

# Investing in Destruction:

## The Impacts of a WTO Investment Agreement on Extractive Industries in Developing Countries



Oxfam America wishes to acknowledge the authorship of Jimmy Langman and the contributions of Erik Bluemel, Keith Slack, Judith Gillespie, Martin Scurrah, Javier Aroca, Cathy Ross, Natalia Solari, Katherine Daniels, Thea Gelbspan, Marcos Orellana and David Waskow in the development of this briefing paper.

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## The Impacts of a WTO Investment Agreement on Extractive Industries in Developing Countries

**A WTO investment agreement would have significant impact on extractive industries, amounting to investment in the destruction of sustainable livelihoods in developing countries. The evidence that investment in extractive industries helps poor countries is slim. According to the United Nations, the proportion of people living on less than \$1 per day in mineral and energy exporting countries grew from 61 percent in 1981 to 82 percent in 1999. Proposed new multilateral rules governing investment will undermine the abilities of developing country governments to pursue pro-poor national investment strategies and public policies regulating extractive industries. For this reason, new rules for investment must be kept off the WTO agenda.**



## Executive Summary

A WTO investment agreement would have significant impact on extractive industries, amounting to investment in the destruction of sustainable livelihoods in developing countries. Oxfam opposes launching WTO negotiations on investment and other Singapore issues as part of the Doha “Development” Round of trade negotiations. Increasing investment in extractive industries has had an immense negative impact on livelihoods in local communities around the world. Competition for foreign investment has propelled a race to the bottom in social and environmental standards. The abilities of developing country governments to pursue pro-poor national investment strategies and public policies regulating extractive industries should be enhanced. Yet proposed new multilateral rules would severely undermine the abilities of countries to regulate investment, which is why these new issues must be kept off the WTO agenda.

**According to the United Nations, the proportion of people living on less than \$1 a day in minerals exporting countries rose from 61 percent in 1981 to 82 percent in 1999.** Despite economic liberalization in many developing countries in recent years, growing foreign investment for these countries continues to be concentrated in natural resource sectors such as oil, gas and mining. South America saw its foreign investment triple in the 1990s, but exports continue to be mostly primary natural resource products. Economic dependence on volatile global commodity markets threatens economic security, while studies point to slower economic growth rates for such countries. Extractive oil, gas and mining sectors are capital intensive, create few direct jobs and, because they are reliant on imported technologies have few linkages with the rest of their host economies.

**Increasing investment in extractive industries has had an immense negative impact on livelihoods in local communities around the world.** Developing country governments typically have little capacity to prevent often extensive, negative consequences to human health, livelihoods and sustainability of ecosystems. The mining industry spews almost half of all toxic emissions in some countries, in the process ruining local agriculture and causing a substantial boost in respiratory disorders and raising cancer rates among workers and people in nearby communities. Oil and gas projects have led to rampant deforestation, spills and accidents. Extractive industries are also frequently pushing indigenous and other rural communities off their lands, forcing them to join the thousands of people around the world that each day migrate to cities in search of jobs.

Extractive industries may have the potential to promote economic growth and poverty reduction, but only if they are properly regulated. Comprehensive and enforceable regulations are necessary in order to control the negative social and environmental impacts of these industries and to guarantee equitable distribution of benefits to impacted areas.

**Competition among and within developing countries for foreign investment has propelled a race to the bottom in social and environmental standards.** It has also discouraged countries from raising standards as they strive to maintain their

“global competitiveness.” Tax breaks, subsidies and other corporate welfare strategies employed in the competition for foreign investment have undermined economic benefits for host countries. The result is an intensification of oil, gas and mining extraction inside a framework of ineffective governmental laws and enforcement.

**A WTO investment agreement would severely limit the abilities of developing country governments to pursue pro-poor national investment strategies and to support the public interest.** If patterned on the current generation of investment agreements such as the investment chapter of the North American Free Trade Agreement (NAFTA), rigid national treatment provisions and a prohibition on performance requirements would rule out a multitude of pro-poor development options. Of special concern since NAFTA, investment agreement provisions on expropriation are so broadly defined that all three participating governments have faced costly lawsuits. Private corporations operating in these countries are using secretive, international arbitral tribunals to pressure governments to change governmental regulations and laws that protect public health or the environment, claiming that they are a form of indirect expropriation.

**Oxfam recommendations include forgoing altogether a WTO investment agreement.** At the same time, Oxfam supports working to strengthen the ability of countries to regulate extractive industries and other investment activities as well as to provide assistance in the formation of pro-poor investment policies. Support should also be increased for greater value-added production in natural resource-dependent economies, which would provide more jobs and lead to sustainable development, and an international agreement on transnational corporation obligations should be pursued.

## Introduction

Worldwide, foreign direct investment has increased dramatically over the past decade as most developed and developing countries have opened up to both trade and capital, pushing deregulation, engaging in privatization and gearing their economies toward the global market. The so-called “Washington Consensus,” the name given to the neo-liberal, free market reforms proffered by the International Monetary Fund (IMF) and other international economic institutions, has radically altered the development paths of nations. And a fundamental part of that philosophy is making the free flow of private capital across sovereign borders everywhere the key to economic development for poor nations.

Foreign direct investment (FDI) can make a major contribution to poverty reduction and sustainable livelihoods in the developing world. But to do so, it depends on how that capital is used. Transnational corporations (TNCs), the largest source of FDI, seek to maximize their competitiveness in the global economy. Governments are supposed to be interested in furthering national development goals. At present, the balance between these interests is heavily skewed in favor of the TNCs with government policies promoting the profit objectives of investors over the development interests of the public. The problem is that private companies do not generally plan their operations with the welfare of the general society in mind. In the real world, not every transnational or domestic venture is in the best interest of developing countries and local communities.

The challenge is to restore to governments their proper role, allowing them the flexibility to guide development without fear of international rules that would prevent them from regulating investment. Governments should be provided incentives to improve their capacity to regulate industries to protect the social and environmental interests of their populations. But an investment agreement proposed at the World Trade Organization (WTO) would brand many national development policies as “unfair barriers.” Launching a WTO investment agreement in Cancun in September 2003 would likely restrict the right of governments to regulate foreign investment to control their development destinies, safeguard their ecosystems and uplift the poor.

The burgeoning democracies of Latin America have had little choice but to accept liberalization. Highly indebted Latin nations were forced to accept budget cuts and slashed social programs, privatization and other market reforms as part of IMF and World Bank “structural adjustment programs.” But if one looks at the results of the corresponding rise in foreign investment during this period, the region’s economies have regressed. According to the United Nations Economic Commission on Latin America (ECLAC), foreign direct investment in Latin America in the 1990s was about 13 times higher than during the import substitution policy days of the 1970s, but the average growth rate in the 1990s was 50 percent lower.<sup>1</sup> Economists surmise that the lackluster growth has occurred partly because that new investment was often merely just a transfer of assets, with most profits repatriated out of countries, changing ownership, but not increasing productive

capacity. The funds that came into governments from privatization, the largest part of Latin American FDI during the past decade, have not been re-invested but instead gone toward narrowing a hefty balance-of-payments gap.<sup>2</sup>

Indeed, in the long run, foreign investment might be the main guilty party for developing country economic woes. Local communities are often left behind in this development model: local residents often are not hired for work in the TNC operations, their homes and livelihoods are pushed away without a say, they typically face unhealthy levels of pollution or degraded vital services such as water, and they become dependent upon the TNC operation. These conditions transform communities from a self-subsisting economy to a welfare-dependent economy, vulnerable to economic ruin upon the departure of the TNC. It is a cycle especially prevalent for extractive industries, which by their nature are finite ventures and short-term, at most medium-term, in longevity.

The recent record of TNC foreign investment in developing countries and the unfortunate role of governments in facilitating investments that often have negative impacts are presented below. Then the effects of foreign investment, and potentially that of a WTO investment agreement, on six developing countries includes the experiences of Peru, Ecuador, Bolivia, Laos, Mali and Honduras. The implications of a possible WTO investment pact are discussed. The lenses used are: the North American Free Trade Agreement (NAFTA), the failed Multilateral Agreement on Investment (MAI), the Free Trade Area of the Americas (FTAA) negotiating draft, and the numerous bilateral investment treaties (BITs) that have been formed by the United States, European nations and others. Finally, some conclusions and recommendations for making foreign investment work to the benefit of the poor, the environment and the general public interest are suggested.

## **Transnational Corporate Extractives Investment: The Record**

Since the early 1990s, many developing country governments have been persuaded that traditional factors like access to natural resources; physical infrastructure and a skilled (or unskilled) labor force are not enough ballast for investment risks. In addition, a stable and permissive regulatory environment in host countries is needed. Hence, many governments have been engaging in a competition to attract FDI by deepening the liberalization process at home and through multilateral and bilateral trade and investment agreements. In 2001 alone, 71 countries made changes to their foreign investment laws, with more than 90 percent of those changes liberalization of rules. In the same year, 97 countries, the most ever, crafted 158 bilateral investment treaties (BITs). Sixty-six of these treaties were between developing countries themselves.<sup>3</sup> Altogether, in the 1990s, BITs quintupled, from 385 to 1,857, involving 173 countries.<sup>4</sup>

In 1989, total global foreign direct investment (FDI) amounted to \$200 billion; in 2000, it reached a record \$1.5 trillion. In 2001, FDI was down to about half of the prior year's total, partly due to the global economic downturn.<sup>5</sup> Still, foreign investment has become such an important part of global development strategies that it has replaced foreign aid as the main source of external capital for many developing countries. Today, FDI amounts to about 60 percent of the international capital flowing into developing countries each year and is nearly ten times larger than official development assistance. In contrast, in the late 1980s, the amounts of annual aid and FDI in developing countries were roughly the same.<sup>6</sup>

Foreign investment in recent times has boomed the world over, but the distribution of FDI remains heavily concentrated in developed countries with less than one-third going to developing countries. Just ten developing countries are the recipients of three-fourths of the capital investment. In 2001, 62 percent of all FDI to developing nations went to just five countries: China, Mexico, Brazil, Hong Kong and Poland. The world's poorest, the 49 Least Developed Countries (LDCs), received in 2001 only 0.5 percent of the global FDI total.<sup>7</sup>

Strip away privatization-related foreign investment, and the leading driver of FDI in developing countries is usually natural resource-based industries. South America is a good example. Although foreign investment tripled during the 1990s, that region's economies have not diversified much as production and exports of primary and slightly processed natural resource-based products continue to dominate. In 1990, 72.6 percent of exports from the continent were natural resources-based products; in 2000, 70.8 percent were natural resources.<sup>8</sup> In Africa, primary natural resource products also amount to three-fourths of the continent's international trade. Just ten countries account for more than 80 percent of all manufacturing exports from the entire developing world, and these are mostly products of the "maquiladora mold" — manufactured goods made with cheap labor and imported parts and technologies.<sup>9</sup>

"A typical profile for an excluded country (one not in the top 20 percent of manufactured exports) would find 70 percent of the economy in the rural sector. The exports would be 95 percent natural resource based, heavily in agriculture and mining," says Jeffrey Sachs, a special advisor to the United Nations and economist at New York's Columbia University.<sup>10</sup> "Ten to fifteen percent of the population would live in urban areas, which tend to be administrative capitals, not economic centers, and certainly not export centers. At best, these cities supply services to the rural areas in terms of finance and port services, but with little urban-based manufacturing for world markets. At least a billion people live in countries with such a profile."

TNCs and foreign direct investment potentially can be instrumental for advancing development. They are often an effective means of transferring technologies, skills and management techniques to poor countries. Some types of FDI could catalyze local industries or businesses through economic linkages. Foreign direct investment, as opposed to volatile portfolio investments which rise and fall with economic



indicators, can also be a stable, long-term source of capital for certain activities. TNCs are capable of raising significantly more financing for their investment projects than poor countries or smaller domestic companies.

However, FDI in natural resource sectors such as oil, gas and mining currently offers few such benefits. It is widely held among economists that natural resource export-dependent economies, many of which are dominated by extractive industries, actually grow slower than countries with more diversified economies. A 1997 Harvard study by Jeffrey Sachs and economist Andrew Warner, called "Natural Resource Abundance and Economic Growth," examined the economic performance of 95 countries between 1970-90 and found that the higher the country's dependence on natural resource exports, the slower their economic growth rate.<sup>11</sup> Indeed, natural resources like minerals or gas are in no measure a requisite for successful economic development, among the World Bank's ranking of countries by national income per person at least half of the richest 25 nations are natural resource-poor.<sup>12</sup>

Extractive oil, gas and mining sectors are capital intensive, create few direct jobs, and because they are reliant on imported technologies create few linkages with host economies. Academic studies are piling up with the common conclusion that poor countries dependent on such exports are stagnating as they fail to take a leap forward in development through diversifying their economies and increasing value-added production activities. At the same time, extractive industries can have devastating impact on the landscape and local agriculture, thereby ruining the livelihoods of indigenous and rural communities. Developing countries continue to focus on promoting investment in destruction at the expense of other development paths that might have wider and longer-term benefits toward reducing poverty.

If extractive industries were adequately regulated to promote economic diversification, environmental protection and full respect for the rights of impacted communities, this current pattern could potentially be altered in favor of greater economic development, poverty reduction and a transition toward more sustainable forms of economic activity. In the absence of such regulation, however, it is likely that the negative impacts of this kind of investment will continue or increase.

## **Environmental and Social Impacts of Transnational Corporate Mining, Oil and Gas Investments**

When it comes to foreign investment in extractive industries, whether digging for minerals or laying pipeline for gas and oil projects, it often leads to ecological devastation that in turn ripples widely with negative social impacts. Caring for the land, water and air, while critical and a must in its own right, is also fundamental to development objectives of tackling poverty and sustaining healthy communities. Rural poor communities are also dependent on surrounding local natural resources for their food and livelihoods. FDI in extractive industries, while as we

have shown has ambiguous economic benefits for nations, is of even greater concern as the scale and breadth of its impact on ecosystems and communities can be immense.

Multinational companies increasingly set their sights on developing countries where taxes are low, labor costs are cheap and environmental regulations are lax or hardly enforced. Mining for iron, copper, gold, silver and a plethora of other minerals spans the globe. Of the \$2 billion mining outfits spent on exploration in 2001, 45 percent was aimed at Latin America and Africa.<sup>13</sup> Once in operation, a brief sample of typical impacts from transnational mining ventures include smelters spewing sulfur dioxide-causing acid rain, and heavy metal emissions causing a high incidence of lead poisoning in children. Toxic waste and tailings are dumped into rivers or seep into groundwater, damaging the health of nearby farms and communities. Mines also use exorbitant amounts of water, draining scarce water supplies for surrounding agriculture. Abandoned mines often leave a toxic legacy for generations. One gold and iron mine in New Guinea at the end of its 30-year life span it's said will have created 143-square mile wide crater visible from outer space.<sup>14</sup>

Payal Sampat, International Campaign Director, Mineral Policy Center, describes mining's huge impact this way: "If an accountant were to weigh the costs and benefits of extracting minerals from the earth and then processing and refining them, the balance sheet would reveal this: an industry that consumes close to 10 percent of the world's energy, spews almost half of all toxic emissions from some countries, and threatens nearly 40 percent of the world's undeveloped tracts of forests—while generating only a small share of jobs and economic output."<sup>15</sup>

In the Oxfam America 2001 report "Extractive Sectors and the Poor," Michael Ross, a political scientist at the University of California at Los Angeles, presents data showing that countries dependent on oil and mineral exports have living standards much lower than they should have given their per capita income. His report shows these countries also suffer from high rates of child mortality and low life expectancy. Mining dependent nations particularly exhibit higher rates of poverty and income equality.<sup>16</sup> UNCTAD says that the proportion of people living on less than \$1 a day in minerals exporting countries rose from 61 percent in 1981 to 82 percent in 1999.<sup>17</sup> Workers in mines receive low wages as well as face serious health risks. Thousands of mine workers die each year in mine accidents while many more are exposed to chemicals and particulate matter that cause respiratory disorders and cancers. Human rights abuses are also part of the equation: in Burma, the military government has assisted the Canadian firm Ivanhoe by forcing, according to the International Labor Organization (ILO), nearly a million of its citizens to work on the development of their copper mine.<sup>18</sup>

In the oil and gas sector, TNCs control about half of oil and gas extraction, refining, and marketing worldwide. Their pipelines cut through rainforests and other ecologically sensitive areas, creating pathways through previously untouched ecosystems of high biodiversity for hunters, loggers, colonizers, farmers and ranchers. When spills occur, the toxic mess can ruin farmland, livestock and rivers

## Regulating Foreign Investment: Mandatory Public Participation Requirements

Mandatory public participation requirements can go a long way toward dealing with invasive or risky projects such as dams, nuclear facilities, large pulp mills, heavy polluting chemical industries, major transportation projects, and the like. Dealing with problems in the design stage is the easiest way to minimize the negative environmental and social consequences of development. Take Cuba. It requires the preparation of an environmental impact study and an environmental license for foreign investments. The environmental review process is still fraught with problems and Cuba's environmental enforcement agency is critically under funded and under staffed. But what has come to blossom is a new respect for public participation. Through local assemblies to help design projects in the planning stages, not only do citizens have a significant and active voice in decisions, but also organizations akin to non-governmental organizations (NGOs) in other countries have sprung up to assist in the battle for environmental protection.<sup>20</sup> The result is an atmosphere conducive to environmental protection, and the proof is in the 66 marine coastal areas that have since been designated as protected tourist resources because of public pressure.<sup>21</sup>

While more improvements to the system can always be made, things are definitely looking up for Cuba's ability to regulate foreign investments. For instance, in 2000, the Cuban environmental agency (CITMA) convinced the Ministry of Foreign Investment to reject a joint venture proposed by a foreign company and the Ministry of Agriculture that sought to develop a vineyard between downtown Havana and the international airport just outside of town. CITMA argued that the "technology to treat and control organic waste and chemical effluents was not adequate and the proposed operation would threaten the city's water supply."<sup>22</sup> The shift from a lackluster Cuban environmental policy to one that includes providing for the highest rate of organic farms per capita has been in large part due to a mandated role for affected communities in the investment evaluation process—a process that could find itself in severe jeopardy after a WTO investment agreement.

The example of Cuba illustrates that a right to public participation and the individual right to sue to enforce environmental regulations is crucial for countries that lack the political will or the enforcement capabilities to ensure environmental protection. But a WTO investment agreement would make the public's participation in investments practically meaningless. If the public effectively works to block an investment, wins a lawsuit to shut down an investment that has been improperly authorized or otherwise is harming its neighbors or the environment, the investor can sue the government under the expanded notion of what constitutes a "taking." The investor can claim in secretive international tribunals that the court's decision to shut the investment down was a "taking" that expropriated the investment, and therefore the investor should be compensated for its loss. The end result being the public will not be able to effectively protect its interests or have a real day in court.



Tintaya Mine, Espinar, Peru

over hundreds of miles and cause explosions and fires. In October 1998, a Royal Dutch Shell pipeline leak that flooded a large region near the village of Jesse in the Niger Delta of Nigeria exploded, causing the deaths of more than a thousand people.<sup>19</sup> Pipeline and mining construction camps bring only short-term, low paying construction jobs, as well as breed prostitution, drug use, alcoholism, and other undesirable activities in highly vulnerable rural and indigenous communities unaccustomed to such activities.

Effective regulation is essential for controlling these negative social and environmental “externalities” and promoting greater contribution by these industries to economic development and poverty reduction. Implementation and enforcement of such regulation is a particularly pressing concern given the importance these sectors are likely to continue to have in many poor countries for the foreseeable future.

Oil, gas, and mining projects not only can pollute the surrounding environment but force indigenous and poor communities off their traditional lands. Indigenous and rural poor are mostly not prepared to confront these projects and defend their rights. Meanwhile, corporations and governments have in some situations forced them off their ancestral lands without prior consultation and through a variety of other tactics. Moreover, many indigenous communities are not able to defend their lands because land titles promised to them for decades have never arrived. Such communities can be highly dependent upon their local natural resources for their very survival and for preserving their traditions and way of life. But according to the United Nations, many of these persons are eventually displaced and forced to join the 160,000 persons that each day migrate from rural areas to overcrowded cities in search of hope and opportunity.<sup>23</sup>

## Performance Requirements: Best Available Technology

Requiring that foreign investment projects use the “best available technology” standard typically requires that a company must use the best technology available so long as the costs “are not wholly disproportionate to the benefits.” Although requiring better technology can increase the cost to industry, this standard has met with significant success in the United States, in fulfilling requirements of the Clean Water Act as one instance, and industries have still been able to flourish.

In the developing world, the electricity industry generates an array of local development concerns but demand for electricity is bound to grow with population growth over the next decades. Meantime, many of the technologies needed to counter ecological and development problems related to the harmful emissions of electricity generation are sometimes deemed too costly. Partly in response to such concerns, the “e7,” a non-profit group made up of nine of the world’s leading electricity companies, called for electricity companies to implement “Best Practices.”<sup>26</sup> Such best practices would include the use of the best available technologies in the use of “energy resources in each country and region to efficiently generate electricity while protecting the environment.”

As part of this strategy, the e7 stated countries should implement requirements toward providing greater access to electricity in the world’s most impoverished communities. Examples of such a requirement in action might include the use of photovoltaics (solar electricity), which has achieved widespread success throughout parts of Africa, including Benin, Burkina Faso, and Niger. Kenya has the highest penetration rate of radiant energy systems in the world, with over 80,000 systems in place and annual sales of nearly 20,000 systems.<sup>27</sup> These photovoltaic systems, or other similar systems that efficiently provide electricity to rural areas, could easily be a requirement for any major rural foreign investment project. However, under a WTO investment pact, requirements to help meet the energy needs of the world’s rural poor would be well nigh impossible. National treatment provisions and provisions against performance requirements would require that domestic and foreign investors be treated equally, this despite the vastly disparate resources and technologies available to them.

The world’s population has doubled since 1960, and is expected to be at least 50 percent larger by 2050 – yet just one-fifth of the world’s current population is annually consuming 90 percent of the planet’s dwindling natural resources. Global demand on resources is sure to rise while already half of the world’s forests have been completely wiped out and half the world’s rivers are seriously depleted or contaminated.<sup>24</sup> The World Bank, which helped finance many of the most disastrous investment projects in the past decades, states in its 2003 World Development Report that sustainable use of resources is the key to future economic development. In the past, the World Bank had almost always praised economic growth no matter the environmental or social consequences. Now, the World Bank admits that uncontrolled growth could impair future generations. “Without better policies and institutions, social and environmental strains may derail development progress, leading to higher poverty levels and a decline in the quality of life for everybody,” it says.

## Race to Destruction: Public Interest Compromised by Governments

Economic globalization is spiraling toward increasing concentration of wealth and power into the hands of an elite group of transnational corporations. Of the 100 largest economies in the world, 51 are corporations and 49 are countries. American retail giant Wal-Mart, one of the world's 20 largest corporations, is larger than the economies of 161 countries; Mitsubishi is larger than Indonesia, the world's fourth most populous nation.<sup>25</sup> The juxtaposition of poor governments desperate for foreign capital with that of wealthier transnational corporations, supported by the world's mightiest economic institutions trying to pry open markets for them, has had predictable consequences. The interests of civil society have been run over and ignored and a backlash is evolving throughout the developing world.

Many developing country governments are now engaging in an aggressive competition for foreign investment that has resulted in massive handouts of subsidies, tax incentives, and sometimes, lowering or failing to enforce environmental and labor regulations. It is often argued by the World Bank and in other studies that lower environmental regulations and lower labor costs in developing countries are not a primary factor for corporations in their location decisions. That might be true on an aggregate scale, but for some sectors and companies, environmental standards and lower labor costs have undeniably played a significant role in relocation decisions. Moreover, the drive for global competitiveness is leading to an intensification of the exploitation of natural resources like oil, gas and minerals through other measures, such as tax breaks. Tax competition in such natural resource sectors has prompted the UN Economic Commission on Latin America and the Caribbean (ECLAC) to warn that it will "exacerbate the concentration of economic activity in natural resource sectors" while at the same time "the region still does not have a system of environmental institutions fully able to deal with the negative externalities of this phenomenon."<sup>28</sup>

Within the first few years of NAFTA, 15 U.S. forest products companies set up new operations in Mexico. The Boise Cascade Corporation, for instance, threatened to move more of its operations south of the border as a pressure tactic to weaken environmental restrictions and open up more public forest for logging in the United States. Eventually, the U.S. Congress passed a bill in 1995, called the Timber Salvage Rider, and dubbed the "Global Competitiveness Restoration Act" by U.S. timber company lobbyists, that did just what Boise Cascade had pushed for.<sup>29</sup> This same tactic is often utilized by other companies when dealing with unions demanding wage increases, i.e. many companies threaten to shut down plants and move abroad as the wage gap between developed and developing countries is especially wide.

More bottom feeding examples include Canada, which in May 1998 lowered the cost of stumpage fees, the amount logging companies must pay the government for each tree they cut down, in order to "restore competitiveness to our forest industry."<sup>30</sup> In 1995, to "increase investment," Mexico controversially waived requirements for environmental impact statements on investments in such polluting

## Regulating Foreign Investment: Peru's 2002 Norm of Public Participation

Peruvian communities have a constitutionally guaranteed right to access information about projects affecting them, strengthened by a 1999 law providing for public participation in the review and approval of environmental impact studies. The experiences of communities like Tambogrande, where a legal referendum opposing a mining project by Canadian-based Manhattan Minerals was rejected by the national government as irrelevant, show that even constitutional guarantees mean little in a world driven by the rights of foreign investors.

However, the Tambogrande case led to a new resolution that broadened the rights of communities and created a new Norm of Public Participation to implement the 1999 law. While the December 2002 resolution does not provide citizens the right to veto projects, it does outline a specific framework for their consultation in the identification, prevention and management of possible social and environmental project impacts. Though still lacking in certain areas, the Norm represents an improvement over previous EIA regulations. Some of the highlights are:

**Prior consultation.** First, the state must organize public meetings prior to the Environmental Impact Assessment (EIA) to inform citizens of their rights and duties, relevant environmental legislation, and the technologies to be used in the proposed project. The project's representative must continue to disseminate information about the project and the EIA as they evolve. Upon completion of the EIA, the representative must present the results not only to the Ministry of Energy and Mines, but also to local citizens in a series of workshops in coordination with the Ministry's regional authority. The final EIA should include the concerns of these participants.

**Dissemination of information.** The outcomes of the EIA shall be publicized in at least one general hearing in the town or towns nearest the proposed project, scheduled at a date and time that guarantees significant attendance. The hearing time must be advertised in the official government publication and a widely circulated newspaper at least 40 days prior to the hearing. The radio announcements will air for five days, at least 10 days prior to the hearing. The EIA must be made available for public perusal at least ten days prior to the hearing (at the Ministry, regional, and local levels). The resolution requires that the executive summary be written in simple language and that it address key questions.

**Hearing process.** The resolution requires the Director General of Environment (DGAA) of the Ministry of Energy and Mines to attend the hearings, which will be conducted in the predominant local language, ensuring greater participation of indigenous women and others. The project representative(s) will present the EIA and then answer verbal and/or written questions from the audience. If the allotted time is not sufficient to respond to all questions, the hearing will reconvene the following day, limited to a written list of participants whose questions were not previously addressed. The transcript of the questions and answers will be attached to the EIA and considered in the Ministry's evaluation of the project. These records shall be made publicly available according to procedures established in the Law of Transparency and Access to Public Information.



Diego Nebel

Tintaya Mine, Espinar, Peru

industries as petrochemicals, refining, fertilizers and steel.<sup>31</sup> “When trade and investment barriers are removed,” echoes a 1999 WTO study on trade and the environment, “industries become more mobile and more difficult to regulate. Indeed, some evidence suggests that industries often appeal to competitiveness concerns when lobbying against environmental regulations, and on occasion with some success.”<sup>32</sup>

This race to the bottom has further led to the so-called “chilling effect” or “stuck in the mud” syndrome in which governments refuse to raise environmental, labor and other standards. Such governments fear raising standards may discourage foreign investors and put them at a comparative disadvantage in relation to other developing country FDI-suitors. Threats of industrial re-location have defeated or have weakened proposals on energy taxation in the UK, US, EU and Australia.<sup>33</sup> In Chile, environmental tax proposals were similarly defeated because they were perceived as “changing the rules of the game” for foreign investors.<sup>34</sup> After concluding a recent bilateral free trade agreement negotiation with the United States in which one of the requirements is effective environmental enforcement, Chilean politicians and business leaders warned against strengthening environmental laws because the new free trade rules would now “obligate us to comply with them.”<sup>35</sup>

Contributing further still to a chilling effect are trade and investment pacts like NAFTA in which corporations have filed multi-million dollar lawsuits in response to environmental or other regulations which they claim are a form of expropriation. The threat of having to compensate foreign investors for raising standards on public health, environment, labor or development issues is an undoubtedly strong



disincentive for developing country governments. Speaking about how investment should be dealt with in a proposed free trade agreement between the United States and Chile, a Chilean trade official offered the following assessment: "Chile is a country where there will be quite a lot of regulatory changes in the future. There is still a lot of work to be done in that area, and to expose ourselves to the kind of demands by U.S. investors like what has happened with NAFTA, where the investors say regulatory changes have been tantamount to indirect expropriation and have demanded huge compensation involving many millions of dollars, well that would be very difficult for Chile."<sup>36</sup>

If one needs any further evidence that a competition for FDI is on amongst developing countries, according to UNCTAD, since 1991 a total of 1,333 regulatory changes affecting foreign investment have been enacted in at least 76 countries around the world. 95 percent of them, or 1,315, were targeted at making their countries more attractive to foreign investors.<sup>37</sup> Many times, TNCs are able to pit developing countries against each other in this race and negotiate more generous tax abatements (typically 5 to 10 years), infrastructure improvements, tariff exemptions, subsidies and other unusual benefits. In 1998, one study found that 103 countries handed out special tax concessions to TNCs that set up production or administrative facilities inside their borders.<sup>38</sup>

A study by University of Michigan economist Gordon Hanson found that more often than not, such FDI promotion incentives lowered the national welfare. In other words, low tax revenue, few economic linkages, and sometimes an increase in competition for domestic producers made the generous FDI packages "unwarranted."<sup>39</sup> UNCTAD in its 1999 World Investment Report said: "The policy challenge for developing countries is to guard themselves, in their eagerness to attract FDI, against engaging a financial incentives competition race toward the sky, a fiscal incentives-competition race toward zero, or a policy competition race toward the bottom. There are many indications that such races are under way. Incentive wars take place both between countries and within countries."<sup>40</sup>

Tax incentives aside, much of the revenues from the taxes that do get levied are frequently lost through accounting maneuvers by the TNCs. An estimated one-third of potential tax revenue is avoided by TNCs through methods such as manipulation of transfer pricing, the price of goods and services across borders within corporate networks or between foreign affiliates and parent companies. In an UNCTAD survey, 84 percent of developing countries said they "felt that the affiliates they hosted shifted income to their parent companies to avoid tax liabilities."<sup>41</sup>

The diminishing and questionable rate of return on many of these foreign investment projects stands in stark contrast with the high estimated investment totals quoted by TNCs upon their arrival. Nevertheless, governments often fight fiercely to protect the interests of foreign companies in the face of citizen pressure and protests that sometimes challenge the local social, economic and environmental costs/benefits of foreign investment projects. In most developing countries, the trend is that the approval of foreign investment projects is typically a rubber stamp affair: citizen consultation and environmental impact assessments, if they

occur, are a sham exercise. In the following section are some developing country case studies outlining specific conflicts that strongly exhibit these and other worrisome trends for those concerned for the public interest.

## **Case Studies: Bolivia, Ecuador, Honduras, Laos, Mali and Peru**

The following case studies describe countries heavily dependent on foreign investment in their natural resource sectors. Each country has liberalized its investment regulations in recent years to attract this investment. The diversity of the cases (from Latin America, Asia and Africa) suggests the global spread of this phenomenon. Oxfam America is supporting efforts by local partner organizations in each country to address some of the impacts caused by this investment.

### **Bolivia**

In Bolivia, protests in February 2003 over a government income tax hike issued in order to meet an IMF mandate to lower the nation's public budget deficit led to violent protests and the deaths of some 30 persons. The nation's president, Gonzalo Sanchez de Lozada, is now understandably loudly re-thinking the economic medicine sent down by Washington. Sanchez de Lozada was only elected with 22 percent of the vote in an August 2002 presidential election that saw virtually all of the nine candidates lash out at the 18-year old neo-liberal, free market model. As former president of the country from 1993-97, Sanchez de Lozada helped install much of the model by leading a sweeping privatization process of the country's energy, telecommunications and transportation sectors over vociferous opposition from workers and others.

Bolivia's privatization experience, almost complete with only a few remaining state entities left to sell off, has taken its share of lumps. Under Bolivia's novel approach to privatization, called "capitalization," the government auctions off 50 percent ownership in state companies to foreign corporations who then are responsible for managing them with much of the government's share of the profits deposited in a senior citizen pension plan called "Bonosol." The country has surely benefited in some cases from privatization, such as improved technology and expanded services in some sectors like telecommunications, but in others jobs have been cut, services slashed and work conditions deemed a low priority. Last year, the Bolivian government withdrew its concession from British-based Allied Deals for its Huanuni tin mine after numerous strikes and protests by workers over low pay, pensions, and working conditions.

Bolivia is the poorest country in South America and saddled as well with high foreign debt. Apart from privatizations, the only significant foreign investment in recent years has been in the natural gas sector. Seen as the country's most lucrative and promising resource, the state oil and gas company was sold off seven years

ago but now many Bolivians are angry over poor benefits. Instead of reaping rewards from the nation's bountiful natural gas reserves, the second largest gas supply in Latin America after Venezuela, jobs in the sector have fallen to about half of previous levels while annual royalties and tax income collected from gas production are paltry, amounting to less than 2 percent of the gross domestic product.<sup>42</sup> Bolivians are revolting and pining for the days of state control of "strategic" resources, pointing to Venezuela and Brazil's continuing state ownership of their energy sectors, and Chile's ownership of its national copper company Codelco.

Yet, under a WTO investment treaty, Bolivian attempt to regain greater control over its natural gas may be challenged as interfering with foreign investment in a manner that violates the agreement. For instance, limiting or retaking control over the resources could be seen as incompatible with rules commonly included in investment agreements, including disciplines concerning direct and indirect expropriation. Even indirect efforts by the country to capture more societal benefits from its gas are susceptible to challenge, such as if Bolivia sought, for example, to impose higher taxes, stricter regulations or performance requirements to achieve an improved distribution of wealth from the nation's resources to its citizens.

In March 2002, the Houston-based Enron Corporation finished commissioning its 480-megawatt thermal power plant in Cuiaba, Matto Gross, Brazil. But the natural gas pipeline passes through indigenous communities, the rare Chiquitano Dry Forest and one of the world's richest wildlife habitats, the Pantanal wetlands. Ever since Enron, and junior partner Royal Dutch Shell, decided to blaze through eastern Bolivia, the 390-mile Cuiaba pipeline project has drawn fire. In March 2002, Bolivia's Congress formed a special committee to investigate allegations of corruption. Armando de la Parra, the congressman heading up the committee, said they uncovered numerous "irregularities" in the bidding process and eventual agreement and the original contract for the Enron's purchase of the government's pipeline network has mysteriously "disappeared."<sup>43</sup>

Illegal logging, cattle grazing and hunting are increasing on access roads the companies cleared near the Cuiaba pipeline. Patricia Caffrey, former director of WWF-Bolivia, says Enron made a new network of roads in the region in violation of the company's own environmental management plan. "You couldn't penetrate the mass of forest before." Indigenous communities, furthermore, are angry that Enron has yet to comply with a May 1999 compensation agreement to supply them with land ownership titles. In Natividad, an indigenous community located near the pipeline, Erwin Chuvre said that his and other native communities are at risk of losing the forest without those land titles. "I see at night trucks hauling out timber that were cut illegally by day. This never happened here before," said Chuvre.<sup>44</sup>

The Bolivia/Bechtel case further illustrates how investment disciplines may be used to constrain policy options of local governments in issues of vital importance such as access to water. In this case, the U.S. multinational Bechtel Corporation is using a Dutch-Bolivian bilateral investment treaty in an attempt to force the Bolivian government to pay roughly US\$25 million for claimed losses as a result of events surrounding the privatization of the municipal water system in

Cochabamba. Upon taking over the system, the Bechtel subsidiary Aguas del Tunari raised prices for water by an average of nearly a third, causing massive protests and riots. In response to the breakdown in public order, the company withdrew and now blames the Bolivian government for its losses. The arbitral tribunal hearing the case under ICSID rules has declined to provide access to documents and hearings, as well as to allow the participation in the proceedings, to people affected by this failed water privatization scheme.

## Ecuador

Ecuador is a small country of 12.8 million, 70 percent in poverty. It is seeking to pay back international lenders and combat economic woes through natural resource extraction. For the transnationals, Ecuador's prime asset is oil. It accounts for half of the nation's exports, and the country has been pushing to double its oil production by 2006. But unfortunately for the TNCs, the oil is located mostly on land belonging to indigenous communities, which number well over 40 percent of Ecuador's population.

New oil revenues would help pay back their crushing debt, because the country's foreign credit dried up when it defaulted on loans in 1999. But more oil extraction would add few new jobs; few linkages to the domestic economy and over the long-term might even constitute a net economic loss. But Ecuadorian governments and the TNCs have persisted, provoking conflicts with indigenous communities that continue to fester. Center stage is the 300-mile OCP pipeline, which is being constructed by an international consortium of TNC heavyweights including Spain's Repsol YPF, U.S.-based Occidental Petroleum, and EnCana of Canada. The pipeline cuts through 24 communities, numerous water sources and wildlife habitats and, particularly, the Mindo Nambillo Cloudforest Reserve. The Mindo reserve is one of the world's most important bird habitats, home to more than 450 species of birds, 46 of them threatened with extinction. It's considered one of the leading eco-tourism spots in South America.<sup>45</sup> But environmental groups are worried about spills, among other issues.

They have reason to be concerned: a Chevron-Texaco oil venture spanning three decades in Ecuador left behind about 350 contaminated waste sites encompassing an estimated 1.8 million gallons (4 million gallons according to plaintiffs, NY Times May 8, 03) of spilled crude oil, nearly twice the size of the infamous Exxon oil spill in Valdez, Alaska.<sup>46</sup> After leaving the country in 1992, the companies have worked to sidestep lawsuits filed by indigenous groups demanding that they pay for cleanup. Recently, in August 2002, the United States Court of Appeals in New York ruled that the case should be sent to Ecuador, as Chevron Texaco originally wanted. The Court also ruled that American courts could step back in if the plaintiffs were unable to bring their case or if Chevron-Texaco did not adhere to the Ecuadorian court's final decision. (NY Times, Thurs May 8, 03); meantime, nearby communities continue to suffer the effects of soil and water contamination, deforestation, and cultural erosion.

A 2002 independent study done by Robert Goodland, former chief of the World Bank's environment department, found that the OCP project had "substantial non-compliance with all four applicable World Bank Social and Environmental Safeguard Policies" dealing with environmental assessment, natural habitats, involuntary resettlement, and indigenous peoples. But over substantial protests for more than two years, the government and companies proceeded with construction anyway.<sup>47</sup> That is, until the Lucio Gutierrez government assumed office in January 2003 and ordered work to stop temporarily around the Mindo. The new government's environmental minister said that pipeline construction had violated the terms of the pipeline's license by damaging trees, plants and habitats of local species near the protected forest reserve.<sup>48</sup>

Still, the pipeline will eventually be completed. The OCP consortium signed a deal with the government guaranteeing the pipeline will be finished by July 2003. If they fail, they must pay \$70,000 per day for the first week thereafter, increasing to possibly \$2.93 million per day after 85 days. This deadline, though, has hurried work and is one of the reasons for the environmental transgressions. Meantime, in a TNC power play, the OCP consortium has vastly scaled back plans and says it will only transport through the pipeline 15,000 barrels of oil a day for the first three years, well short of the 400,000 barrels originally hoped for by government enthusiasts.<sup>49</sup> Observers say the primary reason for the change is a new value-added tax levied on oil companies. The transnationals are rebelling, cutting back investments to pressure the government to repeal the tax.

Once the OCP pipeline is readied, the Shuar and Achuar indigenous peoples fear the government will finally go around laws and courts and force them to give up their land to oil development to help supply the nation's ambitious oil export plans. The Shuar and Achuar indigenous communities have been dependent on their local ecosystems for centuries. The disastrous experience suffered by communities near the Chevron-Texaco oil fields helped motivate their federations to declare their unconditional opposition to drilling on their ancestral lands by the U.S.-based Arco Oriente Inc. When Arco persisted in its efforts to divide the federations anyway, using a variety of pressure tactics against individual communities, such as offering jobs, water supplies, health care and free air travel, an Ecuadorian judge ruled that Arco violated the rights of the Shuar people to organizational integrity. In the judge's September 1999 ruling he forbade the company from approaching the Shuar without the express authorization of the court.

The case was held up as a legal precedent. Under the constitution of Ecuador, and the International Labor Organization (ILO) Convention 169, the Shuar and other indigenous peoples must be allowed to independently decide how to manage their natural resources without outside interference.<sup>50</sup> But in a WTO investment agreement, the right of indigenous peoples to decide how to manage their natural resources, currently protected under Ecuadorian law, could now be challenged under the proposed WTO pact's national treatment non-discrimination principle. Foreign investors could argue that the Shuar people are, in essence, an investor in

the oil resources through their holding of title to assets that could be covered under the agreement's definition of investment. The foreign companies could thus demand similar access to the oil as that enjoyed by the Shuar people.

## Honduras

Primarily due to civil wars in neighboring countries, the small Central American country of Honduras only recently joined the mining boom sweeping Latin America and the developing world. But Honduras has not been shy in its embrace of foreign mining companies. Ever since it extended the neoliberal market reforms advised by the IMF to its dormant mining sector in 1998, well over 30 percent of the nation's territory is under gold mining concessions with more on the way. In a March 2003 interview with Reuters news service, Juan Francisco Castro, technical director at the Honduran mining ministry, said in the past half year they had received 60 new applications for gold concessions. "That is double the average of the past four years," said Castro.<sup>51</sup>

More than its abundant gold reserves, the country offers an attractive financial incentives package to its foreign mining investors, who currently come mostly from the United States, Canada and Australia. Under the nation's mining law, companies can obtain permanent concessions, with low taxes (land use fees are reportedly as low as \$1,500 for a large mine while the local municipality tax a tiny 1 percent), unlimited access to water, and legal authority to expropriate surrounding farmer and indigenous lands. In December 2000, the IMF pressured Honduras to lower taxes further still by eliminating an export tax on mining products.<sup>52</sup>

As in many developing countries, environmental regulations are seen as a low priority and separate, even conflictive, with promoting economic development. But local residents see it differently and say weak environmental protection is at the core of their development concerns. The gold mines are using and releasing into the local rivers and ecosystems cyanide and other toxic chemicals as well as reducing drastically water needed vitally for their farms and for personal use of cooking, cleaning, bathing and drinking.<sup>53</sup> Protests are on the rise, such as in the town of San Ignacio, where hundreds of residents are staging protests against Canada's Glamis Gold Ltd. Among resident's environmental complaints is that the company's open-pit gold and silver mine is destroying forests and endangering the community's water supply.<sup>54</sup> If communities succeed in enacting environmentally based restrictions on the mining operations, these regulatory efforts could be considered indirect expropriations of the foreign investor's investment.

## Laos

In Laos, agriculture accounts for about 80 percent of the nation's jobs. But according to the Asian Development Bank, only 3 percent of the total land area is suitable for crops while this scarce area is "already under severe pressure" while "it is difficult to find actual open or readily available land for future population expansion and new communities."<sup>55</sup> In 1994, Laos adopted a new foreign investment law.

The investment law, among other provisions, gave assurances on expropriation protection and repatriation of profits, and tax breaks for re-investment of profits. All foreign investment projects, to the dismay of the IMF and others, are also first screened for approval by a governmental foreign investment “management committee.”<sup>56</sup>

But Laos remains one of the world’s poorest nations, with a per capita income of about \$320. The country’s poverty and the government’s quest for economic growth have driven it to attempt to attract any and all foreign investment. Laos also unfortunately has weak governmental institutions with weak capacity for protecting the environment or the development interests of rural communities.<sup>57</sup> An outcome of such conditions is that the country is vulnerable to poorly regulated or monitored investments. Most recent investment has been concentrated in energy and hydropower projects designed in concert with multinational logging companies. Commitments to control logging made to the World Bank are often ignored and energy infrastructure is often slow to materialize. Meantime, a recent withdrawal of a large foreign hydropower investment recently sparked the IMF to declare the country must liberalize its economy further still to create even more favorable foreign investment conditions.<sup>58</sup>

The recent, high profile Sepon mining project of Australia-based Oxiana Resources, a gold mining venture near the border of Vietnam, has tested the country’s investment regime as never before. The project has garnered a slew of tax breaks and is the nation’s first large foreign mining investment in a country with a great potential for more such projects.<sup>59</sup> A grand steal for Oxiana, when factoring in all the tax relief, the company must pay a modest corporate tax for only three years of the 7-year project. Most worrisome, the mine also utilizes cyanide-leaching technology, a technology prone to spills as evident from recent accidents at similar mines in Ghana, China, Romania and the US. This is of special concern as a cyanide spill at Sepon could affect the region’s fisheries and the important Mekong River system.

Three villages may also have to be relocated as their forests and farmland are cleared and the surrounding water table drops.<sup>60</sup> But the lack of competent institutions, combined with weak participation by civil society in the country’s investment decisions, has allowed the project to be approved – and it will operate – without adequate independent monitoring.<sup>61</sup> And an independent assessment of the environmental impact plan found that locals were hardly consulted with numerous holes in the company’s mitigation plans concerning impacted communities and ecosystems.<sup>62</sup>

Under a WTO investment treaty, Laos’ foreign investment screening process could be eliminated and the country would lose a key tool for helping channel investment into the most pressing development priorities.

## Mali

One of the world's 10 poorest countries, the West African country of Mali has few resources to convert to economic prosperity. 60 percent of the country is Sahara desert, while desertification is fast advancing on much of the nation's remaining fertile lands.<sup>63</sup> Mali has recently begun privatizing its socialist model of the past four decades, and opened up substantially to foreign investment, but poverty persists, due as well to factors such as corruption, poor infrastructure, government mismanagement and few energy sources.<sup>64</sup> Gold production has more than doubled in just the past two years alone, making the country the third leading gold producer in Africa after South Africa and Ghana. Gold is now the country's largest export, replacing cotton.

If foreign investment in gold is to be the nation's great hope, then, many Malians fail to see it that way. Gold production is booming at the Morila mine, owned by South Africa's AngloGold and Randgold. But local residents living near the mine say prices of basic goods are also rising fast while jobs and water for farms are increasingly scarce. Workers complain that its corporate owners don't provide access to basic health care, while one mine operator recently told the BBC News that only "80 of 440 technical workers have lodging and the rest of us live in mud huts." The mayor of the local municipality says that prostitution is out of control, long-term environmental damage is mounting due to deforestation and the hazardous use of cyanide, and the company cheated locals who lost their farmland to the mine: local Malians asked for \$400 for each hectare of farmland they lost to the mine but instead received just \$80. "Of all the 702 mayors in Mali, I am the one with the most problems because of that mine," Sogolo Togola, the mayor told the BBC.<sup>65</sup>

A country such as Mali would be an ideal setting for the use of performance requirements to help diversify the economy. The government could implement a requirement that foreign investors buy certain products from local businesses to create economic linkages or that a percentage of revenues go toward transferring needed technologies or improving local infrastructure. Under an investment agreement, however, such measures could be found to be WTO illegal.

## Peru

Recently, Peru's President Alejandro Toledo made his pitch for foreign investment at the U.S. Chamber of Commerce in Washington. "You have an extraordinary opportunity to make money in Peru ... I want you to be my partner in this task," Toledo told the group. "We are doing our best to create an adequate climate to be successful in competing for capital investment," he said. "And we are committed to clear rules of the game."<sup>66</sup> Indeed, Toledo's government has picked up from where the previous Alberto Fujimori government left off and is aggressively courting more foreign investment in mining, oil and privatized services such as electricity. While FDI for the whole of Latin America is on the downturn, Peru's is on the rise. In 2001, FDI doubled to about \$990 million.<sup>67</sup>



In the early 1990s, the Fujimori government made sweeping changes to national laws to jumpstart foreign investment in extractive oil, gas and mining sectors. For instance, in September 1990, Peru's Congress passed an extensive environmental and natural resources law that included protection for national parks and biodiversity and spelled out specific requirements for oil and mining projects. But in November 1991, the Fujimori government successfully modified some sections of the law for worried, prospective mining investors. Much of the changes gave new powers to "the competent sectoral authority," or agencies that oversee mining and oil projects, to set on a case-by-case basis emissions limits, toxic waste disposal procedures and other concerns that had previously been liable to specific guidelines under the environmental law.

The clear lowering of environmental protections to attract foreign investment was exemplified by changes to chapter 8 of the law, which deals with energy resources. Article 71, which had prohibited developing energy and other projects that exploit non-renewable resources in nature protection areas, was completely eliminated by the June 1991 passage of an investment promotion law.<sup>68</sup> The parks, Andean highlands and biodiverse-rich Amazon had joined the sale of Peru's 220 state-owned industries. Now, nothing was off limits. Said Doris Balvin, an expert on Peru's environmental laws, it was clear that foreign mining companies had influenced the changes. "It was understood that this was done to appease them [the foreign mining companies]."<sup>69</sup>

Today, Toledo's government argues that the country is dependent on foreign investment in extractive sectors to raise the country out of poverty, which affects nearly half the country's 27 million people. Half of the country's exports are from the mining sector, and government officials say mining export revenues are needed to help pay off the country's 30 billion foreign debt, a debt that eats up about a quarter of the government budget each year. But multinationals and foreign investors can and are freely transferring most of the profits abroad as well as given excessive tax breaks. According to one Peruvian economist, the government collects only about \$300 million a year in taxes from mining companies, a relatively small portion of the nation's \$7 billion in tax revenue collected annually, especially when considering the emphasis the government places on the sector.<sup>70</sup> Local communities receive little of the taxes that are collected. In 2001, U.S.-based Newmont Mining Corporation paid \$50 million in taxes for its gold mine near Cajamarca, one of the most profitable in the world.<sup>71</sup> Meanwhile, there is no limit on the amount of natural resources extracted, environmental woes mount with the nation's lax enforcement of environmental laws, and there is little investment of monies in other, more sustainable industries.

Nowhere is the conflict over the questionable mining benefits and unusually well-defended foreign investors rights in Peru more clear than in Tambogrande, a small town of 18,000 located in the north of the country. Canadian-based Manhattan Minerals corporation was given its mining concession during the Fujimori government for a \$315 million project to dig out the gold, silver, copper and zinc that lies below at least a third of the homes in this agricultural town.

The company projects it will earn a billion dollar profit over the life of the project, while it says the town will benefit by relocating 8,000 displaced residents to modern homes and creating 300 direct jobs.

But Tambogrande is situated in the agriculturally rich San Lorenzo valley, which produces about 25,000 mangoes each year and about half of the limes used annually for Peru's beloved ceviche, a traditional national dish of raw seafood flavored with lime juice. The town is nearly fully employed in the fields of San Lorenzo, which account for \$100 million in agricultural production a year. This agricultural success means the town and the surrounding valley do not need such a mining venture to aid their future economic development. Moreover, citizens believe that the short-term mining venture will harm their fortunes by, among other concerns, contaminating their fruit production and using up too much of the water needed for their farms.

In June 2002, the mayor of Tambogrande called for a referendum, which although rarely used, under Peruvian law is allowed for by municipalities on issues of local importance. Of the 73 percent of town residents who participated in the vote, 94 percent voted against the mining venture.<sup>72</sup> But Peru's Minister of Energy and Mines Jaime Quijandria, who had worked hard to block the initiative prior to the vote, does not recognize the referendum. He charges it has "no legal weight," and said the government, which has negotiated a 25 percent stake in the project, will continue to evaluate Manhattan's mining proposal according to the nation's permissive mining law.<sup>73</sup> Quijandria insists that the fate of the project is for the national government to decide, and not for the affected people who live there. For its part, Manhattan Minerals is also pressing ahead.

If a WTO investment treaty is formed, the residents of Tambogrande will have even less control over their fate. If Tambogrande's residents were to be fortunate enough to ultimately win their battle to stop the project by using Peruvian laws or courts, the company could then argue that Peru would be engaging in expropriation of the company's expected investment. This is what happened in the Metalclad case in Mexico, where a local municipality that denied a construction permit for the operation of hazardous waste facility in an already highly contaminated site was held in breach of NAFTA and ordered to pay compensation in the millions of US dollars. Faced with such a threat, Peru would be even less likely to uphold the rights of Tambogrande residents, or the rights of any other community for that matter. Under a WTO investment agreement, the Peruvian government could also be forbidden to impose special performance requirements aimed at ensuring a diverse economy.

Another large foreign investment project, the Camisea natural gas project, led by an international consortium of investors that includes Texas-based Hunt Oil and Argentina's Pluspetrol, is also proving controversial. The Camisea gas field is situated in southeastern Peru on land claimed by the Machiguenga, Yine, Nanti, Nahua and Kirineri indigenous peoples, including one legally recognized indigenous reserve, and threatens to severely disrupt their way of life. The project also intersects with the Cordillera of Vilcabamba and the Lower Urubamba Region,

which have been declared by Conservation International as one of twenty-five global “hotspots” for conservation because of its “biological richness, high incidence of endemism and highly threatened status.”<sup>74</sup>

Royal Dutch Shell first discovered the gas reserves in the 1980s, but disputes with the government led the natural gas concession to be awarded in 2000 to the Hunt-Pluspetrol consortia. As expected, the government is pushing this project forward over the concerns of local and indigenous communities, an action that some groups argue violates International Labor Organization (ILO) Convention 169 that specifies indigenous peoples must be consulted on decisions that affect them. As well, the government has not sufficiently dealt with concerns that the pipeline will increase deforestation, habitat loss, hunting, and contamination of local water sources. An April 2002 independent assessment conducted by technical experts from international and Peruvian non-governmental groups stated: “the project will have negative irreversible impacts on the biodiversity of this area and on indigenous groups living in isolation regardless of the implementation of the strictest mitigation measures”

Already, the Camisea Consortium has been fined for violation of environmental law during construction, but the companies refuse to pay. Indigenous leaders say that the companies’ workers are also coming into frequent contact with long isolated indigenous peoples, which is believed to have spread contagious diseases for which they have no immunity.<sup>75</sup> “In Peru, and regrettably other developing countries, capital is above any other interest and the government prefers to maintain clear rules of the game for foreign investors over the environment, human rights and other interests,” said Lelis Rivera, director of Center for Development of Amazon Indigenous Peoples (CEDIA). “We have good environmental and social laws, but nobody respects them. Justice and independent courts do not exist here.”<sup>76</sup>

On February 25, 2003, Miguel Palacin, president of CONACAMI (National Coordinator of Peruvian Communities Affected by Mining), filed a formal complaint against the Peruvian government for violation of fundamental rights – including right to life, right to property, right to organize – with the Interamerican Commission on Human Rights. The complaint documents with volumes of evidence countless cases involving illegal expulsion from lands; contamination of water, air and land; violations of human rights; and other problems experienced by thousands of persons from 15 indigenous communities located near foreign and domestic mining projects. “The multinationals want to extract all our resources, and our governments do not have the power to say no. The state is weak; it’s desperately competing with other countries for investment offering less taxes, better facilities. They are also corrupt,” said Palacin. “We are the only ones who can stand up and defend our country.”<sup>77</sup>

## No New Issues: Reject the Negotiation of a WTO Investment Agreement

In 1994, the preamble to the WTO was amended to include the objective of sustainable development. But the agreements and decisions that emanate from the institution have since continued to undermine development, environmental and social concerns around the world. At the November 2001 Doha WTO ministerial meeting, developed countries and the WTO secretariat trumpeted to all who would listen that the decisions taken at that meeting to pursue negotiations on investment, competition, government procurement, and trade facilitation issues constituted the launch of a “development round.” While proponents of the agreement have not suggested regulatory expropriation or investor-state dispute settlement per se, many others have seen such negotiations as “everything but development.”<sup>78</sup> Several developing countries were able to obtain a commitment at Doha that an explicit consensus is needed at the Cancun ministerial before any such negotiations can commence. However, given the controversial nature of these issues and the threat of an investment regime to the regulatory capacity of countries and to development, developing countries have a clear opportunity to safeguard their rights and interest by blocking consensus. Oxfam urges that the new Singapore issues, including investment, not be taken up by the WTO.

The European Union, the United States, Japan and other countries may argue that developing countries will have the space to pursue their development policies within a WTO investment agreement. After all, in the Doha Ministerial Declaration, paragraph 22 includes a clause spelling out that “any framework [investment] should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest.” The same paragraph also states “the special development, trade and financial needs of developing and least developed countries should be taken into account as an integral part of any framework.”<sup>79</sup>

But given that the principal aim of the WTO and its proposed investment agreement is to liberalize investment rules and establish maximum investor rights, such preamble-like words are once more not likely to mean much in practice. The WTO investment agenda will be much like that of existing international investment agreements around the world that include non-discrimination and national treatment, elimination of performance requirements, limits on expropriation, and investor-state dispute procedures. Such rules are expressly designed to leave little space for the governmental right to regulate foreign investment. And the investor-state secretive and closed arbitration designed to carry forward the agenda of increased privileges for investors, at the expense of taxpayers dollars. It is also important to note that any WTO agreement will not prevent the US or other countries from continuing to press for bilateral and regional agreements that may introduce or augment these problems.

Moreover, the positive-list approach used in the General Agreement on Trade in Services (GATS) negotiation has already shown the pitfalls of WTO promises of flexibility: the rules are imprecise, liberalization is once more the overriding objective, and once a sectoral commitment is made, it cannot be reversed. There will furthermore be the usual enormous political pressure on developing countries by developed countries, transnational corporations, and others in “green room” deals, offering foreign aid, more agricultural access – the gamut of carrots and sticks – in exchange for including key sectors under the liberalized investment regime. Extractive industries could well be covered under the services negotiations and at least Canada has asked for liberalization commitments in this area.

Without the ability to regulate and guide foreign investment much of the potential benefits of increased investments will continue to be lost. And as we have shown in this report, evidence suggests that the possible benefits of FDI in extractive industries are questionable and, in fact, even destructive for the public welfare without proper regulation and enforcement. In the global economy, developed nations and TNCs have the obvious advantage over poor, developing nations. Guaranteeing the right of all nations to engage in development policy that restricts some foreign investments must be the aim of all involved in international trade negotiations.

As the former Director General of the WTO, Renato Ruggiero, puts it, such an international investment agreement would be like “writing a constitution of a single world economy.”<sup>80</sup> It is important to carefully consider the consequences of allowing an institution like the WTO to write the rules on what governments can and cannot do in relation to transnational corporations. Should not it be the other way around, and instead, what TNCs can and cannot do in relation to countries? It would be highly unlikely for the United States and European nations to sign on to an agreement that gave their TNCs less rights than they already have.

## **National Treatment: Maximum Investor Rights**

The principle of national treatment, as seen in NAFTA, BITs, and other such investor rights agreements, essentially means that foreign investors can in no way be treated less favorably than domestic investors. In other words, countries may not discriminate against FDI, but they can discriminate against local investors. Even further, under this obligation, investors are demanding the best treatment ever accorded to locals. In the context of NAFTA, compensation has been awarded after findings of breach of this principle, even for illegal activities! (Feldman case, ARB(AF) 88/1, Dissenting Opinion of Judge Jorge Covarrubias, available at <http://www.state.gov/s/l/c3751.htm>) The national treatment principle has extensive implications for national development policies.

Some countries, in an attempt at boosting the long-term fortunes of their national and local economies, restrict foreign ownership in strategic extractive industries. They have a screening process prior to approval of foreign ownership, or require joint ventures. These practices have a variety of motives. They may seek to discriminate via a screening process in order to choose investors with a positive track

record or sound financial footing. Even the World Bank's International Finance Corporation Office of the Ombudsman is recommending that the "IFC should ensure that in its selection of partners, as project sponsors or financial intermediaries, the commitment to positive environmental and social outcomes is proven and that a specific assessment of their capacity is included at pre-appraisal." (CAO, *A Review of IFC's Safeguard Policies*, January 2003). They may want to steer investment in such a way that it contributes to improving know-how and performance of local companies, or toward helping local industries reach the same level of efficiency and competitiveness as their counterparts in more developed countries. But under national treatment rights, all of the aforementioned are subject to elimination.

Moreover, laws set up without any discriminatory intent whatsoever under the national treatment principle would be a target for rollback or cut down before they are ever hatched. New laws placing limits on the expansion of extractive industries—such as regulations on sustainable management or the designation of ecological protection areas—would be targeted. These regulatory limits could be construed as limiting the access of TNCs to resources relative to domestic investors who already have access to minerals or other natural resources. In addition, longstanding laws and policies in many developing countries regarding rural land reform and redistribution would be deemed discriminatory.

### **US-Chile and US-Singapore Bilateral FTAs Undermine Sustainable Development**

The recently concluded US-Chile and US-Singapore Free Trade Agreements (FTAs) contain trade and investment policies that, if passed, would not promote sustainable and equitable development. Oxfam supports fair trade rules that are negotiated through meaningful, transparent dialogue that takes into account the diverse voices of a broad range of civil society organizations. But the Chile and Singapore agreements were, until recently, secret documents, to which only a limited handful of private sector representatives had access. It was only after a Freedom of Information Act (FOIA) suit that citizens obtained access to the background documents of the investment negotiations. (CIEL, et.al, Press Release available at [http://www.ciel.org/Tae/FTAA\\_Chile\\_Dec2302.html](http://www.ciel.org/Tae/FTAA_Chile_Dec2302.html)).

Moreover, the investment provisions in these agreements undermine governments' ability to regulate investment so that it contributes to development. The Trade Act of 2002 requires that trade agreements not accord foreign investors greater rights than domestic investors. This requirement of the US Congress has not been met, as the investor-state dispute settlement mechanism would permit foreign companies to bypass domestic judicial processes and demand compensation in secret international arbitration panels. By defining investment broadly to include the "expectation of gain or profit," as well as intellectual property rights, the Chile and Singapore agreements leave ample room for foreign companies to challenge domestic regulations, such as laws to protect health, safety, and the environment.

The investment provisions in these FTAs even go beyond NAFTA and typical BITs, in that they establish a new and separate cause of action for damages in cases of breach of concession contracts or concession authorizations. This new cause of action has significant implications for extractive industries, as foreign investors usually acquire access to natural resources through authorizations from, or contracts with, the State administration. This new provision translates in that alleged breaches of contracts, which would otherwise be subject to the domestic law of the host state and would be heard by domestic courts, are now placed under the purview of the investor-state arbitration mechanism. Thus, local governments will find it much harder to secure compliance with the conditions and terms of concession authorizations and contracts, as any dispute would involve the State in costly international litigation.

By restricting the use of performance requirements, the Chile and Singapore agreements fail to promote investment that will lead to sustainable development. Restricting performance requirements such as local content and technology transfers, for example, fails to ensure that investment will be linked to the local economy. It leads to a scenario similar to NAFTA, which encouraged maquiladoras as a means of cheap processing of US-made imports with minimal labor and environmental enforcement. The Chile and Singapore agreements also call for the removal of controls on capital, which have proven to be instrumental to protecting countries from financial instability. Further, these agreements provide investors with a private cause for action in damages if countries establish capital controls, even in cases of financial crisis. These prohibitions are very problematic for countries with balance of payments instabilities.

The investment provisions in this new generation of bilateral agreements do not contain sufficient “fixes” to counter the problem. The US also has a responsibility to ensure that the enormous difference in the level of development between the countries negotiating these accords is taken into account. Ensuring investment rules that promote, rather than undermine, transparency and sustainable development should be a priority in all trade and investment pacts.

Other laws set up for attack could include laws limiting foreign ownership of culturally significant industries and properties, or laws guaranteeing that public utilities such as water are majority-owned by domestic companies. Advertising in countries warning against the consumption of products, for example a hypothetical warning on products made with genetically modified organisms, could be disputed by TNCs in the WTO’s tribunals as discriminatory actions. And all subsidies and other forms of assistance designed to foster local companies would also have to be made available to TNCs, including low-interest small business loans made by governments to domestic companies.

In sum, the obligations pertaining to national treatment and the protection of investments do not protect bona fide State regulation from legal assault, but rather encourage it, thereby undermining the ability of States to regulate for the public good.

## **Most Favored Nation**

The Most Favored Nation (MFN) principle requires that the investments and investors of a foreign country be treated no less favorably than those of any other country. In essence, MFN amounts to an obligation to provide to all the best treatment given to any. However, this principle poses particularly difficult problems given the existence of numerous bilateral investment treaties. If a country is required to provide its best treatment to all, then rights granted to investors in any bilateral investment treaty must be granted to all investors. In other words, if a WTO investment agreement includes the MFN principle, the current model of bilateral investment treaties would be extended to the multilateral level for all WTO member countries. In essence, this would mean that even if certain investment rules such as expropriation were not negotiated in the WTO itself, they would still be imposed globally in an almost automatic fashion.

The MFN principle would also restrict the ability of governments to distinguish between other countries' investment based on criteria such as human rights. Under Most Favored Nation investment rules, bans on university or other public investment in certain countries, such as, for example, a ban by a state legislature or town council on buying from companies that have investments in countries with a history of human rights violations, would no longer be permissible. In addition, laws by national or local governments set up to encourage countries not to decimate their forests or fisheries or to raise labor standards such as laws or policies that place environmental or social conditions on purchases, loans or grants, would no longer be allowed.

## **Prohibition on Performance Requirements**

If the WTO investment agreement goes according to past trends, like other aspects of the WTO, such as in its Trade-Related Investment Measures (TRIMS) and GATS, performance requirements on investments will be prohibited. The MAI and NAFTA also include specific lists of government policies, laws and programs—under the rubric of performance requirements—which are prohibited no matter if they discriminate or not.

Many countries have regulations or policies obliging foreign investors to follow certain performance requirements so that they will contribute toward host country development and environment objectives. Performance requirements are needed foremost in the case of transnational corporations, which have neither stake nor interest in the well being of local communities. Typical requirements include upgrading technologies, local hiring and training requirements, stimulating local businesses through purchasing, ensuring minimum local equity participation, or retaining a percentage of revenues within the country.

These and other performance requirements are made precisely to ensure that the benefits of investments meet local and national development needs. Local communities, in particular, use such requirements to make sure local economic activities are in balance with their unique needs and concerns. In British



Columbia, Canada, one law requires timber harvested in the region to be used for manufacturing in that same region.<sup>81</sup> Such a policy is an attempt by British Columbia to move away from concentrating on exploiting and exporting primary resources as much as they can and instead help foster industries that create more and longer-term jobs and encourage sustainable management.

## **Investment Protection and Expropriations: The Regulatory Chill**

The expropriation, or “takings,” provisions of a WTO investment treaty would likely be the most damaging. The expropriation clauses, common to all investment agreements to varying degrees, would give maximum protection to the interests of foreign investors. But if the WTO follows the NAFTA and MAI formula, as is expected, foreign investors who feel that a host country has impaired their investment in any way – directly or indirectly – can take legal action against that host nation.

The definition of investment as included in NAFTA and BITs and advanced in investors’ claims is overly broad, encompassing virtually any tangible or intangible assets or expectations, including market share, expected profits, and even business opportunities! These extensive interpretations blur the line between trade and investment, with the effect of privatizing trade remedies under GATT, and make virtually any government measure subject to challenge before unaccountable, closed arbitral tribunals. Further, arbitral tribunals have failed to recognize that investment is only a means for development and not an end in itself, and that international law should only avail protection when demonstrable development impacts are established.

Likewise, the definition of expropriation as practiced in NAFTA and most other investment accords is very broad and extends even to decisions of national courts. These investor protections are also often construed as offering investors the right to monetary compensation if a host government enacts regulations affecting the value of the investments, regardless of whether such regulations are vital to protect public health, the environment or other societal concerns. Expropriation provisions are thus being utilized by TNCs to win multi-million dollar awards and rollback regulations intended to protect the public interest.

Since NAFTA came in to force in 1994, corporations in all three-member nations have used their new investor rights to file lawsuits numbering in the tens of billions of dollars. Not only are they after money, but also environmental, public health and other laws have indeed been reversed. The numerous examples include the infamous Ethyl case. In this instance, the Canadian government in July 1998 agreed to lift its prohibition on the fuel additive methylcyclopentadienyl manganese tricarbonyl (MMT). The Canadians also further agreed to pay MMT maker Ethyl Corporation US\$10 million and issued a public statement that the formula posed no health risk.

This occurred even as the United States Environmental Protection Agency (EPA) had moved to institute a similar ban and new evidence surfaced linking the manganese in MMT to nervous-system problems. In return, the U.S. based Ethyl Corporation agreed to drop a US\$ 250 million suit alleging that Canada had effectively seized its property, that it had “expropriated” it by damaging its anticipated profits when banning MMT.<sup>82</sup> Another rollback occurred when, after Canada, in pursuance of its international obligation under a multilateral environmental agreement—the Basel Convention on the Transboundary Movement of Hazardous Wastes, had banned in 1995 the exports of industrial waste containing carcinogenic PCBs. In early 1997 it was forced to drop this policy as well after U.S. firms threatened a challenge it under NAFTA. But lawyers for the US company S.D. Myers Inc., which specializes in PCB treatment, sued anyway, because they said that during the one and a half year ban it lost US\$ 30 million in potential revenue.<sup>83</sup>

One of the most notorious cases in the NAFTA annals of investor rights is a 1997 complaint filed by the U.S.-based waste disposal company Metalclad against the Mexican government. Metalclad claimed that the Mexican state of San Luis Potosi had violated its NAFTA rights when it prevented the company from opening a waste disposal plant. But Metalclad had taken over a facility with a history of contaminating local groundwater. After an environmental impact assessment revealed that the site lay atop an ecologically sensitive underground alluvial stream, the local government denied Metalclad a permit, which would have allowed the company to reopen the facility. Later, the government declared the site as part of a 600,000-acre ecological zone. Metalclad claimed that the government’s actions effectively expropriated its future expected profits and sought US\$90 million in damages. In August 2000, the NAFTA “tribunal” ruled in favor of Metalclad and ordered Mexico to pay US\$16.7 million in damages.<sup>84</sup>

Subsequently, Mexico sought judicial review of the Metalclad award in the place of arbitration, British Columbia. On May 2001, the Supreme Court of British Columbia (BC) held that the Tribunal had exceeded its jurisdiction after finding that the Tribunal had mis-stated the applicable law on fair and equitable treatment, and partially set aside the award. The judicial review conducted by the BC Supreme Court highlights that arbitral tribunals are inclined to elaborate idiosyncratic theories with no basis in law, in order to award damages to investors. The judicial review also highlights the important role that domestic courts should play in providing opportunities for procedural and substantive justice and in reviewing poorly reasoned or manifestly biased awards.

The implications of the Metalclad, Ethyl and other such lawsuits are clear. Not only do these actions roll back laws intended to protect the public interest but they create an enormous disincentive for both local and national governments to raise environmental, health or other standards for fear of multi-million dollar lawsuits involving costly legal and other administrative fees. Replace big countries such as Canada and the United States with poor developing countries that have total budgets many times less than many of the world’s transnational corporations and the problem is magnified many times.

NAFTA regulatory takings claims were sufficiently worrisome that controversy over such claims helped scuttle the MAI in 1998. Concern about the investor protection provisions also figured prominently in debates over the Trade Promotion Authority Act (TPA) recently pushed through the U.S. Congress and continues to be a basis of opposition to the proposed FTAA. The TPA, which gives the United States president authority to submit trade agreements to the U.S. Congress for a straight up or down vote with no amendments, was passed with an amendment from Senators Max Baucus and Chuck Grassley intended to address the outrageous problems with NAFTA's expropriation standard.

But legal experts say the amendment in reality did absolutely nothing to change NAFTA and the Baucus-Grassley language has provided little specific guidance to U.S. negotiators in avoiding similar problems with future investment agreements such as the WTO. Senator John Kerry, in a May 2002 letter to his colleagues in the congress, called the effect of the Baucus-Grassley amendment on future investment agreements "little more than cosmetic change."<sup>85</sup>

## **Minimum Standards of Treatment**

In their claims, investors have not been satisfied with national treatment, as that only entitles them to demand that same treatment afforded to locals, treatment that in the eyes of investors may not be adequate. Thus, the claim to an absolute minimum after which international law and the diplomatic protection of the home states would enter the scene to protect investors. The Calvo doctrine emerged as the expression of the resistance of Latin American states to the abuse of diplomatic protection, with implications in three spheres: national treatment, diplomatic protection, and the exhaustion of local remedies. In short, the Calvo doctrine required that foreigners not be afforded greater rights than locals and that domestic law and courts would apply and adjudicate over investment disputes.

Currently, many investment treaties include a minimal treatment standard that requires that a host State treat the foreign investor in accordance with an indefinable standard of "fair and equitable" treatment. Traditionally, this type of provision applied only to extreme cases of egregious or shocking mistreatment; however, tribunals under NAFTA's investment chapter have interpreted this provision extremely broadly, and have failed to articulate a clear, objective standard. In response to this troubling expansion of the scope of this provision by arbitral panels, the trade ministers of the NAFTA parties issued an interpretive note in July 2001 attempting to curtail extensively broad interpretations.

In spite of such interpretive note, arbitral tribunals have held that the customary law on this point is evolving, and that the 2000 plus BITs in force around the world must have an impact on the meaning of fair and equitable treatment under MST. In this line of reasoning, they have held that a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith (Mondev Award, para. 116, ADF Award para. 180, available at <http://www.state.gov/s/1/c3741.htm>), a development which is problematic for developing countries in particular,

because these findings involve after-the-fact appreciation exposing the State to liability on subjective considerations that vary by tribunal. The danger of such expansive interpretations is greatly amplified by a potential WTO agreement.

## **Secretive Dispute Settlement**

The settlement procedures for investor disputes may include not just state-to-state procedures, where the full diplomatic and economic muscle of powerful States backs the pretenses of its investors, but as well the NAFTA-like investor-to-state procedures in which private companies are given the power to sue governments in special, secretive tribunals. This is the case with NAFTA, the proposed FTAA, and many of the numerous bilateral investment (BIT) agreements forged in recent years. The WTO dispute procedures have never before included such powers for private companies. But if they soon do, the secretive hearings would compound the problem.

In NAFTA and numerous BITs, disputes are settled through arbitration under ICSID, ICSID Additional Facility or UNCITRAL rules. ICSID is the International Centre for the Settlement of Investment Disputes, established under the auspices of the world bank and housed in the same building, while UNCITRAL is a loose set of rules designed by the United Nations Commission on International Trade Law to resolve private commercial disputes. In the past few years, these courts have decided on significantly more investor-to-state disputes than ever before. Between 1966 and 1997, for example, the ICSID arbitration panels dealt with just six BIT cases, while in 2001, had 43 NAFTA and BIT cases under its purview.<sup>86</sup>

These arbitration courts suffer serious democracy deficits, particularly in terms of public participation and transparency. Like those of the WTO, arbitral panels have barred both the media and citizens affected by their rulings from participating or observing its proceedings. In fact, under prevailing interpretations of arbitration rules, unless the investor and the State agree, citizens cannot be party to a case nor may they observe the documents or proceedings of the tribunals. Further, under UNCITRAL rules there is not even a register of disputes. Then, under ICSID the two disputing parties each appoint a judge, with the third appointed by the World Bank. But as with the WTO dispute procedures, these judges usually consist of international trade lawyers without expertise in environmental matters or the other specialized fields they may rule upon.

The investor-state mechanism is unidirectional, biased, and undemocratic in that its aim is to favor foreign investors at the expense of the rule of law. In fact, the investor may initiate international arbitration at any time, thereby by-passing the role of domestic courts and undermining due process. Further, the investor may decide on the rules of procedure, may object to disclosure of documents, and may even appoint one of the judges of the arbitral tribunal. Finally, the rules governing the arbitration do not adequately comprehend the broader public policy issues arising in investment cases, as these rules were conceived for private commercial arbitration.

This secretive and unfair process coupled with the extraordinary powers given to corporations to bypass national and local judicial processes under investor-to-states procedures, would weaken national and local sovereignty in nations that participate in the WTO. In the United States, such concerns arising from NAFTA have sparked strong criticism from many diverse sectors, including the Conference of Chief Justices, comprised of the chief judge of every U.S. state, the National Conference of State Legislatures (NCSL), which represents all of the U.S. state legislatures, and others.

Mike McGrath, attorney general of the state of Montana, described in a March 2002 letter<sup>87</sup> to U.S. Senator Max Baucus, chairman of the U.S. Senate Finance Committee, some of the problems with the dispute settlement procedures this way: "In short, under this regime, foreign arbitration panels, composed largely of non-U.S. citizens and non-U.S. lawyers, would become the courts of last resort to resolve domestic legal issues of vital importance to all Americans." The sensitive nature of this issue in the United States clearly reveals the potential threat of such dispute settlement mechanism on the poorer countries of the world.

## **The Way Forward: Conclusions and Recommendations**

The record so far for some developing countries has not been good under liberalized investment regimes. Environmental deterioration has been exacerbated in many cases. The equity gap has widened. The economic fortunes of developing countries have been damaged and worker rights have been trampled upon. Governmental laws and budgets have been reduced to new lows in ineffectiveness. Now, some developed nations want to consolidate and intensify that model and permanently give their transnational corporations stronger rights than that those of sovereign nations around the world.

Oxfam believes that globalization need not harm the poor and undermine democratic institutions. The global economy needs rules of the game that are fair and work for all sectors of society, not just transnational corporations. The proper role of government is to protect the public interest. It is an elementary lesson, but one that seems to have not yet been learned by the supporters of an investment agreement in the WTO. Until there is a truly level playing field among nations, developing countries must be given the space to guide their economies toward sustainability and equity.

But if we allow the WTO to go the way of NAFTA, MAI, and the current investment approach of the Free Trade Area of the Americas, we are sure to fail. Some recommendations on forging an international investment regime that meets the development needs of the world's poorest countries are:

**1. No investment negotiation should be held in the WTO.**

At the end of the Doha WTO meeting, the chair of the ministerial, Qatari trade minister Youssef Kamal, said in a statement: “My understanding is that at that fifth ministerial [Cancun] a decision would indeed need to be taken by explicit consensus before negotiations on the Singapore issues could proceed. In my view, this would give each member the right to take positions on modalities that would prevent negotiations from proceeding after the Fifth Ministerial Conference until that Member is prepared to join an explicit consensus.”<sup>88</sup> Developing countries and others should exercise their rights and refuse to join the “explicit consensus.”

**2. International institutions, from the United Nations to the World Bank, must begin working now to strengthen the capacity of developing countries to develop pro-poor development policies.**

Developing countries especially need to regulate extractive industries and other economic activities and, most importantly, to strengthen enforcement of such regulations. The leading international institutions should implement programs to assist developing countries with devising development plans. These plans need to be less dependent on extractive sectors and to emphasize instead value-added industries that create more and higher paying jobs and more sustainably use the natural resource base.

**3. Regional and bilateral agreements should be forged that do not compromise vital public interests to attract investment.**

Such agreements must make legally clear that each nation has the sovereign right to set higher labor, environmental, public health or other standards in the public interest. These governments should not undergo any threat whatsoever of expropriation lawsuits. Multilateral environmental agreements should take precedence over free trade and investment laws.

**4. The investment provisions of the bilateral US-Chile and US-Singapore free trade agreements set dangerous precedents for future trade agreements negotiated by the US. They should not be used as models for future agreements.**

With negotiations under way for a Free Trade Area of the Americas (FTAA) as well as new deals with countries in Central America, Southern Africa, and other regions in the works, the US must at the very least bring its negotiating position in line with the requirements of the Trade Promotion Authority (TPA) Act. While the TPA was itself insufficient, at present the current set of bilateral agreements fall far short of protecting the sovereignty of domestic courts and laws, which the US Congress had clearly intended to guarantee through passage of the TPA.

**5. Transnational corporations should not be accorded stronger investor rights in any international, regional or bilateral investment pact.**

A good starting point toward achieving a fair economic playing field would be to make the Organization of Economic Cooperation and Development (OECD) guidelines on corporate responsibility binding and legally enforceable.

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