conformity among bilateral and regional agreements (*Preferential Trade Agreements in Asia and the Pacific, Asian Development Outlook 2002, Asian Development Bank*). Similarly Columbia University economist Jagdish Bhagwati refers to a "spaghetti bowl effect" created by bilateral and regional trade agreements – meaning that these create overlapping, contradictory and complex rules for trade (*Economic Analysis: Doubts Grow About Regional Trade Pacts, Peter Passell, New York Times, 04/02/97*).

Some argue that governments which do not enter into such bilateral agreements risk being left behind. Yet the extent to which BITs actually succeed in attracting foreign direct investment (FDI) is also rather doubtful. Investment flows are determined by access to markets, market size, infrastructure, regulatory costs, perceived economic stability and a range of social and political conditions (*Bilateral investment agreements play only a minor role in attracting FDI*, *Chakravarthi Raghavan*, *Third World Economics 1-15 June 1997*)

But perhaps the fundamental question should be who the “free market” economic model, in any of its guises, serves. Workers or capitalists?

Graphic taken from Z Magazine

<u>Disputes and Disputes Settlement</u>

powerful weapon for corporations

These agreements are already being used to aggressively challenge domestic laws and circumvent traditional legal and political channels. Investors can have enforceable rights to take their cases directly to international arbitration, sidestepping domestic courts, and in virtual secrecy.

Dispute settlement covers two sorts of action: state-to-state and investor-state. In many bilateral agreements, where a dispute cannot be settled amicably and procedures for settlement have not been agreed within a specified period (eg 6 months) it will be referred to a body like ICSID (the International Centre for Settlement of Investment Disputes) or UNCITRAL (United Nations Commission on International Trade Law).

The World Bank's private arbitration body for investment disputes, ICSID only allows for the investor and government parties to the dispute to have legal standing.

> **The rules of ICSID allow arbitrations to proceed in camera, with only a minimal disclosure of the names of the parties involved and a brief indication of the subject matter.**

"In its 35-odd year history, ICSID has handled a mere 79 cases, of which approximately 40 have dealt with a BIT. However, a staggering half of ICSID's case-load has been instigated in the past five years alone. Whereas the centre might have seen no more than a single new dispute each year during the 1980s, it now sees 1 or 2 new disputes a month. It seems that the high-profile disputes under the NAFTA appear to have inspired many litigators to dust off the NAFTA's more obscure predecessors" (*Luke Peterson, Changing Investment Litigation, Bit by BIT, BRIDGES May 2001*).

The arbitration rules of UNCITRAL are a set of model rules that will be used by parties to disputes. The tribunal is appointed by the parties to the dispute. No third parties, such as unions, have any standing in hearings, and there may not even be hearings as submissions may instead be in writing. The public has no right to listen to proceedings or view evidence or submissions presented.

While governments can in theory withhold their consent to such arbitration, it seems highly unlikely that they would exercise such a right having entered into this kind of agreement. Conversely, there is little incentive for investors to settle disputes amicably given the highly favourable outcomes for corporations that have initiated disputes under NAFTA's dispute procedures.

This kind of process, which also characterises NAFTA investor-state disputes has been described as the privatisation of the commercial justice system. Unions, communities and ordinary citizens have no standing before these tribunals, and the public has no right to listen to proceedings.

Investment treaties have "proved 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" says William D Rogers, of Washington law firm Arnold & Potter (*Speech to Inter-American Development Bank Conference October 26-27, 2000*). Even the threat of such action may be enough to force a government to back down.

The Canadian Union of Postal Workers (CUPW) says that Chapter 11 of NAFTA "has handed a big stick to corporations who can now wave it in the direction of any government that is creating public policy and laws they oppose." (*The Case Against NAFTA, CUPW factsheet, September 2001*)

With the current interest in bilateral trade and investment negotiations in the Asia-Pacific, particularly East Asia, the kinds of disputes and corporate bullying tactics which NAFTA and South American countries are already experiencing because of bilateral agreements will likely become reality.

Examples of investor state disputes:

a) UPS v Canada

US transnational courier company UPS has lodged a complaint under NAFTA and is suing the Canadian government for Cdn $230 million because it says that its investments – particularly its express and courier service - are being harmed by Canada's publicly funded postal system. NAFTA's Chapter 11 allows foreign corporations the right to sue governments when they take actions that allegedly limit the value of their investments. The Canadian Union of Postal Workers (CUPW) is conducting a campaign to protect the public postal service including launching a case in the Ontario Superior Court of Justice that argues that NAFTA rules and the Canadian laws that enforce them should be declared null and void (*CUPW factsheet*).

b) Ethyl Corp v Canada

Another example of how a corporation has been able to sue a government has been the one involving Ethyl Corporation (a US chemical TNC) and Canada. In 1997 the Canadian federal government banned imports of a fuel additive called MMT because it was toxic and hazardous to public health and car emission systems. Ethyl Corp used NAFTA to sue the Canadian government for Cdn $250 million claiming that the ban "expropriated" its future profit earnings in Canada. It also said that the parliamentary debate over MMT had damaged its reputation and demanded compensation. Ottawa backed down, removed the ban, apologised and paid Ethyl

Corp Cdn $19 million (see Public Citizen's Global Trade Watch website, www.citizen.org/pctrade/nafta/naftaindex.htm)

c) Azurix v Argentina

Azurix, a former subsidiary of the disgraced Enron won a bid to run the privatised water and sewage service for 2.5 million people in parts of Buenos Aires province, Argentina, in May 1999. Bahia Blanca residents complained of bad odour and brown tones in their water, while regional regulators considered sanctions against Azurix for very low water pressure. After the water supply was found to be contaminated, health authorities warned people not to drink or bathe in the water. The local regulating agency forced the company to deliver free bottled water to all those affected, that it not charge for a period when the water was of poor quality, and also fined Azurix for breach of contract. In October 2001 Azurix said that it would withdraw from the contract, complaining that the province would not let it charge rates according to the tariff specified in the contract and would not deliver infrastructure. The province rejected the notice of termination. Then, under a 1991 US-Argentina bilateral investment treaty, Azurix sued Argentina's bankrupt government for US $550 million. Azurix says that Buenos Aires failed to build promised infrastructure ahead of the sale and capped rates at levels which made the business unviable. It alleges that the authorities' actions amount to interference with its investment. The case is currently before ICSID and had its first hearing in May 2002 in Washington. (See www.worldbank.org/icsid/cases/pending.htm and Public Citizen's report http://www.citizen.org/publications/release.cfm?ID=7165)

d) Bechtel vs Bolivia

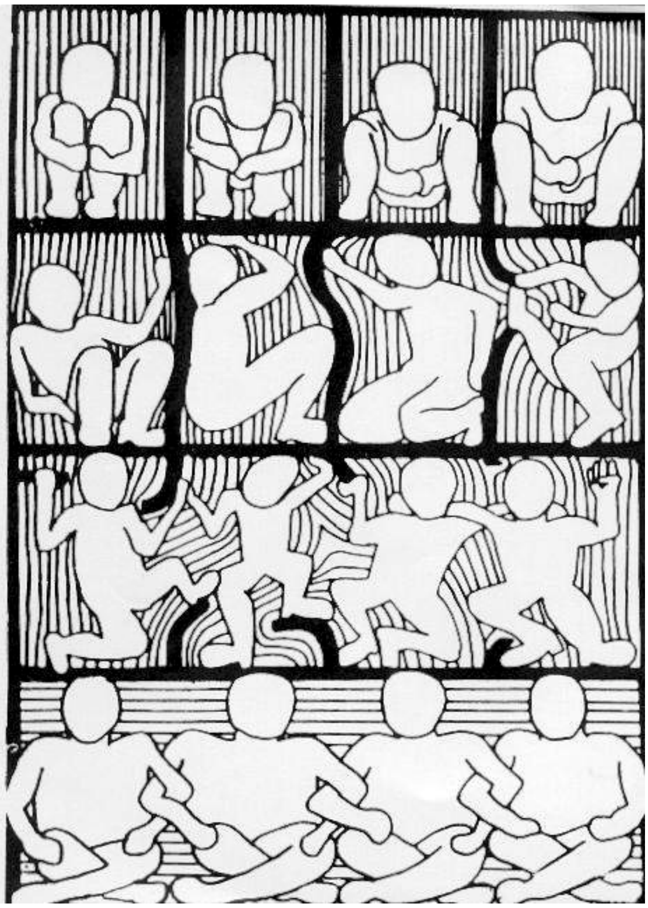
The popular struggle against the privatised water system of Bolivia's third largest city, Cochabamba after Aguas del Tunari, affiliate of US water corporation Bechtel sharply increased prices has become a symbol of the fightback against neoliberalism and privatisation. But after the privatisation was reversed, the water system handed back to the public and it was forced to leave Bolivia, Aguas del Tunari/Bechtel lodged a "request for arbitration" against Bolivia at ICSID. It was seeking US $25 million, claiming as "expropriated investment" the millions of dollars in potential profits it had hoped to make and was not allowed to.

Amazingly, this California-based corporation used a 1992 Bilateral Investment Treaty between Bolivia and Holland. How? Because while it was establishing its operations in Cochabamba, Bechtel was filing papers to shift its subsidiary's corporate registration to Holland from the Cayman Islands. Bolivia's government refused to recognise the transfer of shares as legitimate and insisted that the matter be settled in Bolivian courts. This dispute illustrates how easy it is for owners to move the legal ownership of assets in order to avail itself of rights under agreements signed by a third country (*Bechtel Vs Bolivia, Pacific News Service, 19/12/01* and *www.democracyctr.org/bechtel/bechtellegalaction.htm*).

We have already seen what the effects of investment liberalisation have meant for many millions of workers throughout the Asia region. Economic crises, job losses, price hikes and lower quality for basic services like water and power and the interference with the rights of communities to set their own agendas for development.

Many peoples' movements, trade unions, and other organisations are preparing to fight the attempted expansion of the WTO in the lead up to the 2003 WTO Ministerial Meeting in Cancun, Mexico. The European Union and the US have put enormous pressure on developing countries to commit to negotiations on the new issues - investment, competition policy, government procurement and trade facilitation - after the Cancun meeting.

But meanwhile, bilateral investment agreements are already creating more rights and powers for foreign investors, particularly transnational corporations, to wander and plunder at will. Any strategy to confront the neoliberal agenda and its impact on workers' rights must include a focus on exposing and opposing these lower-profile yet very real threats.



Decoding a Bilateral Trade and Investment Agreement

The texts of bilateral trade and investment agreements are written in legalistic language which is often difficult to understand.

Most of these agreements contain common elements and provisions. It is helpful to have some understanding of what they mean in order to analyse them and strategise.

It is equally important to ask some other questions.

Access to information

A major obstacle to mobilising around free trade and investment agreements is that they are negotiated in secret.

This makes independent analysis of the text and its implications for workers very difficult. Usually governments only publicly release the text once the agreement has already been concluded, if at all.

Where "consultations" have taken place with unions, they have usually been selective, based on very limited information, and little more than a way of trying to defuse potential opposition.

It might be useful to find out who has been consulted about the agreement. Business (who?) selected union officials, government ministries or departments, opposition parties?

What is the political process for concluding or ratifying the agreement? Will it go before parliament for debate before signing? Is there scope for challenging the agreement and the process before it enters into effect?

When it is known that a government intends to enter a bilateral trade and/or investment agreement with another country, pressure needs to be put on governments to release the text for public scrutiny long before negotiations conclude. It may also be useful to identify and seek information and solidarity from trade unions or social movements in the other country which is party to the agreement.

What kind of agreement?

The "new age" bilateral agreements can cover a broad range of areas. Trade in goods, trade in services, investment, intellectual property, government procurement, and a range of regulations and standards which impact on trade. Free trade agreements can vary quite widely in their coverage of products. It is useful to know which sectors are covered, and which, if any, are explicitly excluded.

A number of questions need to be asked:

What kind of agreement is this? What exactly does it cover? How does the agreement define the specific concepts and terms used in the agreement? Trade in goods (which ones?) Services (which ones?) Investment?

How are these and other terms defined in the agreement?

What is the duration of the agreement? What is the process for either terminating, revising or renewing it?

What commitments has the country made at the WTO, through other regional or bilateral agreements, or as a result of the dictates of structural adjustment programmes? How do these compare to the agreement in question? Does this agreement go further than existing commitments? In what way?

> **(If there is a preamble to the agreement, it is important to note that this has no legal effect. It is what is in the provisions of the actual text of the agreement which is enforceable.)**

It's also important to consider the broader geopolitical context in which the agreement is being negotiated. For example, in the case of a bilateral investment agreement, it is useful to know what level and what kinds of investment already exist that are owned by investors from the other country with which the agreement is being negotiated. Is it possible to identify key companies or industrial sectors and their umbrella organisations which are promoting this agreement?

How does this particular bilateral agreement relate to other actual or proposed regional or international agreements or arrangements (like APEC, ASEAN, the WTO, or existing bilateral agreements)? For example, is it seen as a first step towards a new regional agreement? Does it set a precedent for future negotiations on similar agreements with other countries? Even without access to the text itself, can we deduce from existing trade and investment agreements or from an understanding of the policy objectives of either of the governments involved what the new agreement will cover?

What is the political context? For example, is it portrayed as a "reward" for political support for the "war on terror" or a sign of commitment for certain positions at the WTO or another international forum? How will it be used to lock in and further accelerate economic "reforms" implemented under IMF/World Bank or Asian Development Bank structural adjustment programmes? How does it relate to promises of future aid commitments?

Are there progressive domestic (national, state, provincial or municipal) policies or measures that will be undermined or overwritten by the provisions of the agreement? What are they? Why are they important to workers and their communities?

Identifying the weaknesses and pressure points:

Just as there are variations of the form, scope and coverage of bilateral agreements, formulating campaign strategy and building opposition to free trade and investment agreements may vary from country to country. But there are some key aspects and provisions of such agreements which may provide useful entry points for mobilising opposition.

1) National Treatment

This is a core provision in free trade and investment agreements. In the trade context it requires foreign products to receive no less favourable (and possibly better) treatment than local products. In investment agreements it means that a foreign investor/investment must be treated on equal or better terms than a local investor/investment. Likewise in services agreements. Effectively this prevents governments from giving preference to local producers, service suppliers, or investors. It severely restricts their capacity to encourage local development and local employment. It gives overseas-based corporations an open door into the country and its market.

2) Performance Requirements

Governments have often sought to regulate investment so that it meets social and/or environmental policy goals. But many bilateral agreements specify that no performance requirements shall be imposed. Traditionally, performance requirements have included measures aimed to achieve a particular level of local content, hire a certain proportion of local workers, to limit imports and sales, and to transfer technology. When these measures are prohibited in favour of overseas investors, many of whom may be transnational corporations, what benefit is there for workers and local communities?

3) Rules of Origin

Under a free trade agreement import duties or tariffs are reduced or even removed on a range of goods. Governments in the North and South have often used tariffs to protect local industries and jobs and raising revenue. (With the removal of tariffs comes the likelihood of local producers, especially smaller ones, not being able to compete with cheaper imports and being forced to close down.) Because the preferential treatment provided for in a free trade agreement is usually granted only to products originating from members of that FTA, rules of origin are important. These are the criteria which determine the national origin of a product. The country of origin of a product is usually seen as the country where the last substantial transformation took place. Enforcing and defining rules of origin for goods or services poses major problems.

This issue has been very controversial in a number of agreements and unions and other critics have campaigned to highlight the ways in which rules of origin can be used and abused by governments and corporations alike (*see section on Multi Fibre Agreement for more details*). In particular there are concerns about the ease with which goods processed partly or fully in a third country can get duty-free access under a bilateral agreement by being re-exported with just enough processing to satisfy rules of origin requirements.

4) Disputes and Disputes Settlement

Some of the most crucial parts of any bilateral trade/investment agreement are the provisions about disputes and the mechanisms for settling and resolving these disputes. The scope for enforceable action to be taken by a government or an investor against a government for a law, regulation or other measure or action has greatly expanded the power of corporate capital over governments (*see section on Bilateral Investment Agreements for examples*). So if a clever corporate lawyer can argue, using a bilateral trade and/orinvestment agreement, that actual or planned progressive labour or social policy legislation, environmental regulations are a “barrier to free trade” or will reduce the profitability of an enterprise, they probably will. Such a dispute will be heard in secret and could result in large awards of compensation (from the public purse to the corporate pocket!) and the law or regulation being changed or reversed.

Arguably, once signed, the broad scope, definitions and applications of the terms in such agreements, and these enforceable and anti-democratic disputes procedures only make it a matter of time before they are used by an unhappy investor to undermine or block the rights of governments to set policies.

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A series of four fact sheets (presented in a less complex format) based on this research are also available. It may be possible to translate the fact sheets into local languages depending on demand and distribution numbers. For further information contact TIE-Asia coordinator Kelly Dent.

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