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Europe - Third World Centre
Rue J.-C. Amat 6
CH - 1202 Geneva
Tel.: +41 (0)22 731 59 63 - Fax: +41 (0)22 731 91 52
Email: cetim@bluewin.ch - Website: www.cetim.ch

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INTERNATIONAL, REGIONAL, SUBREGIONAL AND BILATERAL FREE TRADE AGREEMENTS

by Alejandro Teitelbaum

Graduate in international economic relations, Institute for the Study of Economic and Social Development of the University of Paris I, lawyer, National University of Buenos Aires

I. INTRODUCTION

There is a dense network of economic and financial agreements and treaties – international, regional, sub-regional and bilateral – that have superseded the basic instruments of international and regional human rights, including the right to a safe environment. Constitutions and national laws intended to promote harmonious national development and political, economic, social, cultural and environmental human rights have been subordinated to them.

This network, as a consequence of the implementation of "most favourable treatment", "national treatment" and "most favoured nation" clauses that appear in almost every treaty, works as an interconnecting system that allows neo-liberal policies to operate freely on a planetary scale and penetrate countries where they result in the dismantling of national economies, provoking grave social harm.

All this involves the primacy of the interests of capital over the democratic and human rights of peoples. Liberalization and privatization policies are coalescing into a legally binding system. And these policies are being made **irreversible** through international agreements.

Thus one is witnessing the creation of a sort of feudal-style corporative law, advanced by a strong coercive system underpinning its implementation: fines, economic, diplomatic and military pressure and sanctions.

To settle disputes between the parties, "arbitration tribunals" have been created outside the international and national public law legal system, among which those set up within the World Bank, especially the International Centre for the Settlement of Investment Disputes (**ICSID**), are outstanding.[1] As already stated, this system is underpinned by international, regional, sub-regional and bilateral agreements.

A. International Trade Agreements

These are basically those agreed upon within the framework of the World Trade Organization: the Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPS**), the Agreement on Textiles and Clothing, the Agreement on Trade-Related Investment Measures and the General Agreement on Trade in Services.

B. Regional and Sub-Regional Agreements

Especially noteworthy are the North American Free Trade Agreement (**NAFTA**) between the United States, Canada and Mexico in force since 1994, the Central American Free Trade Agreement (**CAFTA**)[2] and two other regional structures such as the Association of Southeast Asian Nations (**ASEAN**).[3]

The initiative of a free trade area (**FTA**) between the United States and the Middle East (**MEFTA)** is a plan to create by 2013-2014 a single free trade treaty between the United States and all countries between Western Sahara and Iran. As in the case of the plan for a USA-ASEAN treaty, the idea is to build an FTA step by step from the bottom up. This means putting pressure on all countries to comply with a range of staggered compulsory conditions: from becoming a member of the WTO, and the signing of a trade and investment framework agreement (**TIFA**) to a bilateral treaty on investments and/or a free trade agreement. The countries that the United States have set their sights on for membership in the MEFTA are Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia and Yemen.

The MEFTA project is in direct competition with European Union plans to establish a free trade area with Southern Mediterranean countries (European Mediterranean Free Trade Area – **EMFTA**).

The European Free Trade Association (**EFTA**), comprising Iceland, Liechtenstein, Norway and Switzerland, has signed bilateral treaties with Turkey (1991), Israel

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1 In the WTO there is another tribunal, the Appellate Body, for dispute settlements.

2 The CAFTA is the free trade Agreement signed between the United States on the one hand, and El Salvador, Honduras, Guatemala, Nicaragua and Costa Rica, on the other.
The Dominican Republic negotiated its entry into the Agreement that was then called CAFTA-RD and ratified it in 2005. Panama is not a party to the CAFTA and negotiated a separate trade treaty with the United States. It was signed in 2007, but the United States Senate has blocked its ratification.

3 Member states of the ASEAN negotiated a treaty with Australia and New Zealand (the AANZFTA) that provides for a regional common market by 2015 involving all sectors, including goods, services, investment and intellectual property. The Textile Clothing and Footwear Union of Australia objects to the agreement because of the effect of future trade liberalization on these manufacturing sectors, on Australian workers, and on human rights as regards Burma.

(1992), Morocco (1997), the Palestinian Authority (1998), Mexico (2000), Jordan (2001), Singapore (2002), Chile (2003), Lebanon (2004), Tunisia (2004), South Korea (2005), the Southern African Customs Union (2006), Egypt (2007), the Gulf Cooperation Council (2008), Colombia (2008) and Peru (2008), and it is negotiating FTAs with Algeria, India, Pakistan and Thailand.[4]

The European Union has already signed several economic partnership agreements (**EPA**) and is negotiating more with countries in several parts of the world. The EU, in its trade agreement proposals, demands that Southern countries open their markets to European companies, thus putting at risk jobs, industries and public services in the poorest nations.

For instance, the reciprocal trade preferences accords within the framework of the so-called Cotonou Agreement, between the EU and the group of 77 countries that were European colonial enclaves in Africa, the Caribbean and the Pacific (ACP), would lift customs duties on imported products and make the sale of subsidized goods easier for EU countries.

Two non-governmental organizations, Traidcraft in the United Kingdom and Eco-News Africa in Kenya, pointed out in a 2005 report, "EPAs Through the Lens of Kenya", that the deteriorated manufacturing sector as well as the rising poverty and unemployment in countries such as Kenya should be seriously considered before signing this sort of agreement. It added that economic and trade liberalization in recent years in this African country has led to "extreme situations", including high rates of crime and prostitution, regressing of education and even suicides, and that the number of poor persons rose from 11 to 17 million, more than half the Kenyan population.[5]

As regards European Union negotiations with Latin American and Caribbean countries, the final declaration of the People's Summit, "Linking Alternatives", held in Lima from13 to 16 May 2008, stated among other things:
"....we reject the project of Association Agreements proposed by the European Union and backed by diverse Latin American and Caribbean governments which only aim to deepen and perpetuate the current system of domination which has caused so much harm to our peoples. The European Union strategy "Global Europe: Competing in the World" pushes for the deepening of policies of competition and economic growth, the implementation of multinational companies' agenda and the entrenchment of neo-liberal policies, all of which are incompatible with the discourse of climate change, poverty reduction and social cohesion. Despite trying to hide its true nature by including themes such as international aid and political dialogue, the core of the proposal is to open capital, goods and services markets, to protect foreign investment and to reduce the state's capacity to promote economic and social development".[6]

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4 Extensive information on trade treaties is available at www.bilaterals.org.

5 *Report exposes impact of free trade deals,* www.traidcraft.co.uk/template2.asp?pageID=1867

6 See the page: www.enlazandoalternativas.org/spip.php?article194. The Bolivarian Alliance for the Americas (in Spanish, ALBA, which means "dawn") is a project launched in opposition to the United States initiated FTAA (Free Trade Area of the Americas). The outcome of preliminary agreements negotiated between the governments of Venezuela and Cuba in December 2004, the ALBA aims to promote the regional integration of Latin America and the Caribbean, building on values and objectives opposed to the hegemony of great powers. The Peoples' Trade Agreement (PTA) is considered the trade arm of the ALBA. It is an effort to undermine the bilateral free-trade treaties

To avoid the fate of the European constitutional treaty, abandoned because of the defeat it suffered in countries where it was subject to a referendum, a second attempt avoided such referenda. Thus, the Lisbon Treaty, which replaced it, was accepted in every country by parliamentary vote – except in Ireland, where it was subject to a referendum in conformity with the constitution. Refused in June 2008, it was approved by a new referendum in October 2009. Thus, the Lisbon Treaty entered into force 1 December 2009.

Except for some positive institutional changes (increase of some prerogatives, rather formal, to the European Parliament; some protection of state sovereign national powers), the new treaty does not modify at all the constitutional treaty's prevailing orientation of very undemocratic legislation and practice by European institutions, all in the service of big capital.

C. Bilateral Trade Agreements (more than 2,000 in force throughout the world)
These are not perceptible to public opinion, many were agreed upon stealthily ***and are even more harmful to the rights of peoples than international or regional treaties drafted or in force.***

Domestic laws on foreign investments complement international, regional and bilateral trade treaties, as they leave almost unlimited open doors to foreign investors, to whom they offer "national treatment" and safeguard only a few economic areas that vary from one country to another. In general, they do not hinder or limit remittance of profits abroad. They do not try to assure any technological contribution to the national economy, neither do they consider the so-called "performance requirements".

II. THE DIFFERENT BILATERAL TREATIES

Bilateral treaties include basically treaties on promotion and protection of foreign investments, on free trade, on intellectual property rights, on cooperation and on science and technology.

These treaties are the result of a tactic used by world-wide economic-political centres of power, particularly the United States, that consists of negotiating one by one with weak and/or corrupted governments inclined to give in to pressure from the outside.

In the case of Latin America and the Caribbean, the United States first chose the fast track of a single continental treaty to subject the whole continent to its intentions, based upon the previous North American Free Trade Agreement (**NAFTA**) between the United States, Canada and Mexico. This was the planned Free Trade Area of the Americas (**FTAA**). This project of a hemispheric agreement had been under negotiation since 1994 without the participation of populations and parliaments, but alarms were set off by different groups and social movements by explaining the disastrous consequences for the rights of populations on the continent that the

that the United States government has imposed on Latin America. The objective of the PTA is to promote trade in the region through solidarity, cooperation and complementarity. Launched in May 2006, its members are Antigua and Barbuda, Bolivia, Cuba, the Dominican Republic, Ecuador, Nicaragua, Saint Vincent and the Grenadines, Venezuela.

approval of the FTAA would lead to.[7] This enabled some governments to show their reluctance towards it, although there was no real opposition, as they proceeded to talk about reaching a "good" FTAA, which is like having a "good" cancer.

The truth is that the FTAA project is on hold. The United States chose another method that consists of separately negotiating bilateral and sub-regional agreements, as they do in other regions of the world.

We shall briefly examine bilateral foreign investment promotion and protection agreements (**FIPA**), bilateral free trade agreements (**FTA**) and bilateral treaties on intellectual property.

A. Bilateral Foreign Investment Promotion and Protection Agreements (FIPAs)

These treaties, also called Agreements on Reciprocal Promotion and Protection of Investments (**ARPPIs**), preceded the free trade bilateral treaties, and there are more than a thousand in force worldwide. These are treaties between countries, but the rights they provide for are conferred upon individuals (including and especially legal persons, such as corporations) and include provisions for a mechanism to settle disputes, should any arise relative to the investment between the foreign investor and the country receiving the investment. The breach of any of the obligations arising from a FIPA creates international liability for the receiving country for harm caused to the investor. The novelty lies in that the procedure to obtain compensation from the receiver country is outside of traditional international law.

Under this regime, the foreign investor has no direct access to court, and it is the country whose nationality he holds which files the claim through diplomatic channels. By virtue of the Calvo Doctrine (see Chapter V.C) this can happen only once the investor who claims to be affected has exhausted all administrative and judicial recourse under domestic law in the country it intends to sue.

Under the system of ARPPIs, this is different in that foreign investors have direct access to the international arbitration instances to assert their claims against the receiver country, under the conditions agreed upon in the treaty. Even when the foreign investor is a minor shareholder in a company, holding the nationality of the receiver country, he can recur to the arbitration tribunal if he considers his interests harmed.[8]

It can also happen that an investing company makes a fictitious removal of its headquarters from one country to another to be able to invoke the bilateral treaty that is most favourable to its claims. That is what Aguas del Tunari (a group comprising International Waters, Abengoa de Servicios Urbanos de España and minor

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[7] The approval of the FTAA would affect the rights of workers, smallholder farmers, small businesses, the right to culture and education, to health, to a safe environment, to access to water, etc. (See in particular *Mobilisations des peuples contre l'ALCA-ZLEA. Traité$ de libre-échange aux Amériques*, Ed. CETIM, February 2005). This can be inferred from the project itself and the outcome of ten years of the free trade agreement between the United States, Canada and Mexico (NAFTA), similar to the FTAA project.

[8] For instance, in May 2005 the International Centre for Settlement of Investment Disputes (ICSID) arbitration tribunal admitted a claim brought in August 2001 against Argentina by CMS Energy, minor shareholder of the company Transportadora de Gas del Norte (TGN).

Bolivian partners) did in order to sue the Bolivian state when they were expelled from Cochabamba.

Aguas del Tunari brought a claim under the bilateral treaty on investments between Bolivia and Holland, signed in 1992, even though the major shareholder of Aguas del Tunari was International Waters, comprising Bechtel, from the United States, and Edison, from Italy. Aguas del Tunari transferred its domicile to Holland only to be able to start a procedure against Bolivia invoking the treaty between Bolivia and Holland. Aguas del Tunari had only a mail box in Amsterdam after a doubtful and possibly illegal transfer of domicile from the Cayman Islands to Holland at the end of November 1999.

This is one of the ways in which bilateral treaties can be invoked by transnational corporations that have no headquarters in any of the states parties to the treaty.[9] Another way is for a company based in country A to invoke against country B a treaty that the latter has signed with country C which is more favourable than the one between A and B, in accordance with the principle of "the most favoured nation".

Such corporations act like pirates, flying any flag in order to catch their prey unaware.

Another investor's privilege is having the right to choose the jurisdiction. According to Article VII.2 and VII.3(a) i) of the FIPA between Argentina and the United States, in case of a controversy between an investor and the state, if there is no amicable settlement, ***it is the company or the national involved, and not the state, that chooses jurisdiction.*** The same principle is found in article VIII, paras. 2 and 3 of the FIPA between Argentina and France.

Besides, and almost as a necessary consequence, the investor is not obliged to exhaust all domestic appeals, administrative and judicial, contrary to the existing general rule for submitting a case to international instances.

It can even happen that the investor submits the case to the international arbitration tribunal as an appeal against a judgement from a court of the receiver state. This was case with Haas and Calmark Comercial, which, invoking article 11 of the NAFTA, asked that an arbitration tribunal be established because it lost a suit against its local partners in the Mexican courts.[10]

This asymmetric relationship established by FIPAs is for the exclusive benefit of major corporations in the most industrialised countries and to the detriment of less developed countries. (The word ***reciprocal*** represented in the acronym ARPPIs is completely deceptive since the general rule in such treaties is that only the

[9] Another example: Aeroport Development Corporation, based in Montreal, invoked the bilateral treaty on investments between Cyprus and Hungary in the dispute with Hungary over the building and operation of a terminal in the Budapest airport. Although Canada had signed a bilateral treaty with Hungary, the investors operated through Cypriot subsidiary companies so as to invoke the treaty between Cyprus and Hungary because its provisions were more favourable than those in the treaty between Canada and Hungary.

[10] Cited by Rodrigo Pizarro, economist: *Tratado de libre comercio entre Chile y Estados Unidos. Un análisis del capítulo de inversiones : las restricciones a las políticas públicas,* Ed. Fondation Terram, N°21, October 2003, *www.clasecontraclase.cl/scripts/downloadDocs.php?id=52*

corporation can file a claim against the state for breach of contract while the latter cannot file a claim against the corporation.)[11] This explains why there are no such treaties between major powers.

The following are the main provisions of the existing FIPAs:
1. Foreign investments always enjoy preferential treatment, irrespective of whether this is stipulated in the TPPI itself, or in other treaties or norms. The non-observance of such treatment generates liability on the part of the receiving state, with redress through procedures (usually an arbitration tribunal) provided for by the treaty itself.

This means that the preferential treatment will be given to investment, irrespective of which norm (national or international) grants better conditions.

2. National treatment. Any advantage granted to national investors must be extended to foreign investors. National investors cannot receive any aid from the state, since this would involve a violation of equality of treatment between national and foreign investors.

3. The "most favoured nation" clause. Advantages mutually agreed between two states under a bilateral treaty are automatically extended to treaties concluded by them with other states, which thus include a "most favoured nation" clause, a clause found in all, or almost all, bilateral treaties.

4. Absence and even prohibition of performance requirements. Performance requirements consist of requiring of the investor, in order for the investment to be authorized, specific actions aimed at protecting the national economy: for example use, as much as possible, of national raw materials, exporting of part of the production to increase foreign currency income, etc. ***Such requirements are not included in FIPAs and in some cases they are expressly prohibited***, as in the Argentina-U.S.A. treaty and in the Canada-Uruguay one. In some cases, the situation of the receiving state is worse than that specified in the TRIMs (Trade-Related Investment Measures [related to trade in goods]), agreed upon within the WTO that prohibits performance requirements only in the trade of goods. For example, the Canada-Uruguay agreement extends the prohibition of performance requirements to services and to the transfer of technology. Within this framework, the receiving state cannot require that the investor transfer its *know how* to local partners and local workers. Thus, in this case, there is no incorpora*tio*n of technology in the receiving state.

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[11] Thus have private corporations been ranked equal, or even superior, to most nation states. The fundamental principle of public law that legal persons such as national states are qualitatively different from private law legal persons (corporations) has been done away with. These states are above and beyond private law because, as already stated by the ancient Romans, they derive from the "common pact of the republic". Public legal persons are the result, at least theoretically, of Rousseau's "social contract" based on the people's sovereignty, an expression of the general will. ***Maintaining a clear distinction between public legal persons, an expression of the general will, and private legal persons, an expression of particular interests of individuals or groups, is fundamental to the existence of a democratic society. Removing the borders between them leads to the predominance of policies fostered by corporations or dominant minority entities, to the detriment of the general interest, theoretically represented by public legal persons, and to the undermining of the fundaments of democracy.*** In this respect, v. Mariana Herz, "Régimen argentino de promoción y protección de inversiones en los albores del nuevo milenio: de los tratados bilaterales, MERCOSUR mediante, al ALCA y la OMC", in *Revista Electrónica de Estudios Internacionales*, Nº7: www.reei.org

5. FIPAs include clauses that provide for compensation in case of expropriation or "other measures of equivalent effect". This last phrase, highly ambiguous, makes it possible to seek compensation in the case of measures adopted by the receiving state that "prevent the investor from profits that it could reasonably expect", as stated by the arbitration tribunal in the *Metalclad v. México* case, within the framework of the NAFTA.[12]

6. Compensation. FIPAs include compensation for losses incurred for a variety of reasons, such as the loss of future or expected profits, as noted in Point 5.

7. Unrestricted transfer out of the country. FIPAs include authorization for unrestricted transfer out of the country of capital: profits, remunerations, privileges, honoraria for consultancy services etc., with no restrictions in freely convertible currency.[13]

B. Bilateral Free Trade Agreements (FTA)

Following the process started with FIPAs, many countries have signed, or are negotiating, bilateral treaties on free trade with the United States or the European Union. "Are negotiating" is, particularly in the case of the United States, a euphemism. In fact, it is a matter of signing a standard treaty already prepared by the United States, and the negotiation part is merely an attempt to add some formal adjustments to the standardized United States form.[14] The European Union is following the United States' footsteps in this regard.

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[12] In 1996, the American company Metalclad sued the Mexican government for violating Chapter 11 of the FTAA, when the government of San Luis Potosí blocked the opening of a toxic waste deposit belonging to this company. According to the FTAA, denying the permission to open a dump was considered to be an act of "expropriation", and the Mexican government had to pay Metalclad $ 16.7 million in compensation. The ruling for *Metalclad Corporation v. United Mexican States* (Case No.ARB(AF)/97/1) can be found at: www.worldbank.org/icsid/cases/mm-award-s.pdf
This judgment is very illustrative since the NAFTA's provisions are very similar to those found in many current FIPPAs, both in force or under negotiation. The ruling handed down by the arbitration tribunal in the Metalclad case gives an idea of the degree of economic, social, political and institutional subordination to which the countries that ratify such treaties are subjected. It is worth noting that the Mexican federal government, out of servility and irresponsibility, authorized the dump's opening and that finally it was the local government that opposed it, thus weakening the Mexican government's legal position in the proceedings. Further, the government of Mexico did not raise the objection that domestic appeals were not exhausted (v. Paragraph 100 of the judgment).

[13] In Latin America and the Caribbean region, Argentina signed 54 FIPAs in the 1990s, and its parliament ratified all, or almost all, of them. Brazil signed 14 but did not ratify any of them. Chile signed 45. Colombia signed them with France, Spain, Peru, Chile and Cuba. Costa Rica and Mexico signed 11 each. Cuba signed 62 of those treaties between 1993 and 2002, most of them with underdeveloped countries, but also with Italy, Spain, Great Britain, Germany, Holland, Austria, China and Russia. Peru signed 22, Uruguay 24, Venezuela 22.

[14] The American standard bilateral treaty is based upon the *Trade Act of 2002*, establishing the Bipartisan Trade Promotion Authority, also known as the "Fast track to sign commercial treaties", that conferred for 5 years (until June 2007) broad powers upon the president, in the name of national security, freedom and the interests of the United States, to sign commercial treaties that can be approved of refused, but not modified, by the Congress. In Paragraphs 1 and 2,b (Recommendations) of Section 2101 of Title XXI, the Act reads: "The expansion of international trade is vital to the national security of the United States. Trade is critical to the economic growth and strength of the United States and to its leadership in the world. … The national security of the United States depends on its economic security, which in turn is founded upon a vibrant and growing industrial base. Trade expansion has been the engine of economic growth. Trade agreements maximize opportunities for the critical sectors and building blocks of the economy of the United States, such as information technology, telecommunications and other leading technologies, basic industries, capital equipment, medical equipment, services, agriculture, environmental technology, and intellectual property. Trade will create new opportunities for the United States and preserve the unparalleled strength of the United States in economic, political, and military affairs." In July 2007, the Congress did not renew these powers conferred upon the president.

In Latin America, there were joint negotiations with Colombia, Ecuador and Peru to sign an FTA with the United States. But in December 2005, the president of Peru decided to conclude a separate treaty with the United States, which was ratified by the Peruvian congress in June 2006. Regarding Colombia, it signed the FTA in November 2006. However, as a consequence of a decision made by the Democratic majority, the United States Congress has kept its ratification "frozen" because of problems with human rights and labour matters. This was still the situation in February 2010.

Ecuador did not sign the FTA with the United States, a decision that was reiterated by President Correa in April 2009. ***In May of that same year, President Correa expressed his concern about the neo-liberal shift that the commercial negotiation with the European Union was taking and said that his country, unlike Colombia and Peru, will not accept a free trade agreement with the European Union.***

To give a better idea of what these bilateral free trade treaties mean, the following is an analysis of the Chile-United States treaty in general as well as of certain aspects of several others: South Korea-United States, Morocco-United States and the European Union treaty with India, under negotiation.

Chile-United States FTA

The core of the treaty is Chapter 10, which includes three sections. Section A includes Articles 10.1 to 10.13, which deal with investments; section B (Articles 10.14 to 10.26) deals with settlement of investor-state disputes; Section C, containing a single article, 10.27, contains definitions of some of the terms used in this chapter.

By virtue of article 10.5.3, Chile can impose administrative, environmental and health measures upon the investment production location *of any country in the world* but only if such restrictions are not applied on an arbitrary of unjustified manner, or do not constitute a covert restriction to international trade or investment. This means that an investor from any country could buy land or get a license to an abandoned mine in the Chilean desert in order to deposit nuclear waste in it and Chile could not prohibit this because such a prohibition could be construed as covert restriction to international trade or investment.

In case of a conflict with a foreign investor, no Chilean authority will have the power to rule on any provision under this chapter. Only international arbitration tribunals will have jurisdiction to resolve these controversies.

Article 10.12, also referring to investors worldwide, states that one of the parties (Chile or the USA) will be able to keep or to make others keep any measure compatible with this chapter, in order to guarantee that investment activities on its territory take into account *concerns* about environment. It talks about taking into account concerns but does not say that Chile may reject an investment that threatens the environment's preservation. As the Chilean government may not refuse an environmentally threatening investment, Paragraph 8 of Article 19 of the Chilean Constitution is being breached. It establishes "the right to live in an environment free

from contamination. It is the duty of the State to watch over the protection of this right and the preservation of nature". This is to say that the Chilean government has renounced its constitutional duty to preserve the environment not only from investors of the contracting state party, the United States, but also from investors of undetermined countries that are not party to the treaty.[15]

The other articles in this chapter concern only United States investors. Article 10.9 ("Expropriation and Compensation"), provides that Chile "will not expropriate nor nationalize a covered investment, either directly or indirectly through measures equivalent to expropriation or nationalization", except for a public purpose, in a non-discriminatory manner, and through prompt payment of a compensation at market value. "Covered investment" refers to USA investments already existing in Chile that will not be affected by measures taken by Chile that could be considered equivalent to expropriation. On the other hand, Article 23.3.6 of Chapter 23 ("Exceptions"), says that "Articles 10,9 ("Expropriation and Compensation") and Article 10.15 ("Submission of a Claim to Arbitration"), shall apply to a taxation measure alleged to be an expropriation or a breach of an investment agreement or investment authorization [emphasis added]."

This means that Chile would have no chance of making any taxation modifications that might affect United States investors, under penalty of being sued before an international arbitration tribunal for establishing measures that can be considered as expropriation.

Pursuant to Article 10.9, an increase in the fees that the investor must pay to the country that receives the investment can be considered as a measure equivalent to expropriation.

As regards settlement of disputes, Article 10.15 states that the plaintiff may submit a claim to arbitration if the defendant has violated an investment authorization or agreement. It is inferred from this article that the government of Chile can be only a defendant but never a plaintiff even though the government may consider that an investor is not observing the treaty's provisions. Even more explicit on such one-sidedness before the law is Article 10.27, entitled "Definitions", that carefully defines the defendant as the "party" in a dispute, while "party" is used only for states signatories to a treaty.

In any dispute related to this treaty, Chilean courts will have no jurisdiction; only international arbitration tribunals will. They are composed of three arbitrators, one from Chile, one from the other party and a third with a different nationality. The law applicable in these procedures is customary international law, not Chilean law, which implicitly repeals Article 16 of the Chilean Civil Code that reads: "Any goods placed in Chile are subject to Chilean laws, even if its owners are foreign and reside in Chile". But, according to the treaty, lawsuits involving United States companies established in Chile and, by extension (Arts. 10.5 and 10.12) foreign companies with any other nationality established in Chile, will not be governed by Chilean laws, in contradiction to Article 16 of the Civil Code.

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[15] On the absolute restrictive interpretation of "environmental clauses", v. the Metalclad judgement, Paragraphs 96, 98, 109 and 111. Also, v. note 12.

South Korea-United States FTA

The United States set four preliminary requisites that the government of Korea had to comply with in order to initiate FTA negotiations. These prerequisites were:

- suspending regulations on pharmaceutical product prices so that United States pharmaceutical companies might increase their profits in the South Korean market (complied with in October 2005);
- easing government regulation of gas emissions on imported US cars so that those cars would be less expensive and more could be sold in South Korea (satisfied in November 2005);
- resuming importation of US beef that was suspended in 2003 owing to the outbreaks of the Creutzfeldt-Jacob ("mad cow") disease that were registered in the USA (agreed in January 2006);
- reducing the compulsory quota for the showing of South Korean films for cinemas from 146 days per year to 73 days, so as to allow more American films to be shown (agreed in January 2006).

Once the South Korean government had yielded and accepted these conditions, progress was made in negotiations resulting in the treaty's being signed in 2007.

A parallel agreement set up specific rules regarding the way in which Korea should open its market as much as possible to imported American beef, despite large scale protests by the population, very concerned by the health consequences of such an agreement.

Morocco-United States FTA

The treaty was ratified by the United States Senate in July 2004 and by the parliament of Morocco in January 2005.

The agreement with Morocco was promoted by the United States government as the first step towards a broader FTA with the Middle East. Any regional agreement of this sort would summarize the main lines of United States policy in the Middle East: "democratize" governments of Arab countries, open them to the US penetration and eventually neutralize any hostility against to the state of Israel. Morocco now constitutes an obliging partner in that process.

The treaty includes a broad range of sensitive issues: opening of the Moroccan market to wheat imported form the US, rules of origin for Moroccan textile exports to the United States, drug pricing etc.

In Morocco, several social, political, arts and agricultural associations as well as the scientific community – and even some groups of industrial businessmen – mobilized owing to problems arising from the FTA. One of them was access to drugs, which was going to be undermined by the rules in the agreement regarding intellectual property rights. Another was erosion of cultural pluralism and the imminent threat to transfer the Moroccan media and other cultural sectors to Walt Disney, the Voice of America and the CNN. Another problem, of a more general nature, was the constant refusal of the Moroccan administration to requests for consultation, debate and participation and its turning a deaf ear to any questioning from the grass roots (protests by activists against AIDS and film producers that were violently put down).

In the parliament, opposition parties had to organize their own meetings with NGOs and with the business sector to talk about the draft of the treaty.

Two years after the FTA's implementation, Morocco's balance of payments in favour of the United States had risen exponentially, from $ 84 million in 2005 to nearly $ 735 million in 2007.

India-European Union FTA, negotiation in progress

Since 2007, the EU has been negotiating a bilateral free trade agreement with India. There are several disagreements between the two parties. For instance, the Indian government wants the EU to ease its strict criteria regarding food safety that penalize farming and fishing exports from India and to make entrance of Indian professionals to the EU labour market easier. Europe has its sights set on obtaining better access to the service market in India and a broad liberalization of foreign investment, whereas India does not want to even discuss authorization of European companies to compete in the Indian market of public contracts and purchases made by the government.

At the end of April 2010, the humanitarian organization Doctors without Borders (MSF) asked the European Union and India to withdraw any component in the treaty under negotiation that would mean a restriction on the production of generic drugs. According to MSF, the EU wants to include in the treaty some copyright rules that could "restrict" production and export of Indian generics. For its part, the European Commission (EC) stated [May 2010] through a spokesperson that the EU is "completely committed" to granting people living in the world's poorest countries "an attainable access to drugs". MSF pointed out that the agreement could include provisions that would extend patent protection beyond 20 years, "which would broaden the monopoly of that patent's owner, impeding the generics competition".

C. Bilateral Treaties on Intellectual Property

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization is a much criticized text, and rightly so. But there are a number of bilateral treaties covering the same issue that are more exacting than the TRIPS rules, which is why such treaties are referred to as "TRIPS-plus".

For instance, the TRIPS Agreement admits the possibility of excluding living beings from the patent system, although its Article 27.3, b, states: "However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof…" There is no definition of "an effective *sui generis* system". Therefore, with TRIPS the door is open to plant variety patents anyhow.

But most bilateral treaties on intellectual property *oblige* signatories to adhere to the **UPOV** (International Union for the Protection of Plant Variety), which is not mentioned in the TRIPS. The UPOV was created by a convention that entered into force in 1961 and to which only Northern countries and South Africa were parties until 1994. However, since then, some Southern countries have joined it. The treaty grants broad latitude for the patenting of plants and exposes farmers to paying higher and higher duties to major transnational corporations specialized in genetic

engineering and biopiracy,[16] in order to be able to continue to sow and grow. Although traditional patent law requires the object of the patent to be an invention, and thus excluding living organisms existing in nature, with the UPOV, the so-called "rights of the obtainer" were confirmed. These rights refer to living varieties obtained out of genetic manipulation. Thus, by requiring the ratification of the UPOV, the great majority of bilateral treaties do away with the fundamental right of the farmer to keep or exchange with other farmers for the following sowing seeds bearing registered "rights of the obtainer".[17]

In Chapter IV.F of this report and in the India-European Union FTA under negotiation (see above), there are examples of how an abuse of the rights of intellectual property on drugs can violate the right to health.[18]

III. INTERNATIONAL ARBITRATION TRIBUNALS

Corporative or neo-feudal law in the service of transnational corporations, comprising free trade, promotion and protection of foreign investments and intellectual property bilateral treaties, among other things, is complemented by a specific jurisdiction: the international arbitration tribunals.

Acceptance of its jurisdiction in bilateral and regional treaties, as we shall see, involves renouncing a basic aspect of sovereignty: territorial jurisdiction of domestic courts.

A. The International Centre for Settlement of Investment Disputes

Among arbitration tribunals, those in the International Centre for Settlement of Investment Disputes (**ICSID**) play a predominant role. The ICSID, as part of the World Bank, has as president, *ex officio*, the president of the World Bank, as established in the ICSID's regulations. By January 2010, 155 countries had signed the ICSID convention and 144 of them had ratified it.

The ICSID, with the lack of objectivity and impartiality for which the World Bank is notorious, supports international arbitration tribunals that settle disputes between transnational corporations and the countries that submit themselves to its procedure. ***When accepting this jurisdiction to settle disputes, countries put themselves at a disadvantage with private corporations by renouncing a basic prerogative of sovereignty: territorial jurisdiction of their domestic tribunals. We speak of disadvantage because as a general rule in free trade bilateral treaties, only the corporation can sue the state for breach of contract, but the latter cannot sue the corporation.*** (See above, the analysis of the Chile-United States FTA)

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[16] Biopiracy is the appropriation of indigenous biomedical knowledge, through patenting, by private genetic engineering firms without compensation for the indigenous groups that initially developed this knowledge. Since the 1990s, some pharmaceutical and agricultural industries have appropriated an exclusive right to the genes of the human genome, plants etc. (v. http://en.wikipedia.org/wiki/Biopiracy)

[17] See Silvia Ribeiro, "Campesinos, biodiversidad y nuevas formas de privatización" in *América Latina en Movimiento*, February 2004, http://alainet.org/revista.phtml

[18] V. the CETIM study entitled: *The Right to Health*, May 2006, http://cetim.ch/en/publications_brochures.php

The World Bank's web page introduces the ICSID as follows:
"...Function: The ICSID provides the basic framework for conciliation and arbitration of investment disputes arising between member countries and investors that qualify as nationals of other member countries. Arbitration and conciliation under the Convention are entirely voluntary, but once the parties have given their consent, neither may unilaterally withdraw it. The Convention also requires that all Contracting States, whether or not parties to the dispute, recognize and enforce ICSID Convention arbitration awards. Besides providing facilities for conciliation and arbitration under the ICSID Convention, the Centre has since 1978 had a set of Additional Facility Rules authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention. It also gives additional facilities on conciliation and arbitration for the settlement of disputes that do not directly arise out of an investment, whenever they are related to an investment 'with such an investment that is different from a regular national investment'. A third activity of ICSID in the field of the settlement of disputes is ***the Secretary General of ICSID accepting to act as the appointing authority of arbitrators in ad hoc arbitration proceedings (i.e., non-institutional)*** [emphasis added]*."*[19]

The outstanding functions given to the Secretary General of the ICSID emphasized in the preceding paragraph are noteworthy.

Clearly, the tribunals constituted under the auspices of the ICSID lack independence, as two of their three arbitrators represent in fact the company's interests: the one named by the company and the president of the tribunal who, in case of non-agreement between parties – almost always the case – is appointed by the chairman of the ICSID's board of directors (Article 38 of the ICSID's charter), who is no other than the president of the World Bank.

The ICSID's arbitration tribunals are created *ad hoc*. For the purposes of the arbitration tribunal there is, in principle, no other law but the bilateral treaty claimed to be violated and the ICSID's regulations. No other judgements, by arbitration tribunals or others, are taken into account, neither national laws and constitutions, nor the Universal Declaration of Human Rights nor the international covenants on human rights. The 1965 Washington Convention that created the ICSID and its regulations does not mention human rights at all. Neither do bilateral commercial treaties (except for some few cases and in a very limited and ambiguous way). Therefore, if the rules of ICSID and bilateral commercial treaties have been accepted, there is no way to invoke human rights before an arbitration tribunal constituted on the basis of such instruments. The ICSID's arbitration tribunals have repeatedly refused any appeal to human rights made by sued states ***but have accepted investors' arguments in favour of the "human right to property"***.[20]

[19] V. www.worldbank.org./icsid

[20] For instance, among many others, *Tecmed v, Mexico, Azurix v. Argentina and CMS Gas Transmission v. Argentina*. See Luke Eric Peterson, "Exploring the relationship between human rights and investment treaties" in *Human Rights and bilateral investment treaties*, Ed. Rights and Democracy, chapter 2, 2009, www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf.

Cases are heard behind closed doors, and the proceedings, as well as the final ruling, are often inaccessible to the public.[21] Although in most of these proceedings the issues dealt with are or general interest, confidentiality is almost always the rule.

The chair of the arbitration tribunal, who owes his appointment to the president of the Wold Bank, has links to the interests of the enterprise in litigation. In fact, the World Bank itself represents these interests for two main reasons: the first is that the World Bank intervenes in almost all foreign operations of private investments, by means of advising, financing etc.; the second is that most of the World Bank's operating capital ($400 billion out of $500 billion – 80% of the funds it has managed since its foundation), comes from private investors' contributions and only $100 billion, or 20%, from the States.[22]

In other words, the World Bank is essentially a manager of private capital for foreign investments. Thus, when suing a government, such capital can count on the partiality, in its favour, of the tribunals of the ICSID, a World Bank body.

It can also happen that the president of the World Bank, when appointing the chair of the arbitration tribunal, does not even respect last paragraph of Article 38 of the ICSID Convention, which reads: "*Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute".*[23]
For instance, in the case of Aguas del Tunari (Bechtel) against Bolivia, David D. Caron, a United States citizen, thus of the same nationality as Bechtel, was appointed chair of the arbitration tribunal.

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, of 18 March 1965 (the Washington Convention), that created the ICSID, was drafted by the World Bank. During negotiations leading to it, Latin American and Caribbean countries, faithful at that time to the Calvo Doctrine (see below, point V. C), ***unanimously*** opposed the creation of an international arbitration tribunal to settle disputes between states and foreign investors.[24]
Later, in the region, as in the rest of the world, there was a shift to neo-liberalism, and today most of the world's countries, among which most Latin American and Caribbean states, are party to the ICSID.[25] Also many countries from Latin America

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[21] **Cases pending at the ICSID (October 2009): c**ompanies suing states: 120 cases; states suing companies: 1 case.
Cases by region and/or continent: North America: 3; Central America: 10; South America: 51; Caribbean: 1; Africa: 18; Asia: 13; Europe: 24; Oceania: 1 (this is the only case in which a government is suing a company).
List of countries with lawsuits at the ICSID (with number of lawsuits): Argentina: 30; Ecuador, Venezuela and Ukraine: 6; Romania and Egypt: 5; Georgia and Kazakhstan: 4; Costa Rica, Bolivia, Turkey and Central African Republic: 3; Mexico, El Salvador, Guatemala, Honduras, Chile, Paraguay, Peru, Hungary, Macedonia, Jordan and Gabon: 2; Canada, Panama, Grenada, Germany, Slovenia, Bangladesh, Cambodia, Philippines, Lebanon, Sri Lanka, Turkmenistan, Yemen, Algeria, Ghana, Nigeria, Togo, Senegal, South Africa, Tanzania and Tunisia: 1.
Cf. http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=ViewAllCases#

[22] V. World Bank Financing (available only in French or Spanish), http://go.worldbank.org/WKAQFX4330

[23] V. ICSID Convention, http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf

[24] The Chilean delegate, Félix Ruiz, expressed this opposition on behalf of all Latin American countries. World Bank Press Release of 9 September 1964. Gonzalo Biggs, *La crisis de la deuda latinoamericana frente a los precedentes históricos.* Grupo Editor Latinoamericano. Colección Estudios Internacionales, 1987, page 77.

[25] After the end of World War II, a series of movements and governments with nationalist, agricultural and anti-imperialist orientation arose in Latin American and the Caribbean with varying levels of consequences: Arévalo and Arbenz in Guatemala

and other regions have ratified the Multilateral Investment Guarantee Agency (**MIGA**).[26]

In the Latin American and Caribbean region, only Brazil, Cuba and Mexico have not signed the ICSID, and the Dominican Republic has not yet ratified it.

In May 2007, Bolivia, Nicaragua and Venezuela announced that they were withdrawing from the ICSID, but only Bolivia notified the World Bank of its decision, that same month.[27] Nicaragua and Venezuela continue to be parties to the ICSID and the latter accepted the ICSID's jurisdiction in its dispute with Exxon Mobil. For its part, on 6 July 2009, Ecuador officially communicated to the World Bank its decision to withdraw from the ICSID.

As for other regions, it is noteworthy that India is not a party to the ICSID.

It must be emphasized that ratifying the ICSID Convention ***does not oblige*** states parties to submit its disputes with foreign investors to international arbitration tribunals. Actually, the last part of the preamble of the Convention reads: "*Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.*"

Nonetheless, submission of disputes between states and foreign investors to international arbitration is one of the obligations assumed under foreign

(1945-1954); the revolution led by the *Movimiento Nacionalista Revolucionario* in Bolivia in 1952; the first period of Peronism in Argentina (1945-1951); the Cuban Revolution in 1959; Goulart in Brazil (1961-64); the Sandaninista Revolution (1979-1990); the government of Salvador Allende in Chile (1970-1973) etc. All these, except for the Cuban revolution, were frustrated, as a result of their own incongruities, economic pressure and direct military intervention (invasions), or indirectly by means of logistic support by the United States to coups d'état or to armed counter-revolutionary operations. This cycle of advancement then regression of popular movements coincides, very approximately, with policies of several countries of the region in dealing with foreign investments. One sees this in domestic laws presently in force, clearly neo-liberal in dealing with the foreign investor, and which completely ignore the protection of national interest. It is also reflected in later decisions under the Cartagena Agreement, within the framework of the Andean Pact, which, after the exemplary 1970 Decision 24, marked the beginning of the change of attitude of most of the region's countries toward international arbitration tribunals, in particular the ICSID. Thus, the last ten or fifteen years have seen huge concessions made to the economic transnational powers through bilateral trade treaties. It should be noted that the relative and unequal positive change noted in the region after the reactionary wave of the 1980s and 1990s is barely perceptible in the normative sphere, be it regarding foreign investment laws, bilateral agreements or in the attitude toward the ICSID, the only exceptions being Bolivia and Ecuador.

[26] The MIGA was established the 12 April 1988 **as an organization member of the World Bank Group.** The MIGA has its Rules of Arbitration for Disputes under Contracts of Guarantee of the Multilateral Investment Guarantee Agency (1990), www.miga.org

[27] In December 2008, the ICSID tribunal adjourned until 2010 the arbitration suit brought by Euro Telecom International (ETI), a company of Italian and Spanish capital, arising from the nationalization of Bolivian Empresa Nacional de Telecomunicaciones (ENTEL), while resolving challenges raised by the Bolivian government regarding the ICSID's jurisdiction in accepting that suit. The arbitration tribunal accepted the preliminary challenge brought by Bolivia, with a view to having it resolved in 2009. Bolivia questioned the jurisdiction of the ICSID tribunal, for the transnational company brought the suit almost six months after Bolivia had communicated its decision to withdraw from the ICSID, in May 2007. Bolivia claims that the correct interpretation of Articles 71 and 72 of the ICSID convention is that its jurisdiction ended when the state communicated its decision to withdraw. ETI, on the contrary, maintains that the arbitration tribunal keeps its jurisdiction up to six months after the communication of withdrawal. Admitting the most unfavourable interpretation of the ICSID convention for Bolivia, its withdrawal from the ICSID came into effect in November 2007. However, on the 12 April 2010, the ICSID accepted an arbitration lawsuit against Bolivia by American Energy LLC (PAE), a former major shareholder of the oil company Chaco, nationalized in 2009 – another proof of the arbitrariness of the ICSID. The government of Bolivia immediately sent a note of protest to the secretary of the institution.

investment promotion and protection agreements (FIPAs), free trade agreements and similar accords.

As stated in a document of the Analysis Team of the Bolivian Ministry of Foreign Affairs and Religion: "*As regards the results, approximately a third of the cases brought to the ICSID end with judgements that are favourable to investors, and in another third parties reach an agreement on compensation outside the ICSID. In short, in most of the cases companies are the winners. On the other hand, States in fact never win – the best attainable result, given that it is a unidirectional system,is not to lose."*[28] *[emphasis added]*

B. Other International Arbitration Tribunals

Another international arbitration tribunal is the Permanent Court of Arbitration (**PCA**) based in The Hague, established by the Convention for the Pacific Settlement of International Disputes and originally entrusted with the settlement of disputes between states parties. However, in the 1970s, it adopted arbitration regulations for disputes between states and individuals and in 1993 Optional Rules to the PCA for arbitration of disputes between two parties of which only one is a state.

The International Chamber of Commerce (**ICC**), created in 1919, which includes the biggest companies in the world, has an International Court of Arbitration that organizes arbitration tribunals to solve disputes between companies.

Another arbitration jurisdiction is the Dispute Settlement Body of the World Trade Organization which, through its own case law, is creating an international standard that totally ignores state control – as the ICSID does – as well as basic norms of international human rights law.

The United Nations Commission on International Trade Law (**UNCITRAL**) was established in 1966 by United National General Assembly Resolution 2205 (XXI). Although its mandate did not include the creation or management of arbitration tribunals, it is enjoined to keep in mind in carrying out its work "the interests of all peoples, and particularly those of the developing countries, in the extensive development of international trade". The members of the Commission represent the various geographical regions and are elected by the General Assembly with "due regard to the adequate representation of the principal economic and legal systems of the world, and of developed and developing countries". Among other documents, the UNCITRAL drafted arbitration rules in 1976 and another on conciliation in 1980 the use of which the General Assembly recommends in its resolutions.

[28] "Bolivia y el CIADI: crónica de un divorcio anunciado", in *¡Soberanía de los pueblos o intereses empresariales!*, Published by Fundación Solón, REDES-Amigos de la Tierra Uruguay, Bolivia, 2008, http://www.redes.org.uy/category/publicaciones/page/2/

IV. EFFECT OF SUCH TREATIES ON HUMAN RIGHTS

It is clear from what has been said above that treaties have a strong negative effect on human rights, among which are the following.

A. The Right of States and Peoples to Self-Determination

When protecting investors against "indirect expropriations" or the loss of "expected profits", bilateral treaties subvert the sovereign right of receiving states to set policies on taxes, wages and social protection that investors might consider as affecting their "expected profits" and that could constitute an "indirect expropriation". Moreover, with these treaties, governments lose the sovereign power to have any lawsuits initiated on their own territory settled in their domestic courts.

B. Right to Development

This is understood as the right of peoples to choose their options to attain their full economic, political, social and cultural realization, both at the individual and collective level, with no external interferences.

In the press release presenting its *Trade and Development Report 2007*, the United Nations Conference on Trade and Development (UNCTAD) wrote the following regarding bilateral trade treaties: *"There has been a proliferation of regional and bilateral free trade agreements (FTAs) or preferential trade agreements (PTAs), many of them between developed and developing countries. These deals often present tough choices for the governments of developing countries and countries with economies in transition, and may be more costly than expected... Such agreements may offer transitory gains in terms of market access and higher foreign direct investment (FDI), but may also limit government action that can play an important role for the medium- and long-term growth of competitive industries. Officials of developing countries should therefore think carefully before entering into such agreements.... industrialized countries and developing nations that have recorded spectacular economic growth in recent years began by protecting nascent industries, allowing them to develop their abilities to face international competition. By contrast..., FTAs or PTAs between developed and developing countries often require sharply reduced tariffs on industrial goods, exposing domestic manufacturers to overwhelming foreign competition. That can keep poorer nations from developing their industrial sectors. Such agreements also tend to reduce developing countries´ control over foreign direct investment (FDI).... the trend towards such agreements, sometimes labelled "new regionalism", is a risky departure from multilateralism. Such agreements often include provisions that extend beyond current WTO rules and regulations in areas such as investment, intellectual property rights, competition policy and government procurement. Or they cover areas that have been excluded from the agenda of multilateral trade negotiations. As a result, many of these provisions reduce the options for developing country policy-makers to carry out proactive policies in support of industrialization and structural change.... bilateral and regional deals threaten the coherence of the multilateral trading system... and may limit the benefits of existing regional cooperation arrangements among developing countries. In assessing the potential economic and social benefits and costs of entering into North-South bilateral or regional FTAs, developing countries should not only take into account the potential changes in exports and imports arising from market opening, and possible increases in FDI. They should*

also consider the impact of such agreements on their policy options and instruments in the pursuit of longer-term development strategies. Rather than subscribing to the "new regionalism", developing countries may examine other areas of cooperation with partners in the same geographical region and at a similar level of economic development, in a spirit of a true regionalism. This could help strengthen their own strategies for national development and integration into the global economy, building on the advantages of proximity, similarity of interests and economic complementarity. The motivation of a developing country for concluding a bilateral agreement with a developed-country partner is to obtain concessions that are not granted to other countries, particularly better market access for its products. Although North-South FTAs may bring new trading opportunities and additional FDI to the developing-country partner, this should not be equated with progress in development. Increased trade and FDI are desirable only when they enhance development and structural change. In exchange for better market access, a developing country may be required to give up not only control over FDI but control over government procurement, and may be required to observe stricter rules on intellectual property rights. It may also come under pressure to undertake broader and deeper liberalization of trade in goods and services than has been agreed to under WTO arrangements. (...) Unlike negotiations in a multilateral context, individual bilateral negotiations create an environment of 'competitive liberalization.' That is, countries may feel forced to conclude FTAs for fear of losing competitiveness with other developing countries that enter into FTAs with the same major trading partner. On the other hand, the gains that developing countries can obtain in North-South bilateral negotiations are circumscribed by their usually weaker bargaining power. And they are often unable to derive the full benefits of the improved market access opportunities of FTAs because of limited supply and marketing capacities and competitiveness, protracted subsidies to 'sensitive' sectors in developed countries, and because local firms are frequently unable to comply with restrictive rules of origin on goods destined for export to the developed-country partner. And preferences negotiated by one developing country with a developed partner may quickly be eroded if the same developed country also concludes FTAs with other developing countries (all emphasis added)."[29]

C. The Right to Permanent Sovereignty over Natural Resources and the Right – for the Entire Population – to Access to Essential Public Services

The water issue is part of the process to turn over natural resources to transnational companies and the privatization of essential public services.

The human right to water is implicit in the main international instruments and is explicitly invoked in Paragraph 24 of *General Observation n°15* of the Committee on Economic, Social and Cultural Rights: "equal, affordable and physical access to sufficient, safe and acceptable water".

Foreign investments in the area of drinking water and sewer services have led to at least a dozen lawsuits before arbitration tribunals against various governments. Ten of these cases were brought against Argentina and two others against Bolivia and Tanzania. The governments invoked in their defence the human right to water

[29] Cf. UNCTAD/PRESS/PR/2007/025, 5th September 2007, www.unctad.org/Templates/webflyer.asp?docid=8948&intItemID=1528&lang=1

and the investors (for instance in *Suez and others v. Argentina*) responded that the human right to water "is not applicable" in arbitration.[30]

D. The Right to a Safe Environment

There are numerous cases in different countries of mines that cause serious environmental damage, but, if the mine owners are asked to withdraw or to invest in measures intended to protect the environment, they can sue the receiving state in an international arbitration tribunal for "indirect expropriation" and/or loss of "expected profits". See, in note 12, the *Metalclad* case.

E. Labour and Social Rights

As pointed out in Section A, the investor can consider that an increase in the wages or in the employer's contribution to the welfare system implies a loss of its "expected profits". Moreover, the receiving countries, in order to attract foreign investment to their territories, offer them advantageous conditions by limiting and restricting labour rights.

F. The Right to Health

The special rapporteur on the right to health of the former Commission on Human Rights, Paul Hunt, summarized it clearly in his report on his mission to Peru: "At the time of the Special Rapporteur's mission, the Government of Peru was engaged in negotiations towards a bilateral trade agreement with the United States. While the agreement may cover a wide range of issues, for the purposes of the present report the Special Rapporteur focuses on the potential impact of the trade agreement on access to essential medicines in Peru. He is concerned that the agreement may result in 'OMC-plus' restrictions, including new patent and registration regulations that impede access to essential medicines for those living in poverty".[31]

Transnational pharmaceutical corporations can block the distribution of generic medicines and extend the validity of patents beyond 20 years through "new uses" patents. This means that a medicine that is now used to treat a certain illness could benefit from a new 20-year patent if it is proven that it is efficient in the treatment of another illness. In a further effort to extend the validity of patents, transnational pharmaceutical corporations may modify one or some molecules of an already existing medicine without there being any real invention. Moreover, the current Human Rights Council special rapporteur on the right to health recently expressed great concern regarding the practice consisting of "obtaining new patents on a patented medicine by making minor changes to it".[32]

Moreover, the bilateral treaties that the United States is negotiating with many countries, allow for setting aside the mechanism of compulsory licensing, one of the most important safeguards of intellectual property rules provided for by the WTO. This provision allows countries to lift patent barriers and produce or buy generics in case of public emergency. The right of compulsory licensing is recognized by the WTO's Trade Related Intellectual Property Rights agreement (TRIPS), which was

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30 A detailed analysis of these cases can be found in Luke Eric Peterson's document, cited in note 20.

31 V. E/CN.4/2005/51/Add.3, §§ 47 and 48. See also, Javier Llamoza, "Tratados comerciales y acceso a medicamentos en el Perú" in *Revista Peruana de Medicina Experimental y Salud Publica*, Vol. 26, Nº4, October/December 2009.

32 Annual report of the special rapporteur on the right to health, Anand Grover, Human Rights Council, A/HRC/11/12, § 34, 31 March 2009.

reinforced with a statement at the fourth ministerial meeting of the WTO in Doha (Qatar) in November 2001. The United States is opposed to this safeguard for public health and intends to reduce it to a minimum list of illnesses. In the World AIDS Conference, in Bangkok in July 2004, the severe restrictions on the distribution of generic medicines as a result of bilateral treaties were denounced.
The right to health can be also affected by the pollution of the environment caused, among other things, by mining activities, particularly those carried out in open air.

G. The Right to Food Security

As stated at the end of Chapter II, the obligation, more and more extensive, for farmers to use seeds genetically modified (paying for them for each sowing), limits in a significant way the productive capacity of millions of farmers all over the world. Commercial bilateral treaties not only do not raise any obstacle to this practice, rather they facilitate it.
Such treaties also facilitate a phenomenon that in recent years is becoming alarmingly common: the take over, by transnational companies or with state funds from foreign countries, of farming land in Latin America, Africa and Asia, which implies the displacing of local farmers. It is estimated that some 40 million hectares of farm land has been thus appropriated.
In April 2010, the World Bank held a two-day conference to examine the problem of land grabbing. La Vía Campesina, FIAN, Land Research Action Network and GRAIN produced a joint statement saying that the World Bank's initiative serves only to facilitate land grabbing and gave the reasons why it must stop. These and other organizations said that the real solution to feeding the world is support for family and community production and for local and regional markets, and not for industrial-scale farming and for global agro-business.[33]

H. The Right to Freedom of Expression and to a Cultural Identity

These bilateral treaties open countries' doors to international communication monopolies and to their so-called cultural products. For instance, in a law on the media passed in October 2009 in Argentina, supposedly to make communication democratic and to impede the existence of monopolies, in Article 25, after establishing in Paragraphs b and c limits to foreign capital, the second part of Paragraph c reads: "The conditions set up in Paragraphs b and c will not apply when, according to international treaties to which the Nation is a party, effective reciprocity in the activity of audiovisual communication services is established". That is to say, the anti-monopoly statements contained in the law are blocked by bilateral commercial treaties in force. An example of the imposition of so-called cultural products is the bilateral treaty between South Korea and the United States, which provides for a decrease of the compulsory number of days when cinemas must show South Korean films, from 146 to 73 days per year, so that more United States movies can be shown.

[33] The statement LVC-FIAN-LRAN-GRAIN, together with the list of groups that supported it, is available in Arabic, Spanish, French and English, www.grain.org/o/?id=104

V. SEVERAL WAYS TO RENOUNCE THESE TREATIES

If there is political will, it is possible to get out of the trap of free trade and promotion and protection of investment bilateral agreements, to re-establish national and international public law and to defend and promote human rights. ***Until now, practically no country, despite having the capacity to do so, has used any of the mechanisms named below to get free from these treaties, or, at least, to renegotiate them.***

A. Outright Renunciation of the Treaties

It is possible to withdraw from the treaties when thy have expired in order to avoid automatic extension. However, a treaty's entry into force or its tacit extension can be recent, and, in that case, the point at which it can be renounced would be far off. Nonetheless, in general, treaties include a mechanism of renunciation that can be executed at any time when it is in force, though its effect is suspensive, in other words renouncing it takes effect only after some time has lapsed.

B. Invoking Pre-Eminence of a Hierarchically Superior Rule

Article 53 of the Vienna Convention on the law of treaties, states: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only b a subsequent norm of general international law having the same character”

The Universal Declaration of Human Rights, the International Covenants on Civil, and Political Rights and on Economic, Social and Cultural Rights and other treaties and international conventions on human rights and the environment are peremptory norms of general international law that cannot be breached by other treaties or international agreements, on penalty of nullity of the latter.

C. Re-establishing Territorial Jurisdiction of Domestic Courts

In many bilateral treaties on trade and investment such as the NAFTA (North American Free Trade Agreement) and the projected FTAA (Free Trade Area of the Americas), there is a nullification clause of national jurisdiction in favour of arbitration tribunals to settle disputes between a given investor and the country that receives the investment.

Such nullification implies a renunciation of the so-called Calvo Doctrine, based on the principles of national sovereignty, equality between national and foreign citizens and the pre-eminence of territorial jurisdiction. According to the Calvo Doctrine, sovereign states have the right to be free from any kind of interference by other states, and foreigners have the same rights as nationals and, in case of lawsuits or claims, foreigners will have the duty to exhaust legal appeals before domestic tribunals without the need to ask for diplomatic protection and intervention from their country of origin.

The Calvo Doctrine, formulated by the Argentinian jurist Carlos Calvo in the nineteenth century, is incorporated into the charter of the Organization of American States (Article 15); the Bogotá Covenant (Article 7), United Nations General Assembly Resolution 3171 of 17 December 1973 (Permanent sovereignty over natural resources), Paragraph 3, and in several national constitutions.[34]

D. Monitoring of Constitutionality

International treaties can be submitted to a control of constitutionality in order for national tribunals to determine if they are in accordance with the constitution as regards rights and guarantees and more particularly with international human rights law and with *jus cogens* (imperative norms of international law).[35]

E. Verification of Irreparable Defects Implying Nullification During Ratification or Approval

In the approval of a treaty there can be procedural defects causing its nullification. For instance, when domestic laws or the constitution provide for a preliminary constitutional check and it has not been carried out.

Another reason for the nullification of a treaty is factual defects. Section 2 (Articles 46 to 53) of the Vienna Convention on the law of treaties deals with this under "Invalidity of Treaties. We have already referred in Section B to Article 53 of the Vienna Convention. According to Article 46 of this Convention, a treaty can be null if it has been ratified in manifest violation of a domestic law of fundamental importance by one of the contracting parties. By combining Articles 46 and 53, ratifying a treaty in breach of fundamental rights and guarantees set up in the country's constitution as well as in break of major international human rights norms, such as the right to health, to food, to adequate housing, to education etc. would cause the nullification of such a treaty.

F. Invoking Nullification Caused by Ratification by Representatives Breaching Their Mandate

The representatives of a country that signed and ratified a treaty containing clauses that breach that country's sovereignty and the population's fundamental rights, apart from committing grave crimes that could even include treason, have violated their mandate, consisting of carrying out their tasks within the framework of the constitution, the laws and fundamental international norms, binding upon all states. The treaty will be void, because one of the parties has violated its mandate, and the other will not be able to allege ignorance of this in claiming the treaty's validity, when such violation is apparent.

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[34] Constitutions of Argentina (Article 116); Bolivia (Article 24); El Salvador (Articles 98 and 99); Ecuador (Article 14); Guatemala (Article 29); Peru (Article. 63, 2° c); Venezuela (Article 151) etc.

[35] In January 2005 the Council of Canadians, the Canadian Union of Postal Workers (CUPW), and the Charter Committee on Poverty Issues (CCPI) **denounced the NAFTA's unconstitutionality** before a Canadian high court **because it deprived Canadian courts of the jurisdiction granted by the constitution, inter alia, to hear lawsuits of foreign investors against the state.** See http://www.dfait-maeci.gc.ca/tna-nac/disp/cupw_archive-en.asp and presentation by Steven Shrybman at the International Workshop on the FTTA and bilateral treaties organized by the *Instituto Latinoamericano de Servicios Legales Alternativos* (ILSA) in Bogotá on 29 and 30 March 2005. Published in: Instituto Latinoamericano de Servicios Legales Alternativos, *Juicio al libre comercio. Aspectos jurídicos de los TLC.*El Otro Derecho Nº 33. Editores: Margarita Flórez, Héctor Moncayo y Libardo Herreño. Bogotá, December 2005.

And, very especially:

G. Promoting Popular Legislative Initiatives, Repeal Referenda, and/or Legal Actions against Treaties – Already in Force or under Negotiation – Contrary to National Sovereignty or National Interests

Depending on the country, popular consultation, if possible, may be ***compulsory*** or ***optional***. Compulsory consultation can be ***automatically compulsory***, in cases specifically required by the constitution, and ***compulsory but limited*** to certain procedures, which become operational only when there is a specific situation (for instance, a conflict between the executive and the parliament) that cannot be solved within the framework of the representative system.

Optional consultations are divided in two groups: 1. when the initiative comes "**from above**" (that is to say when official bodies have the exclusive right to initiate the mechanism), and 2. when the initiative comes "**from below**", that is to say from the citizenry. In cases of initiatives "from above", they can come from the executive, the legislature, or both in co-ordination. In cases of initiatives "from below", it is important to establish what the requirements are (e.g. percentage or minimum number of citizens' signatures) in order to trigger the mechanism.

The results of popular consultations' results can be ***binding*** or not, and if they are binding, they can be so be ***with or without the need of a specific quorum***. For instance, in Colombia, Article 103 of the constitution states: "To exercise its sovereignty, the people have the following mechanisms: the vote, the plebiscite, the referendum, the popular consultation, the open town meeting, the legislative initiative and the mandate revocation. These mechanisms will be regulated by law". Law 134 of 1994 regulates the popular and normative initiative, the referendum, the referendum for approval and the referendum for repeal.[36]

In the case of bringing legal action, legal standing – the right to act – requires that those who bring the case must be able to demonstrate that they are directly affected. This is the classic requirement for legal action: the infringement of a subjective right. If several people have separately initiated the action, they can file a joint claim because the source of such harm is the same in all the cases.

But legal standing has been somewhat extended to the defence of undefined interests, as established, for instance, in Articles 88 of the Colombian Constitution, 43 of the Argentinian constitution and 42 of the General Procedural Code of Uruguay. The claimant need not invoke direct infringement upon his/her subjective rights but to an undetermined number of specifically identified persons.

In general, defence of undefined interests is invoked when harm is done to the environment.[37] But this can be applied when there is a violation of other fundamental rights of the general community or of a particular community.[38]

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[36] See *Mesa de trabajo: las reformas sociales que Colombia necesita,* held by many root organizations: CUT, CGTD, CPC, Platform DESC, ILSA, ANUC, etc., Bogotá, Mpvember 2004.

[37] Judgement of Supreme Court of the Province of Buenos Aires of 19 March 2008 in "Spagnolo, César v. Municipalidad de Mercedes s/amparo". Commented on by Pablo Peredo in Revista de Derecho Ambiental, Abeledo Perrot, nº 17, Buenos Aires, April 2009.

[38] Judgement of the Court of First Instance Montevideo, Uruguay, *in Salle Lorier, Gustavo and others v. Ministerio del Interior*. In this case two solicitors, Salle and Chimuris, filed an appeal in order to "make inhumane conditions cease

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for those legally deprived of their freedom" and so that "human rights of persons that are or will be in prisons in the country be protected". In this case, the active competency of the solicitors whose subjective rights were not affected was accepted in favour of presently affected persons and those who could be affected in the future.