SOUTH BULLETIN

The focus of this issue of the South Bulletin is on the
Doha Round of trade negotiations

In this Issue

The Doha Deal: More Harm than Good to Developing Countries?....................212

As WTO negotiators miss yet another deadline for concluding the current round of world trade talks, a new report "Doha Round and Developing Countries: Will the Doha deal do more harm than good?" paints a picture of little gains and higher costs. A report by the Research and Information System for Developing Countries (RIS).

Without Better Offers, No Doha Deal Better - Oxfam..216

As it stands now, the Doha Round of multilateral trade talks have little to offer to developing countries, says Oxfam. "Aggressive demands by rich countries mean that, far from being able to pursue reforms that will lift people out of poverty, poor countries are having to engage in damage limitation," says the Oxfam report.

Peoples' Trade Agreement: An Alternative For a Just Trade 221

The President of Bolivia, Evo Morales recently made a proposal for an alternative trade model that trancends the narrow commercial interests now pursued by the free trade agreements. The peoples' Trade Agreement, as it is called, would integrate societies in ways that respects their necessities and promotes a more just trade.

Deadline Missed But No Deadlock – Lamy..224

According to WTO Director-General Pascal Lamy, a missed deadline does not mean deadlock. He now wants that negotiators 'should be on call on a permanent basis.' The statement by Mr. Lamy to the Informal Heads of Delegation meeting on 24 April.

Is the DDA a Development Round?...225

"This Round is more than a negotiation, it is also a test. A test of the credibility of the WTO, and its ability to deliver on its promises to developing countries. A test of the global community's willingness to turning their talk of international cooperation and policy coherence into meaningful results." Views expressed by Valentine Sendanyoye-Rugwabiza, a Deputy Director General of the WTO, in an address to the London School of Economics.

More in this Issue

Lifting the Lid on Foreign Investment Contracts - (II)................................ 228
Turbo-Charging Investor Sovereignty – (II)... 232
South Centre News...239
Editorial..240

The Doha Deal: More Harm than Good to Developing Countries?

As WTO negotiators miss yet another deadline for concluding the current round of world trade talks, a new report "Doha Round and Developing Countries: Will the Doha deal do more harm than good?" paints a picture of little gains and higher costs. Released by the Indian think tank **RIS - the Research and Information System for Developing Countries** *– the report is authored by* **Timothy A. Wise** *and* **Kevin P. Gallagher** *of Tufts Global Development and Environment Institute. For many governments, the balance sheet on the Doha deal may well be negative, says the report, repdroduced below. The authors call for a re-examination of the proposed agreement in light of the WTO's current mandate to foster broad-based development.*

Now that the tear gas has cleared in Hong Kong and negotiations have moved to London and Geneva, the broad outlines of a new WTO agreement are emerging from the haze. Advocates of meaningful economic development cannot be happy with what they see. As the Doha negotiations limp toward an ill-defined finish line, it is not surprising that many developing country negotiators are asking themselves if the emerging deal is better than no deal at all.

The round began with vows to enable poorer nations to develop their economies. The deal taking shape now offers limited economic gains for the developing world as a whole, and many countries end up worse off, according to recent economic projections. Hidden behind those modest benefits are costs that should give negotiators pause. Tariff losses and other "adjustment costs" may be prohibitively high, some countries will experience a loss in national production after opening their manufacturing and services sectors to rich-country competition, and all face the loss of autonomy to pursue the kinds of national development policies that have proven effective in the past.

Small Gains, and Only for a Few

The World Bank and other economic modelers have generated a raft of new projections of the economic gains from further global trade liberalization. Though they differ in important ways, the recent estimates share two features: The economic benefits are much smaller than previously estimated, and developing countries see losses or small gains of well under one percent of GDP.

The shrinking gains since the earlier estimates are by now well known. For the Cancún ministerial, the World Bank and others produced estimates of more than $500 billion in developing country benefits from liberalization. More than 100 million people were to be lifted out of poverty. These estimates, which used a 1997 base year, were rightly updated for the Hong Kong meetings. The new figures include China's liberalization as an accomplished fact rather than a prospective gain from the negotiations, incorporate existing trade preferences, and use applied rather than bound tariff rates, along with several other improvements.

Projections of global gains from full trade liberalization dropped from $832 billion to $287 billion; the developing country share fell from $539 billion to just $90 billion. Fortunately, the modelers did not stop there. An added feature of these new economic analyses is the attempt to project not just the abstract gains from a level of worldwide liberalization no one expects to happen but also the likely gains from the current round of negotiations.

The results of two recent projections are presented in Table 1. The World Bank's projections, which were out before the Hong Kong meetings and received widespread publicity, showed a "likely Doha scenario" of just $16 billion, out of a global total of $96 billion.

In Hong Kong nations agreed to allow exemptions from negotiated liberalization levels for so-called Special and Sensitive Products (SSPs) in agriculture. As the table shows, after adjusting the Bank's likely scenario for the special products exemptions, based on its own modeling scenario, developing country gains fall to just $6.7 billion, out of a total of $38.4 billion. [1] This amounts to less than a penny a day for those in the developing world.

Using the same underlying economic model and data, the Carnegie Endowment for International Peace (CEIP) produced a different set of projections based on a policy scenario more representative of what was negotiated in Hong Kong and an interesting adjustment to the assumptions used by the World Bank and most other modelers. [2] Most models assume full employment; a country that expands its exports will only do so by shifting workers from a contracting sector to an expanding one. CEIP adjusted its modeling to recognize the prevalence of urban unemployment and rural underemployment in developing countries. Thus export gains can lead to net expansion of employment with a greater effect on national income. However losses of export market share can mean greater unemployment, as well, with no guarantee that workers will be absorbed in other sectors. The presence of unemployed labor also means that competitive exporters can expand production and exports without facing increased wages and thus will maintain their price competitiveness until the unemployed and underemployed labor is absorbed. The gains to currently competitive countries will be larger, but the prospect for less competitive countries to gain market share in the future will be more remote.

The CEIP projections remain of the same order of magnitude as the Bank's, with global gains from a more limited "Hong Kong scenario" of just $43 billion. Because of CEIPs more realistic policy scenario and assumptions, a larger share – $21.5 billion – goes to developing countries. Also

Table 1
Assessing the Gains from Doha
Welfare Gains from Partial Trade Liberalization, Two Models
(billions of 2001 US dollars)

	World Bank Doha Scenario*			**CEIP Hong Kong Scenario****		
	Manuf.	**Agric.**	**Total**	**Manuf.**	**Agric.**	**Total**
High-income countries	13.6	18.1	31.7	16.4	5.5	21.9
Developing countries total	7.1	-0.4	6.7	21.7	-0.06	21.5
Brazil	0.3	1.1	1.4	0.8	0.3	1.1
India	2.0	0.2	2.2	2.3	-0.04	2.3
China	2.2	-1.5	0.7	10.6	-0.3	10.3
Argentina	0.3	1.0	1.3	0.2	0.4	0.6
Bangladesh	0.1	0.0	0.1	-0.03	-0.02	-0.05
Vietnam	0.4	0.0	0.4	1.8	-0.2	1.6
South Africa	0.3	0.3	0.6	0.3	0.06	0.3
Rest of Sub-Sah. Africa	0.6	-0.3	0.3	0.08	-0.11	-0.19
World total	**20.7**	**17.7**	**38.4**	**38.1**	**5.4**	**43.4**

* Anderson and Martin, *Agricultural Trade Reform and the Doha Development Agenda*, World Bank, 2005; Table 12.14, Scenario 7 with SSPs.
** Polaski, Sandra, "Winners and Losers: Impact of the Doha Round on Developing Countries," CEIP 2006; Figures 3.1, 3.3, 3.5, 3.8.

of interest are their findings that the gains come not from agriculture but entirely from manufacturing and go overwhelmingly to China, which gets $10.6 billion – nearly half of that income. The CEIP study concludes that the emerging Doha deal will leave some of the world's poorest countries worse off unless issues of surplus labor in developing countries are dealt with in a sustained manner.

While these results highlight important differences between the two studies, and the authors draw very different conclusions, they coincide on the order of magnitude of the developing country gains from the Doha negotiations. The developing country share is projected to be small, between $6.7 billion and $22 billion, well under one-half percent of GDP. These findings coincide with other recent studies. A paper by the International Food Policy Research Institute (IFPRI) found developing country gains ranging from $8-21 billion, depending on the "levels of ambition" in agricultural reform. [3] Others have found even smaller gains, with some projecting negative welfare effects for developing countries as a whole from agricultural trade reforms alone. [4] Even projections that include services liberalization yield only an additional $6.9 billion for the developing world in a likely scenario of fifty percent reduction in services trade barriers. [5]

The Case for Special Products

The World Bank suggested in issuing its study that the results highlighted the importance of pursuing deep cuts in order to realize the gains for developing countries, and the importance of developing countries making deep cuts themselves. The Bank also argued that virtually all the gains from agricultural liberalization would be lost if negotiators allowed any significant level of exemption for "Special and Sensitive Products" (SSPs), which the WTO's July 2004 Framework Agreement explicitly sanctioned to promote "food security, livelihood security, and rural development."

The World Bank ran a simulation allowing a modest SSP exemption for 2 percent of product lines for rich countries, 4 percent for developing countries. Indeed, they found that the $9 billion in gains for developing countries from agricultural liberalization vanished with even that modest SSP allowance.

As with much of the Bank's presentation of its research, the underlying numbers do not always justify its policy conclusions. The economic rationale for recognizing special products for developing countries is well-founded, even if the case for developed country "sensitive products" is not. Many developing countries still have sizable populations of small-scale farmers growing basic staples for home consumption and sale on local markets. Trade liberalization can swamp those producers with a flood of imports from richer countries. Often, those crops are subsidized in both explicit (farm payments) and implicit (oil or irrigation subsidies) ways. In addition, large transnational exporters wield undue market power, limiting full competition in the marketplace. In such a context, continued protection is warranted as a form of market correction rather than

market distortion; tariffs are often the best available policy instrument to achieve this.

The World Bank's data on the costs of exempting SSPs suggest that those costs are very low – about $9 billion for the developing world as a whole, well under a penny a day per capita. Little of that cost comes from granting special product exemptions to developing countries, so there is little justification for denying developing countries ample policy space under SSP guidelines.

Hidden Costs

Much of the discussion of the Doha Round's development impact has centered on the potential benefits of the round, but less attention has been paid to the costs. When the costs of adjustment, deindustrialization, and the loss of policy space for development are juxtaposed with the relatively small projected gains from the deal on the table, it becomes clear why many developing country governments are questioning the utility of the Doha round.

In terms of adjustment costs, tariff losses for developing countries could outweigh the benefits by a factor of four. These losses are not reported in discussions of the gains from trade because they are assumed away in the modeling exercises. A key assumption in most models is that governments' fiscal balances are fixed—in other words any losses in tariff revenue are offset by lump sum taxes. While there is evidence that shifting from trade to consumption taxes can be better for welfare, in the real world such taxation schemes cost political capital and in some cases may not even be possible. Indeed, it has been shown that tariffs may be preferable in developing countries with large informal sectors that cannot be taxed efficiently.

Using the same model as the World Bank, UNCTAD has projected tariff revenue losses under the proposed reduction levels in the ongoing NAMA negotiations. [6] These tariff revenue losses for the world and selected regions and countries are shown in Table 2 compared to the World Bank benefit projections with and without SSPs.

Many developing countries rely on tariffs for more than one quarter of their tax revenue. For smaller nations with little diversification in their economies, tariff revenues provide the core of government budgets. According to the South Centre, in the Dominican Republic, Guinea, Madagascar, Sierra Leone, Swaziland, and Uganda tariff revenues represent more than 40 percent of all government revenue.

Table 2 shows that the tariff revenue losses will be significant and even outweigh the benefits. Total tariff losses for developing countries under the NAMA could be $63.4 billion, or almost ten times the projected gains. Africa, the Middle East, and Bangladesh—areas with large informal economies and where tariffs are key for government revenues—are predicted to be net losers in terms of benefits; they will suffer even larger losses in tariff revenues. In a recent issue of *Foreign Affairs*, Jagdish Bhagwati commented that more attention needed to be paid to this issue:

Table 2
Doha's Hidden Price Tag
Doha Benefits vs. NAMA Tariffs Losses
(billions of 2001 US dollars)

	WB "Likely" Scenario*	**WB Doha Scenario***	**NAMA Tariffs Losses****
Developed	79.9	31.7	38.8
Developing	16.1	6.7	63.4
Selected developing regions			
Middle East and North Africa	-0.6	-0.1	7.0
Sub-Saharan Africa	0.4	0.6	1.7
Latin America and the Carribean	7.9	2.4	10.7
Selected Countries			
Brazil	3.6	1.4	3.1
India	2.2	2.2	7.9
Mexico	-0.9	-0.7	0.4
Bangladesh	-0.1	0.1	0.04

* Anderson and Martin (2005), *Agricultural Trade Reform and the Doha Development Agenda.* World Bank Table 12.14; scenario 7, and adjusted for SSPs.
** De Cordoba and Vanzetti (2005). *Coping with Trade Reforms.* UNCTAD. Table 11.

"If poor countries that are dependent on tariff revenues for social spending risk losing those revenues by cutting tariffs, international agencies such as the World Bank should stand ready to make up the difference until their tax systems can be fixed to raise revenues in other, more appropriate, ways."

At present even the most ambitious "aid for trade" packages come nowhere near filling the gap in lost tariff revenue predicted by UNCTAD.

De-industrialization

Recent UNCTAD research highlights how far the Doha Round has strayed from its development mission. Development is a process of transforming an economy from concentrated assets based on primary products to a diverse set of assets based on knowledge. This process involves investing in human, physical and natural capital in manufacturing and services while moving away from extractive industries and lowproductivity agriculture. The move from lessdeveloped to developed country has been associated with industrial diversification.

According to UNCTAD, India is predicted to experience significant output and employment losses in high value-added sectors such as chemicals, leather, and food processing industries while gaining in textiles and apparel, further down the technological ladder. [7] Brazil is predicted to lose in the metals, machinery, motor vehicles, and chemicals industries in exchange for modest gains in its soy and meat sectors.

In both cases, these large and dynamic developing countries are projected to see their levels of industrial development decline with a Doha agreement. Countries that have yet to develop their industrial sectors will find themselves even more locked in to primary production. According to the CEIP projections, only China sees significant gains in its manufacturing sector from a Doha agreement.

Not surprisingly, developing countries see their terms of trade – the price ratio between a country's exports and its imports – decline, by .74 percent according to CEIP. Declining terms of trade indicate a failure to move up the value chain to higher valueadded forms of production. According to CEIP, India's terms of trade will decrease by 1.62 percent. Even Brazil is predicted to see its terms of trade decrease by .18 percent. With long-term trends showing declining prices for non-oil commodities, terms of trade are likely to worsen over time.

With these structural shifts, of course, comes unemployment. While some nations may see net gains in employment, many will see job losses in industrial areas as part of the deindustrialization process. These workers are unlikely to move to rural or coastal areas to work in expanding industrial agriculture or apparel industries, adding to urban unemployment in countries such as Brazil.

Conclusion

Of course, the biggest cost to developing countries is hard to calculate – the loss of policy space. In exchange for limited gains in agriculture and low-technology manufacturing, developing countries will have to surrender the right to use many of the policy instruments that have proven successful in moving countries toward higher levels of development and improved incomes for their people. Where the Asian Tigers, for example, used a shifting mix of selective tariffs, export and credit subsidies, and the strategic use of foreign investment, many of those policy instruments will no longer be available following a Doha deal.

Under the proposed NAMA agreement, for example, nations will have to bind virtually all of their tariffs using the so-called Swiss Formula, which prevents countries from keeping low average tariffs while using high tariffs in strategic industries. Like the developed world before them, nations such as Taiwan and South Korea have relied on such tariff strategies to industrialize their economies, and China and India now make liberal use of such measures. These countries also developed formidable financial, telecommunications, and construction sectors, taking advantage of the policy space in the previous agreement to hold off on liberalizing key service sectors.

Current proposals would adopt a "one size fits all" approach that would make developing countries liberalize a certain percentage of all services at once with no room for strategic exemptions.

WTO members agreed that the current round of trade talks should focus on development. The deal that seems to be emerging, however, is unlikely to deliver. The benefits are small for developing countries and the costs are high. It will be up to developing country governments to decide whether the Doha deal does more harm than good to their prospects for economic advancement.

Endnotes

* For further background on this issue, see: Wise and Gallagher, "Doha Round's Development Impacts: Shrinking Gains and Real Costs," RIS Policy Brief #19; Kevin Gallagher's *Putting Development First: The Importance of Policy Space in the WTO*; Frank Ackerman, "The Shrinking Gains from Trade: A Critical Assessment of the Doha Round Projections," GDAE Working Paper No. 05-01, October 2005: Available at http:// www.ase.tufts.edu/gdae/policy_research/WTO05.htm

[1] Anderson, Martin, and van der Mensbrugghe, "Market and Welfare Implications of Doha Reform Scenarios," in Agricultural Trade Reform and the Doha Development Agenda, Anderson and Martin, World Bank 2005. Doha scenario includes in agriculture, elimination of export subsidies; reductions in domestic subsidies of 28 percent for the U.S., 18 percent for the EU, and 16 percent for Norway; cuts in bound tariffs for developed countries in three bands (45 percent, 70 percent,

and 75 percent), with four bands for developing countries (35 percent, 40 percent, 50 percent and 60 percent cuts), and none for LDCs; SSP exemptions of 4 percent for developing and 2 percent for developed countries (from Scenario 2); in manufacturing, developed countries reduce bound tariffs 50 percent, developing countries 33 percent, LDCs none. Gains include estimated income growth through 2015 from the 2001 base year, which increases the estimates by about 45 percent. Numbers in Table 1 are from Scenario 7 with the gains from agriculture adjusted downward for SSPs, as modeled in Scenario 2.
[2] Polaski, "Winners and Losers: Impact of the Doha Round on Developing Countries," CEIP 2006. Hong Kong Scenario is more modest than the World Bank's Doha scenario. It includes, in agriculture, elimination of export subsidies; 33 percent reductions in domestic support for developed and developing countries; cuts in applied tariffs of 36 percent for developed countries, 24 percent for developing countries; no Special and Sensitive Products exemption; in manufacturing, 36 percent tariff cuts for developed, 24 percent for developing countries. LDCs are exempt from all reduction commitments. Gains are for 2001, so without incorporating income growth through 2015.
[3] Bouet, Mervel, and Orden, "More or Less Ambition? Modeling the Development Impact of U.S.-EU Agricultural Proposals in the Doha Round," IFPRI, 2005.
[4] See, for example, Bouet, Bureau, Decreax, and Jean, "Multilateral Agricultural Trade Liberalization: The Contrasting Fortunes of Developing Countries in the Doha Round," CEPII Working Paper No. 2004-18, November 2004. Three recent papers offer good overviews of the different models and their results: FAO, "Trade Policy Simulation Models: Estimating global impacts of agricultural trade policy reform in the Doha Round," FAO Trade Policy Technical Notes No. 13 , 2005; Bouet, "What Can the Poor Expect from Trade Liberalization? Opening the Black Box of Trade Modeling," IFPRI, MTID Discussion Paper No. 93, March 2006; Congressional Budget Office, "The Effects of Liberalizing World Agricultural Trade: A Survey," December 2005.
[5] Francois, J., H. van Meijl and F. van Tongeren (2003). Trade Liberalization and Developing Countries Under the Doha Round. Tinbergen Institute Discussion Paper 2003-060/2. Rotterdam and Amsterdam, Tinbergen Institute. These figures are based on the older 1997 base year data and would themselves have to be revised downward to reflect the changes in the world economy since then.
[6] UNCTAD uses the so-called Swiss Formula with approximate coefficient of 10.
[7] UNCTAD (2006). Trade Adjustment Study: India. Geneva.

WITHOUT BETTER OFFERS, NO DOHA DEAL BETTER – OXFAM

As it stands now, the Doha Round of multilateral trade talks have little to offer to developing countries, says **Oxfam**. *In a new briefing paper, "**A recipe for disaster** Will the Doha Round fail to deliver for development?' it maintains that unless the substance of the offers on the table changes radically, no deal should be signed in 2006. "Aggressive demands by rich countries mean that, far from being able to pursue reforms that will lift people out of poverty, poor countries are having to engage in damage limitation," says the Oxfam report. Presented below are extracts from the report.*

As yet another deadline approaches in the Doha Round of trade negotiations, the chances of a deal being done this year that helps developing countries are looking increasingly slim. All the fine rhetoric about development and putting poor countries' needs first has been repeatedly belied by selfishness, deception and hypocrisy at the WTO. Developed countries are trying to make minimal concessions in agriculture while demanding that poor countries open their industrial and services markets to foreign competition. Far from being able to pursue reforms that will deliver equitable and sustainable economic growth that lifts people out of poverty, poor countries are having to engage in damage limitation.

In June 2007 the US administration will lose its mandate to negotiate a new trade deal without the involvement of Congress. Once the US Trade Promotion Authority (TPA) expires, Congress will be able to block any part of a deal, rather than simply saying yes or no to an overall package – a change that would make agreement much harder to achieve. As a result of this, WTO members and commentators have taken TPA expiration as a final deadline for the WTO talks to end. Many public pronouncements have been made about the importance of meeting the deadline. This means having at least some definite proposals in place by the end of this month (April 2006), and the rest by July, in order to have a final deal signed, sealed, and delivered by June 2007.

Unfortunately, the combination of disappointing offers on agriculture, coupled with aggressive demands on industry and services, means that the Doha Round in its current form would be very unlikely to boost development as originally promised. On the contrary, the deal that is emerging at the moment would harm rather than help most developing countries.

Tariff cuts in agriculture and industry could cause economic development to go into reverse and exacerbate existing poverty and inequality. The absence of sufficient exceptions and protective measures would expose subsistence farmers and their families to severe shocks. One recent study suggests that the poorest countries would lose the

most, with sub-Saharan Africa facing losses of over $300m in all the most likely outcomes. This is in contrast to the dramatic gains predicted by the World Bank, and would be a bitterly ironic end to the so-called 'development round'.

The very poorest countries at the WTO – the Least Developed Countries (LDCs) - are exempt from many of the demands. They will not have to make tariff cuts in Non-Agricultural Market Access (NAMA) or agriculture, and are excluded from plurilateral requests on services. However, they feel the impact of unfair trade rules equally, if not more than other countries. Without adequate action to address the pernicious effects of agricultural dumping or to increase opportunities to trade, LDCs will continue to lose out. The offer of duty-free quota-free (DFQF) market access for LDCs has significant limitations, and the other elements of the 'development package' are also flawed. A lot more is needed than simply exempting LDCs from commitments to make this a development round.

In this context, Oxfam believes that developing countries would be better off missing the current deadline and waiting longer for a new set of rules. A slow round, though not without its disadvantages, would offer developing countries the chance to hold out for the reforms that they were promised, and avoid signing away the flexibilities that they need in order to use trade policy to fight poverty. Although a slow round would prolong some imbalances and delay long-promised improvements, it could prevent things getting worse.

The constructive assertiveness and teamwork pioneered by the Group of 20 developing countries (G20) at the WTO Ministerial in Cancun in 2003 has become much stronger, despite scepticism from the North. The Hong Kong meeting saw the formation of the loose alliance of all 110 developing countries, united in opposition to the status quo. The result of this stance is that there was more on offer for developing countries at the Ministerial in Hong Kong in 2005 than in Cancun. But there is still a long way to go.

As Dipak Patel, the Zambian trade minister and Chair of the LDCs, said in Hong Kong, until there is a deal on offer that promises to help poor countries, they will be perfectly right to keep saying: 'What part of "No" do you not understand?'

Meanwhile, the WTO dispute-settlement body offers developing countries a forum in which to attack the worst excesses of EU and US policy. Successful rulings like those against EU sugar subsidies and US cotton subsidies boost developing countries' influence in the negotiations, and show rich countries that there are limits to what they can get away with. Oxfam research shows that there are a large number of potential cases that developing countries could take and win against Europe and America.

Multilateral trade negotiations are effectively irreversible, and they dictate policy for years at a time. They cannot be taken lightly. Although unfair trade rules are hurting developing countries every day, this is far from a good reason to sign up to a deal that makes things even worse. No deadline is hard enough to justify signing a new trade deal that is going to undermine development.

Agriculture

Agriculture has always been at the centre of the Doha negotiations. The vast majority of the world's poor depends on farming to make a living, and most people agree that a trade round focused on development must treat agricultural reform as a priority. Despite this, there has been little progress in the last four years.

Lack of progress on agriculture can be blamed on the reluctance of rich countries to reduce the trade-distorting support that they give to their (mostly big) farmers and agribusinesses, or to lessen the tariff protection that they provide for the agricultural community.

This is despite the well-documented damage that the dumping of surplus subsidised Northern agricultural produce on world markets causes to poor countries' export revenues (losses of $305m for cotton farmers in sub-Saharan Africa in 2001); or the harm done to poor countries that cannot sell their produce to the North as a result of restrictive tariffs (losses of $38m for Mozambique in potential earnings from sugar sales to the EU in 2004). This is also despite the promises made at the beginning of the negotiations to deal with these issues as a priority.

Obviously not all subsidies are bad, and it is the prerogative of Northern governments to support their agricultural producers if they want to, but much more must be done to make sure that subsidies in the North do not harm farmers in the South. Government money for agriculture should be directed towards promoting rural jobs, supporting small producers, rewarding environmental stewardship, and ensuring high-quality food. It should not be used to encourage overproduction and dumping.

- Subsidy offers so far: more spin than substance

In October last year, the USA and EU made proposals on tariff and subsidy cuts. The offers were heralded as unprecedented but Oxfam analysis at the time revealed that, thanks to creative accounting and loopholes in WTO law, at the most the USA would only have to cut actual spending by 19 per cent ($4bn), and the EU would not have to make any cuts at all. This is despite the fact that the USA announced headline cuts of 54 per cent, and the EU 70 per cent.

Within the WTO system, cuts are made to the maximum payment ceiling instead of actual payments, so both blocs were able to make the proposals sound much more dramatic than they really were.

The EU had also already made some of the cuts it announced, so even after a 70 per cent reduction in the ceiling they would have room to increase spending by $13bn. For the USA, the system of classifying subsidies into different categories offered them a way of moving con-

troversial payments around, rather than cutting them.

Put as simply as possible, the WTO sorts agricultural payments into different boxes – blue, green, and amber (AMS) – according to how much they distort trade. Amber box subsidies are the most distorting, and are subject to the biggest cuts. Blue box subsidies are less trade distorting. Green box subsidies allegedly distort trade only minimally or not at all, and therefore no limit is set for them. In their proposals, the EU and USA largely moved payments between boxes, rather than cutting them.

Importantly, neither bloc is currently offering large enough cuts to trade-distorting subsidies, nor proposing sufficiently different ways of classifying and disciplining payments to guarantee an end to export dumping.

- Market access offers: each bad in their own way

The market access proposal made by the USA in October 2005 was received as more 'ambitious' than the EU's proposal, and it certainly provides greater opportunities for developing countries to sell their food to the North, but it is unacceptably aggressive in terms of what it demands in return. The reciprocity expected from developing countries in the US proposal would have serious implications for food security and livelihoods because it would deny developing countries the chance to defend basic products or sectors against subsidised exports.

On the other hand, the EU offer is disappointingly protectionist. The EU is proposing to exempt 8 per cent of its products from significant tariff cuts. These are likely to be products of the greatest importance to developing countries, for example sugar, rice, and beef. The good news is that the EU is not asking for so much from developing countries in return.

Since October the EU has come under a lot of pressure to 'improve its offer', but it says it has nothing else to give. Despite the inadequacy of the EU and US agriculture offers, they have not changed since October 2005. On the contrary, they have been heralded as progress, and repeatedly used as an excuse to place much more pressure on developing countries to make concessions on NAMA and Services - areas where rich countries have a lot more to gain.

This pressure has grown since the Ministerial in Hong Kong, where negotiators agreed to end agricultural export subsidies in 2013, reiterated their commitment to deal with cotton subsidies and dumping, and reaffirmed their promise to allow developing countries to shield products essential for food security and rural development. While these advances are not negligible, they certainly do not warrant the disproportionate demands being made in the other areas.

- Export subsidies

Export subsidies explicitly promote the dumping of rich countries' agricultural surpluses on developing countries' markets at below the cost of production, thereby undermining poor farmers' ability to earn a living and pushing down world prices. Their elimination is politically significant and a victory for developing countries.

However, export subsidies only represent 3.6 per cent of overall EU farm support, and will be even less by 2013 thanks to reforms agreed in 2003. Developing countries were hoping for an end date to export subsidies of 2010. Furthermore, the EU promise to get rid of its export subsidies is conditional on the USA regulating comparable payments – specifically export credits and food aid – but they have not yet indicated how they will do this.

Most importantly, in both the EU and USA billions of dollars of other subsidies that distort trade and cause dumping will remain. Without meaningful cuts to these other trade-distorting subsidies, and additional measures to define and discipline allowable payments, dumping will carry on and farmers in poor countries will continue to suffer.

- Cotton

In Hong Kong, the USA promised to eliminate export subsidies for cotton by 2006 and to treat domestic subsidies for cotton as a priority, above other agricultural payments. Cynics may recall the promise at the General Council in July 2004, to treat cotton 'expeditiously, ambitiously, and specifically', which was followed by no such emphatic action.

Cotton has become a flagship issue in the talks, and is a strong example of just how badly developing countries are being treated. The 'cotton four' – Benin, Burkina Faso, Mali, and Chad - have pushed for recognition and early action to end the damaging US payments that undermine millions of African farmers and were ruled illegal in 2004 in a landmark WTO case bought by Brazil against the USA.

The statistics are compelling: the USA spent over $4.2bn in 2005 on its 25,000 cotton farmers, encouraging them to overproduce. In the same year, the USA sold 3.3m tonnes of surplus cotton on world markets with the help of specially designed payments that facilitate exports. Even the World Bank now recognises that reduced US cotton subsidies, rather than tariff cuts, would make the biggest difference for African farmers. In fact, the World Bank estimates that removing US cotton subsidies alone would raise the price of cotton on international markets by an average of 12.9 per cent, and could generate $72m across sub-Saharan Africa.

And yet, despite repeatedly acknowledging cotton as an issue, the USA has missed every deadline for implementing the WTO panel's recommendations, and has taken only minimal steps towards eliminating the payments that were ruled illegal in 2004. Only one-tenth of US cotton subsidies will be eliminated by 2006. No plans have been announced concerning the rest, even though they have been found to be illegal under WTO rules.

Furthermore, the USA is making reform of its domestic support programmes conditional on the conclusion of an ambitious agreement on agricultural market access in the Doha Round. This is despite the fact that the WTO panel ruled against the USA on the basis of their Uruguay Round obligations, so reform should be implemented regardless of the Doha outcome. The cotton four – and the other affected African countries – are understandably concerned. Unless the USA turns more of its rhetoric into action, cotton could still be the thread by which the Doha Round unravels.

- **Special Products and Special Safeguard Mechanism**

If anything, the most significant advances in agriculture so far for developing countries have been defensive. In Hong Kong, WTO members reaffirmed the decision to allow developing countries to designate a number of 'Special Products' of importance for food security and livelihoods, which would be either exempt from tariff cuts, or subject to smaller tariff cuts than other products. They were also granted the right to use a 'Special Safeguard Mechanism' in the case of import surges, something that rich countries currently enjoy but most poor countries do not.

Unfortunately, even these small victories are under attack. A letter recently sent to a number of developing countries at the WTO by a developed-country member with agro-exporting interests, attacked as excessive the request that up to 20 per cent of tariff lines should be designated as Special Products. The letter dismissed the Special Safeguard Mechanism as an: 'unnecessary double layer of protection', and said, 'Special Products should be provided only in exceptional cases for a very narrow range of products'.

However, new research suggests that without additional special measures to those currently on offer, Bangladesh, Indonesia, and many countries in sub-Saharan Africa, will actually be worse off as a result of a Doha deal. And there is no good reason why these exceptions should not be granted, since such special treatment would at most cause minor reductions to other countries' gains from the Doha round, even if those countries are major agricultural exporters.

Beyond Special Products and a Special Safeguard Mechanism, action to address preference erosion and the impact of higher food prices on Net Food-Importing Countries is essential in order to mitigate the likely losses to some of the poorest countries. But wealthy countries have done little more than acknowledge the problem.

It is profoundly disappointing that, as the round that was meant to boost development seemingly draws to a close, developing countries in the agricultural negotiations are having to focus on protecting minimum flexibilities rather than pursuing the promised reforms that would allow them to use trade to promote development.

Don't get fooled again

In the last round of trade negotiations – the Uruguay Round – the big promise was that agricultural subsidies would be dealt with. This was a major reason why developing countries signed on in 1994, even though they had to accept an intellectual property agreement that largely benefits rich countries as a trade off. However, the promises of the Uruguay Round did not materialise. Although rich countries got the stringent new agreement on intellectual property rights that they wanted, loopholes in the final deal meant that agricultural subsidies were hardly touched at all. Developing countries are still trying to come to terms with the implications of the flawed Uruguay deal.

Before signing up to a final Doha declaration, poor countries should remember the lessons of Uruguay and make sure that they do not make significant concessions on NAMA and Services in exchange for largely illusory gains on agriculture.

Conclusion

There is an urgent need for fairer trade rules that more evenly benefit developing countries. It is for this reason that the Doha Development Round was launched in 2001. Since then, the high hopes and noble ideals of the Doha declaration have dwindled into little more than rhetoric, because rich countries have failed to look beyond narrow, short-term gains for their farmers and companies.

Poor countries are not being given enough time or space to negotiate a deal that will help them to develop. Many of them are being excluded from the process, as small groups of influential countries meet in an effort to make progress (for example the G6 group of Australia, Japan, the EU, USA, Brazil, and India). The role of Director General has emerged as a pivotal one, with Pascal Lamy involving himself heavily in the negotiations and contributing to the pressure for a deal in 2006. There is a general rush towards the mid-2006 deadline for an outline deal, but this threatens to undermine the very reasons for launching the round in the first place.

The combination of current offers, and the dwindling chances of improvements, particularly in agriculture, mean that the Doha deal is shaping up to be anything but development friendly. Aggressive demands from rich countries on NAMA and services threaten to more than cancel out the minimal gains in other areas. The most likely result of a deal done in 2006 is that poor countries will be worse off.

Even a 'minimal deal' that keeps the multilateral system on course and justifies the investment of lots of political capital and time could have very harsh effects on developing countries. Concessions on all areas would be fixed, and potentially damaging precedents would be established – such as the line-by-line cuts in agriculture and NAMA, and the plurilateral approach in services.

As Nobel Prize winning economist Joseph Stiglitz writes in his new book, Fair Trade for All, 'an agreement based on principles of economic anal-

ysis and social justice […] would look markedly different from that which has been at the center of discussions [...]. Fears of the developing countries that the Doha round of negotiations would disadvantage them […] were indeed justified.'

It seems unlikely that there is enough time or political will for the situation to be improved. Unless rich countries fundamentally alter their approach to the talks and withdraw many of the demands they are making on the poorer members, there can be no deal this year that helps to reduce poverty. Therefore, an extended round that gives members a chance to reassert the primacy of development, and saves poor countries from signing away their future, seems increasingly like the best option. Developing countries that choose this option must not be blamed, but applauded for their commitment to getting a deal that helps the poorest.

Recommendations for a pro-development outcome

Agriculture

- Deeper cuts to rich countries' trade-distorting agricultural subsidies
- Better market access offers, with no unreasonable demands for reciprocation
- Elimination of tariff peaks and tariff escalation in rich countries
- Disciplines on the use of Non-Tariff Barriers
- Adequate Special and Differential Treatment, including Special Products and a workable Special Safeguard Mechanism to food and livelihood security and rural development
- Elimination of all US cotton subsidies, as ruled by the WTO dispute settlement body
- A cap on Green Box subsidies and a full review of the current Green Box to ensure that subsidies in it do not distort trade
- Further disciplines on the Blue Box
- New rules to prevent the abusive use of food aid to dump surplus commodities
- Action to address preference erosion and the impact of higher food prices on Net Food-Importing Countries

NAMA

- At minimum, a formula with coefficients that ensure Less Than Full Reciprocity, but preferably no formula for developing countries, which should have to make average cuts instead
- Disciplines on use of Non-Tariff Barriers, including anti-dumping actions (Rules negotiations)
- Elimination of tariff peaks and tariff escalation in rich countries
- Countries that have not already bound their tariffs at the WTO must not be asked to cut and bind in this round. Binding should be considered a concession in itself
- Action to address preference erosion

Services

- Sufficient time for poor countries to carry out impact assessments and to consult with civil society
- Affirmation of the right to regulate in the public interest before further commitments are made
- Adoption of emergency safeguard measures and special and differential treatment provisions
- Response to developing-country demands for access to Northern labour markets (Mode 4)
- Exclusion of essential public services and government procurement from liberalisation commitments

Development package

- Full duty-free quota-free (DFQF) market access for the poorest countries implemented immediately, with simplified rules of origin
- Adequate aid for trade should be provided, but it should not be conditional on market opening.

Malaria Still Kills Needlessly In Africa

Geneva, April -- Alarmingly few African patients with malaria are getting existing effective treatment that could cure them in a few days, says Médecins Sans Frontières. Four years after the World Health Organization issued a global recommendation for countries to switch from old malaria treatments to artemisinin-based combination therapies, or ACTs, and two years after the Global Fund decided to fund ACTs, MSF teams witness government-run health facilities still giving patients old malaria medicines instead of a treatment that works.

In the West African country of Guinea, Malaria is the leading cause of death, accounting for over 15% of all deaths recorded in the country's health facilities. "Here in the town of Dabola, we manage to provide ACTs and we see our patients cured after three days, but just 40 km down the road the situation is dramatically different -- people aren't getting the best treatment, although officially the government changed the protocol a year ago," said Dr. Barbara Maccagno, medical coordinator for MSF in Guinea. MSF estimates that less than 1% of all malaria patients in the country are getting ACTs today.

Guinea is by no means an isolated case. In Zambia, MSF estimates that a mere 11% of all patients presenting with malaria are receiving ACTs. MSF teams in several African countries report similar experiences: for example in Sudan, Kenya, Malawi, Côte d'Ivoire and Sierra Leone, the ministries of health are still using chloroquine or sulfadoxine-pyrimethamine, even though these drugs are known to be largely ineffective and are no longer recommended as first-line treatment.

Peoples' Trade Agreement: An Alternative for a Just Trade

The **President of Bolivia, Evo Morales** *recently made a proposal for an alternative trade model that trancends the narrow commercial interests now pursued by the free trade agreements. The peoples' Trade Agreement, as it is called, would integrate societies in ways that respects their necessities and promotes a more just trade. The stated purpose of their Agreement is: "To achieve a true integration among peoples that transcends the commercial and economic arenas, recognizing the differences of each country, and at the same time prioritizing the protection of internal production and national companies. A treaty which holds, above all, the well being of the people and a respect for their history and cultures." The following are some details on the proposal by the Bolivian Movement for Sovereignty and Integration of the Peoples.*

The Peoples Trade Treaty proposed by President Evo Morales is a response to the failure of the neo-liberal model, based as it is on deregulation, privatisation and the indiscriminate opening of markets.

It is no longer acceptable that a small group of powerful nations deny poor countries the right to design their own models of development based on internal needs, or for them to dictate global economic policies that even World Bank studies show will not solve problems of development.

During the 1990s, we were told that policies known as the "Washington Consensus" would enable poor countries to move closer towards the conditions for people in rich countries: Today we see that the exact opposite has happened. The rich are richer and the poor poorer. For this reason, the peoples of Latin America are starting to be authors of their own destiny, and are punishing by ballot box the authors of policies of submission which have been applied during almost 20 years.

FTAs: Death of the countryside

The reality for countries that have signed a Free Trade Agreement (FTA) with the USA is far from the dream painted by neo-liberal economists. Mexico is the most interesting country to evaluate the effects of "free trade" as it signed the North American Free Trade Agreement (NAFTA) with the US and Canada in 1994. Whilst there was a growth in exports, studies show that the FTA destroyed a large part of small and medium-sized industries which were the main source of formal employment; dismantled the existing chains of production without creating new ones, and strengthened the de-nationalisation of the large-scale industrial sector geared to exports.

But perhaps the most harm from this policy of "trade liberalisation" has taken place in the countryside. Some writers talk plainly and starkly of the "destruction of the Mexican countryside." From being self-sufficient and an exporter of basic foods, Mexico now imports 40% of its cereals and oil-based products that it consumes: between 1994 and 2000, its imports of rice increased by 242%, maize 112%, wheat 84%, soya 75%, sorghum 48% and beef by 247%. As a result in the last eight years, 1,100,000 agricultural jobs have been lost which has fuelled rural migration, not just temporary migration to fertile regions but also to cities and above all to the US. It is estimated that this has led to an exodus of 5 million Mexicans, which the US has tried to "resolve" with a wall on the border.

A recent newspaper article warned: "The possibility of life in the countryside for the large majority of thousands of producers is in doubt. The winners are no more than a thousand people set against millions of losers."

To highlight an example of the inequality: in May 2002 the US approved the Law of Food Security and Rural Investment 2002-2011 which increased by almost 80% direct aid to agriculture with a package worth more than U$S 180 billion dollars over 10 years. In Peru, which has just signed a Free Trade Agreement, it is estimated that 97% of community-based companies and cooperatives will be swept aside by the Free Trade Agreement in order to allow the indiscriminate imports of wheat, cotton, soya and other agricultural products together with oil and beef.

What is PTA and what is it trying to do?

In contrast to capitalist ideology, PTA brings into the debate on trade integration principles of complementarity, cooperation, solidarity, reciprocity, prosperity and respect for countries' sovereignty. In this way it incorporates aims that are absent in programmes of trade integration proposed by the North, such as the effective reduction of poverty, the preservation of indigenous communities and respect for the environment.

PTA understands trade and investment not as ends in themselves but as means towards development. Consequently its aim is not total liberalization of markets and the shrinking of States but rather benefiting all peoples. That is to say, the strengthening of small producers, micro-industries, cooperatives and community-based companies facilitating their exchanges of goods with external markets.

PTA is not directed towards a small export sector, but is instead proposed as part of a new economic model aimed at improving the conditions of life for Bolivians (income, health, education, water, culture) and to promote a sustainable, equitable, egalitarian and democratic development that allows the conscious participation of citizens in the taking of collective decisions. Whilst Free

Trade Agreements are negotiated in secret, PTA must be based on active participation and discussion by social movements, which through our political instrument [party of MAS], is starting to govern Bolivia for all Bolivians.

PTA wants to rebuild the State, not destroy it

Trade integration promoted by dominant countries puts "market freedom" above regulatory functions of the State, and denies the weakest countries the right to protect its productive sectors. Free Trade Agreements are like a "padlock" that prevents an exit from neo-liberalism or the taking of sovereign measures such as the nationalisation of hydrocarbons. One of the clauses of the Free Trade Agreement of the Americas (FTAA) and other Free Trade Agreements says that conflicts between States and Companies have to be resolved in international tribunals whose jurisdiction is above national States.

Based on national interests, the proposal for a PTA promotes a model of trade integration between peoples that limits and regulates the rights of foreign investors and multinationals so that they serve the purpose of national productive development. Partners and not masters, as President Evo Morales has signalled. As a result, part of this proposal aims to give incentives to agreements between public companies of different countries in order to strengthen each other.

PTA does not prohibit the use of mechanisms to promote industrialization nor does it prevent the protection of areas of the internal market that are necessary in order to preserve the most vulnerable sectors of society. If FTAs imply the death of the countryside as a result of being put up against subsidized products from the North, PTA promotes the defence of economies of small-scale farmers and food sovereignty of our countries.

PTA recognizes the right of peoples to define their own agricultural and food policies; to protect and regulate national agricultural production to prevent the flooding of domestic markets by other countries' excess products; and to privilege the collective good above the rights of agro-industries by controlling and regulating imports.

At the same time, PTA considers that essential services should be exclusively provided by public companies regulated by the State. The negotiation of any trade treaty must always put at the forefront the principle that the majority of basic services are public goods that can not be handed over to the market. For that reason in the Fourth World Water Forum in Mexico, the Bolivian delegation defended access to water as a human right and not a commodity.

PTA promotes an indigenous vision of development

Trade treaties designed in the North facilitate development and the expansion of the capitalist system on a global scale based on the unlimited exploitation of natural and human resources in the constant search for private benefit and individual accumulation of wealth, a vision which has inevitably led to degradation of our environment. Pollution and degradation with the sole aim of earning profit puts as risk the lives of groups of human beings who live closely in harmony with nature, such as indigenous communities.

FTAs cause the fragmentation and subsequent disappearance of indigenous communities not only because they contribute to the destruction of habitats but also because they promote naked competition in equality of conditions with large Northern companies.

PTA questions the sustainability of the theory of "economic growth" and the culture of waste of the West which measures the economic development of a country based on the capacity to consume of its inhabitants. Therefore it proposes another logic based on relationships between human beings, that is a distinct model of co-existence which isn't based on competition and the urge for accumulation which takes advantage of and exploits to the maximum human labour and natural resources.

Rescuing the premises of indigenous culture, PTA promotes complementarity instead of competition; co-existence with nature against irrational exploitation of resources; defence of social property against extreme privatization; promotion of cultural diversity against monoculturalism and the uniformity of the market which homogenizes consumers' habits.

PTA defends national production

In neo-liberal rhetoric, it is argued that the State is able to save the most money by means of free trade amongst service and good providers. However, this argument does not compensate in any way for the impact that liberalisation of State Purchases to foreign companies has on national production; neither does it take into account the multiple effects an injection of resources into the internal economy can have. Pursuing efficiency in fiscal spending to save a few million dollars can not justify failing to use a mechanism to promote growth in the national economy, a measure amply used by industrialized countries.

PTA therefore urges all participating countries committed to a process of integration based on solidarity to give priority to national companies as sole providers of public entities. It is important to remember that in the majority of countries, despite their virtual dismantling in recent years, national States continue to be the principal buyer of goods and services. Independent of its agreements, the Bolivian proposal will establish list of priority providers, especially those from ethnic groups, cooperatives and community-based companies in order to avoid ruinous and impossible competition with powerful multinationals.

With its proposal for a Peoples Trade Treaty, Bolivia is proposing a path to a true integration that transcends considerations of economy and trade – whose philosophy instead

is to reach an endogenous just and sustainable development based on community principles. It takes into account national differences based on population, geography, production, access to infrastructure and resources, and history and is developed in line with two most advanced proposals for alternative integration proposed by the Hemispheric Social Alliance (HAS) and the Bolivarian Alternative for the Americas, known best as ALBA in Spanish.

Ten principles of PTA

1. The Trade Treaty of the Peoples – proposed by President Evo Morales – is a response to the failed neo-liberal model, based as it is on deregulation, privatisation and the indiscriminate opening of markets.

2. PTA understands trade and investment not as ends in themselves, but rather means towards development. Therefore its aim is not total market liberalization and the shrinking of the State but rather seeking benefits for all peoples.

3. PTA promotes a model of trade integration between people that limits and regulates the rights of foreign investors and multinationals so that they serve the purpose of national productive development.

4. PTA does not prohibit the use of mechanisms to promote industrialisation nor does it prevent protection of areas of the internal market which are necessary to preserve the most vulnerable sectors of society.

5. PTA recognises the right of peoples to define their own agriculture and food policies and to protect and regulate national agricultural production in order to prevent domestic markets being inundated with excess products of other countries.

6. PTA considers that vital services must depend on public companies as exclusive providers, regulated by the State. The negotiation of any trade agreement must hold as a central principle that the majority of basic services are public goods that can not be handed over to the market.

7. PTA proposes complementarity instead of competition; co-existence with nature against irrational exploitation of resources; defence of social property against extreme privatisation.

8. PTA urges participating countries involved in a process of integration based on solidarity to give priority to national companies as exclusive providers to public entities.

9. With the proposal for a Trade Treaty of the Peoples, Bolivia is proposing a true integration that transcends economic and trade considerations – whose philosophy is based on achieving an endogenous just and sustainable development based on community principles that takes into account national differences.

10. PTA proposes a different logic of relationship between human beings, in other words a distinct model of co-existence that isn't based on competition and the urge to accumulate which takes advantage of and exploits to the maximum human labour and natural resources.

(The following section was added by the 'Quest for Peace' of the Quixote Centre)

Reasons to Oppose the FTA

The Free Trade Ageeement (FTA) which the United States wants to impose on Bolivia is nothing more than the continuation of the annexation project which is called the Free Trade Agreement of the Americas (FTAA). Because Latin American people were opposed to the FTAA, the country from the north has attempted to divide us by trying to sign FTAs with each of the neo-liberal governments in power in Latin America. But the consciousness of the people is advancing and beginning to understand the perverse commercial plans which the United States has for our region. A detailed study of the FTA should lead us to conclude that it must not be permitted. Here are five reasons why:

1. The FTA is born from a non-democratic process

The majority of the Bolivian population does not know the content of the FTA, even though their lives will be profoundly affected by this plan. The reason for this is that the FTAs have been negotiated in secret, with secret documents between authorities in the U.S. Government and people from neo-liberal Latin American governments who are subordinate to the U.S. power. The negotiations in different Latin American countries began in 1994, (from this point on it was called FTAA) were carried out in secret, and the first draft was only published after six years of negotiations. When the FTAA fell apart, because of opposition from social movements, principally from Brazil and the Andean Countries, the United States decided to sign FTAs with each country. In essence the FTAs maintain the same spirit as the FTAA.

2. The opening of markets will destroy small producers

With the FTAs, 'barriers' to commerce will be eliminated; for example, the taxes on imported products. In this way, the promoters of FTAs plan to have free competition among all products. The elimination of trade barriers means that the large producers will have significant advantages, reducing the possibility of small producers to sell their products.

3. The poor countries will loose their food sovereignty

What will happen if Bolivian farmers stop producing potatoes, migrate to the cities or out of the country to look for work, or if they start producing products for export, such as in Ecuador, where many farmers have

begun planting flowers to export to the United States. As a result, in Ecuador they have stopped growing the things they eat, and are now dependent on importing a portion of their food. Now they are in a treacherous position relative to food sovereignty. If the price of, or demand for the flowers goes down, or if the price of imported products goes up, the population will not be able to buy what they need to eat. With an FTA, we will loose food sovereignty and security.

4. Subordination to the trans-nationals

The FTAs are designed to foment and protect private investment. If a trans-national company claims that because of labor laws, or due to measures in Bolivia to protect the environment its profits are 'impacted,' it is possible to take the Bolivian government to a tribunal and demand compensation. The government in all likelihood would be obligated to pay. The FTAs, to protect private investment and the profits of trans-national companies, want to do away with laws which protect workers and the environment. The FTAs have jurisdiction above our national laws. In the case of Cochabamba, the mobilizations of the people in the so called "war of water" managed to reverse the sale of the water system to the trans-national company Bechtel, and that was followed by a demand by Bechtel against the Bolivian state for $25 million. According to the FTAs, the government is obligated to pay this sum.

5. Intellectual Property

According to the FTAs, patents may be granted on plants, micro-organisms or drawings. If seeds or traditional medicines are patented, everyone will be required to pay a 'user fee' for the seeds or the medicine to the 'owner' of the patent. In this way we will loose the right to use seeds and traditional knowledge, as has happened with certain varieties of quinine.

The FTAs are in conflict with the relationships in the Andean Community of Nations referring to patent monopolies from the entire Hemisphere. This means that countries with patents in one country will have exclusive rights to sell their products in the entire hemisphere with the exception of Cuba. Rules about intellectual property are especially important for the pharmaceutical industry, which uses these regulations to prevent other countries from producing generic versions of medicines at a lower cost. But the majority of the poorest people in the world are not able to purchase medicines made by United States companies because of their high prices. The FTAs will aggravate the crises of epidemics like AIDs and tuberculosis.

DEADLINE MISSED BUT NO DEADLOCK – LAMY

At the Hong Kong Ministerial Conference of the WTO last December, the goal of achieving modalities in agriculture and NAMA negotiations by end of April 2006 was an important sign post. With that being missed, attention now seems to be shifting to respect the overall deadline of completing the Doha Round by end of this year. According to **WTO Director-General Pascal Lamy***, a missed deadline does not mean deadlock. He now wants that negotiators 'should be on call on a permanent basis.' The statement by Mr. Lamy to the Informal Heads of Delegation meeting on 24 April, presented below, explains his position.*

"Welcome to this Informal Heads of Delegation Meeting. The purpose of this informal meeting is to review progress in the negotiations so far and consider the next steps.

Let me begin with the first element, reviewing progress. You will recall that at the last TNC, on 28 March, I said that in my view the establishment of modalities in agriculture and NAMA as foreseen in Hong Kong would require some sort of Ministerial involvement in the last week of April or the beginning of May. However, I also said that this depended upon an intensification of work in the period leading up to the agriculture and NAMA meetings last week.

We need to face the facts squarely, but not sensationally. By now, most if not all of you know that I am a frank, direct person. It is clear to me — and it is no surprise to any of you — that we will not be in a position to establish modalities in agriculture and NAMA by the end of April, effectively end of this week. Despite all the work that has been put in by the Chairs of the negotiating groups — to whom I will give the floor shortly — and by all participants here and in capitals, the progress made is insufficient for Ministers to be able to negotiate modalities with a reasonable chance of success. In the other area which has an April 30 deadline, RTA Transparency a draft text is on the table, and I understand that it could be close to agreement. I would like to thank Ambassador Valles, the Chairman of the Rules Negotiating Group, for his hard work and I urge all delegations to make the effort to overcome the final obstacles.

Genuine and important progress has been made, but not fast enough to allow us to reach agreement on modalities by the end of the month. In my view, more time is needed, even if the time available is now very limited. These are the basic facts of the present situation, and I suggest that we take them on board and deal with them coolly and constructively.

Let me also stress something which I believe is essential now: this is not a time for blame or recrimination, which I am sure you will all wish to avoid, but for determination, refocusing our efforts and working together more productively.

I would like to thank the three chairs (Agriculture, NAMA and Rules — RTAs) for their assessment of the situation. As we have seen from their reports, the necessary conditions have not yet been fully met, and consequently the modalities are not yet at the takeoff point. This in turn means that, as many Members have pointed out to me in the last few days, the moment is not ripe for the Ministerial involvement of which I spoke. In order to make productive use of the direct involvement of Ministers in the negotiations, we need to put well-developed texts before them for decision, and these texts are not yet there.

Therefore, I am not encouraging Ministers to come to Geneva this week or next, and I am not planning to organize any specific gatherings at Ministerial level. I have convened a TNC next week, on Monday 1st of May, and as always it is up to delegations to choose the level of their representation, but I emphasize that this will be an ordinary TNC meeting.

Our attention must now move rapidly to the work ahead. It is absolutely imperative to organize this in an intensive, continuous and effective way if we are to make up for lost time and fulfil our ultimate deadline of concluding the Round this year.

We are all aware of the further target Ministers have given us at the end of July, but I firmly believe that if we are to meet this date, we need to increase the pressure of the negotiating process without delay. It is simply not possible to backload the modalities on agriculture and NAMA to July; that would guarantee failure.

Instead, we need to share a clear sense of the steps ahead, bearing in mind the very urgent need to move to a real text-based negotiation from the reference papers which have already been tabled on some elements of the agriculture negotiations.

The production of these texts must be the immediate objective, and the sooner it can be done the greater will be our chances of success.

Such texts do not come out of thin air. They must arise out of the work in the negotiating groups, and the Chairs of these groups — Agriculture and NAMA in the first instance — are the best people to bring all the elements together in the right way. You have to give them all the trust and co-operation necessary to carry out this difficult task, knowing that they — and I — remain totally committed to an inclusive, bottom-up, transparent and participatory process.

The process leading up to the production of negotiating texts must be intensive and uninterrupted. We have a lot of work still to do in a very short time. This is why I am asking the Chairs of the Agriculture and NAMA groups to operate on a continuous basis, and I ask all of you also to make the necessary officials continuously available over the next few weeks. This means that, from now on, negotiators should be on call on a permanent basis.

I am not proposing today a precise date for the circulation of negotiating texts, but I urge you all to think in weeks rather than months, and a small number of weeks. I will be working in very close contact with the negotiating group Chairs as well as the General Council Chair and with delegations to make sure we do not waste a minute. In order to maintain transparency and inclusiveness, I also intend to make more frequent use of this open-ended informal format.

There should be no doubt that the game is here in Geneva, in the multilateral arena, not anywhere else. This is a guarantee for all the membership that they are all players. It is true that the game is at a crucial stage but it is also true that we are really not far from a win in which everyone can share.

Is the DDA a Development Round?

"This Round is more than a negotiation, it is also a test. A test of the credibility of the WTO, and its ability to deliver on its promises to developing countries. A test of the global community's willingness to turning their talk of international cooperation and policy coherence into meaningful results. And a test of whether we can construct a truly "global" trading system, where all countries benefit." That view was expressed by **Valentine Sendanyoye-Rugwabiza, a Deputy Director General of the WTO***, while speaking on the above-titled theme in a lecture at the London School of Economics on 31 March, 2006. She also warned that if the Doha Development Round does not live up to its name, we would have 'a more fragmented world, with greater marginalization, inequality and uncertainty.'*

"When a child is born in some of our traditional societies, the family only gives it a name seven days after its birth. On the seventh day, the parents throw a big party and the relatives collectively decide on the name of the child. Then the eldest man of the family holds the baby in his lap, turns his face to the South, and whispers the name into the ear of the baby three times. Thus a name has been given to the child.

Giving a name to a round of trade negotiations is also a complex business. As in our traditional societies, there is a collective decision, a celebration and quite a lot of movement and whispering amongst the WTO

family. What trade negotiators have not yet learnt from the wise people of our villages – is to wait a while until they give a name. The current round of trade negotiations – the Doha Development Agenda, or DDA in our jargon, bears the name of the city of Doha, the capital of Qatar, where the round was launched in the WTO Ministerial in 2001. It also has the word "Development" in it – meaning that this round should be focused on, or aimed at, development.

The decision by WTO Members in 2001 to designate the Doha Round a *development* Round was a recognition that there remain, in today's multilateral trading system's rules and disciplines, imbalances that penalise developing countries – and this must be corrected. The intention, therefore, is to try to improve the multilateral disciplines and the commitments by all Members of the WTO in such a way that they establish a more level playing field and provide developing countries with better conditions to enable them to reap the benefits of opening trade.

Several imbalances in the multilateral trading system were not addressed during previous rounds -- including the last one, the Uruguay Round. When the current round was launched in Doha in 2001, developing countries made it a condition that these imbalances should be addressed with the priority of reforming and improving the trading system.

What are these imbalances? I will give you one example: if one looks closely at the structure of industrial tariffs, especially in developed countries, there remain oddities like tariff peaks or tariff escalation. This means that, very often, the highest import tariffs in **developed** countries are applied on products in which, as if by coincidence, **developing** countries have a comparative advantage.

Let me give a concrete example of the tariff escalation issue: it has come to our attention that the United States collects more tariffs on goods imported from Cambodia than it does on goods imported from France. It this possible ? In January 96, the US imported three billion dollars worth of French goods – and collected roughly 30 million dollars in import tariffs. In the same month, the US imported only 200 million dollars worth of goods from Cambodia – that is less than 10% of US imports from France – but the amount of import duties paid was the same -- 30 million dollars ! How can you justify a country exporting only one tenth of what another country exports, but paying the same amount in duties?

The crunch of the problem is the type of goods that each country exports. In the United States most tariffs on technology and heavy-industry goods have been eliminated. In contrast, tariffs on textiles, clothing and footwear are still higher – even if employment, production and trade patterns have changed dramatically. Thus, if a country exports technology or luxury products, it pays very low duties – this is what rich countries trade with each other. But if a country exports low value-added products, like textiles, clothing and footwear – usually produced by poor countries – then it pays high duties. The same is true in the European Union and in Japan in the case of cocoa, and many other products. Imports of raw cocoa are subject to very low import tariffs to enter the EU and Japan, but processed cocoa pays high import tariffs.

These imbalances basically stem from past – but sometimes also current – political and economic factors. Much as there are many new players, new products and new patterns of export and import in today's world market, trade relations are still tainted by history, by a heritage of production choices and trading flows formed during colonial times. These imbalances have to be corrected.

Another imbalance in the current disciplines is Agriculture. This sector is several trade rounds behind industrial goods. The Agreement on Agriculture only came into force in 1995 – only ten years ago. In other words, the agricultural sector has not been able to benefit from the 50-year process of trade liberalization that we have witnessed in industrial goods. There is clearly a backlog in this area.

In order to rebalance the multilateral trading system in favour of developing countries, this Round has to deliver improved market access, reduce tariffs and remove quantitative restrictions on products where developing countries have a comparative advantage – and here we are talking about the two problems identified above: increased access into the markets of developed countries for both industrial and agricultural products exported by developing countries.

In addition to improved market access for industrial and agricultural products, there should also be a rebalancing of the rules and disciplines that govern international trade – rules on trade-distorting agricultural subsidies on products such as cotton, and rules that provide developing countries with special and differential treatment.

And I can keep going on with a long list of imbalances which should be corrected. But let's look at what is already on the table. **In agriculture**, Members have agreed on a date for the elimination of the most trade distorting agricultural subsidies – the export subsidies. This was a key negotiating demand by developing countries. Agricultural export subsidies must be eliminated by 2013, with a substantial part of them gone by 2010.

Members have also agreed to achieve "effective cuts" in trade distorting domestic subsidies to agriculture – another demand of developing countries. There will be three bands of reductions, with the EU, US and Japan undertaking the biggest of them.

Furthermore, on the defensive side, a group of developing countries have made two key demands: one, that they have the flexibility to self-designate a number of Special Products on criteria of food security, livelihood security and rural development; and, two, that they have to be able to trigger a special safeguard to protect themselves against imports, based on import quantities and prices, which they need in order to cope with the volatility of farm products on in-

ternational markets. These demands have already been addressed.

In the important area of **cotton** (considered a litmus test by many), rich countries agreed to eliminate all export subsidies in 2006; they also agreed to make deeper and faster reductions in trade distorting domestic subsidies for cotton than for the remainder of agricultural products. Finally, rich countries and developing countries wishing to do so, agree to provide duty free and quota free access to LDC exports of cotton.

Furthermore, during the Hong Kong Ministerial Conference last December, Members succeeded in addressing a long-standing demand of 32 of our poorest members (**the LDCs**). Rich countries agreed to provide duty-free and quota-free access to 97% of all LDC products on a lasting basis; with a view to eventually extending this treatment to 100% of their products.

As you can see, there are signs that this Round's achievements are already more than zero, but far from enough. Ensuring that the results of the DDA, in terms of market access, rules and disciplines, will be beneficial to developing countries is crucial to the success of the Round. But are market access and disciplines enough to promote development ? Are these conditions sufficient to increase the level of development for the poorest countries in the world ?

The answer to these questions, experience shows, is no. Why is it so ? The problem is that by addressing imbalances in market access and in the disciplines of the multilateral trading system, they do not, in and of themselves, generate the concrete results in terms of development that are so crucial for the majority of WTO Members.

Trade openness and improved disciplines play a vital role in growth and development (not much doubt about it if we look at the historical record), but they are not a panacea for all the challenges of development. **Development is not necessarily easy to accomplish, unless it is embedded in a supportive economic, social and political context and a coherent multi-faceted policy framework.** Trade opening and improved disciplines are a potential, a recipe – they are a necessary, but not a sufficient condition for development.

Governments need to adjust to new conditions, they need to ensure that a whole set of domestic conditions is put in place, so that trade opening and new rules can indeed result in development. If you allow me a simplistic metaphor, market access and new rules are seeds – they will only bear fruit if the land is prepared, if the right conditions are present to promote growth and fructify. Without certain necessary conditions, trade opening and improved rules will not suffice to promote growth and development. In some circumstances, premature opening can be harmful to the domestic economy.

What are these conditions? What are the areas where domestic policy activism, or at least attentiveness, is required, so that the results of this Round can bear fruit?

First, sound macroeconomic policies. These are the basis, the minimum ground for any successful trade policy.

Second, markets that function reasonably well. If price signals are not transmitted to markets – in such a way that markets remain rigid, unresponsive and often monopolistic – then benefits from opening to trade may be dissipated or appropriated, and in these situations trade opening can even be harmful. At worst, trade opening could end up impairing current economic activity and employment without opening up new and better opportunities.

Third, the necessary infrastructure must be in place, be it human capital or physical infrastructure. If the infrastructure is missing, then there is a potential for problems which will not be solved by trade opening, but might be worsened by it. This is a matter both of investment and sound policy (e.g. de-monopolizing telecoms services).

Fourth, as usual, good governance and functioning, reliable institutions. Whatever else happens in an economy, bad government and neglected institutions are a killer, perhaps the most profound force militating against progress.

What I am saying is that trade opening can only be politically and economically sustainable if it is complemented by flanking policies which address, at the same time, capacity problems (whether human, bureaucratic or structural) and the challenges of distribution of the benefits created by freer trade.

The immediate test of our ability to respond to this challenge – the challenge of creating a coherent international policy for development – is an initiative called Aid for Trade – an idea advanced by Great Britain, and given impetus by the G8 and now the WTO.

Because trade is a complex economic activity, there are many different kinds of Aid for Trade. There is technical assistance – helping countries gain knowledge of trade opportunities and how to access them. There is institution building – strengthening customs authorities, tax systems, and product testing, to lower the cost of trading. There are infrastructure improvements – building the roads, ports, and telecommunications networks that are increasingly essential to linking exports to global markets. Then there is adjustment assistance – helping with any transition costs associated with tariff reductions, preference erosion, or declining terms of trade.

So the agenda is potentially very large. But the complexity of the details should not blind us to the "big picture". Aid for Trade is all about empowering developing countries to benefit from trade. It is about helping the private sector – entrepreneurs, traders, investors – to seize export opportunities.

Above all it's about making the promise of international cooperation and coherence real – between the WTO, the World Bank, the IMF, and the UN at the global level, and between trade, finance and develop-

ment ministries at the national level – because it is at ground level that policy coherence must begin.

Aid for Trade, in other words, is one part of the much larger challenge presented by the Development Round – ensure that trade is not just an end in itself, but works to raise living standards, improve health and education, and reduce poverty.

What is needed, as WTO Director-General Pascal Lamy has been saying, is need for a new consensus amongst international actors. He has called it the "Geneva consensus": a new basis for the opening up of trade that takes into account the creation of the necessary conditions for benefiting from freer trade.

We need to ensure that market opening translates itself into real gains and benefits to public, by helping to put in place the necessary conditions for those gains and benefits. The problems of freer trade have appeared in a striking and loud manner in the recent past. We cannot ignore them. The "Geneva consensus" combines the objectives of market opening with the establishment of conditions for benefiting from freer trade, whether you are rich or poor, weak or strong.

To me, therefore, the main question about this Round of trade negotiations is not a Shakespearean one, a Hamlet dilemma of "to be or not to be" a development round. The main question is actually whether the **results** of this round help poor countries increase their level of development or not.

What I can tell you is that, in terms of results, this Round has a concrete potential to achieve much for developing countries. I already mentioned progress achieved in agricultural export subsidies, in the duty-free quota-free commitment for LDCs, in promises in the area of cotton. As compared to previous negotiations, this Round is surely different. The old days when the QUAD (the group formed by US, EC, Canada and Japan) monopolized the driving seat are definitely over.

Developing countries have gained both capacity and strength – just look at the G-20 group of countries, led by Brazil, India and China, among others, which has changed the landscape of main players in the WTO, or the G-90 group of poor countries. Three-quarters of the Members of the WTO are developing countries – this Round must necessarily meet their legitimate expectations. If it is to end successfully, this Round cannot but produce results that foster development.

So will this Round live up to its name? Will there be a discussion on whether or not it has attained the objective of promoting development? In fact, we will only know the answer to these questions when the Round is concluded – or even later, when its results are implemented.

What I can do – in conclusion – is raise another question: "If the DDA fails as a development round, what is the alternative? This Round is more than a negotiation, it is also a test. A test of the credibility of the WTO, and its ability to deliver on its promises to developing countries. A test of the global community's willingness to turning their talk of international cooperation and policy coherence into meaningful results. And a test of whether we can construct a truly "global" trading system, where all countries benefit.

What is the alternative? It is a more fragmented world, with greater marginalization, inequality and uncertainty. At a time when shared prosperity and peace depend more than ever on multilateralism, the cost of failure extends far beyond the trade system. The Doha Development Agenda is too important to fail. Millions are depending on it."

LIFTING THE LID ON FOREIGN INVESTMENT CONTRACTS - (II)

The following is the second and final part of the report 'Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development.' by the UK-based **International Institute for Environment and Development (IIED)**. *The report highlights a range of concerns relating to how foreign investment contracts are framed – often favouring the foreign investors and not the host countries. Beyond the specific systemic concerns, more of actual cases have been cited.*

The content of foreign investment contracts

Foreign investment contracts need to strike a balance between the legitimate interest of investors in stability for their investment on the one hand, and the pursuit of sustainable development on the other. When there is a long time-frame between the initial investment and materialisation of profits, investors need appropriate safeguards against non-commercial risks – such as the risk that their investment could be expropriated through nationalisation. All too often in the cases that we are aware of, the balance reflected in foreign investment contracts appears disproportionately to favour the foreign investor, not the host country government as keeper of the country's overall public policy goals. Some examples of contract clauses that raise particular concerns are highlighted below. The detailed implications of any contract for sustainable development can only be assessed by looking at it in the round; alongside wider domestic legal requirements and the provisions

of any relevant intergovernmental investment agreements.

● Dispute settlement

Foreign investors generally have rights to compensation from host states if their contractual rights are breached. But compensation is not a benefit that is typically available to domestic businesses. When disputes arise between foreign investors and the countries that host them, foreign investment contracts usually say that they should be resolved in the largely closed world of international arbitration, as opposed to through national courts. Many have criticised the opaque nature of arbitration processes. Restrictions on dissemination of information about the dispute, publication of the detailed outcome of the dispute (the 'arbitral award') and interventions by non-disputants with an interest in the outcome of the dispute are the norm. The members of the elite community of international arbitrators are often eployed by law firms that specialise in negotiating foreign investment contracts for companies. Conflicts of interest are a real and systemic concern. And where investment disputes arise from action taken by host states to protect a public interest or the rights of their citizens (e.g. environmental legislation, or action in favour of indigenous communities), international commercial arbitrators may not be best placed effectively to take those broader interests into account.

● Stabilisation clauses

'Stabilisation' clauses are legal devices that foreign investors commonly use to manage so-called 'non-commercial risks'. They are typically used in contracts with host countries where there is political, regulatory or institutional uncertainty or when standards addressing potential impacts of the investment have not yet been developed. In effect, stabilisation clauses work by committing the host government not to take action or to alter its legal system in a way that negatively affects the investment project. If a government that is party to a stabilisation clause breaches the commitment, it is likely to be required to pay compensation. With increasing attention now being paid by governments to environmental and social issues in many countries, these policy areas have also been brought within the scope of the stabilisation mechanisms of foreign investment contracts, alongside longstanding areas of 'stabilisation' concern such as tax laws. Even where stabilisation clauses specifically focus on the risk of 'expropriation' of foreign investment projects through government action – as in Mali's model mining agreement, for example, – developments in international arbitration can make them more far-reaching than they appear at first sight. Recent arbitral awards, particularly under the North American Free Trade Agreement (NAFTA), have shown the willingness of arbitrators to broaden the concept of expropriation well beyond nationalisation or similar acts of government to environmental measures with a substantial impact on the competitiveness or viability of investment projects.

The legacy of a peculiar form of stabilization arrangement is now the subject of considerable controversy in Chile. Following the 1974 military coup, General Pinochet's government set about addressing the reluctance of foreign companies – particularly those in the mining sector whose interests had previously been expropriated – to invest in Chile. 'Decreto Ley 600' of 1974 set out a series of tax benefits and guarantees for foreign investors. Foreign investors benefiting from the law would be protected by means of a contract signed with the State. Due to the particular legal form of the contract, it could not be modified without the consent of the investor. And even then, amendment carried the same requirements as an amendment to the constitution: a two-thirds majority vote of the legislature. The effect, practically if not legally, is to place foreign investors on the same level as the sovereign state. One of the principal contributions of foreign investment to the development of poorer countries lies, at macro level, with its potential to generate tax revenues. But the pressure for middle and low income countries to compete for position in the race to attract foreign investment by lowering taxes is significant.

Current debate on mining tax reform in Chile follows increased public awareness of consistently low levels of taxes paid by mining companies investing in the country. The transnational enterprises that control more than 60% of the Chilean mining industry bear less than 25% of the tax burden. In the last decade, foreign companies investing in Chile have exported copper of a value of over US$43 billion, whilst contributing taxes of less than US$270 million.* Government proposals aim to head off sophisticated tax avoidance strategies and to levy royalty payments on income derived from the sale of mineral products. Proposals provide for a phased approach for investments currently protected by contracts provided for under 'Decreto Ley 600'.

The legal implications of stabilisation clauses are controversial, but they tend to be interpreted by arbitrators as creating legally binding obligationns that have to be respected by the state. In many cases, such clauses are reinforced by provisions of bilateral investment treaties committing a state party to comply with investment contracts concluded with nationals of the other state party ('umbrella clause'). In some contexts, there are legal concerns about the constitutionality of stabilisation clauses, and the legitimacy of state action in agreeing to them.

● Choice of law clauses

The effect of stabilisation clauses can be reinforced by clauses that define which system of laws governs the project. Sometimes these clauses 'internationalise' the contract, so that parts of it are governed by a legal system other than that of the host state. Most controversially, these 'choice of law' clauses, as they are known, may state that the law of the host state is to apply with the exception of specified pieces of legislation. The Belize Chalillo Dam 'Third Master Agreement' waives 'any and all environmental laws, rules or regulations', whether in force or new,

except those to which the investor specifically agrees to be bound.

• Applicable standards clauses

Sometimes, investment contracts contain clauses setting out the range of standards, other than those of the host * Jorge Lavanderos Illanes (2003), *Royalty, regalia o renta minera (lo que Chile no cobra).* Santiago de Chile: Impresos y Editorial Lafken Ltda, p132. state, that are to govern the project. These may include references to 'good industry practice', or even to the standards of another country. The substance of these provisions (including in particular how clearly the substantive obligations that they lead to can be identified) and their appropriateness are particular concerns.

• Local content requirements

The quality of the local economic development benefits brought by a foreign investment project may depend on the kinds of economic opportunities that it brings for local people. Here, host states may be concerned to maximize input to the project through locally produced goods and services, whereas foreign investors may seek to maximize their freedom to source goods and services, or hire workers, from whatever sources they see fit.

• Property rights-related provisions

Foreign investment contracts sometimes address property rights – with direct implications for property rights-holders near proposed investment projects. For example, host country governments sometimes provide investment contract guarantees to foreign investors that land for the project is guaranteed free of any other conflicting property rights.

The indirect impacts of foreign investment contracts

Foreign investment contracts can have many indirectly associated impacts, aside from the direct impacts of the terms of the contracts themselves. Most starkly, Belize's Chalillo Dam and an oil exploration concession granted to Shell-Premier for exploration in Pakistan's Kirthar National Park were associated with legislative changes with the express aim of removing legal blockages to the investment projects.

The Chalillo Dam project was lauded by the Government of Belize as a solution to the country's energy security challenges and to bolster the under-productive Mollejón Dam. Belize meets its energy needs from dieseldriven power stations and by using imported oil and the output of a hydroelectric power station on the Macal River at Mollejón. Additionally, about half the country's energy needs are met under a preferential contract with Mexico, allowing purchase of off-peak electricity (mostly from a natural gas facility in the Yucatan). The Government of Belize attempted to rally public support for the building of a second dam and reservoir on the Macal River at Chalillo by suggesting that the Mexico supply could be cut off at the whim of the Mexican government, leaving Belize at the mercy of a foreign power. Building the dam would mean flooding nearly ten square kilometres of land that had been designated by Belize as protected. The area has been described as one of the most biologically rich and diverse regions remaining in Central America. The Government of Belize gave its consent to the dam. Whilst ultimately unsuccessful litigation challenging the environmental impact assessment was making its way to Belize's highest court of appeal (the Privy Council in the UK), the Government proposed legislation to secure the future of the controversial project – regardless of what any court or tribunal anywhere might have to say about it. Section 4(d) of the Macal River Hydroelectric Development Bill, 2003 said:

> *[F]or the avoidance of doubt and for greater clarity,[the Belize Electric Company Limited] shall proceed with the design, financing, construction and operation of the Chalillo Project... notwithstanding any judgment, order or declaration of any court or tribunal, whether heretofore or hereafter granted, issued or made.*

A storm of protest followed in the national press. The Bill was passed and subsequently repealed after the Privy Council reacted unfavourably. But construction of the Chalillo Dam had already begun.

In Pakistan, non-governmental organisations made strong legal arguments against oil exploration by Shell-Premier in the Kirthar National Park. They based their arguments on the provincial legislation of the state of Sindh. Section 15 of the 1972 Sindh Wildlife Ordinance prohibited activities likely to disturb or damage local fauna and flora in any area designated as a National Park. It also prohibited *'clearing or breaking up any land for cultivation, mining or for any other purpose'* in a National Park. Notwithstanding the apparent illegality of its move, the Sindh Department of Industries reportedly granted a letter of no objection to oil exploration in the Park in 1996. In 1997, in contradiction of the letter of no objection, the ban on mining was reinforced through a Government of Sindh notification.

Local NGOs prepared to mount a legal challenge to Shell-Premier's exploration. Their efforts were thwarted in 2001, when the Governor of Sindh (who had himself formerly been a Shell-Premier Director) amended the protective Wildlife Ordinance so that it would not apply to *'any activity in a national park in connection with the exploration or production of oil and gas which is undertaken in accordance with an environmental impact assessment'*. The Governor's notification had the effect of legalising the exploration so long as requirements imposed by an environmental impact assessment were complied with.

The Shell-Premier investors and then their successors had closed their operations in the Kirthar National Park by the end of 2004 after exploratory wells drew a blank. The legislation designed to facilitate their investment is their legacy. And with legal obstacles to further exploration cleared, Pakistan's central government has reportedly received expressions of interest from a number of foreign

companies for awards of new exploration licences.

Foreign investment contracts have more indirect impacts too. One example is the 1288km Dakar-Niger railway line, which runs from Koulikoro on the river Niger in Mali to the port of Dakar on the Atlantic Coast. For the inhabitants of Mali's Kayes region, the train line is the principal connection to the rest of the country. The railway was controlled by public companies owned by the governments of Mali and Senegal – until poor economic circumstances led the governments of the two countries to consider privatisation through the issue of a concession. After several years of negotiation, in September 2003, a concession was granted to Transrail SA. Transrail is a private, limited liability for-profit company under Malian law with a shareholding structure that includes the governments of Mali and Senegal, employees of the enterprise established to operate the line, and a Canadian investor, Canac, which is part of the Canadian National Railway Company.

Since privatisation, the new company has prioritized freight over passenger services. This has resulted in an erosion of citizens' opportunities for free movement, generating frustration among affected populations and possible negative effects for the socio-economic development of the region. While the concession agreement does refer to developing passenger services, the implementation of this clause does not seem to have been a priority for the investor. These issues could have been better addressed, either in the legislation governing the privatisation or in the terms of the concession itself – for instance, through more effective mechanisms to call the investor to account for failure to deliver. The balance that was eventually arrived at may have been the only way of securing a future for the railway. But without full transparency in negotiations that conclusion is difficult to verify.

Some foreign investment contracts generate major impacts on the property rights or livelihoods of local people. In Ghana, for example, a key by-product of mining agreements has been the taking of land and damage to property associated with mining. Legislation provides for compensation to be paid for disturbance of rights related to the land's surface and the appropriation of property. But even mining industry practitioners agree that compensation levels are inadequate. A significant number of cases before the Ghanaian High Court in Tarkwa, a major mining town, deal with issues either of non-payment or payment of inadequate compensation.

In most African countries, only a tiny proportion of rural land is formally registered or titled. Most African farmers gain access to land through customary rights, which are rarely adequately protected by national legal systems. Whilst some countries, including Mali, have adopted a legislative approach that ensures greater sensitivity to these local realities, many have yet to do so, exacerbating the likelihood that efforts physically to 'clear the way' for foreign investment or guarantee free access to foreign investors through foreign investment contracts will cause hardship for local people.

These kinds of indirect impacts happen to have been associated with foreign investment contracts. But the problems are of wider significance, reflecting systemic challenges in the governance of foreign direct investment. We expect that our efforts to understand the wider impacts of foreign investment contracts will generate helpful insights for others working to analyse the sustainable development implications of foreign direct investment more widely.

What needs to happen next?

This report has highlighted a range of concerns about foreign direct investment governed by foreign investment contracts. The specific concerns are heightened by a generalised lack of transparency in the negotiation and accessibility of foreign investment contracts, by their tendency to favour settlement of disputes by private international arbitral tribunals not national courts, and by their potential to undermine public policy goals related to sustainable development. Alongside enhanced transparency, new tools will need to be developed to facilitate monitoring and evaluation of foreign investment contracts through a sustainable development lens, linked to provisions that allow foreign investment contracts to be reviewed.

Some of those concerns can be addressed through changes in the terms of the contracts themselves. Others might best be addressed through changes in national legislation in the host countries concerned, or through efforts on the part of home countries to ensure that multinational corporations headquartered in their territories behave properly. International financial institutions and the providers of the project finance that allows deals to go ahead are also potentially important leverage points. Their loan repayment terms can fundamentally affect the structure of foreign investment contracts themselves, but they can also help to improve the terms of contracts by attaching social and environmental conditions to provision of finance. Addressing some of these issues, and assessing what is commercially feasible, will call for sound economic analysis of the terms of different deals.

What makes most sense when strengthening the contribution of foreign investment contracts to sustainable development will differ from sector to sector, country to country, and project to project. That is one reason why it is important to assess the sustainable development implications of these deals from the bottom up, applying a mix of 'home' and 'host' country expertise and political understanding. We will work with allies in civil society, business, financial institutions and governments to get a balance between full transparency and commercial confidentiality so as to meet the needs of sustainable development. We will build wider understanding on the different types of foreign investment contracts, why they are used, and the global and the sectoral legal and economic trends. We will ground our recommendations in an understanding of commercial realities and local impacts. And we will use a creative mix of sound research, advocacy and engagement to make sure that foreign investment contracts make the best possible contribution to sustainable development.

TURBO-CHARGING INVESTOR SOVEREIGNTY – (II)

Continuing from the previous issue, the following is the second and concluding part of the above article. It gives more examples of how Corporate power has managed to bend foreign investment rules to their advantage, especially ensuring their security of operations and repatriation of profits. The article was carried recently in the UK-based Corner House by authors **Nicholas Hildyard** *and* **Greg Muttitt.** The original title was *'Investment Agreements and Corporate Colonialism.'*

Corporate Sovereignty

Until recently, exemptions from specified laws – usually those that companies find most onerous – used to be rare in investor-state contracts. Increasingly, however, there is a growing trend for exceptions and exemptions to be included in concession and other agreements. Recently, for example, the Government of Belize not only exempted the proposed Chalillo Dam from any environmental laws other than those which the Canadian-owned project developer had agreed to follow but also to waive all taxes, except payroll taxes. An Act was also passed into law which put the project beyond legal challenge by any court – thereby arguably violating the protection of judicial rights guaranteed under the Inter-American Human Rights Convention.

But the exemptions gained by BTC Co go several steps further – exemptions which, as the project lawyers themselves have hinted, had to be pushed through over objections by the host governments.34 Under the Host Government Agreements, the BTC consortium is exempted from any obligations under Azerbaijan, Georgian and Turkish law, aside from the Constitutions of the three countries, where those laws conflict with the terms of the agreements. In signing those agreements, the host governments have effectively abrogated their executive and legislative powers to protect their citizens from potential environmental damage and associated health and safety hazards or to improve the regulatory regime. By locking themselves into a frozen and drastically weakened regulatory environment, the governments are thus less able to respond to new environmental and other threats or to the evolving understanding of risk.

The HGAs have already been invoked to override Georgian environmental laws and to force the Georgian Minister of the Environment to sign off on the pipeline route despite grave reservations about its legality under Georgian environmental law. Both BP and the US government put pressure on the Minister, through then President Shevardnadze. The Minister was forced first to concede the routing with environmental conditions, and then water down her conditions. Since the project agreements have a higher status than other Georgian laws, the environment laws the Minister referred to were simply irrelevant.

Ultimately, on the day of the deadline, the President called the Minister into his office, and kept her there until she signed, which was at about 4 o'clock in the morning.

In Turkey, too, the HGAs have been invoked to set aside stricter environmental and social legislation. Critically, provisions in the HGA were invoked to truncate the "scoping period" for the Environmental Impact Assessment. In a letter to BTC Co, dated 29th November 2001, the Ministry of Agriculture and Rural Affairs waived the requirement for site investigations (despite an almost total absence of on-the-ground data on flora and fauna along the pipeline route) before granting approval for the pipeline route "in accordance with the Host Government Agreement". The normal requirement, under Turkey's environmental regulations, for a 60-day period for the Ministry of the Environment to review and approve the final draft of the EIA, in order to give a development consent, was also reduced to 30 days for BTC, in order to ensure that BOTAS, the Turkish company contracted to build the Turkish section of the pipeline, could complete the project in the period specified under the project agreements. The project agreements also overrode key provisions in Turkey's Expropriation Law which require the price for expropriated property to be negotiated: instead, it was compulsorily purchased, under an emergency law normally invoked only in times of national disaster or war, under the terms of the agreements.

BP has countered that the exemptions it obtained were nothing out of the ordinary and are common to other concession agreements. The company states: "The creation of a prevailing legal framework is not unusual and has been used by extractive projects even in nations with highly developed legal systems, such as Chile, Canada and Australia." Justifying the BTC Host Government Agreement, it adds: "The Prevailing Legal Regime (PLR) is designed to supplement the existing framework, rather than replace existing laws and regulations".

In fact, the HGAs for the BTC project go far beyond simply "supplementing" existing legislation. As the term "Prevailing Legal Regime" (PLR) accurately reflects, they prevail over such legislation: indeed, their express intent is to provide investors with the right to exempt their projects from specified laws and regulations. BP is fully aware of this: indeed, BTC's own Citizens Guide to the Project Agreements explicitly acknowledges that the legal regime that the company has crafted for the project grants investors the power to "supersede provisions that directly conflict with project agreement requirements."

Substituting Corporate Standards for National and International Law

Although BP accepts that the agreements trump local law, it insists that they set out a more stringent and coherent environmental and social regulatory regime than would otherwise be available.

In fact, the Agreements replace hard law with voluntary, vague, and unenforceable corporate guidelines. Under the Intergovernmental Agreement, the "floor" requirements for the project are a set of non-binding, loosely-worded and largely technical petroleum industry pipeline "standards". Where these "standards" conflict with local environmental and labour law, the "standards" win out. "Soft" industry guidelines have thus been allowed to replace "hard" law, with the environment and human and labour rights the losers.

As Amnesty International notes: "Instead of referring to internationally recognised human rights standards, the agreement between the state and the consortium says that the project is to be regulated by 'the standards and practices generally prevailing in the international petroleum industry for comparable projects.' Apart from the fact that on BP's own admission these standards have never been formulated, this is not a substitute of like for like. It jettisons the carefully worked out balances made by the regional and international bodies charged with fixing the dimensions of basic rights and instead the reference point becomes the consensus among actors in the petroleum industry on how things should be done."

BP cites a clause in the Intergovernmental Agreement to argue that the project must comply with "EU standards", implying that the body of EU law will be honoured. In reality, however, the IGA's commitments only extend to those (unspecified) "standards" that relate to "technical, safety and environmental" practices within the petroleum industry. Beyond this, the phrase "European Standards" remains undefined in any of the legal agreements or project documents which form the legal regime for the project.

If (as BP has argued) the phrase is taken to refer to "European Union Directives", the project falls below this floor in a number of important areas. For example, the "applicable EU Directives" listed in the Environmental and Social Impact Assessment (the project document that sets the legally-binding standards for the project) do not include such key EU Directives as the Strategic Environmental Impact Assessment Directive (2001/42/EC), reflecting a "pick and mix" approach to the applicability of standards. In addition, the Supplementary Lenders Information Pack for Turkey makes no mention of either "EU standards" or "EU Directives" as the floor for the project. Instead it states: "The BTC project standards will adhere to Turkish and/ or World Bank standards, whichever is the more stringent".

Further confusion arises from many project standards falling below those that would be required under relevant EU Directives. The Environmental Impact Assessment's Matrix of Environmental Standards and Guidelines clearly indicates, for example, that emission standards for the pipeline would exceed (or would be likely to exceed) three applicable European Union directives: in the case of nitrous oxide, permitted emissions exceed relevant EU directive standards by 78% and the EU sulphur directive standards by 283%.

The claim that "EU standards" provide a floor for the project also conflicts with the choice of field joint coating system for the pipeline in Azerbaijan and Georgia. Far from meeting "generally applicable industry practice in the European Union", the chosen coating is entirely experimental. As has now been confirmed by the UK government, the coating (known as SPC 2888) has never previously been used on a similar operational pipeline anywhere else in the world – and is therefore outside the experience of industry practice whether in Europe or elsewhere.

The coating, which was not tested in field conditions on a polyethylene-coated pipeline (such as is being used in the BTC project) until after it had been selected by BP, was chosen despite strong objections from Derek Mortimore, BP's own expert consultant, and in the face of criticism from within the industry. Reviewing the specification for the selected coating, Mr Mortimore, warned: "I am at a loss to understand why this specification has been issued. Purely as a coating it is underdeveloped and incomplete. As a field joint coating specification, it is utterly inappropriate as it does not confirm a protective system that can be successfully applied in all the conditions under which this pipeline will be constructed, nor does it confirm the integrity of the protection for the design life of the pipeline." The pipeline coating system has since experienced multiple failures in the Azerbaijan and Georgia sections of the pipeline. Recent press reports indicate that such failures continue despite remedial measures undertaken by BTC Co.

Freezing out New Social and Environmental Legislation

"Stabilisation" clauses – under which governments agree to compensate concessionaires for changes in legislation that adversely affect their business – are now common to many concession agreements. When first introduced, companies sought to use the clauses to freeze the legal framework of the host State once-and-for-all by prohibiting changes to the law. However, this quickly fell foul of the courts. As Marcos Orellana of the Centre for International Environmental Law comments: "This extreme construct was challenged on several grounds, including fundamental principles of self-determination and the permanent sovereignty over natural resources. After early arbitration cases involving Libya revealed that this rigid model broke in the face of political and economic crises, greater flexibility was introduced to stabilisation clauses, including obligations to negotiate if circumstances changed or to compensate if legal changes radically altered the expected economic returns of the project."

That need for flexibility and the accompanying emphasis on negotiation is reflected in the model investment agreement that has been drafted by the United Nations Commission on In-

ternational Trade Law (UNCITRAL), the inter-governmental body that makes recommendations on investment rules. UNCITRAL makes the rather obvious point that corporations, like citizens, should expect changes in the law: indeed, such change is part and parcel of democracy. Stabilisation clauses should therefore be limited in their scope, only covering "specific legislative changes that target the particular project, a class of similar projects or privately financed infrastructure projects in general"or changes in economic circumstances that could not reasonably have been foreseen at the time of the contract being signed. The OECD similarly recommends that stabilisation clauses should not grant blanket rights to compensation for any new legislation that might adversely affect an investment but should be restricted to legislation that is clearly specified. In addition, the OECD rejects the demand for generalised, unspecific damages in the event of new legislation incurring economic costs: the financial costs that are to be covered must be "clearly and precisely described".

Moreover, in keeping with the stabilization clauses in standard contracts are generally "two-way" in their application. India's model concession agreement, for example, allows for the company to negotiate new terms where a change in law leads to a rise in costs – but equally for the government to seek amendments where new laws reduce the concessionaire's expenses. Generic claims – such as "disruption to the economic equilibrium" of a project (the phrase used in the BTC stabilization clause) – would not therefore be acceptable.

Indeed, the stabilization clauses in the BTC contract completely disregard both the letter and the spirit of UNCITRAL's recommendations: not only are they so broad brush as to effectively cover any new changes in social and environmental legislation but they allow for no equality of treatment. Under the HGAs, the host governments are bound by the HGAs to compensate the BTC Consortium for any changes in the law that the three countries may introduce over the 40-year lifetime of the project (including changes aimed at improving protection of human rights or the environment) where such changes adversely affect the profitability of the project.

The broad, sweeping nature of the BTC's stabilisation clauses led Amnesty and other human rights groups to warn that the clauses were likely to have a "chilling effect" on the State's adherence to human rights standards – the fear of having to pay compensation causing the three states not to implement new human rights obligations.

Amnesty also warned that other clauses in the Intergovernmental Agreement and the HGAs could further freeze out action by the three governments to protect the public interest. In particular, Amnesty and others expressed grave reservations about: the HGA's stipulation that the pipeline may only be shut down in the event of an "imminent, material threat"; the specific denial within the Intergovernmental Agreement that the project has any public purpose (thus preventing governments from invoking a public interest defence for intervening to protect the public); and the wording of the clauses relating to security along the pipeline route, which could be used to justify severe human rights abuses.

In September 2003, in an effort both to assuage concerns within the legal community and to ensure the support of the World Bank and other public funders, the BTC Co. published a Deed Poll, entitled the BTC Human Rights Undertaking, in which it undertook not to invoke the compensation clauses in the HGA in the event of new laws being introduced for human rights or environmental reasons. Legal opinion, however, is divided on the efficacy of the Deed Poll, not least because it is only signed by the BTC Co. and does not form part of the bundle of documents that constitute the prevailing legal regime. Indeed, the HGAs and Intergovernmental Agreement remain unaltered.

Moreover, BTC Co. has since qualified its commitments under the Deed Poll, stating that it reserves the right to invoke the stabilisation clauses if it deems new legislation to constitute "rent-seeking". The Deed Poll also makes it clear that it does not apply where legislation introduced by the three governments is more stringent than EU standards, World Bank Group standards and existing international and human rights treaty obligations. In effect, the Deed Poll places an explicit cap on the ability of the host governments to regulate as they (rather than BP) see fit, severely constraining their ability to pioneer new legislation that is more protective of the public interest than that in the European Union.

All the Powers of a State – without the Liabilities

Susan Leubuscher, the researcher who first alerted the international NGO community to the colonial nature of the new legal arrangements being put in place by oil companies under the umbrella of BITs, through her work on Exxon's Chad Cameroon oil pipeline, has warned that HGA-type contracts have the power to transform "multinational enterprises into ad hoc legal institutions with the power to dictate the law that governs their own relations with States and their activities within States."

Such powers are evident from the provisions of the HGAs negotiated for the BTC pipeline. But whilst the companies have imposed obligations on the states – and taken over a number of prerogatives of the state (for example, in the case of Exxon-Mobil's Chad- Cameroon pipeline, the power to derogate from obtaining permits to enter private land) – they themselves have been assiduous in protecting themselves from liability. Whilst, for example, the project agreements oblige the states to take any action necessary to protect the pipeline – a highly worrying prospect given the human rights record of the three states – they also absolve the BTC consortium from any liability for any human rights abuses that might arise.

The consortium has also sought considerable protection for itself in the event of a pipeline leak – which many consider an inevitability, particularly given the controversy over

the choice of anti-corrosion coating for the pipeline. The rights of individuals to sue for damages that arise from the operation of the pipeline are minimal and the chances of a fair hearing are slim. In addition, individuals are likely to have to act against not only the companies but also their own national governments, since investment agreements place the onus on the states to ensure that the pipeline is operated safely. In all three states, such a challenge by ordinary citizens – particularly if it was likely to result in major costs to the state – is likely to result in political pressure being exerted on the courts.

Indeed, whilst the Agreements have created legal certainty for the companies, they have only been able to do so by causing legal mayhem for ordinary citizens. The layer upon layer of agreements, coupled with the hybrid public/private nature of the contracts, have severely muddied the waters of redress for third parties, potentially denying citizens access to justice. Indeed, the European Bank for Reconstruction and Development, in a commentary on the agreements, itself acknowledges the uncertainties. "Clearly [a right of action for local citizens if BTC Co. breaches the environmental or social standards set out in the HGA] cannot accrue as a matter of contract, since the third party is not part of the HGA. However, the argument is that, by virtue of the ratification of the HGA as a part of local law, the right becomes part of domestic legislation. Presumably on this basis such a right would also be enforceable in domestic courts, not just through the mechanism of international arbitration set out in the HGA. This provision granting rights to third parties in this manner is unusual in the context of such agreements and an *interesting* development" (emphasis added). Interesting perhaps for lawyers, but a matter of livelihood for those directly affected – and an issue on which citizens have a right to expect clarity, not experimentation.

Undermining the Rule of Law

The use of HGAs is now openly endorsed by the multilateral development banks, such as the World Bank, which raised no public objections to the BTC contracts. On the contrary, the World Bank funded the BTC project, just as it had previously funded the Chad Cameroon pipeline, in the face of similar public concern over the project agreements.

Yet HGAs and the BITs under which they are being negotiated threaten more than just an increase in the power of already powerful corporations – problematic as this undoubtedly is. By allowing companies to supersede the state's national and international human rights and environmental obligations, as built up through years of domestic and international negotiation and civil society pressure, they also threaten to undermine the comprehensive international, national and local legal frameworks that have been patiently and painfully established over the years – a comprehensive framework which, as Kofi Annan has stated, "makes the modern world a far better place to live than before."

Indeed, by lending their support to HGA-type project agreements, governments and multilateral institutions are taking foreign direct investment and corporate accountability in a direction that is precisely the opposite of that being encouraged by the UN. In that regard, the July 2003 report by the UN Commission on Human Rights on Human Rights Trade and Investment specifically recommends that investment agreements – far from overriding human rights law – should include among their objectives "the promotion and protection of human rights". It also recommends that States should "avoid the situation where a requirement to pay compensation might discourage States from taking action to protect human rights."

Delivering the Industry Wish List

If HGAs are being used – in conjunction with BITs – to allow corporate power to dictate the laws that frame its infrastructure investment projects, Production Sharing Agreements (PSAs) are being used to establish control over a state's natural resources. And, like HGAs, PSAs are now being adapted to guarantee corporate profits at the expense of states.

PSAs were first developed in Indonesia in the late 1960s, at a time when the European empires around the world were collapsing. PSAs were seen by many as reflecting a new era of national control over resources, and a rejection of the colonial-era concession agreements that had persisted for more than 50 years previously. In response, industry insiders reportedly viewed PSAs as having "something Communist" about them.

But, compared with the nationalisations that took place in most major oil-producing countries just a few years later, PSAs quickly seemed rather more appealing. Now they are oil companies' contract of choice in most developing countries.

Symbolic sovereignty

It was not long after the introduction of PSAs that oil companies realised that – despite their apparent differences – PSAs could deliver just the same results as the old concessions. In particular, PSAs can provide oil companies exactly what they most seek when investing in a country: guaranteed access to oil reserves; predictability of tax and regulation; and the opportunity to make large profits. And like the colonial-era concessions, they can do this through either reasonable or draconian legal measures.

Professor Thomas Wälde, an expert in oil law and policy at the University of Dundee, has described PSAs as "A convenient marriage between the politically useful symbolism of the production-sharing contract (appearance of a service contract to the state company acting as master) [combined with] the material equivalence of this contract model with concession/licence regimes in all significant aspects". He explains, "The government can be seen to be running the show - and the company can run it behind the camouflage of legal title symbolising the assertion of national sovereignty."

PSAs refer to the private investor as a "contractor", while the state remains the owner or client. The implication is that the state calls the shots. However, in practice, the lead private company within the consortium is still the "operator", making day-to-day decisions, while the rights and obligations of either side are at least as closely specified in a PSA contract as in a standard concession contract, and any not explicitly specified are not actionable. Like with HGAs, this may go so far as to deny the state the right to regulate or legislate. As a result, the change from concessionaire to "contractor" is essentially a terminological, more than a substantive, one.

Most PSAs specify that any disputes would be resolved not in the courts of the country concerned, but in international arbitration tribunals administered by the International Centre for Settlement of Investment Disputes (ICSID) in Washington, DC or the International Chamber of Commerce in Paris. These arbitration hearings are generally closed to other than contract parties and are presided over by tribunals consisting generally of corporate lawyers and trade negotiators – as such, they tend to narrowly favour commercial interests rather than broader issues of national interest or sovereignty. As Susan Leubuscher comments, "[The] system assigns the State the role of just another commercial partner, ensures that non-commercial issues will not be aired, and excludes representation and redress for populations affected by the wide-ranging powers granted [multinationals] under international contracts".

Also like HGAs, PSAs frequently contain stabilisation clauses, protecting the investor's profits from future changes in regulation. Often this is done by requiring the state partner (usually the state oil company) to bear the "risk" arising from legislative change. Whereas formerly, such provisions were applied to changes in taxation, by making the state oil company liable for taxes (payable out of the state share of profit oil), more recent contracts apply the same approach to reduced profitability arising from legislation as well.

The majority of PSAs are ratified as Acts of parliament, making them laws in their own right, and many are negotiated within the framework of the Energy Charter Treaty, or make reference to BITs, thus nestling them within international agreements. Like the BTC Host Government Agreements, the provisions of PSAs generally include clauses setting out exemptions to national laws and obligations to compensate companies in the event of new legislation interfering with profits.

Maintaining the economic status quo

PSAs also have profound economic implications for states, in the extraction of their non-renewable resources.

PSAs appear to shift the ownership of oil from companies to state, and invert the flow of payments. The mechanism is based on the division of the extracted oil into 'cost oil', which is used to repay development and production costs, and the remaining 'profit oil', which is shared between company and state in agreed proportions.

Whereas in a concession system, foreign companies are granted rights to the oil, and must compensate host states through royalties and taxes, in a PSA, the oil is defined as the property of the state, and the foreign companies are compensated both for the costs they have expended (through 'cost oil'), and for the risk they have taken in investing their capital (through their share of 'profit oil').

But just as a concession system can set any rate of tax and royalty (in theory, anywhere between 1% and 99%), so in a PSA, the profit oil can be split in any proportion (as can other features of the PSA).

There is a clear parallel with the legal aspects discussed above. In one of the standard textbooks on petroleum fiscal arrangements, industry consultant Daniel Johnston comments: "At first [PSAs] and concessionary systems appear to be quite different [from each other] symbolic and philosophical differences, but these serve more of a political function than anything else. The terminology is certainly distinct, but these systems are really not that different from a financial point of view".

Importantly, PSAs are like concession systems in giving oil companies the potential for enormous profits. Unlike technical service contracts, where a contractor (often a company like the US oil services company Halliburton) receives a fixed fee for services carried out for a client (for example, a state oil company), or risk service contracts, where the contractor receives a specified rate of return on capital invested, in PSAs a company receives a share of overall profits from the venture.

In a project to extract natural resources, there are high risks that resources may not be found (exploration risk), that the development may not go to plan, or may over-run on costs (development risk), or that the project may be made unprofitable by changes in commodity prices (price risk). Meanwhile, large up-front capital investment is required to develop the infrastructure to extract the resource. The theory behind the PSA and concession models – and the model under which major oil companies like BP, ExxonMobil and Shell operate, in contrast to service companies like Halliburton – is that capital is risked by an investor. In some cases the project will be unsuccessful and the capital will be lost; these cases are offset by the successful ones, where very large profits are obtained.

While this model may be appropriate in some cases where risks are too high for a state to bear itself, or where a project is beyond the state's technical competence, they are increasingly being applied to lower-risk situations, in particular in the states of the Former Soviet Union. In countries such as Russia, Kazakhstan and Azerbaijan, PSAs – contracts designed to deal with high risk – are being applied to fields that were already discovered during the Soviet era, where the exploration risk is reduced to nil, in states that already possess consider-

able technical competence from their long history in the oil industry. As we shall see, much the same process is now being pushed – even more inappropriately – in Iraq.

Complexity as a weapon

Oil companies consistently argue for taxation to be based on profits, not on production. They argue that profit taxes can respond more effectively to economic circumstances, and ensure that the state obtains a share of any excess profits. This may be true, but there is another respect in which systems such as PSAs appeal to investors: that they are more complex.

At the other end of the scale from PSAs, the simplest system of payment to a state by a private investor which extracts its natural resources is the royalty, whereby a percentage of the total value of the resource is paid to the state, effectively 'buying' the resource. In this case, the amount owed by the company is readily and easily reckoned – it is a straight percentage of the output volume, multiplied by oil price.

But in a PSA, the system's very complexity throws up numerous ways in which companies can reduce their tax payment by the clever use of accountancy techniques. Not only do multinationals have access to the world's largest and most experienced accountancy companies, they also know their business in more detail than the government which is taxing them, so a more complicated system tends to give them the upper hand.

Thus a company can obtain profit not just from the profit oil, but also from cost oil. Although that is not intended in the deal, careful accounting and financial management can allow the companies to exploit loopholes in the tax rules. For this reason, the details of how profits are calculated, what costs are allowable and so on are very important.

Furthermore, while it is possible to devise ever more sophisticated tax systems, which respond better to both circumstances and policy priorities, the drawback is that complexity removes transparency: if the tax system is understandable only to experts, there is little chance of public accountability. Production sharing agreements often consist of several hundred pages of technical, legal and financial language. Even when they are not treated as commercially confidential (which they often are), they do not lend themselves to public scrutiny.

One result of this complexity can be that even when a government thinks it has got a good deal, it may later find itself receiving rather less income than it had bargained for – even in countries with long experience of oil development.

For example, in the Sakhalin II project in Russia's Far East, currently being developed by a Shell-led consortium, the way the PSA is written, all cost over-runs are effectively deducted from the state's revenue, not the consortium's profits. During the planning and early construction of the project, costs have inflated dramatically. In February 2005, the Audit Chamber of the Russian Federation found that, as a result of the terms of the PSA, cost over-runs had already cost the Russian state $2.5 billion.

Guaranteeing profits

Russia's Sakhalin II and Azerbaijan's Azeri- Chirag-Guneshli (ACG) PSAs are examples of a newer form of PSA, designed to guarantee private investors' profits. As explained above, PSAs divide 'profit oil' between state and private company in agreed proportions. In a more complex form, this split is not fixed at one level, but is given a sliding scale, intended to reflect the profitability of the venture.

The theory is that the more profitable a venture, the quicker costs are recovered, and so, the more is available for the state. Initially, the sliding scale was set according to the rate of production or cumulative production from a field. For example, in Syria, the state's share of profit oil ranges from 79% for fields producing less than 50,000 barrels per day, to 87.5% for fields producing more than 200,000 barrels per day.

Within these, production rates were used as a proxy for profitability – in general, the larger a field, the more profitable it is. A newer innovation was to base the sliding scale more directly on profitability – either the company's internal rate of return, or an 'R'-factor, which is defined as the ratio of cumulative receipts to cumulative expenditures.

In the ACG PSA, the Azerbaijan state only gets 30% of the profit oil until the BP-led consortium has achieved 16.75% rate of return – a comfortable level of profits. After that, the state's share goes up to 55%. Only after the consortium has achieved a 22.75% rate of return – a high level of profits – does the state's share of profit oil go up to a more normal 80%.

The Sakhalin II PSA goes even further. In that case, the Russian state gets no profit oil until the Shell-led consortium has achieved 17.5% rate of return. The state then receives just 10% for a further two years, and then 50% until the consortium has obtained 24% rate of return, after which the state receives 70%.

Much as with the opposition to royalties, the argument for rate-of-return style PSAs is based on allowing the state to capture a reasonable share of profits, but in practice the impact can favour the investor. Effectively, there are three consequences:

1) the investor's profits are effectively guaranteed, by denying the state a fair share of revenue until the specified profit has been achieved;

2) while the specified level of profits is assured, this does not preclude the investor from obtaining much higher profits (at the more normal, lower share of profit oil);

3) it is in the investor's interests to inflate costs (a process known as 'gold-plating'), especially if the company can sub-contract operations to another company in the same group (for example, from one Shell subsidiary to an-

other Shell subsidiary) – as the subcontractor profits from its work, the project operator still profits according to the PSA, and the state gets little or nothing.

As such, investors transfer much of their risk back to the state. The investor has achieved the gambler's dream – guaranteed comfortable profits, with an opportunity if successful of enormous profits.

From the Caspian to Iraq

Having used PSAs and HGAs to establish control over the production and transport of oil out of the Former Soviet Union, oil companies see Iraq as a new frontier to push the approach out more widely.

Indeed, this move can be seen in one of the key players that pushed corporate-friendly tax and investment regimes in the Former Soviet Union, the lobby group International Tax and Investment Center (ITIC). Since its launch in 1993, ITIC has primarily focused on the former Soviet Union, and has offices in Baku, Almaty, Astana, Moscow and Kiev. More recently, it has expanded its work to lobbying for the use of PSAs in Iraq's oil industry. Its 2004 strategy review concluded that this project "should be continued and considered as a "beachhead" for possible further expansion in the Middle East."

Although oil was excluded from the sweeping privatisations enacted by US administrator Paul Bremer in 2003, major moves to open the sector to multinational oil companies are now imminent. A Petroleum Law will be enacted soon after the elections in early 2006, which according to sources in the government, will allocate all of Iraq's oilfields that are not currently in production to multinational oil companies.

This is most likely to be through production sharing agreements (PSAs), the mechanism favoured by the oil companies. Only 17 of Iraq's 80 known fields, and 40 billion of its 115 billion barrels of known reserves, are currently in production. Thus the policy potentially allocates to foreign companies 64% of known reserves. If a further 100 billion barrels are found, as is widely predicted, the foreign companies would control 81% of the total, and if 200 billion were found, as some suggest, they would have 87%.

Officials in the Oil Ministry have publicly announced that long-term contracts will be signed with foreign oil companies during the first nine months of 2006. In order to achieve this goal, officials have stated that negotiations should begin with the companies during the second half of 2005, in parallel with the writing of the Petroleum Law, in order to be able to sign soon after the law is enacted.

These policies have been pushed heavily by the USA and the UK. Their roots lie in the US State Department prior to the 2003 invasion. In 2002, the State Department established its Future of Iraq project, in which Iraqi exiles and members of the then opposition, including current Oil Minister Ibrahim Bahr al-Uloum, met with US officials to plan for the future of Iraq after regime change. One of the group's key recommendations was the use of PSAs, with favourable terms to attract the companies.

The Coalition Provisional Authority (CPA) appointed former senior executives from oil companies to begin setting up the framework for long-term oil policy. The first advisers were appointed in January 2003, before the invasion even started, and were stationed in Kuwait ready to move in.

First, there were Phillip Carroll, formerly of Shell, and Gary Vogler, of ExxonMobil, backed up by three employees of the US Department of Energy and one of the Australian government. They were replaced in October 2003 by former executives of BP and ConocoPhillips. Shell itself was lobbying for the use of PSAs.

During his first period as Oil Minister under the CPA and the Iraqi Governing Council, Bahr al-Uloum told the Financial Times that he was preparing plans for the privatisation of Iraq's oil sector, but that no decision would be taken until after the 2005 elections. He commented that: "The Iraqi oil sector needs privatisation, but it's a cultural issue", noting the difficulty of persuading the Iraqi people of such a policy. He further announced that he personally supported production-sharing agreements for oil development, giving priority to US oil companies "and European companies, probably".

In August 2004, Interim Prime Minister Ayad Allawi issued a set of guidelines to the Supreme Council for Oil Policy, from which the Council was to develop a full petroleum policy – a policy that would eventually develop into the Petroleum Law. Allawi's guidelines specified that existing fields would be developed by the Iraq National Oil Company (INOC) and new fields by private companies through production sharing agreements.

He added that the Iraqi authorities should not spend time negotiating good deals with the companies, but should proceed quickly with terms that the companies will accept, while leaving open the possibility of later renegotiation.

In June 2005, Ministry officials announced that they were actively seeking discussions with multinational oil companies on the development of 11 oilfields in the south of Iraq, remaining open as to what type of contract would be used, and had held preliminary talks with BP, Chevron, Eni and Total.

The following month, the Ministry announced that alongside these direct discussions, it was also considering a licensing round, in which oil companies would bid for production sharing agreements on both known fields and exploration blocks.

The precise terms of PSAs are subject to negotiation; however, once signed, they are fixed for 25-40 years, preventing future elected governments from changing the contract. Thus the contractual terms for the following decades will be based on the bargaining position

and political balance that exists at the time of signing – a time when Iraq is still under military occupation. In Iraq's case, this could mean that arguments about political and security risks in 2006 could land its people with a poor deal that long outlasts those risks, and denies large chunks of revenue to a potentially more stable, and independent, Iraq of the future.

Given the central role of oil in Iraq's economy, and the long-term nature of the contracts, Iraq's rapid moves towards handing its undeveloped oilfields to multinational oil companies through production sharing agreements are a cause for concern.

That this is occurring without public debate is wholly unacceptable. It is up to the people of Iraq how they choose to develop their oil; transparency and the provision of accurate information to inform debate are absolutely crucial.

BIT by BIT: Establishing International Law by Default

As the use of PSAs, HGAs and BITs proliferate, so corporate power's institutional allies are once again pushing for a binding international investment agreement, arguing that the provisions established in BITs are now so generalised that they effectively constitute international customary law – and that a new international framework is necessary to avoid the development of "multiple, bespoke regimes rather than a generic legal structure".

BIT by BIT, agreement by agreement, the path is being laid to what corporate power has sought since the early 1970s – an international agreement, backed by the retaliatory measures available to bodies such as the World Trade Organisation, that would lock countries into an investment regime that puts investors' rights above those of the host country, its citizens and its environment.

There is, however, nothing inevitable about the process – much as corporate power would like to portray it as such. HGAs, BITs and PSAs are now major obstacles in the struggle for economic democracy. Supporting the emerging opposition to the corporate takeover of Iraq's oil wealth is perhaps one of the best starting points for a more general, globalised resistance.

South Centre News

Executive Director

Prof. Yash Tandon, the Executive Director of the South Centre, participated in a symposium on Africa, organized by Oxfam in Brussels (28-29 April, 2006). Prof. Tandon spoke on the subject of 'What Africa Gains from Trade Liberalisation?'

Trade for Development Programme

- Recent research & publication:

A new south Centre Analysis entitled "Elements for the architecture of aid for trade" has been uploaded in the South Centre website. The Analysis is available in English, French and Spanish languages. The Analysis argues that aid for trade is important to mitigate trade-induced adjustment costs and to bolster supply-side capacity in developing countries. However, aid is only second-best to balanced, fair and equitable trading rules. The Aid for trade architecture should, thus, be crafted to make trade supportive and not a substitute to a pro-development outcome in the multilateral trade negotiations.

- Conferences & meetings:

The South Centre staff:

- Made a presentation on services at a Post Hong Kong African Regional Workshop organized by the Commonwealth Secretariat and TRALAC 10-11 April held in Cape Town, South Africa, which was aimed at African government officials and their Geneva based trade counterparts. The workshop provided a state of play and identified pitfalls for developing countries as certain important deadlines for various negotiating areas get closer.
- Provided bilateral assistance to delegates on domestic regulation and the LDC Modalities on 16 and 17 April in the context of the Services negotiations.
- Oorganized a meeting with developing country delegations in Geneva to assess the current situation of the negotiations under the WTO Doha Work Programme. During the discussion a number of important process-related aspects of the negotiations were raised such as the need to maintain the locus of the negotiations in Geneva and at the multilateral setting; the dangers of partial agreements covering only a selected number of issues; and the importance of transparency and inclusiveness in order to allow all developing countries to effectively participate and influence the negotiation process and its outcome.

Editorial

WTO: No need to Rush

Lowering of ambitions and missing deadlines seem to characterize the progress of the so-called Doha Development Round being negotiated in the World Trade Organization. It signals in a sense the difficulty of an international organization, geared to promote and manage just foreign trade, to come to grips with actually fostering development in a large part of the world with a great potential to boost world trade. But the WTO has not flinched when it comes to spreading its wings in domains that can strictly be said to have crossed the confines of international trade regime – it forays into intellectual property rights (affecting access to medicines), laying down investment rules which make it difficult to promote domestic industries, and is now actively seeking to promote privatization in the Services sector which maintains some of the most essential public services in most countries. In short, the WTO would seem to be comfortable when encroaching on the policy space in developing world. However, when it comes to letting loose its grip on that same policy space, it appears to start getting teething problems.

But beyond those postulates, what it really boils down to is encashing the business opportunities unleashed by these international trade rules crafted in the WTO. The developing world has long lived on promised benefits which somehow have failed to materialize. And all the blame cannot be just put within national boundaries. It is perhaps this disenchantment with the international governance systems that has given rise to coalitions among developing countries which are forcing the rich so-called developed countries to move away from their old-style, closed-door, and one-sided deals which corners the business cake for themselves and leaves the crumbs to the rest of the world. Just a few months ago, while describing the lack of progress in the trade negotiations, the WTO DG Pascal Lamy himself admitted that 'trust' was a major missing element.

In Latin America, which today symbolizes the biggest reaction against the 'free market' economic ideology, the recent proposal for an alternative trade model by way of a Peoples' Trade Agreement (PTA - referred to in one of the articles in this issue of the South Bulletin) sounds like a breath of fresh air. In contrast to capitalist ideology, PTA brings into the debate on trade integration principles of complementarity, cooperation, solidarity, reciprocity, prosperity and respect for countries' sovereignty. In this way it incorporates aims that are absent in programmes of trade integration proposed by the North, such as the effective reduction of poverty, the preservation of indigenous communities and respect for the environment.

PTA understands trade and investment not as ends in themselves but as means towards development. Consequently its aim is not total liberalization of markets and the shrinking of States but rather benefiting all peoples. That is to say, the strengthening of small producers, micro-industries, cooperatives and community-based companies facilitating their exchanges of goods with external markets. Thus, based on national interests, the proposal for a PTA promotes a model of trade integration between peoples that limits and regulates the rights of foreign investors and multinationals so that they serve the purpose of national productive development. Partners and not masters, as President Evo Morales has signalled. As a result, part of this proposal aims to give incentives to agreements between public companies of different countries in order to strengthen each other.

This Round is more than a negotiation, it is also a test, as Valentine Sendanyoye-Rugwabiza, a Deputy Director General of the WTO, pointed out in her recent address to the London School of Economics. "A test of the credibility of the WTO, and its ability to deliver on its promises to developing countries. A test of the global community's willingness to turning their talk of international cooperation and policy coherence into meaningful results. And a test of whether we can construct a truly "global" trading system, where all countries benefit. What is the alternative? It is a more fragmented world, with greater marginalization, inequality and uncertainty. At a time when shared prosperity and peace depend more than ever on multilateralism, the cost of failure extends far beyond the trade system. The Doha Development Agenda is too important to fail. Millions are depending on it."

The going has become tough as developing countries have begun to fight for their rights. But that fight is a continuous battle on two fronts – unraveling the wrongs of the past and making sure that no new chains to freedom of policy space will be accepted. If that means spending more time to get a fairer deal, then so be it. The burden of unfair rules and imbalances in the international trading system have played themselves out on resource rich South for decades now and centuries before. In any case, what is the rush when it is difficult to count the gains? It has to be incremental – the search for a better, more just international trade regime. No revolution is in sight. A deal that short-shrifts the developing world once again, in whatever guise, cannot be acceptable. Nor can current imbalances be allowed to continue to disadvantage and marginalise developing countries.

South Bulletin

A publication of the South Centre, an intergovernmental organization of the developing countries

Executive Director of South Centre

Prof. Yash Tandon

Senior Editor

Someshwar Singh

South Centre

PO Box 228, 1211 Geneva 19
Tel. (+4122) 791 80 50
Fax. (+4122) 798 85 31
E-mail: south@southcentre.org
Web page: www.southcentre.org

*Articles may be reproduced provided source is acknowledged. The **South Bulletin** can also be accessed at www.southcentre.org*