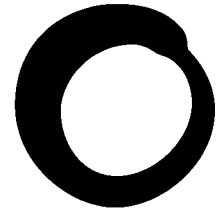


June 2003



**Friends of
the Earth**

Briefing

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Reasons to reject a WTO investment agreement

The government want us and developing countries to believe that a World Trade Organisation agreement on investment will be a good thing but it will only open us all to more abuse by unscrupulous global business and will fail to address poverty or protect the environment.

Friends of the Earth inspires solutions to environmental problems, which make life better for people.

Friends of the Earth is:

- dedicated to protecting the environment and promoting a sustainable future for Northern Ireland**
- the UK and Irelands most influential environmental campaigning organisation**
- the most extensive environmental network in the world, with over 60 national organisations across five continents**
- a unique network of campaigning local groups working in over 200 communities throughout the UK and Ireland**
- dependent upon individuals for over 90 per cent of its income**

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Introduction

Shell drilling for oil in Nigeria; British vacuum cleaner company Dyson moving its manufacturing to Malaysia; your pension fund buying shares in a South Korean Company: these are all examples of foreign investment: the international movement of money and expansion of companies that is one of the symbols of globalisation of the world's economy.

Key players in international investment are trans-national companies (TNCs). Decisions by TNCs about where to put their money and where to locate have an enormous impact on communities in the UK and abroad through the extraction of natural resources, the siting of factories, the treatment of workers and locals and the influence of companies on the local economy and decision making. Through international investment the power of the world's largest companies is increasing.

Many of the rules for foreign investors and TNCs vary from country to country reflecting the internal, often shifting, economic, social and environmental needs of a country. But some TNCs think these policies, and the fact that they vary, are a barrier to maximising their profits and want global rules that "open" up countries to more investment, get rid of local rules, and "protect" their investments. The TNCs want it their way which includes continuing to operate in ways that would never be tolerated in their home countries. In effect, the TNCs want even more power.

Now governments led by the EU and including the UK, want to agree rules that favour international investors in the World Trade Organisation (WTO). They wrongly claim that this would be good for development and poorer countries. At the next WTO ministerial meeting in Cancun, Mexico in September 2003 they will face strong opposition from civil society campaigners and most developing countries because such an agreement would not only take rights away from people and give them to big business, but do little to address the growing environmental damage, poverty and social exclusion around the world.

Instead, world leaders should be discussing how investment can be regulated to achieve sustainable development and how other international organisations could deliver corporate accountability rules which would ensure safeguards for all those that are adversely affected by the activities of all companies at home and abroad.

A WTO investment agreement can be stopped. Friends of the Earth is part of a huge social movement that has turned around such proposals for "liberalisation" of investment before – the OECD Multilateral Agreement on Investment (MAI) was abandoned in 1998 when politicians were forced to realise how unpopular the idea was. The Cancun ministerial will be another watershed, where our government Ministers will have to choose whether to push their proposals in the face of overwhelming evidence that a WTO Investment agreement is a bad idea.

This briefing details ten reasons why a WTO investment agreement is a bad idea:

1. Foreign Direct Investment is not delivering for the world's poor (and a WTO agreement won't fix this)
2. Foreign Direct Investment threatens the environment and increases environmental injustice (and a WTO agreement won't fix this)
3. Foreign Direct Investment can lead to human rights abuses (and a WTO agreement won't fix this)
4. There is little evidence that a WTO Agreement would bring any more Foreign Direct Investment
5. A WTO Agreement would not lead to better trans-national company behaviour
6. Policing of a WTO investment agreement would favour the economically strong countries and big business
7. A WTO investment agreement will be used as a negotiating tactic
8. A WTO investment agreement would give the WTO too much power and undermine democracy
9. Most of the world doesn't want a WTO investment agreement
10. But look who does want a WTO investment agreement? The vested interests.

What is "Investment"?

Instead of, or as well as, trading goods and services globally, businesses are actually moving to foreign countries or establishing or buying into operations in those countries. This is euphemistically called "investment". Investment can broadly be defined as including:

Foreign Direct Investment (FDI)

- Transnational companies (TNCs) are the main agents for FDI (and very often the main beneficiaries). It works in two main ways:
- "setting up shop" - for example, starting a factory or buying some real estate;
- mergers and acquisitions (M&As) - for example, buying or gaining a controlling interest in another company's assets.

Portfolio Investment

- Financial companies (such as banks and pension funds) and shareholders are the main agents for portfolio investment;
- Portfolio Investment includes having a holding or owning shares in a foreign enterprise;
- either on a long term basis hoping for a dividend,

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- or on a short term or speculative basis (betting that the value of that share will grow).

Other forms of ownership

- intellectual property such as patents and trademarks;
- contract rights;
- concession rights to exploit natural resources.

There is no one definition of investment, nor an agreed proposal of what could go into a WTO agreement. The MAI included all of the above. Existing bi-lateral investment treaties (BITs) contain a mix. Advocates of a WTO agreement propose to start with FDI (and most likely move onto the other types later).

How much foreign investment is there?

Global investment flows are big and getting bigger. Twenty years ago the world experienced growth in trade of goods, now the growth is in FDI. Between 1990 and 2001 FDI inflow and outflow grew by \$532 billion and \$388 billion respectively.¹

Global investment flows were valued in 2001 at around \$US 19 trillion in annual sales by overseas affiliates of multinational companies², more than twice as high as world trade flows (in 1990 these were roughly equal).

A lot of this is money circulating within and between TNCs rather than directly contributing to new endeavours in a host country. Around 80% of FDI is accounted for by cross border mergers and acquisitions and a third of world trade is intra trade cross border within multinational companies³.

FDI flows are highly unequally dispersed. From 1991-96 between one half and two thirds of the world was still virtually written off the map as far as any benefit from this form of investment was concerned and this continues. As of 2002 as much as 30% of the world's population mostly in developed countries receive 80% of the flows⁴. Over the last few years developing countries have received around 25% of FDI but the 49 least developed countries received only 2% of this (0.5% overall). Africa receives only 2% of global FDI (and that is highly concentrated in just a few countries).

FDI is highly concentrated in a few very powerful TNCs. The hundred largest TNCs controlled 1/5 of total global foreign assets in 1995⁵. Around 90% of TNCs are from the developed world and some of them are economically larger than many countries.⁶

The EU and the US dominate the league tables of both recipients and home countries to investors. The UK is not only one of the main recipients of foreign investment in Western Europe but the home of many of the TNCs that invest the most overseas.

The multinational companies who invest the most overseas (those highlighted are based in the UK)

The worlds non-financial TNCs, ranked by foreign assets, 2000⁷

1. Vodafone	10. Fiat	19. TotalFinaElf
2. General Electric	11. IBM	20. Repsol YPF
3. ExxonMobil	12. Volkswagen	21. BMW
4. Vivendi Universal	13. Chevron Texaco	22. Sony
5. General Motors	14. Hutchison Whampoa	23. E.On
6. Royal Dutch/Shell	15. Suez	24. ABB
7. BP	16. DaimlerChrysler	25. Philips Electronics
8. Toyota Motor	17. News Corporation	26. Anglo American
9. Telefonica	18. Nestle	

The world's top 10 TNCs in terms of "transnationality", 2000⁸

1. Rio Tinto	6. Electrolux
2. Thompson	7. Interbrew
3. ABB	8. Anglo American
4. Nestle	9. Astrazeneca
5. British American Tobacco	10. Philips Electronics

There are 65,000 TNCs with 850,000 affiliates abroad

Is investment good or bad?

The answer is it depends how you do it. There is the potential for some investment by TNCs, if properly regulated, to make a contribution to sustainable development. For example, you could imagine a renewable energy company working to bring the technology to an area of the world which did not yet have it and boosting the local economy.

However the situation today is that the TNCs have a poor record of ensuring that all their foreign investment activities are ethical and contribute to sustainable development. Governments have bent over too far to attract foreign investment at the expense of the local economy, people and the environment. The key point is that there are trade-offs between the risks and returns of FDI. As UNCTAD reports, "Not all FDI is in the best interests of host countries. Some can have an adverse effect on development."⁹ Moreover UNCTAD points out that the benefits from TNC investment "may fail to materialise in the host country. In particular, dynamic comparative advantages may not be developed and affiliates may not embed themselves in the local economy by building linkages to the domestic entrepreneurial community, by further developing labour skills, or by introducing more complex technologies."¹⁰ In other words, sometimes the TNCs are the only winners.

For investment to do some good, it seems that governments have to be prepared to regulate, not only to ensure that TNCs meet minimum standards, but that citizen's have rights and the local economic, political, environmental and social circumstances can be taken into account. This room to regulate the activities of foreign investors, as necessary for

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the higher goals of sustainable development (often called policy space), is key to whether investment is a force for good. UNCTAD goes on to conclude that if the potential for FDI to promote development is to be realised “the need for developing countries to preserve sufficient policy space to pursue their development objectives also has to be recognised.”¹¹

When TNC investment goes wrong: British American Tobacco supporting Burma's brutal regime¹²

British-owned multinational, BAT, is the world's second largest international tobacco company. BAT is among the most significant of UK investors in Burma, a country ruled by one of the longest running and most brutal military dictatorships in the world. Burma is charged by the United Nations with a “crime against humanity”. Aung San Suu Kyi, the National League for Democracy leader and Nobel Peace Laureate, urges companies to withdraw from Burma. She said: “Sanctions have a role to play because they are a strong political message, but also because they are an economic message”. Over the past five years a large number of foreign companies, including Texaco, British Home Stores, Reebok and Premier Oil, have withdrawn from the country.

But despite the clear views of the international community BAT continues to operate in Burma through its subsidiary, Rothmans of Pall Mall Myanmar, (a joint venture with the Union of Myanmar Economic Holdings), which is itself wholly run by Burma's military regime. In 1996 the industrial area where BAT's cigarette factory is located was upgraded using child labour. At this factory, workers are paid around 23p a day. The annual salary of a BAT factory worker is approximately £68. BAT chairman Michael Broughton's salary is £967,500 a year. BAT is taking advantage of the situation in Burma where unions are banned, there are limited and rarely enforced health and safety laws and the minimum working age is 13 years.

A WTO investment agreement would do nothing to address such unscrupulous international investment. Rather, it would give more licence to companies like BAT to operate without adequate control.

From Doha to Cancun?

Since a WTO Ministerial in Singapore in 1996 there have been attempts led by the EU to get “new” issues like investment on the WTO agenda. However, the majority of developing countries have been extremely reluctant for this to happen. At the Doha Ministerial in 2001 powerful pro-investment agreement countries managed to force a commitment in the formal meeting declaration which “recognised the case for a multilateral framework” on investment and which agreed that “negotiations will take place after the 5th session of the Ministerial conference [Cancun] on the basis of a decision to be taken by explicit consensus at that session on modalities of negotiations”.

This declaration was highly controversial and has been subject to varying interpretation ever since. The chairman of the Doha Ministerial made a special clarifying statement:

“A decision would indeed need to be taken by explicit consensus, before negotiations on

trade and investment....could proceed” and “this would also give each member the right to take a position on modalities that would prevent negotiations from proceeding”.

Pro-investment countries led by the EU have been deliberately interpreting the statement to mean the issue on the table in Cancun is *how* to proceed, whereas many others believe the issue on the table is *whether* to proceed. Moreover although the declaration recognises the need for a multilateral framework it does not say what kind of framework nor what is the appropriate venue.

Friends of the Earth believes that there is no legitimate mandate to proceed with negotiations on investment in the WTO.

Investment is largely a new issue for the WTO

Whereas most of the WTO rules cover the trade of goods (real things like bananas) and, more recently, services (things you cannot drop on your foot, like banking), investment is not yet a major component of the WTO rules.

Investment is only partly covered under the current WTO agreements. All of these current agreements are not primarily investment agreements and all of them are seriously flawed and highly controversial (see further reading below). They include:

- The Agreement on Trade Related Investment Measures (TRIMs) already bars countries from imposing several kinds of performance requirements on foreign investors. For example, governments cannot require corporations to use a minimum percentage of domestically produced components.
- The Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement protects the interests of foreign investors through the enforcement of patents, for example.
- The General Agreement on the Trade in Services (GATS) covers the case where a service supplier from one country sets up a business, subsidiary or branch in the territory of another: for example, US Citibank opening a branch office in Singapore. There are many sectors of business which are deemed services including financial services, retailing, energy and water supply. Together they represent about half of FDI world stocks and flows.¹³
- The agreement on Subsidies and countervailing measure has a bearing on certain aspects of incentives provided for export-oriented FDI.

Who wants what in a WTO investment agreement?

- The European Union (particularly the UK), backed by Japan and others, is the main protagonist pushing for a decision at Cancun to launch negotiations on investment. The EU will, at least, go for getting agreement on the process that keeps the idea alive: procedural issues pertaining to the negotiating phase, such as the number of meetings, timing, and deadlines for tabling proposals; the scope and coverage of the negotiating agenda; and special and differential treatment for developing countries.
- Most developing countries such as India insist that the issues should either be discussed outside of the WTO context or should be deemed not yet ripe for negotiation.
- The US has said it will “not block progress” in investment talks but recent leaks suggest that they want to go for a “high-standards” agreement - fearing a “lowest-common-denominator” agreement that would not match the “high standards” of investment protection contained in hugely problematical U.S. free trade agreements (FTAs – like NAFTA) and Bilateral Investment Treaties (BITs)¹⁴. In practice this could mean the US is pushing for a “stronger” agreement than the EU has tabled.
- The Business lobby including powerful industry groups such as the International Chamber of Commerce (ICC), UNICE, the CBI, the European Services Forum are for an agreement on investment. In some cases they have lobbied for much “stronger” provisions than the governments have. For example the ICC wants to include all investment including portfolio investment and highly controversial investor-state dispute settlement (See below)
- Much of civil society is against an agreement. For example the Trade Justice Movement representing up to 10 million people in the UK is against it. This is matched by the views of people in the South as shown in the positions of FOEI, Third World Network, the Our World Is Not for Sale network and many others. The Trade Unions have said that they cannot support current proposals

The negotiating context for Cancun

It must be noted that the context in which an investment agreement is being fought is one of a Round (or “single undertaking”) where everything is on the table. That means that the countries who oppose or propose an investment agreement cannot view it in isolation but rather must consider how and to what extent their view is “negotiable” and to be traded off against other gains or losses in another part of the talks. Even this is an optimistic analysis of the situation, as invariably the ways of the WTO mean negotiating power lies with the rich countries. In particular, an investment agreement is likely to be used as a bargaining tool against the discussions about Agriculture.

Proposals for a WTO investment agreement: the key concepts explained

Broadly the agreement would be about “opening” up access by TNCs and putting constraints on governments to discriminate over foreign investment. The EU have adopted a strategy of going for the less controversial parts of the old MAI now, presumably with the hope that the remaining parts can follow subsequently. Proposals put to the WTO’s Working Group in Trade and Investment (WGTI) or published in policy papers so far include:

Coverage (the types of investment) - In the first instance the EU propose it to be centred around FDI (i.e not portfolio investment) and apply to the primary (i.e agriculture, fisheries and mining, and secondary (i.e manufacturing) sectors¹⁵ although the US have recently said they want a “broad” definition which could be interpreted to go beyond FDI.¹⁶

Non-discrimination - This would require that a host country should not discriminate between companies from other countries (so-called most favoured nation treatment (MFN)), nor between local and foreign investors (so-called national treatment (NT)). But it is precisely the ability to discriminate between investors which is needed by countries to ensure that the quantity and quality of FDI needed for sustainable development is achieved. National treatment exposes local businesses to direct investment competition from the world’s most powerful TNCs and threatens countries’ ability to regulate TNCs to protect local economies.

Market Access - Unlike MFN and NT which are relative standards of treatment, market access is about host countries committing to refrain from specific policies or measures regardless of whether they are discriminatory or not. Market access measures could cover disallowing limits to be set on the content of foreign capital, or limits on the number of suppliers in a sector. These measures restrict “policy space” for countries.

“Opt in”, “bottom-up”, “positive list” or “GATS” approach - For TNCs that want to gain access to a country there would be a system of commitments made by each country sector by sector to the NT and market access provisions (as in the GATS agreement). This, in particular, is advocated by the EU and is claimed as a major concession from the MAI. This is misguided not least because the GATS agreement is not flexible as claimed.¹⁷

“Top-down” or “negative” approach - The negative approach as favoured by some industry lobbies would say that everything is covered unless a country specifically negotiates an exemption. This could apply MFN and NT across the board (allowing for “exceptions”). Either way MFN and NT are not appropriate for investment as the ability to discriminate is vital for countries’ development.

Admission rules (pre-establishment rights for foreign investors) - These would apply to government measures affecting investors before they invest. They would remove the right of countries to screen investment and to be able to decide if a particular form of investment should proceed.

Post-establishment rules - These would apply to government measures affecting investors after they invest; applying NT for example to all investments already established in the host country. This would restrict a country’s ability to ensure that FDI does some good for the local economy, for example.

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De facto discrimination - If the effect (intended or not) of domestic laws in a host country is to discriminate between foreign and local investors then those domestic rules would be subject to a dispute. (This is in the current GATS agreement). This would exert a serious chill effect on democratic law making.

Asset expropriation - Companies or countries can challenge a host country, or seek compensation if it changes the circumstances for an investor such that its assets are taken or devalued. This could apply to **direct** expropriation i.e. pertain to re-nationalisation of an industry or **indirect** (or "creeping") expropriation i.e. to changes in environmental rules. (This was in the MAI, is in NAFTA but not in GATS, and is not in EU proposals so far despite industry lobbying for it).

Standstill provisions (or "lock in") - This means that in practice the only direction policy can go is towards more liberalisation. Commitments made by countries are effectively irreversible, even if they need to protect themselves from a new technology or nurture an emerging sustainable industry.

Investor state disputes - Whereas WTO rules currently only allow a country to initiate a dispute against another, some corporate lobbies think a company should be able to do this as well (and some BITs already allow this). This would give too much power to TNCs.

Competition policy is another "new" issue proposed for the WTO. This could be another means for investment issues to be introduced into the WTO. So far proposals are focusing on the investment rules in host countries to promote market access for foreign multinational companies, rather than rules to stop the mega-mergers that place large amounts of trade and investment into a smaller and smaller number of giant companies, leading to anti-competitive, near monopoly, situations.

British Brands Bowing out

Further "liberalisation" of investment under the WTO could be more bad news for Britain. Already businesses are choosing to locate overseas. For example:

- James **Dyson**, inventor and champion of British manufacturing, was condemned by the government and unions last year after he shifted production of his vacuum cleaners from Wiltshire to the Far East with the loss of 590 jobs. The driving forces, he said, were the much lower labour and production costs in the Far East, and the fact that the company's suppliers were increasingly based in the region. Hourly labour costs at the time in the UK were £9 while in Malaysia they were £3. The Trades Union Congress said: "Malmesbury is a small market town and Dyson is the only major manufacturer in the area. How is the local economy expected to soak up these redundancies?".¹⁸
- **Hornby** was the last significant toy manufacturer left in the UK until its factory in Margate was closed to switch to Chinese production. Hornby says it is "reaping the benefits" of moving its production to China: Hornby's site near Hong Kong employs 1,100 people for the same amount of money it cost to employ 500 people in Margate.¹⁹
- The crystal and china maker **Waterford Wedgwood** announced this year that it was closing two British factories, with the loss of more than 1,000 jobs, and switching to a lower cost producer in China. "How would you feel if you walked into work and someone said they were shutting?" said Carol Jones, a factory worker. "Until two or three weeks ago we were told we were doing well". China is fast gaining a name as the workshop of the world. Critics say that should be sweatshop. The average annual income in China is around £555. In the UK it is more than £15,300, but this difference in purchasing power is irrelevant for companies concerned with serving international markets rather than China's domestic market. Their concern is the comparative labour cost for the same product.

Investment rules could make it easier for UK jobs to go because it could be more difficult for us to encourage our local businesses and economies. Richard Hawes of the accountants Grant Thornton predicts that these trends will continue: "attracted by cheap labouring costs, free trade zones and improved global reach, many UK companies are following the example of the likes of Dyson and moving production lines to Asia to increase profit margins".

Peter Booth, the T&G union's national officer for manufacturing, said globalisation was costing thousands of British jobs. "We have seen it in the textile and clothing industry with production being transferred to the Far East and Asia. Now we are seeing it in other industries". Greater access to western European markets through the World Trade Organisation and lower tariffs was making it easier for low-cost manufacturers from countries without western levels of labour protection to export globally. "It is really serious stuff. It is becoming easier for companies to relocate their production there at the expense of jobs here".²⁰

Ten reasons to reject a WTO investment agreement.

1. Foreign Direct Investment is not delivering for the world's poor (and a WTO agreement won't fix this)

There is only limited evidence that FDI is good for development even if it gets to those who need it. The bulk of FDI goes to the world's wealthiest countries leaving the poorest without. In 2002 70% of FDI went to developed countries while just 30 countries got 100% of the FDI going to the South, with Africa receiving only 2%²¹.

In any case, much of current FDI is associated with some serious problems:

- Investment that consists of mergers and acquisitions may not actually lead to any increase in production in a country as it simply changes the ownership, often followed by "efficiency measures" aimed at maximising profit for the new owners rather than the good of local development.
- FDI is renowned for leading to job losses. For example, when BP merged with Amoco it led to 10,000 job losses then a further 2000 when it in turn acquired American oil company Arco.
- FDI doesn't necessarily bring new technology to countries that need it (as even the EC has had to concede).²²
- Investment can lead to a net outflow from the host local and national economy of profit royalties, licence fees and dividends and can lead to a structural balance of payments deficit. In balance of payments terms, FDI is like a very expensive loan, and generates the effect that you require more and more FDI/debt to pay off the returns on existing FDI. As a development tool FDI can even be more "expensive" for a country than the repayments on aid or debt²³. It is even suggested that FDI is the contributor to what could be the next big economic crisis for the developing world.²⁴
- There is no consistent evidence that FDI promotes narrowly defined economic growth – studies differ in their conclusions depending on a variety of factors.

The development benefits of portfolio investment are even more doubtful. Increasing movement of short term capital is thought to contribute to financial crises. For example in the 1997 Asian economic collapse at the first sign of economic problems the huge amount of speculative investment that had poured in to the region in boom time flowed out again almost overnight with the estimated effect that over 50 million more people in Asia fell into poverty. Impacts were felt all around the world; cheaper exports from Thailand caused the closure of a German Electronics company in the UK with the loss of 1,100 jobs²⁵.

FDI can play a role in sustainable development however for it to do so governments need the right to regulate it at the national level in order to achieve their goals; for example by using performance requirements that ensure some of the money goes into the local economy, or into a region of the country that needs it the most and other measure to protect public health, social security and the environment.

Even the World Bank has noted the limited effect of FDI because factors like domestic savings, promoting local competition and entrepreneurship and complementary public

investment in areas such as education are much better for generating growth²⁶.

It was these kind of policies that Northern countries used on their development path and today the many developing countries that have succeeded in attracting foreign investment have used the proceeds to further their development. It is precisely this power to regulate and discriminate in the interests of development that a WTO investment agreement threatens.

2. FDI threatens the Environment and increases environmental injustice (and a WTO agreement won't fix this)

If sustainable development (as it should be) is the ultimate goal for public policy then three outcomes must be sought simultaneously. The first is that the level of natural resource extraction, pollution and impact on diversity must be within the limits that the environment can sustain. The second is that everybody must have access to their fair share of natural resources and the burdens of over extraction and pollution must not be born disproportionately (in particular, the imbalance between the "over-consumption" of resources by the rich and developed world and the "under-consumption" by the poorest needs to be addressed). The third is that, to both make the transition to sustainability and to maintain it, the active and democratic participation of society must be ensured.²⁷ Any claim about the benefit of FDI under a WTO investment agreement must be measured against these benchmarks.

The world is clearly a long way from achieving sustainable development. In the case of global climate change, for example, not only have we exceeded the atmosphere's limit to absorb greenhouse gases emissions, but there are huge disparities between the winners and losers in the situation. In 1995 20% of the world's population in the North were 'high emitters' responsible for 63% of global carbon emissions, while 20% of the population (primarily in the South) were 'low emitters', responsible for 2% of emissions²⁸. Moreover the poorest people and countries are desperately in need of energy sources and are the most likely to die from the devastating effects of climate change.

This briefing already establishes that unregulated FDI may be more likely to exacerbate poverty than to improve it and that a WTO investment agreement will not necessarily bring any more or any better FDI. A WTO investment agreement will also not address the trail of environmental destruction and resource expropriation associated with many forms of FDI and could prevent much needed improvements in resource management and local participative decision making for sustainable development. Overall the whole approach of an agreement would be one where sustainable development public policy objectives are confined to the edges, written in as exceptions open to interpretation and dispute rather than the primary consideration. The 'lock-in' effect of a WTO agreement would act as a brake on environmental improvements and transfer power over resources from local people to TNCs, consumers in other countries and the WTO.

A WTO agreement would do little to help and would probably harm the prospects for sustainable development on three main levels. The first is in the overall pattern of production

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and consumption, the second is at the level of policy making and standards and the third is about the performance of individual investors.

When TNC investment goes wrong: Metalclad messing with environmental protection in Mexico

Metalclad is a US company which sued Mexico for \$90 million using the kind of Investment rules that could be agreed in the WTO. Metalclad bought land in Mexico to open a hazardous waste treatment facility. The company claims that delays imposed by the Mexican state government of San Luis Potosi and the creation of protected ecological zone which included Metalclad's site have prevented the company from opening the facility thereby "expropriating" the company's property and initial investments.²⁹ They could do this because the North American Free Trade Area (NAFTA) investment chapter contains expropriation rules. If rules on expropriation and compensation were to be applied through the WTO the right of governments to regulate as they see fit in order to protect the environment would be curtailed just as they were in Mexico.

Unsustainable and inequitable global consumption

At the big picture level a WTO agreement would probably serve to perpetuate the pattern of rich industrialised countries consuming more than their fair share of land, water, wood, minerals and resources. This is because current investment has a high component of northern based TNCs "investing" in the South often concentrated in the extractive industries which export these resources to northern markets. This investment has been associated with high levels of environmental and social damage and serious impacts on un-exploited areas of bio-diversity and indigenous people. In the petroleum and mineral sector, a host of case studies suggest that, on average, TNCs have tended to follow, or even worsen – local practice³⁰. Many countries have raced to liberalise their mining laws, for example, in an attempt to get this short-term foreign exchange with little room to consider the longer term impacts. If they are pressured, through a WTO agreement, to 'lock-in' this liberalisation preventing them from changing policies in future, this will help consolidate the process.

'Locking-in' liberalisation also traps us in unsustainable forms of production and consumption. The claimed 'good' of past and hoped for future increases in global trade and investment seems to be based on the premise of the 'death of distance' with declining world transport and communication costs making it possible to ship and fly products and components across the globe in the 'search for efficiency'³¹. Clearly this notion of efficiency has conveniently ignored the greenhouse gas emissions associated with this transport and the fact that these emissions are not yet regulated under the Kyoto climate change protocol.

Environmental Policy Space

The need for countries to retain policy space to manage FDI for the ends of environmentally sustainable development is not adequately addressed by any of the proposals made for a WTO agreement. Sustainable development is a complex and moving challenge that is likely to be achieved differently according to the particular social, political and environmental circumstances of countries regions and localities. A one size fits all approach that would be

implicit in a WTO agreement is not what is needed. Rather, countries need the space to pick and mix the policy tools (including measures that may be labelled protectionist) that they and their population deem to be the best to achieve sustainable development.

However, countries rights to try and manage their natural resources are already under threat. The EU is already challenging the rights of countries such as Taiwan to prevent foreign companies purchasing or leasing land in agriculture, forestry, fishing, pasture, hunting, salt production, mines and sources of water in the current GATS talks. Also, the EU is leading the development of a 'necessity test' under the GATS aimed at eliminating domestic regulations – such as technical standards – that are considered to be 'more burdensome than necessary' on business. This constitutes a serious threat to effective environmental regulation and there is every reason to think similar rules will be inserted into a new WTO investment agreement.

Leaving it up to WTO dispute panels to decide what is 'necessary' and what is too 'burdensome' is a recipe for bad environmental policy-making. There is already evidence that the WTO is not working for sustainable development considerations. For example, the results of WTO disputes have tended to go against environmental sustainability cases and the multilateral environmental agreements have come under persistent threat from the WTO.

The race to the bottom and the chilling effect

There can be intense competition between countries to attract FDI allowing companies to play countries off against each other, lowering or keeping low labour, health and safety and environmental standards and costs everywhere. Whether or not it actually makes any difference to the long-term investment climate in a country, many companies lobby using the threat of leaving, or the promise of arriving, to lower standards and many governments respond.

UNCTAD acknowledges this when it says, "the fact that some countries view limiting labour and environmental standards as an incentive to FDI [in Export Processing Zones] may indicate a need for collective action ...to limit the risk of a possible race to the bottom."³² There is also further evidence that "while foreign firms may not have been drawn in by lower standards, they clearly perform like environmental renegades once they get there."³³

Even if companies don't actually move, and don't behave any worse than anyone else liberalised investment can have a potential chilling effect on a government's ability to adopt much needed *new* sustainable development policies. There is evidence that policy makers are very sensitive to the presence of foreign investors so they might not weaken environmental standards but they do not enforce or increase them either. Increased corporate globalisation has inhibited a race to the top and causes environmental commitments to be 'stuck in the mud'.³⁴

This process is only likely to accelerate if there is any further deregulation of investment through the WTO. As has already been mentioned, the potential development of GATS-style rules on 'domestic regulation' constitute a serious threat to environmental policy-making. Also of major concern is the likely insertion of rules on 'creeping expropriation' where new government measures that have an impact on a company's operations – and thus affect its investment – can be challenged. Such rules in the North American Free Trade Agreement (NAFTA) have been used to successfully undermine environmental policies on the siting of a

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toxic waste dump and the use of harmful additives in fuel (see box on Metalclad).

Finally a WTO investment agreement would not address the cases of environmental injustice that unregulated FDI can create. There is evidence that the location of polluting FDI can be based on differences in the income and/or education levels of local communities. FDI tends to concentrate in “pollution zones of poorer people, both within and across countries where firms perform worse and where regulation is less effective.”³⁵ A WTO agreement will ‘lock-in’ a process of liberalisation that is putting control out of the hands of local people who bear the brunt of this environmental injustice and in the hands of even more remote institutions and powerful TNCs.

In conclusion, none of the proposals for a WTO investment agreement address the need for collective action to limit the race to the bottom, to raise environmental, labour and other standards, or to stop bad practices being concentrated in the areas where people have the least capacity to fight back. Instead the proposals would make it more difficult to address the sustainable development challenges the world faces for example, by including expropriation measures, and by limiting the policy space of host countries, or by giving more power to already powerful TNCs.

3. FDI can lead to human rights abuses (and a WTO agreement won't fix this)

Foreign investment in non-democratic countries can help support repressive regimes. That is why some governments (at national or local level) use laws and policies to discourage business from investing in dictatorial regimes. But the MAI would have required that foreign companies could not be treated differently for investments they make in other countries. This could have meant that officially sanctioned “Boycotts” of companies associated with the former Apartheid regime in South Africa or the Burma Military Junta would not be possible (see box on BAT).

There are many reports of multinational companies' role in rights abuses and violence. For example, in Indonesia Freeport McMoran (partly owned by Rio Tinto, the world's largest mining company) have admitted that it pays money to the armed forces for security. Indonesian civil society groups are concerned that this has led to human rights violations³⁶. A WTO investment agreement would likely take no particular heed of such concerns, nor allow host countries to discriminate on the basis of concerns about the human rights record of company investors. Business lobbies are keen that there are no performance requirements or “conditionalities” tied to a WTO agreement.³⁷

4. There is little evidence that a WTO Agreement would bring any more FDI

FDI happens anyway and has grown spectacularly without a WTO agreement to help it. In 1999, China attracted about 20% of all FDI inflows to developing countries but was not known for its deregulatory approach to investment or any other sector of its economy. FDI is

much more likely to be attracted to countries with a large market, basic infrastructure and a good skills base – not because of an investment agreement. Even if there as an agreement, the process of trade abandonment (where the majority of FDI goes to a minority of countries whilst the others are abandoned in a supposedly globalised economy) will continue. A WTO investment agreement would do little to change this inequitable pattern of investment.

Even the World Bank says a WTO agreement is not the way to go: “countries get the most of the positive growth stimulus from unilateral reforms tailored to local strategy and conditions and these reforms should not be held hostage to international agreements”³⁸.

Existing bilateral investment agreements rarely bring subsequent increases in investment³⁹ and it is not clear what a WTO agreement would add. Rubens Ricupero Secretary General of UNCTAD has said “so far there is no empirical evidence to suggest that developing countries are necessarily better off in terms of attracting and retaining quality FDI within the confines of multilaterally agreed disciplines in investment...What is evident...is that the existence of investment rules will do little to tackle the problem of distribution of the potential gains from trade and FDI. Investment tends to concentrate where capital is already present. Thus imbalances between and within countries- imbalances which have been sharply exacerbated as a result of globalisation and liberalisation – will not be affected by the absence of investment barriers, as some of its proponents have suggested”⁴⁰.

Even the EU has had to concede: “It has never been suggested that the establishment of such rules was key to enhancing the attractiveness of host countries FDI. Rather they would make a limited but valuable contribution by enhancing legal certainty for investors”⁴¹.

Despite this lack of evidence the proponents of an agreement (like the UK government) still persist in claiming that it is needed in order to bring more investment to developing countries.

5. A WTO Agreement would not lead to better TNC behaviour

A WTO investment agreement is aimed at placing legally binding restrictions on the actions of governments – something international business lobby groups wholeheartedly support. However, the enthusiasm of international business lobby groups for binding rules does not extend as far as the operations of their own member companies. As UNCTAD points out, “The business community’s aversion to binding legal standards governing corporate operations contrasts with its strong advocacy of international legal commitments applied to the obligations of governments towards foreign investors.”⁴²

As can be seen from the quotes above, government policy is completely in line with the views of big business. Businesses, they claim, should not be ‘over-regulated’. Forcing companies to comply with regulations is too ‘heavy-handed’ and the ‘voluntary approach’ is the best way to encourage best practice. However, reliance on voluntary measures and self regulation by international investors, such as the OECD guidelines to counter the negative social and environmental impacts of FDI, is insufficient. This is because the ‘voluntary approach’ has been shown to be ineffective.⁴³ More importantly, UNEP notes the is a growing gap between the efforts of business and industry to reduce their impact on the environment and the worsening state of the planet; “...in most industry sectors, only a small

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number of companies are actively striving for sustainability, actively integrating social and environmental factors into business decisions. And, secondly, because improvements are being overtaken by economic growth and increasing demand for goods and services: a phenomenon known as the "rebound effect."⁴⁴

Similarly the vast proportion of CSR (Corporate Social Responsibility) efforts are merely "greenwash".⁴⁵

In the case of the OECD guidelines, a comprehensive critique has already been made by civil society pointing out the weak implementation mechanisms, a dependence on confidentiality rather than disclosure and weak wording. For example, the guidelines do not even require adherence to existing international instruments such as the International Labour Organisation (ILO) convention, the Universal Declaration on Human Rights and international environmental agreements. Neither is there an enforcement or sanction mechanism or an effective means for citizens to seek justice.⁴⁶ A recent study shows that the guidelines have not been properly implemented, have hardly even been used and when they have the results have been inconsistent.⁴⁷

What is needed is a system of legal rights for the people affected by the foreign investment including rights to information, to participate in decisions (including the right to say no) and to seek redress, and a system of obligations for the corporations and their home countries to ensure transparency and accountability around the world. The WTO is the wrong institution for such an agreement as it is beyond the WTO's remit and expertise.

6. Policing of a WTO investment agreement would favour the economically strong countries and big business

As with other WTO rules, investment rules would be subject to the WTO dispute resolution mechanism in which rulings are made by a technical trade law panel (with no remit and little knowledge of wider sustainable development) and enforced by the use of sanctions or fines.

There are huge differences between the capacity of developing and developed countries' technical expertise to handle WTO disputes and economic muscle to use sanctions. For example, even if a small country like Costa Rica was successful in winning a dispute against the US, the effect of its sanctions on a huge economy like the US would be negligible. Some examples of investment litigation under the investment chapter of the North American Free Trade Agreement (NAFTA) and numerous bilateral investment treaties bear this out.⁴⁸

If an investor state dispute settlement procedure were to be set up in the WTO, as in the NAFTA and as currently proposed by a WTO member, corporations would be able to sue governments at the WTO. This would give the TNCs far too much power over host governments.

7. A WTO investment agreement will be used as a

negotiating tactic

A WTO investment agreement is unpopular not only because of its severe implications but because of the way discussions have been and are likely to be conducted in the WTO.

Firstly the EU has attempted to view the negotiations on an agreement as inevitable when there has not been an explicit consensus to proceed (see above).

Secondly, the EU may be using a tactic of starting with a modest set of proposals that they intend to be progressively extended, in a kind of ratchet effect. Countries would initially be asked to “only” opt in the sectors they wanted to liberalise. The tactic seems to be to draw in countries to agree to the concept that investment rules belong to the mandate of the WTO and then to draw them into an agreement which appears not to be so harmful and where there is some space to make choices; and then later on to pressure them to liberalise more and more in terms of sectors and depth of policy measures⁴⁹.

The example of GATS is relevant here –the EU and others have used the cover of an opt-in approach to put secret pressure on developing countries to open up many sectors of their markets to developed country service companies⁵⁰. GATS also “locks in” any commitments made placing governments in the impossible situation where they would have had to foresee every possibly future eventuality before liberalising a sector. This is because the modification procedure takes three years and involves paying compensation and potentially WTO arbitration – something clearly beyond the capacity of many developing countries. GATS also uses an approach of requests and offers, essentially a bilateral negotiation, which puts individual developing countries at huge negotiating disadvantage. To claim, as promoters do, that a multilateral investment agreement would be fairer for developing countries and then to go for an opt-in bilateral approach is clearly either sneaky or stupid.

Thirdly the negotiations themselves may be beyond the capacity of many developing country representatives who are few in number compared to the delegations of the developed countries. Claims that a WTO agreement would simplify matters for developing countries are false. It is true that many countries are already involved in non-WTO investment agreements with other countries, but claims that a global agreement would lead to the situation being clearer and simpler are misguided. The bilateral treaties would still be in force and a WTO agreement would simply add another layer and burden on developing countries in particular.

Lastly the EU seems intent on getting this new agreement from developing countries on investment when it has very little to give itself. It is suggested that calls for investment liberalisation by the EU and its allies are really concessions hoped to be extracted from developing countries in return for some smaller concession on markets for their agricultural goods. It is difficult to see why the EU thinks it can get away with this when its commitments to reform the Common Agricultural Policy may be largely set and therefore not up for negotiation at least not in the time frame of the Cancun Ministerial.

8. A WTO investment agreement would give the WTO too much power and undermine democracy

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Because the flow of investment is so large, bringing it under the control of the WTO would considerably increase the power of the WTO, transforming it from a body dealing mainly with trade to an institution with oversight of many economic, social and environmental decisions: a woeful prospect given the WTO's record to-date on the environment and sustainable development.

An investment agreement would have serious impact on social, economic and environmental policy making affecting the ability of governments (potentially at all levels including local) to plan in relation to local participation and ownership, the ability to build the capacity of local business and economy, and the ability of communities to have a set of environmental controls and screening procedures on foreign investors. It would also weaken the bargaining position of a government in relation to foreign investors.

In many countries there has been little formal involvement of civil society or parliaments in consideration of the justification for these rules or their alternatives.

9. Most of the world doesn't want a WTO investment agreement

Despite government claims that the WTO Doha declaration is a "development" agenda and that a global liberalisation of investment rules would be in the interests of the developing countries the developing world remains largely unconvinced. According to formal submissions to the WTO and other fora there is no consensus among WTO members on investment rules. This means that unless something else big gives there cannot be progress on this at Cancun.

Many WTO members are actively suggesting alternatives to the EU's proposals.

A couple of months after the World Summit on Sustainable Development (WSSD) in Johannesburg, a set of developing countries proposed international regulation of TNCs as part of the discussions on the need for the proposed new investment agreement under the WTO.⁵¹ This is an indication that the corporate accountability issue is considered a significant and meaningful issue by the developing world. Clearly those governments consider international rules to control multinationals an essential aspect of just development. This shows the UK's rhetoric about its proposals on trade being in the interest of the developing world have not taken account of what the South is actually calling for.

10. But look who does want a WTO investment agreement (the vested interests)

A WTO investment agreement is largely promoted by the countries that are home to the TNCs that invest and the lobby groups that represent them. Despite the fact that developing countries have said they do not want to automatically start negotiations on investment and the lack of evidence that liberalising their investment rules will do them any good, the proponents still insist on claiming they are doing it for the developing world. For example, the International Chamber of Commerce has urged the World Trade Organization to agree

multi-lateral rules governing investment as part of the Doha round and said they would boost investment in the developing world.⁵²

Investment rules as proposed would benefit the investors more than the host countries by giving TNCs more rights and placing more obligations and restrictions on the governments of the host countries.

Some vested interests behind the scenes

Lobby group name: **International Chamber of Commerce (ICC)**

Purpose:

Describes itself as "The world's only truly global business organization". Offers members "direct access to national governments all over the world through its national committees".

Membership:

The A-Z of the corporate world, including companies such as Aracruz, British Aerospace, Coca-Cola, Dow Chemical, Exxon, Ford, General Motors...

Key personnel:

Chaired by Jean-René Fourtou, Honorary Chairman of Aventis SA and a member of the European Roundtable of Industrialists (ERT). Dr Willy de Greef of Syngenta chairs its Commission on Biosociety.

WTO goals:

The ICC is not only calling for new negotiations on investment liberalisation in the WTO, but also aims to push governments even further than they claim to want to go, by recommending that an agreement should cover a very wide range of types of investment and allow companies to take governments to court directly.

The ICC's Biosociety Commission also wants a new investment to "promote investment liberalisation and adopt minimum standards permitting investors to protect their investments, operate freely and expand." It calls for a range of key controls on investors to be considered as "potentially counter-productive to objectives for increasing investment in biotechnology."⁵³

Lobby group name: **American Chamber of Commerce EU Committee**

Purpose:

Based in Brussels with the express purpose of putting the views of "European companies of American parentage to European Union institutions". According to the Economist, "The most effective lobbying force in town."

Membership:

Heavyweight membership including, for example, AOL Time Warner, Boeing, Cargill, Chiquita, Coca Cola, ExxonMobil, Goldman Sachs, McDonalds, Microsoft, Monsanto, Nike, Syngenta and Walt Disney. 72 of these corporations participate in its subcommittee on trade.

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Key statements:

'AmCham' clearly supports a new multilateral framework on investment favouring a strong focus on investment protection and calls for controversial investor-to-state dispute resolution.

What we need instead

It is important to regulate investment but the rules currently proposed are completely inadequate and the WTO is not the right place to do it. If foreign investment is to be harnessed to further sustainable development it will need to be regulated in the right way and weighed up against other means of achieving sustainable development.. Instead:

- Internationally, governments should jointly initiate negotiations within the UN for a binding agreement for corporate accountability requiring investors to protect the environment and the rights and interests of local communities. This would build on the agreement reached at the World Summit on Sustainable Development in Johannesburg in 2002.
- Existing investment related WTO rules should be reformed to allow governments to regulate investment in a manner consistent with sustainable development. In particular GATS should be stopped and overhauled.
- Current Bilateral Investment Treaties should be reviewed and future proposals should only go ahead if they are aimed at achieving sustainable development not simply liberalisation.
- Consideration should be given to a small tax on currency exchange or FDI (such as a Tobin tax) to dampen speculation and to generate and redistribute financial resources to measures that promote sustainable societies and to those areas of the world that FDI does not reach.
- National governments should also do more to ensure that inward and outward investment promotes sustainable development. The UK should include corporate accountability in its review of Company Law. The UK should also link the use of export credits and other investment guarantees for UK companies conditional on meeting international or UK standards (whichever is the highest) wherever the company operates.
- Every country needs the policy space to promote sustainable economies. Attracting appropriate foreign investment therefore forms one part of a development strategy and should not be seen as an end in itself.
- Governments should have the freedom to use the following measures as the norm:
 - promote stable and welcome investment in the real, productive economy (rather than speculative or short term or poor quality investment);
 - screen foreign investors;

- generate locally decided performance requirements;
 - set preferences for local and domestic enterprises;
 - a variety of forms of regulation of both domestic and foreign investors (particularly environmental and social performance);
 - Promote domestic savings and investment.
- Rich countries should not see FDI as a substitute for Overseas Development Assistance (aid) and debt relief⁵⁴.

Conclusion

The Doha meeting of the World Trade Organisation was claimed by some to be the “Doha Development agenda” -a staggering piece of rhetoric, given the likely almost complete absence of a case for development benefits from an investment agreement alone.

All governments, developed and developing, need the flexibility to prioritise development, the environment and social welfare above the rights of the TNCs who are the main investors. It is precisely this flexibility that could determine whether FDI is likely to be a benign or a positive force and that a WTO investment agreement would take away.

A WTO investment agreement should be actively opposed, including a decision to go ahead with discussions about how such an agreement would work or be negotiated.

Further reading and taking action

For updates, further information and new actions to help stop a WTO investment agreement, log onto the dedicated Friends of the Earth web site at www.corporates.org.uk

You can also find other information about the behaviour of international corporations, trade and campaigns for change at www.foe.co.uk.

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Similarly as FDI may just be a more expensive form of debt, northern countries should not view investment measures as a way of helping countries that are heavily indebted. Rather effort would be better placed in dealing directly with canceling debts and removing inappropriate conditions on loans.