

TWN

Third World Network

STATEMENT AND INPUT FOR FFD DISCUSSIONS ON TRADE AND INVESTMENT AGREEMENTS (WTO, FTAs AND BITs)

An enabling international environment for development is one that allows every country to pursue development objectives according to their own priorities with policies of their own choice. To have this policy space, it is necessary to reform multilateral and bilateral arrangements to allow developing countries to use as many economic policies as developed countries used during their own economic growth, social development and industrialization.

The WTO and bilateral and plurilateral trade and investment agreements are adversely affecting peoples rights, including the national right to development, through various means: tariff cuts in key sectors like agriculture, infant industries and essential services; unfair agricultural subsidy rules; requiring financial investments in natural resources, sensitive goods and services; and, through a longstanding refusal to grant full special and differential treatment to developing countries and Least Developed Countries.

Agricultural subsidies disbursed by developed countries have negatively affected food producers across the developing world, particularly sensitive sectors such as cotton farmers, and have threatened productivity and agricultural growth, especially for small farmers.

Recently in the WTO, tense disputes on the provision of essential subsidies to small producers for supporting a public food distribution programme has challenged the right to food of the people in India. The struggle to defend this food security provision highlights the importance of government purchase and public stockholding of food to domestic food security in developing countries, as well as to provide a buffer against global food price volatility. If food security and long-term agricultural production growth is to be ensured across the developing world, there is a need to provide a permanent solution for public stockholding by developing countries for food security along the lines of the G-33 proposal in the WTO.

Proposed goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation

9.2 *promote inclusive and sustainable industrialization, and by 2030 raise significantly industry's share of employment and GDP in line with national circumstances, and double its share in LDCs*

Ensuring adequate policy space for industrial development

Particular policy tools prove historically indispensable to the autonomous and domestic industrialisation process by facilitating **diversified, employment-creating and value-added economies** where industries and sectors are connected through backward- and forward-linkages, create positive synergies and spillovers, and stimulate a virtuous cycle of economic growth and investment, and consumption and production.

All industrialized economies except Hong Kong used infant industry protection to industrialize. The possibility of using **infant industry protection** should be recognized in any WTO negotiations on non-agricultural market access (NAMA) including negotiations on sectorals, Information Technology Agreement (ITA) and environmental goods.

Implementation-issue discussions at the WTO have included a demand for a permanent exception to the prohibition in the Agreement on Trade-Related Investment Measures (TRIMs) of **local-content requirements** for developing countries, as these were widely used by developed countries when they were industrializing.

One way of achieving value addition which has been widely used by developed countries such as the UK and developing countries is **export taxes on raw materials**. Indonesia's successful transformation from exporting raw logs into the largest plywood exporter in the world (from a 4% market share to 80%) in a few years is due to a combination of export taxes, export restrictions and government procurement of domestic plywood. India and Kenya have both boosted their leather industries by imposing export taxes on raw leather. However, a 2011 text by the Chair of the NAMA negotiations in the WTO contains a European Union proposal to bind export taxes at a level to be negotiated (except for LDCs). This would be damaging for value addition in developing countries. In fact, this is already the case in FTAs with developed countries, which often ban export taxes.

Bilateral Investment Treaties block key tools for economic stability

The International Monetary Fund, the Commission of Experts of the President of the

UN General Assembly and other experts recognize the role of **capital controls** on hot money inflows and outflows to reduce the likelihood of financial crisis and prevent quicker and easier exit of such volatile short-term capital flows. Yet some BITs and investment chapters under FTAs prevent capital controls, even under financial crises.

The severity of development challenges imposed by bilateral investment treaties and free trade agreements is acutely highlighted by the **investor-state dispute settlement mechanisms**. The investor-state-dispute-settlement clause allows transnational corporations to sue governments in closed-door international arbitration cases for extraordinary financial sums. This phenomenon is freezing public interest policy regulation worldwide. Most developing country governments lose these cases due to lack of adequate financial resources to fight. More than 50% of these cases are in the area of natural resources threatening access to clear water and air, land, and preventing environmental sustainability and conservation. They also disproportionately punish women and children, indigenous and local communities, and the elderly.

In fact the majority of the known outstanding investor-state dispute cases under the USA's FTAs and BITs (totaling \$11 billion in claims) relate to natural resource policies. Nearly half of the 129 cases pending before the World Bank's investment dispute facility relate to natural resources. Threats to natural resources and access to water also have a disproportionate impact on marginalized groups such as indigenous peoples, women and children.

In a growing number of cases, transnational corporations (TNCs) have sued governments for implement regulations, often those related to health or environmental concerns that could harm their current or future potential corporate profits. For example, several Latin American Governments have been facing a proliferation of lawsuits brought to them by transnational corporations due to bilateral investment treaties (BITs) that were signed back in the 1990s.

This includes, most prominently, a legal battle between the Government of Ecuador and the oil company Chevron. In November 2013, Ecuador's highest court upheld a ruling against Chevron that found the US oil company responsible for the contamination of large parts of Ecuador's Amazon region. The court ordered Chevron to pay US\$9.5 billion. Chevron turned the table and instead is seeking to evade this ruling by asking an investor-state tribunal to second guess the decision. Chevron claimed that the ruling issued in the Ecuadorian legal process was a violation of extraordinary investor privileges enshrined in a US-Ecuador BIT. In similar cases, tobacco companies such as Phillip-Morris have sued Uruguay and Australia for introducing compulsory health warnings on cigarette packets. 2012 saw the highest number of international claims filed against states by foreign companies, with 66% filed against developing countries.

The TRIPS (**Trade-Related Aspects of Intellectual Property Rights**) plus provisions in BITs and FTAs include such measures as data exclusivity, patent term extension, ever-greening and enforcement measures. These measures are used to

raise Intellectual Property standards, which push smaller and cheaper producers in developing countries out of production while also raising costs of essential medicines and health care, agricultural inputs and therefore food prices.

Even the use of TRIPS flexibilities allowed by the WTO to protect public health or the environment are being challenged. The definition of investment under investment chapters is now including Intellectual Property Rights, which automatically gives them a high level of protection.

While these treaties and agreements are supposed to both protect foreign investors and benefit recipient countries, the World Bank and others have found that there is little correlation between having an investment treaty and increased investment.

Recommendations in the area of trade and investment agreements

- A comprehensive **review of all trade agreements and investment treaties**, and in particular the investor-state dispute settlement mechanism, to identify all areas where they may limit developing countries' sovereign right to carry out key regulations, including the ability to prevent and manage crises, regulate capital flows, protect the right to livelihoods and decent jobs, enforce fair taxation, deliver essential public services and ensure sustainable economic and social development;
- A **review of all intellectual property rights regimes** that have been introduced in developing countries through FTAs, to identify adverse impacts on public health, the environment and technology development, among other areas;
- Governments must undertake mandatory **human rights impact assessment** of multilateral, plurilateral and bilateral trade and investment agreements, especially North-South agreements, focusing especially on the rights to development, and the specific rights to food, health, and livelihood taking into account the impact on marginalised groups;
- Address the long-standing problem of **agricultural subsidies** in developed countries that threaten the stability of agricultural growth and productivity in developing countries, especially for small farmers;
- Provide a permanent solution for **public stockholding for food security** by developing countries along the lines of the G-33 proposal in the WTO in order to ensure food security and long-term agricultural production growth across the developing world;
- Recognize the use of **infant industry protection** in any WTO negotiations on non-agricultural market access (NAMA) including

negotiations on sectorals, Information Technology Agreement (ITA) and environmental goods;

- Establish a permanent exception to the prohibition of **local-content requirements** for developing countries in the Agreement on Trade-Related Investment Measures (TRIMs), as local-content requirements are a key tool for the domestic industrialisation process; and,
- Reverse the ban on export taxes on raw materials in Free Trade Agreements (FTAs) and protect its use in the World Trade Organization (WTO), as export taxes are a fundamental tool to achieve value addition in domestic economies and thereby spur economic and social development.

It is obvious that a serious rethink of global trade and investment rules is needed if they are to move in tandem with the world's development needs. If the global leadership is serious about delivering on a global development agenda, development-centered changes in trade-related rules and institutions are a prerequisite.