Unlimited companies

The developmental impacts of an investment agreement at the WTO

actionaid

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Executive summary

The Cancun Ministerial Conference of the World Trade Organisation (WTO), to be held in September 2003, will see a showdown over whether the WTO's agenda should be expanded to include new negotiations on a multilateral investment agreement. Along with its promotion of the three other 'new issues' of competition policy, transparency in government procurement and trade facilitation, the EU's insistence on an investment agreement at the WTO poses a severe threat to progress on international trade rules at a time when the Doha Round of trade negotiations is already on the brink of collapse.

ActionAid is concerned that an investment agreement negotiated at the WTO could inflict lasting damage on the livelihoods of poor people in developing countries. In particular, there are fears that the opening up of new sectors (for example, agriculture) as the result of a WTO investment agreement could threaten the food rights and land rights of the poor. Governments have an obligation to uphold these rights, and to ensure that the poor are protected from any threat which international agreements may pose to them.

Through its work with local communities in over 30 countries, ActionAid appreciates the benefits that foreign investment can bring poor people. But it is wrong to assume that all foreign investment is necessarily good for the poor. Drawing on new case studies from Uganda, Thailand, Haiti, Mozambique, South Africa, India and Brazil, as well as other sources, this briefing demonstrates how poor people have often suffered as a result of foreign investment – especially where liberalisation has led to new investment in previously protected areas and governments have failed to safeguard local communities against its negative effects.

Most developing countries have liberalised their investment regimes to some degree over the past decade. Yet many have retained important controls and regulations in order to protect sensitive sectors from liberalisation and, in sectors which have been opened to foreign investment, to maximise the positive benefits that such investment can bring. It is precisely these measures which would be threatened by a WTO investment agreement, as developing countries find their own pro-development policies under attack from the liberalisation agenda of the WTO.

ActionAid is calling on the EU to drop its insistence on an investment agreement at the WTO. In particular, ActionAid is calling on the UK government – as one of the foremost proponents of a new investment agreement – to withdraw its support for the EU position immediately. If the UK government is genuinely committed to trade justice, as it maintains, it must heed the opposition of developing country representatives to a WTO investment agreement and abandon attempts to expand the WTO's agenda into new issues which will harm poor people.

1. Introduction

The Cancun Ministerial Conference of the World Trade Organisation, to be held in September 2003, will decide whether the WTO's agenda should be expanded to include new negotiations on a multilateral investment agreement. The European Union is one of the main proponents of such an agreement. It argues that a basic framework of investment rules (similar to those covering trade) would benefit the world economy, and that uniform rules would increase the propensity of companies to invest abroad, particularly in developing countries.

However, ActionAid is concerned that a multilateral investment agreement negotiated at the WTO could inflict lasting damage on the livelihoods of poor people in developing countries. In particular, there are fears that the opening up of new sectors as the result of a WTO investment agreement could threaten the rights of the poor. For example in the agricultural sector, without security of tenure, people may be removed from the land and farms destroyed to make way for foreign investment, threatening food security. Developing countries need to regulate investment in order to protect sensitive sectors from liberalisation and to maximise the positive benefits for poor people. Yet it is precisely these measures which would be threatened by a WTO investment agreement because host governments would be restricted in their ability to regulate in favour of the poor.

Howard Baker/ ActionAid

2. The risks of foreign investment

Foreign investment can bring benefits to the economies of developing countries and to some of the poorest communities in those countries. Foreign investment into the clothing industries of countries such as China, Bangladesh, Cambodia and Lesotho has provided new jobs for hundreds of thousands of workers, a large proportion of which have been women from poorer families (UNCTAD 2002).

Yet it is wrong to assume that foreign investment is always beneficial. As the case studies below demonstrate, foreign investment can also cause great damage to the rights and livelihoods of vulnerable communities. In most of these case studies, governments have failed in their duty to protect their people from the negative impacts of foreign investment – either through allowing new projects in areas which had previously been closed to foreign investors, or by ignoring local communities' rights to food, land and self-determination.

ActionAid believes that the proposed WTO investment agreement would make this situation worse, rendering it more difficult for governments to regulate foreign investment in favour of the poor. An investment agreement at the WTO would put developing country governments under ever greater pressure to open up more sectors of their economy to multinational corporations (see section 4.2 as to what exactly is being proposed and how it will undermine development). This pressure can often lead to the violation of the rights of local communities, as the case studies show.

Even in areas where they welcome foreign investment, developing countries will come under pressure to relax essential controls which regulate the entry and performance of multinationals in their territory. These regulations can make the difference between the most positive forms of investment and the worst forms of exploitation. Through a WTO investment agreement, developing countries would be expected to trade away their ability to regulate multinational companies, in order to attract investment which might not be in the interests of their people.

2.1 Rights under attack from foreign investment

Governments have a responsibility to promote and protect the rights of all their people where foreign investment is concerned. Those rights are enshrined in the Universal Declaration of Human Rights and the international covenants which translate its articles into legal obligations. These include economic, social and cultural rights, as well as civil and political rights.

Many governments do not live up to these obligations. Governments are under considerable pressure to attract investment *(see section 2.2)*. This pressure often comes from donors like the World Bank or the International Monetary Fund. In addition, where the amount of aid going to a country has declined, overseas investment becomes an increasingly important way to obtain foreign capital. This pressure can result in governments collaborating with overseas companies in an attempt to attract them to invest in their countries. In the drive to attract foreign investment at any cost, people's rights are often compromised or ignored.

ActionAid, working with our local partners in a number of countries, has come across cases where foreign investment has been responsible for violating the rights of local communities. In all these case studies government action could have mitigated the worst impacts on poor people.

Negative impacts on rights to land, food and sustainable livelihoods

In several of the case studies, local people have been evicted from their land to make way for new foreign investment projects. In Uganda, Haiti and Mozambique local communities were removed from their land and the source of their livelihoods.

In 2001 the world's leading green coffee trader, Neumann Kaffee of Germany, secured 60,000 hectares of land for its new coffee plantation in Mubende, Uganda. The new company operates under the name of Kaweri Coffee Plantation Ltd. In order to make the investment possible under the country's land law, the Ugandan government bought the land from its original owner in 2000 – and during the course of 2001 sent in

the military to evict the families living on it. Many families lost crops and property in the eviction, and have been forced to live ever since as displaced people in a nearby forest, where malaria is prevalent. As well as the severe shock this has brought to families' livelihoods, the community has also lost access to its ancestral burial grounds and to the boreholes from which it drew safe water.

Children have faced particular hardship: the local school, which had been built by the government and expanded with assistance from ActionAid Uganda, was closed as a result of the new investment, and many children were forced to drop out of education altogether.

Women and children alike have been overwhelmed by the increased work load which has been forced upon them in meeting basic tasks such as collecting water and firewood. Families are reluctant to work the land around their shelters for fear that it too will be seized by the government when the coffee plantation is expanded *(see case study 1).*

The inauguration in April 2002 of a new industrial free trade zone on the plain of Maribahoux in northeast Haiti, close to the border with the Dominican Republic, provides another example of local communities losing land to foreign enterprises. Eighty hectares of prime agricultural land – which is already in short supply in Haiti – will be lost to a Dominican clothing company

Case study 1

Uganda A husband who lost his wife during the eviction

"My name is Joseph Mushabe*. I had a home in Kitemba village, which was destroyed during the eviction. It was my relative who persuaded me to come to Mubende. When he told me there was land here, I was interested. I first came in 1984, and visited the area. He took me to the landowner and we discussed the purchase price. I then went back and organised the money. I came a second time with two of my friends. I showed them where I intended to buy and they endorsed the idea. Then I went ahead and paid. I have my documents indicating the ownership of land I purchased.

My house was a 34 iron sheet house constructed with mud and wattle. I had a wife and two children. In June 2001, we were informed that we should leave the land because we were just squatting on land which does not belong to us. I did not take it seriously, as I knew that as for me I formally purchased the land and there were witnesses. After about three months, we were informed that we'd have to leave the land because it did not belong to us. At this point, I sensed a rat and knew that there must be a problem. Then we were invited to a series of meetings with the Resident District Commissioner of Mubende. We agreed that we would be compensated with land and that a

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compensation allowance could be given. We were even promised that the people who bought the land would provide us with building materials such as iron sheets, construct water sources such as boreholes, schools and health centres.

On August 14, 2001, we woke up only to see military personnel backed by heavy military hardware including armoured personnel carriers and trucks. The army destroyed houses, beat up people and in some cases looted household properties including food stuffs. We all ran in different directions. My wife was pregnant at the time and she could not manage the trauma that ensued. In the process, she became sick and died. A friend sympathised with me and gave me a place to settle temporarily. This is where we buried her and this is the same place where I am still living. We have really passed through thick and thin. It was real hell."

** Not his real name.*

2. The risks of foreign investment

Case study 2

Haiti Louis Jean Toussant, age 45, has worked the land for the past 11 years

"Last year President Aristide turned up without telling anyone. He came and talked to us in Spanish – he did not even speak the language of his people. They brought along people they had paid to cheer for them. I had a tired heart when I heard what they said. I was so upset – this President, he is bringing a death project to our land, and these people are applauding. Why should they care? They are not from here, they do not see it."

"I have eight children; my land helps me pay for their education. If I lose this land there will be no more money and no more school. I will be forced to live on the streets and into committing crime. We have a term here – Zenglendo – this is an armed group of people who attack others to steal. This is what I will become, I will have no other option. This is an abuse, a wrong. This President, he wants to take my life away. What value can he place on me when he is busy taking everything I have?"

Gideon Mendel/ ActionAid

which supplies brands such as Gap, Tommy Hilfiger and Banana Republic. This is likely to have severe impacts on food security in a country that already suffers from critical food shortages. It is seen as the first step in a major investment programme that will open a 5km-wide strip along the entire 375km border, amounting to 1,875 square kilometres of land or nearly 7% of the total area of the country.

In March 2003 bulldozers began work on the plain under the guard of riot police, destroying fields of nearly ripe maize and beans in full view of the farmers who had planted them. Only some of the landowners have been offered compensation, at a very low level, whilst those who farmed the land have received nothing. Proposed factory wages are so low that even if farmers are taken on to work in the new investment zone, they will lose up to 90% of their current income levels. Farmers have led vociferous protests against the planned project and are now preparing to take legal action against the government *(see case study 2)*.

Foreign investment in the services sector has also led to the displacement of local communities, as shown in the case of a new tourism enterprise in southern Mozambique. In 2000 the government of Mozambique granted the South African and Mauritian company East African Wildlife Property a 50-year lease to run the Vilanculos Coastal Wildlife Sanctuary in the spectacular Bazaruto archipelago. The local community was removed to make way for the new investment, which includes an exclusive holiday development with safari camps (the $12 million investment included restocking the area with elephants, hippopotamus, rhinoceros and zebra).

While tourists are invited to enjoy the facilities in purpose-built fishing lodges, restrictions on the local community's fishing rights have affected the lives of up to 50,000 people. At the same time, few of the jobs and other opportunities promised to the local community have materialised. Tourist sites within the wildlife sanctuary are now on sale for $100,000 each, with 27 already taken.

In Thailand and India, local communities are threatened by the environmental impacts of foreign investment projects. In both cases described here, the damage caused by the activities of multinationals threatens local people's ability to grow food and restricts their access to clean water. Again, the governments concerned have been prepared to overlook the needs of local communities in order to attract new foreign investment.

The Udon Thani concession to mine potash is located in northeast Thailand, in a 85,000 hectare area which includes densely populated agricultural land, a national highway and a railway linking Bangkok with the border with Laos. The concession was granted to Canadian-based company Asia Pacific Resources, although the Thai government holds a 10% share in the venture.

Approval to mine the potash deposits in the area required a change to the national Minerals Act, since underground mining on such a scale has never been undertaken in Thailand before.

Yet villagers and experts fear that the mining process will damage the local environment and threaten the rice crop on which 30,000 local people depend. The environmental impact assessment of the mine draws particular attention to the 20 million tonnes of salt waste it will generate, which pose a major threat to farmland, soil and water supplies. This prediction echoes the experience of villagers living near the potash mine in nearby Chaiyaphum province, who are no longer able to use the surrounding swamp for fish and vegetable cultivation. The villagers put the blame for contamination firmly on the mine. Local subsidence is also predicted to be a problem at the Udon Thani field, both during the mining of the concession and for some time afterwards *(see case study 3).*

Plachimada, in the Indian state of Kerala, was a thriving agricultural community in which a wide variety of crops had been grown for centuries – until Coca Cola began setting up a bottling plant there in 1998. Where thousands of local people once worked the land for a living, just 134 are now employed at the plant, with another 250 as casual labourers. Coca Cola's average extraction of up to 350,000 litres of water per day from its new deep wells (which rises to 650,000 litres each day during peak production periods) has severely depleted the community's water table, leaving villagers with acute water shortages and environmental contamination. In April 2002, more than 2,000 villagers – mainly indigenous peoples (Adivasis) and oppressed castes (Dalits) – gathered at the plant to protest against Coca Cola's intensive exploitation of groundwater. In August of the same year, local residents and supporters from across the country marched on the factory to mark 105 days of peaceful 'sit-in' protests outside the factory gates.

Food rights and livelihoods are also being undermined as a result of foreign investment by agribusiness. Worldwide, 1.4 billion farmers rely on farm saved seed but in India, as elsewhere, aggressive marketing of seeds has undermined the ability of poor people to feed themselves. Increased foreign investment has led to the growth of India's private sector seed industry, with worrying consequences for the food security of many farming communities. As a result of mergers, acquisitions and aggressive expansionism by European and US companies, the market for private sector seeds has grown dramatically during the 1990s, with many more farmers now growing bought seed – and especially hybrid seed – than before.

Yet increased dependence on bought seed rather than saved or public seed has led to higher levels of debt among farmers, which in turn threatens their ability to meet basic household needs such as food. Dependence on the hybrids sold by foreign affiliates also threatens food security directly: studies in Karnataka's Bellary district reveal that the maize and

Case study 3

Thailand Sunthorn Sophanao farms rice on one and a half hectares of paddy just outside the village of Non Somboon, which lies at the heart of the mining concession

The farm provides enough for him and his family to eat, sometimes with a little left over to sell. His three children attend school in the village, but Sunthorn fears for their future: "Rice has been fundamental to our way of life for a very long time. We cannot survive without our land. We have to rely on our natural resources, and the same goes for my children." Sunthorn adds that "The company has already trampled on our rights. But what are we to do when the salt starts contaminating the land? How will we make a living? I am happy farming my land, and even if I was given the chance, I don't want to do shift work down a mine."

Dominic Eagleton/ ActionAid

Sunthorn Sophanao holding salt waste created by a test borehole in the area

2. The risks of foreign investment

sunflower seed market is now dominated by expensive hybrids sold by Monsanto's Indian partner Mahyco, but that these hybrids are prone to disease and low germination rates. The locally improved variety of maize, which was able to resist these problems, has been forced out of the market.

Violating the rights of local people and communities

In several of the above examples, as in many other cases worldwide, local people have organised protests against the investment projects which threaten their communities. These people have a right to expect their governments to protect their interests. Instead they have all too often found their rights to participation and decision-making swept away along with their rights to food and sustainable livelihoods.

Even in countries where this right is guaranteed by law, the lure of foreign investment often proves stronger than the requirement to secure local consent. Mozambique's progressive Land Law, for example, enshrines the right of communities to be consulted before foreign investors can be given private land concessions, and even gives them the power of veto over new projects. Yet non-governmental organisations and the Food and Agriculture Organisation of the United Nations have noted that the law is not always properly implemented in practice in Mozambique, with consultations kept to a bare minimum as a means of promoting investors' interests over people's rights. In the case of the Vilanculos Coastal Wildlife Sanctuary there were allegations that were reported in the South African press that the community was not properly consulted when the investment was approved (Macleod 2001).

Similar claims have been made against the industrial free trade zone in northeast Haiti, which failed to include local farmers in the decision-making process when the investment was being discussed – even though this is a requirement under the country's constitution (Volk 2002). Local campaigners in Thailand also point out that there was an almost complete lack of consultation with local communities prior to the approval of the giant Udon Thani concession.

Indeed, a group of 77 Thai senators filed a petition to the Constitutional Court in August 2002 that the country's new Minerals Act – which was adopted specifically in order to allow for mining of the Udon Thani concession – is itself a breach of land rights enshrined in the country's constitution. This is by no means a unique case. Coca Cola's bottling plant in Kerala was set up in breach of the state's Land Utilisation Act, which requires prior approval for any agricultural land to be converted to non-agricultural usage – approval which Coca Cola never obtained.

ActionAid campaigns at local and national levels to persuade governments to respect and uphold laws which guarantee the rights of local communities in the face of foreign investment. For example, ActionAid Uganda is working alongside those displaced by the Neumann plantation in support of a legal challenge which is currently awaiting judgement at the High Court. ActionAid is also providing support for local groups challenging the legitimacy of the Udon Thani concession in Thailand.

2.2 Negative impacts of foreign investment on the economy and poor people

The case studies above show how governments are often prepared to compromise people's rights in order to attract foreign investment. Nowhere has this been seen more clearly than in the case of workers' rights.

The drive to secure foreign investment has prompted governments to offer investors the prospect of ever more 'flexible' workforces, where companies will be freed from having to respect the full range of workers' rights which they would have to guarantee in their home countries. As countries compete with one another to attract foreign investment, many have tried to provide even more attractive investment climates than their competitors by disregarding key rights enshrined in national law. In a number of cases, the erosion of workers' rights has been identified as a positive incentive through which to encourage foreign investment (ILO 2001).

This tendency has set up a 'race to the bottom' in which there is constant downwards pressure on workers' rights in order to offer foreign investors the most enticing deals possible, as in the maquiladora sector in Mexico (see Obrera 2003). Nor are the effects confined to foreign investment projects: the race to the bottom can have a damaging impact on workers' rights across the whole economy, not just in the export processing zones set up to attract foreign capital.

Foreign investment can also jeopardise the security of workers in the domestic sector of any industry which is opened up to competition, especially when that competition comes from the world's most powerful multinational corporations. The vastly superior size and strength of these multinationals often prove too much for local competitors, who are simply forced out of the market. Overwhelming competition of this kind can have devastating effects on local employment, as domestic enterprises shed jobs and ultimately have to close down altogether.

Equally, foreign investment can pose a serious threat to local employment opportunities when it takes the form of cross-border mergers and acquisitions (M&As). In developing countries, such M&As most usually mean the takeover of existing enterprises by foreign competitors. In 2001, over half of all foreign direct investment (FDI)[1] to developing countries other than China came in the form of M&As, continuing a trend seen over the past decade.

Brazil's seed sector provides an example of how extensive these takeovers can be. By the end of the 1990s, just four multinational companies had taken control of 90% of the Brazilian corn seed market between them; as a result of its aggressive policy of expansion, within a two year period, Monsanto had gained control of 60% of this market on its own.

Case study 4

Brazil Two farmers supplying milk to Parmalat

Nancy Frederich is 27 years old and has two children. Her farm is located in Ibirubá, in Rio Grande do Sul state, which is 300km from the state capital. Nancy sold the produce from her family dairy to Parmalat for six years, but has now begun to sell her produce to a local cooperative instead. She decided to change because the prices paid by Parmalat to the small-scale dairy farmers were lower than the cooperative prices. Also, Parmalat's truck often failed to pick-up from her farm. This meant that her produce went to waste and she lost vital family income. She realised that this was a result of her property being the last farm in the dairy collection. The local cooperative not only pays a better price for her produce, but also ensures that it is collected every day. As Nancy commented: "Parmalat paid very little for our milk – we practically depend on the money from milk sales for the upkeep of our house".

Dairy farming in Rio Grande Do Sul state

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Renato Adilson Hildt has a family farm in Rio Grande do Sul state, 60km from the border with Argentina. He has two children and the income from his dairy farming is vital to support his family's basic daily needs. Renato sold produce from his farm to Parmalat for two years, but the prices Parmalat offered were constantly being reduced. Five months ago he felt he had no choice but to change and sell to a local cooperative instead. Renato added that: "Parmalat punished us for two years, paying lower and lower prices for our milk, so we had less and less to pay our bills".

[1] *Foreign direct investment refers to foreign investment which gives the investor a significant degree of control over the enterprise in question – normally, following the IMF's definition, a minimum of 10% ownership. FDI is often seen as safer and more productive for the host country than foreign portfolio investment, which tends to be less predictable and more short-term.*

2. The risks of foreign investment

Box 1 Parmalat – infringement of labour rights and job losses

In a document published by Social Observatory in July 2001, which evaluates Parmalat's operations according to the conventions of the International Labour Organisation, various irregularities were found, including:

- persecution of and threats to union members in some of the company's units;
- unjustified punishment of workers with abrupt changes in shift patterns;
- restrictions on the gathering of workers at the work site;
- abuses in relation to overtime and unjustified pressure for work over weekends and holidays;
- gender discrimination existing in jobs, promotion opportunities and management positions.

Along the same lines, in September 2001 the Central Worker's Trade Union reported to the Brazilian government regarding Parmalat's violation of the Directives for Multinational Companies of the Organisation for Economic Co-operation and Development (OECD), to which Brazil is a signatory. According to the document, Parmalat's industrial plant in Rio Grande do Sul transferred its production line of yogurts to another of the company's plants, leading to the dismissal of most of the employees.

Brazil's dairy sector underwent a similar process of rapid consolidation as a result of liberalisation at the beginning of the 1990s, with multinational companies forcing down prices and taking over many of the cooperatives which had previously processed the milk collected from local farmers. By 1996 the top two companies – Nestlé and Parmalat – had gained control of over 50% of the Brazilian dairy sector. Parmalat also introduced UHT milk to the market, which consequently squeezed out pasteurised milk, and was partly responsible for the rapid industrialisation of milk production in the country.

As a result of these processes of consolidation and industrialisation, many farmers have been forced out of the market altogether. Prices received by pasteurised milk producers in Minas Gerais, the largest milk producing state in Brazil, have fallen by 50% since 1989 *(see Case Study 4)*, while the processing companies and retailers now receive a higher percentage of the final price charged to consumers.[2] Consequently, between 1996 and 2002, the number of farmers delivering milk to the largest companies in the dairy sector fell by 70,000 – Nestlé alone dispensed with 32,000 producers, while Parmalat dispensed with 23,200.

At the same time, dramatic consolidation of the Brazilian supermarket sector by European and US multinationals reduced the number of alternative outlets for pasteurised milk, squeezing the market yet further and forcing more producers out of business. ActionAid is supporting the local campaign to make Parmalat negotiate contracts with small farmers and to review the measures which have led to the exclusion of so many farmers from the dairy sector.

The consequences of such competition can cause lasting damage to local communities. As noted by India's Ambassador to the WTO, KM Chandrasekhar, speaking in Geneva in March 2003:

> "India has a large number of small-scale and cottage industries, using very little capital, employing large numbers and contributing to balanced regional growth and distributive justice. A large-scale foreign investment which displaced existing production in this sector by cornering the market would have disastrous human and social consequences."

As a result, the Ambassador concluded, any further commitments towards the negotiation of a WTO investment agreement "could prove to be disastrous for developing countries", and the WTO should drop the issue from its agenda rather than embarking on new negotiations after the Cancun Ministerial in September 2003.

[2] *Whilst consumer prices for pasteurised milk have also fallen, producer prices have fallen even faster. Therefore, questions remain whether the fall in prices has brought any lasting benefits to poor people in Brazil. Not only have a large number of milk producers gone out of business, but per capita milk consumption has been declining since the mid 1990s and the purchasing power of consumers has also recently fallen because of the macro-economic situation in the country. Both consumers and producers need to benefit if there is to be any lasting impact on reducing poverty.*

Paul Weinberg/ Panos Pictures

Box 2 South Africa – a tale of two dairies

European multinationals only started buying into South Africa's dairy sector at the end of the 1990s. A sharp rise in the volume of dairy imports from the EU due to South Africa's new WTO obligations under the Uruguay Round had already weakened the position of local producers, who were badly hit by the resulting fall in milk prices. The subsequent process of investment liberalisation – for example under a series of bilateral treaties with EU member states – opened up the dairy sector to greater penetration by multinationals. Parmalat and Danone now dominate the dairy sector, controlling well over 50% of the market between them. One accusation levelled against foreign companies is that their investment has 'cherry picked' the best domestic companies (Vickers 2001). Early indications are that "[t]he impact of FDI in the South African economy – particularly in the dairy, pharmaceuticals, steel, and electric and electronics sectors – has not always been positive and has had a crowding-out effect on some local producers." (CUTS 2002).

The incorporation of South Africa's dairy sector into the global operations of these multinational giants has led to a restructuring of the domestic industry. In some cases, the companies have taken the decision to close down South African production of lines such as milk powder in favour of imports from the EU. This emphasis on increasing sales from established European production plants rather than expanding local operations is a particular threat, as shown by the contrasting investment strategies of Italian food manufacturer Parmalat and its French rival Danone.

Parmalat bought into the South African market in 1996 through the takeover of two smaller dairies. It then acquired a controlling share in market leader Bonnita in June 1998. As well as its South African enterprises, Parmalat has also taken over dairy companies in Zambia, Botswana, Mozambique and Swaziland. The company has now embarked on a rationalisation of its operations throughout the Southern African region but remains concentrated on bulk dairy products with less focus on the development of new value added products.

By contrast, Danone has entered the region through joint ventures with dairies in both South Africa and Botswana, and has focused on developing the range of products made locally to include yoghurts, soft cheeses and fresh desserts. This strategy increases overall demand for milk as an input and develops the domestic sector structurally, adding more value and creating more jobs. Danone also aims to develop new export markets for the products, both in Africa and further afield.

Many developing countries actively promote joint ventures such as these as a way of linking foreign investment with development (see next section). Yet there is concern that a WTO investment agreement would restrict the ability of host governments to require foreign investors to enter into joint ventures with local partners, in just the same way as the WTO's General Agreement on Trade in Services (GATS) agreement already restricts that ability in the case of services investment. As a result, the positive benefits of foreign investment risk becoming the exception rather than the rule.

The consequences of the 'crowding-out' of domestic investment and local companies by FDI has long been of concern to developing countries (see Agosin and Mayer 2000). This is obviously an issue in India and is also evident in South Africa *(see box 2)*. To safeguard against some of the issues raised by the Indian Ambassador, developing countries often use a range of policies to protect important sectors from foreign investment and to bring positive benefits to their economies.

3. The importance of foreign investment policies

As the case studies above demonstrate, many local communities are vulnerable in the face of foreign investment, and governments have often failed to protect them from its negative impacts. Yet most countries have a range of policies which enable them to manage foreign investment to the benefit of their economies. These policies tend to work in two directions: (a) to maximise the benefits of foreign investment, and (b) to guard against its negative effects. Both are crucial, and both would be threatened by a WTO investment agreement.

3.1 Maximising the benefits of foreign investment

Most developing countries actively welcome foreign investment and have set up investment promotion agencies in order to attract foreign investors into their economies, both at national and sub-national levels. A large number of developing countries also offer a range of incentives to foreign investors, in particular tax incentives and special treatment in respect of import tariffs for inputs to their business activities.

These incentives are often carefully targeted so as to encourage investment in certain sectors or geographical areas. Countries such as Angola, Brazil, Colombia, Ecuador, Egypt, Ghana, India, Nigeria, Pakistan and Thailand all extend special tax incentives to foreign companies undertaking to invest in specified regions, while Costa Rica, Pakistan and Singapore are among those offering incentives to investors in particular sectors of the economy (UNCTAD 2000a).

Although the quantity of FDI is significant for a country's balance of payments, the quality of investment is of even greater importance for development purposes. Investment promotion agencies are keen to attract those investors that will engage in the most productive and development-friendly ways, and they target their efforts and incentives accordingly.

There is a wide range of factors which can increase the development benefits of FDI, many of which often qualify for extra government subsidies. These include:

- the creation of linkages with the domestic economy – with indirect employment and servicing opportunities which usually far exceed the number of jobs created directly by the investments themselves;
- technology and skills transfer – a key objective of using foreign investment for development purposes, including not only the passive spillovers of expertise and technology transfer but also the active training of national employees;
- 'trade balancing' macroeconomic benefits – such as the earning of extra foreign exchange as a result of exporting a proportion of the goods or services produced, rather than selling them in domestic markets only.

Developing countries try to encourage many of these positive aspects of foreign investment through tax incentives and other subsidies. Yet these subsidies represent a considerable loss to the potential revenue of the host country, and several are unable to afford them. Moreover, incentives are sometimes not enough to outweigh other factors in the calculations of foreign investors. In many circumstances, therefore, developing countries also rely on standard regulatory policies in order to maximise the benefits of FDI.

Two key policies which developing countries use to ensure linkages with the domestic economy place conditions of access on foreign investors, namely: (a) the requirement that companies enter into joint ventures with domestic partners, and (b) equity caps which limit the total proportion of foreign capital in a particular enterprise, thus guaranteeing domestic interests a measure of control over the investment. These policies have played a central role in several of the countries which have been successful in using FDI for development purposes, such as Malaysia, China and Thailand, and they remain important elements of many other developing country investment regimes.

As well as such access conditions, many developing countries place performance requirements on foreign investors so as to maximise the spillover effects of FDI. These include requirements that foreign companies employ a minimum proportion of local staff, including in management positions; 'local content' requirements that call on companies to source a given percentage of their inputs from local suppliers so as to maximise linkages with the domestic economy – currently one of the most

widely used policy mechanisms; and requirements that foreign investors retain a certain proportion of their capital in the host country for a fixed period, rather than repatriating it immediately.

While these requirements help host countries to maximise the development benefits of FDI, multinational corporations and industry lobby groups have commonly sought their elimination as unwanted restrictions on their freedom to act solely in their own interests. Despite the fact that the countries using such requirements have been amongst the highest recipients of trade and investment, industry groups and developed country governments have increasingly termed the conditions 'trade-restrictive', as they have become known at the WTO.

In fact, the WTO has already moved to outlaw several of the most important access conditions and performance requirements on foreign investors. The four WTO agreements which prohibit or restrict developing countries' use of pro-development investment policies are:

- the General Agreement on Trade in Services (GATS), which bans access conditions and specific performance requirements on foreign investors in service sectors which have been committed for liberalisation, unless the host country has registered them as 'limitations' in advance;
- the Agreement on Trade-Related Investment Measures (TRIMs), which prohibits local content and trade balancing requirements on investors in agriculture, manufacturing and industry;
- the Agreement on Subsidies and Countervailing Measures (ASCM), which prohibits the use of local content subsidies to promote linkages with the local economy, and makes actionable the use of incentives to encourage technology or skills transfer;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which severely restricts countries in their use of technology for their own development purposes.

Despite signing up to these agreements during the Uruguay Round, developing countries now recognise that these restrictions are anti-development. The restrictions have also been widely condemned by UN agencies and civil society organisations across the world. Yet instead of revising them so as to remove their anti-development elements, the EU is proposing a new WTO investment agreement which would further erode developing countries' ability to use foreign investment to its maximum development advantage, as detailed in section 4.

3.2 Defending against the negative effects of foreign investment

In addition to maximising the development benefits of FDI, developed and developing countries alike protect certain sectors of their economies which are viewed as too sensitive to be opened up to foreign competition. In addition to the defence and cultural sectors, which are safeguarded in most countries, developing countries often protect a range of other sectors from penetration by multinationals.

India, for example, continues to protect its all-important agricultural sector from foreign investment, even while it has dramatically liberalised its investment regime in most other sectors over the past 12 years. This includes sectors related to agriculture, such as the seed industry described above. Similarly, Ethiopia's 1996 investment code still reserves sensitive sectors such as retail, tanning and milling for domestic investors only, as well as the export trade in key goods such as raw coffee, oilseeds, pulses, hides, skins and livestock. The Foreign Business Act which came into effect in Thailand in March 2000, while opening a range of sectors to increased foreign ownership, actually restricted foreign investment in agriculture further.

Mauritius, which has achieved outstanding economic success through diversification into a range of manufacturing and service sectors, has imposed greater restrictions on its crucial tourism sector in recent years. While foreign companies are still permitted 100% ownership of hotel management companies and hotels with over 100 rooms, they are restricted to 49% equity in all smaller hotels and wholly prohibited from investing in travel agencies, tour operators, car rental, yacht charters and all but the largest restaurants. The tourism sector has continued to thrive, however, and many international restaurant and car rental chains have

3. The importance of foreign investment policies

chosen to be represented through local franchises or agencies instead (UNCTAD 2001).

Mauritius is also one of many developing countries which requires foreign investors to seek approval before new investment can go ahead. This policy of prior approval enables the host country to screen proposed investment and assess its potential impact before granting permission to invest – a procedure which allows for consultation with local communities should their rights be threatened.

All these important policy controls could be targeted for removal under a WTO investment agreement, just as many are already under attack in the GATS negotiations currently taking place at the WTO. GATS governs investment in the services sectors of WTO member states, and has been explicitly cited as a model for the proposed WTO agreement on investment in the agricultural and industrial sectors. In the current round of GATS negotiations, the government of Mauritius is under pressure from the EU to open up its tourism sector to multinational companies, while the EU is also requesting countries such as Honduras, Malaysia and Pakistan to abandon their approvals processes in key service sectors.

Many developing countries have already been forced to liberalise their investment regimes in order to qualify for essential loans and debt relief from the World Bank, IMF and other financial institutions. Even Thailand, by no means one of the poorest countries, was required to liberalise its foreign investment regulations in order to gain access to the IMF's bail-out package in the wake of the East Asian financial crisis of 1997-98.

This liberalisation included a revision of Thailand's national Land Code in order to permit greater foreign access to land use, increasing the maximum lease durations permitted for foreign firms and allowing approved companies to purchase land for investment purposes. Community groups in southern Thailand are campaigning against a Malaysian palm oil company's plans to use the new legislation to extend the lease on its tens of thousands of hectares of plantations, thereby depriving landless and small-scale farmers of access to productive agricultural land.

Many developing countries have also entered into bilateral investment treaties (BITs) with other states. There are now more than 2,000 such BITs in force worldwide, including many between developing countries themselves. While these bilateral treaties usually leave countries with a large degree of flexibility in maintaining national policies on regulation of investment, they sometimes go much further than existing multilateral agreements such as GATS and TRIMs, requiring countries to drop key performance requirements on investors from the partner country in order to operate a more liberal investment regime.

Similarly, some developing countries are members of regional frameworks which govern FDI as well as trade policies. Investment liberalisation is by no means included in all free trade areas, but in cases such as NAFTA (the North American Free Trade Agreement, between Mexico, Canada and the USA) and Mercosur (the Common Market of the South, between Argentina, Brazil, Paraguay and Uruguay) there are explicit provisions on investment policy both between members and vis-à-vis the outside world. The ambitious and controversial Free Trade Area of the Americas (FTAA) currently under negotiation in the western hemisphere threatens to introduce dramatic investment liberalisation across its member states.

Despite these moves towards liberalisation on a unilateral, bilateral or regional basis, many developing countries still maintain key policies which allow them to manage foreign investment to the advantage of their own development, and to avoid its negative effects. It is these pro-development measures which would come under threat from an investment agreement negotiated at the WTO.

Even where there are currently no controls on foreign investment in a particular sector, a WTO investment agreement would prevent a country from introducing them in the future. As with GATS, the proposed WTO investment agreement would make it effectively impossible to reverse liberalisation commitments once they have been made (see below). This denial of policy choice would be a major challenge to any countries wishing to revise their investment policies as they reach new levels of development in the future.

Box 3 Foreign investment worldwide: **current trends**

The increase in foreign investment levels over the past 30 years has been unprecedented, as multinational corporations have expanded their activities in search of new markets across the world. In 1973, world FDI flows totalled just $21.5 billion. In the first year of the new millennium they peaked at a record high of $1,492 billion – almost 70 times their 1973 level.

This expansion has had a major impact on many developing countries. Although developed economies still receive around 70% of total world FDI, the levels of investment directed towards developing countries have also risen dramatically. Developing countries now attract over $200 billion in FDI each year – four times as much as they receive in aid.

However, the uneven distribution of this foreign investment means that a small number of developing countries receive the vast majority of FDI going to the South. In 2001, the four economies of China, Hong Kong, Mexico and Brazil alone accounted for well over half of the total $205 billion in FDI flows to all developing countries. Indeed, the top 20 recipients accounted for a full 90% of that total, leaving the 100 other developing countries to share out the rest between them.

Foreign investment thus tends to flow to those countries which already enjoy high rates of domestic savings and investment, while those economies most in need of external capital remain marginalised from global FDI flows. Sub-Saharan Africa, for example, has long been excluded from the feast, averaging no more than $6.5 billion annually even in the five boom years of 1996 to 2000.

Yet even these aggregate figures hide the true story of FDI distribution. Without South Africa and the two oil economies of Angola and Nigeria, the figures for foreign investment flows to sub-Saharan Africa need to be halved again. Even in the continent's record FDI year of 2001, the other 44 sub-Saharan African countries received less than $3 billion between them. The world's 49 least developed countries tell a similar story: excluding Angola, they received just $2.7 billion during 2001.

This does not mean that foreign investment is of no significance for those economies which receive a small proportion of world FDI. Even relatively meagre amounts may be important to individual economies as a source of capital: countries such as Bolivia, Cambodia, Ecuador, the Gambia, Guinea-Bissau, Guyana, Lesotho and several of the Caribbean island states have all relied heavily on FDI in recent years. Indeed, as aid flows have declined over the past decade, more and more developing countries have looked to foreign investment as a source of capital for economic development and as a source of foreign exchange to keep their national balance of payments intact.

Yet over-reliance on foreign investment can have negative effects on economies in the long-term, as it can bring its own balance of payments difficulties (Woodward 2001). In the short-term, too, countries which rely on foreign investment for a high proportion of their capital needs are required to maintain high FDI flows if they are not to run into liquidity problems. It is this need to secure ever greater FDI flows that has already led many countries to liberalise their investment regimes in the hope of attracting foreign investors. Between 1991 and 2001, a total of 1,393 regulatory changes were introduced in national investment regimes worldwide – of which 1,315 (94%) served to make the regimes more liberal than before.

Source: UNCTAD 2002

4. The proposed new WTO investment agreement

4.1 Who wants an investment agreement at the WTO?

The drive to introduce an investment agreement at the WTO comes from only a small handful of its members. The EU has led the call for negotiations on the four 'new issues' of investment, competition policy, transparency in government procurement and trade facilitation. Japan and South Korea have been its most vocal supporters in pushing for negotiations on investment at the WTO. In contrast, the USA has shown little active interest in the type of WTO investment agreement being proposed by the EU.

Within the EU, a small number of member states have taken the lead in pressing for investment negotiations at the WTO. The UK government has been one of the most outspoken advocates, reflecting the UK's strong belief in economic liberalisation and the central importance of British companies' overseas investment to the UK economy. Yet other EU governments have let it be known that they are not so insistent on the inclusion of new issues in the WTO's work programme. The European Commission, which negotiates on behalf of EU member states at the WTO but also has its own agenda in relation to the new issues, is strongly in favour of an investment agreement at the WTO.

In public, developed countries have tried to talk up the Doha Round of WTO negotiations as a 'Development Round' – even though their refusal to move forward on key issues such as intellectual property rights, agriculture and special and differential treatment for developing countries has exposed their development-friendly language as hollow rhetoric. With no sense of irony, the EU has now taken this rhetoric one stage further by calling its proposed WTO investment agreement an 'Investment for Development Framework'.

In private, however, government officials of EU member states acknowledge that the main aim of introducing an investment agreement at the WTO is not to help developing countries but to secure improved rights and greater protection for their own multinationals. This candid admission echoes the publicly stated aim of the EU in the current WTO negotiations on investment in services, where European Commission and UK government officials alike have made it clear that their agenda is dictated by the interests of European companies wishing to invest in foreign markets, not the needs of developing countries or the poor.

This renewed pressure to introduce an investment agreement at the WTO comes in the wake of the OECD's failure to negotiate the infamous Multilateral Agreement on Investment (MAI). The MAI would have granted multinational corporations sweeping new powers over host countries, but negotiations eventually collapsed in October 1998 as a result of internal opposition within the OECD as well as widespread civil society protests outside it.

Yet almost as soon as the MAI negotiations had collapsed, the EU renewed its campaign to introduce an investment agreement at the WTO. Although the proposed new agreement is less ambitious than the MAI, there is little doubt that the EU sees it as a first step towards more extensive investment regulations at the WTO. The US has stated publicly that it would only be interested in negotiating an even stronger agreement than the one that is being proposed by the EU.

Most developing countries, on the other hand, have long opposed the introduction of the new issues to the WTO's work programme. Since the first ever Ministerial Conference of the WTO, held in Singapore in 1996, developing countries have argued against these new negotiations, in view of the fact that the existing WTO workload is already beyond the capacity of many of their delegations. They have also pointed out that the WTO's first priority must be to sort out unfinished business from the previous Uruguay Round of negotiations, and in particular to realise the benefits promised to developing countries during that round.

4.2 What exactly is being proposed, and how will it undermine development?

The EU's proposals for an investment agreement are the most extensive to date, reflecting the fact that the EU is the main proponent of negotiations on the new issues at the WTO. In a series of communications over the course of the past year, the EU has presented an increasingly detailed picture of the investment agreement it would like to see at the WTO.

Box 4 From Doha to Cancun: bad deals and WTO politics

The clash of interests between the EU and developing countries came to a head at the Fourth Ministerial Conference of the WTO, held in Doha, Qatar, in November 2001. Prior to the Ministerial, developing countries made numerous joint statements opposing the introduction of the new issues and calling on those responsible for drawing up the WTO's draft work programme to drop them from the agenda.

As a result of intense pressure from the EU, developing countries did eventually agree to inclusion of the new issues in the text of the final Doha Ministerial Declaration. The Declaration states that negotiations on all four new issues will take place after the WTO's Fifth Ministerial Conference, which is to be held in Cancun, Mexico, in September 2003 – but only on the basis of a decision to be taken there "by explicit consensus" on the modalities of the negotiations.

On the insistence of several developing countries at the very end of the Doha Ministerial, the Chair of the final plenary provided the following clarification of this last phrase before submitting the Declaration for approval:

> "In my view, this would give each member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that member is prepared to join in an explicit consensus."

It was on the basis of this clarification that WTO member states agreed the Doha Ministerial Declaration, thereby leaving a final decision on whether to start negotiations on new issues such as investment until the next Ministerial, in 2003.

Since Doha, however, the EU has repeatedly tried to play down the significance of the Chair's statement, suggesting instead that the decision to commence negotiations on the new issues has already been taken. Many developing countries reject this claim, arguing that WTO members still have to decide, by explicit consensus, whether to expand the WTO's negotiating agenda as proposed by the EU. The Cancun Ministerial will decide the issue, which is why civil society groups across the world are taking action now in support of developing countries' resistance to the EU agenda.

Yet there are strong indications that the EU is playing politics with its aggressive agenda at the WTO, holding out the prospect of EU 'concessions' in agriculture only if developing countries agree to negotiations on the new issues at Cancun. Developing countries were offered precisely this trade-off at Doha – and in the previous Uruguay Round, when developed countries managed to expand the WTO agenda to include services and intellectual property rights on the understanding that they would reduce their own protectionism and agricultural subsidies in return.

Past experience has shown that WTO trade-offs with the EU and USA are not in the interest of developing countries, as the promised returns in agriculture are just as remote as they were 10 years ago. Learning from this experience, any deal put forward at Cancun which promises agricultural concessions in return for negotiations on the new issues should be rejected. Developing countries have paid enough already: it is now time for the rich countries of the developed world to honour their side of the bargain without trying to extort further payment from the poor.

4. The proposed new WTO investment agreement

The key proposal is that WTO member states should take on a range of new obligations in their treatment of foreign investors. As well as increasing the transparency of investment regimes so as to make it easier for foreign investors to assess the investment climate in any particular country, the EU wishes to see all WTO member countries take on obligations not to discriminate against investors from abroad. In particular, the EU wishes all WTO member countries to extend the following treatment to foreign investors:

- Most favoured nation treatment (MFN) – the standard WTO principle which requires all foreign countries to be treated equally by the host country. This would make it increasingly difficult for developing countries to enter into specific treaties with others at a similar level of development as a means of gradually exposing their domestic economy to competition, since they would be expected to extend the same treatment to investors from all WTO member states, including powerful multinationals from the EU, USA and Japan. The EU proposal suggests that this MFN obligation should apply across the board and in all sectors, although WTO members might still be able to register exceptions to the general rule.

- National treatment – the principle which requires host countries to treat foreign investors at least as well as they treat their own domestic firms. This is the most contentious element of the WTO's investment agenda, since it threatens to expose developing countries' companies and their industrial and agricultural sectors to direct investment competition from the world's most powerful multinationals – a level of competition which few are able to survive. It would also threaten developing countries' ability to regulate multinationals so as to maximise the benefits of foreign investment and to protect local communities from the damaging impacts described in the case studies in section 2.

In view of the resistance from developing countries to any investment agreement which threatens to undermine their own economies in this manner, the EU has adopted a more cautious approach to the issue of national treatment. It proposes that the national treatment principle would apply in two ways:

- Across the board for all foreign investments established in accordance with the laws and regulations of the host country – meaning that foreign investors would not face extra obligations over and above those faced by domestic firms once they set up operations in a country.

- On an opt-in basis in respect of the rights of investors to gain access to markets in the first place – as described in section 3, above, this is the key policy area through which developing countries have traditionally been able to protect domestic enterprises from overwhelming competition and to manage foreign investment to their maximum advantage.

The EU suggests that this opt-in or 'positive list' approach would allow developing countries the flexibility they need to protect their industrial and agricultural sectors from multinational corporations, since no country would be forced to commit a sector unless it chose to do so. The EU also argues that developing countries would be able to maintain existing conditions and requirements on those foreign investors which are allowed entry into individual sectors, since such conditions could be registered as 'limitations' to the liberalisation commitments taken by WTO members in their national schedules.

However, we already have a good understanding of how this 'positive list' approach works from experience of the GATS negotiations on services liberalisation at the WTO. This prior experience is particularly relevant, since the Doha Ministerial Declaration explicitly suggests that any WTO investment agreement should be based on the GATS approach.

The first lesson which developing countries have noted in the GATS negotiations is that they can indeed be forced to open up new markets to foreign investors, even when it is not in their own interest to do so. Despite repeated assurances that developing countries should only offer up sectors to liberalisation when they choose to, those countries come under overwhelming pressure to give in to the demands of more powerful WTO members once negotiations begin in earnest.

Negotiations take place on a bilateral basis and in secret, and expose developing country delegates to the full range of threats and pressures which the multilateral system of the WTO was supposed to avoid (Jawara and Kwa 2003). In such an unfair contest, developing countries can often find themselves unable to resist the liberalisation demands of more powerful states.

The second lesson which GATS has taught is that even though WTO members may try to protect key development policies by registering them as limitations to their liberalisation commitments, those policies are then targeted for removal by other countries in negotiations at the WTO. The EU has targeted key development policies for removal in many developing countries in the current round of GATS negotiations, including joint venture requirements and equity caps in countries such as Indonesia, Pakistan, Thailand, China, Cuba, the Philippines, Egypt and India. Those countries are now having to struggle in order to defend their own pro-development policies from EU assault.

Thirdly, and perhaps most importantly, a WTO investment agreement would close down the possibility of introducing or reintroducing such policies in the future. While the EU argues that countries would still be able to modify their liberalisation commitments if the need arose, in reality there is little scope to reverse liberalisation commitments once they have been made. Under GATS, the penalties for any country wishing to take back a commitment are so punitive that WTO officials have themselves acknowledged GATS commitments to be effectively "irreversible".

This binding of liberalisation into the future may offer foreign investors an extra layer of predictability and security, but by the same token it exposes the people of developing countries to greater risk. Any country wishing to introduce policies to regulate the activities of foreign investors in the future must already have registered those policies as limitations to its GATS liberalisation commitments in advance. This is simply not a practical reality, since no government can predict what measures might be required to regulate foreign investors in years to come, especially given the changing circumstances of external factors in the global economy.

One example of the need for countries to retain the flexibility to introduce new regulations on foreign investors has been seen in the retail sector of Thailand, where the rapid increase in foreign investment (particularly from Europe) since 1997 has led to the closure of several thousand small traditional shops each year. Tesco, the largest foreign investor, has been the focus of extensive protest actions by traditional retailers and the wider public, who have petitioned the government to halt the expansion of the hypermarkets and cash-and-carry outlets which foreign investment has introduced to the country.

Box 5 The EU proposal on competition policy

In addition to its proposal for a multilateral investment agreement, the EU is also promoting a new set of WTO negotiations on competition policy. While much of its rhetoric is directed towards positive action to combat hard core cartels, the EU is also arguing that all WTO members should be under an obligation to include WTO non-discrimination principles in their own competition laws – including the controversial national treatment principle described above. Many developing countries fear that this is another strategy for opening up their industrial and agricultural sectors to direct competition from the world's most powerful multinationals, since the EU proposal would prohibit developing countries from protecting their own domestic producers by means of differential competition laws. For this reason, many have seen the EU's proposals on competition policy as an extension of their proposed investment agreement, with a common objective of securing greater rights for multinational corporations in foreign markets.

4. The proposed new WTO investment agreement

In the face of public protest and its own concerns at the potential emergence of oligopolies within the retail sector, the Thai government set about devising new measures to ensure fair competition and greater regulation of the foreign investors. Had it already bound the liberalisation of its retail sector under GATS, it would not have been able to contemplate any such measures. As the Thai delegation to the WTO concluded at the time:

> "Liberalisation… could lead to many unforeseen developments especially given rapid developments that we are witnessing. On certain occasions, governments would need to have certain flexibility in redressing the problems they had not anticipated when undertaking liberalisation commitments."
> *(Thailand 2002)*

As a result of increasing awareness of the problems which binding liberalisation commitments can bring, several WTO member states have now announced that they do not wish to commit their more sensitive service sectors to GATS – even though they know that they will come under great pressure at the WTO to do so. The same problems would apply in the case of a WTO investment agreement, through which WTO member states would be pressured to make binding commitments to liberalisation in their industrial and agricultural sectors too.

EU officials have tried to play down the threat of a WTO investment agreement, arguing that it would still allow developing countries the flexibility they need to protect national development policies from being challenged at the WTO. However, the experience of GATS demonstrates how thin this protection really is. Developing countries risk exposing their economies and their most vulnerable communities to overwhelming competition and exploitation in any WTO investment agreement. For this reason, the majority continue to oppose the EU's expansionist agenda at the WTO.

Moreover, it is widely acknowledged that the EU has an ultimate goal that is far more ambitious than the cautious approach it is advocating at present, and that if negotiations were agreed on, the EU may well aim to raise the stakes. The US has stated openly that it would only be interested in negotiating a far stronger WTO investment agreement which granted multinationals rights of access across the board (although countries would be able to carve out certain sectors as exemptions from the general rule). Any such agreement would force a dramatic liberalisation of national investment regimes across the world and give foreign investors unprecedented new rights over sovereign governments.

4.3 Why the WTO investment agreement must be stopped

EU officials have tried to suggest that an investment agreement at the WTO will be in the best interests of developing countries. Yet the arguments for the development benefits of a WTO investment agreement do not stand up to examination.

…the proposed investment agreement will not increase foreign investment flows…

The most common argument put forward for an investment agreement at the WTO is that the extra security it would bring foreign investors might in turn persuade them to invest more in those marginalised countries which currently receive little or no FDI. There is no doubt that many of the poorest countries would welcome greater flows of foreign investment. Equally, however, there is no suggestion in the evidence collected over the past decade that a WTO agreement would do anything to promote greater investment flows to those countries.

Indeed, all the evidence points the other way. There is extensive literature from the United Nations and other research bodies stretching back over several years which indicates that a WTO investment agreement would not lead to increased FDI flows to the poorest countries (for a summary of this evidence, see UNCTAD 1999 and 2000c). Even the World Bank, which supports a WTO investment agreement, has conceded that any new investment resulting from such an agreement would be "virtually nonexistent for low-income developing countries" (World Bank 2003).

This conclusion supports evidence already gathered in relation to foreign investment arising from GATS. Foreign investment in services accounts for half of the world total of FDI flows, and developing countries have been assured in the past that making GATS commitments would increase the level of FDI they would receive in future. Yet as UNCTAD concluded, on the basis of its assessment of the impact of GATS commitments on foreign investment:

> "There is no empirical evidence to link any significant increase in FDI flows to developing countries with the conclusion of GATS." (UNCTAD 2000b)

The fact that poorer developing countries do not attract more foreign investment has more to do with the underdevelopment of their economies and infrastructure than with the investment climate which they offer to potential investors. There is consensus that these more fundamental problems will not be addressed by signing an investment agreement at the WTO. Indeed, the UK government has admitted that it has no evidence to support its claim that the poorest countries would benefit from a multilateral investment agreement. Yet this has not stopped it from promoting such an agreement at the WTO.

....non-discrimination is not a development friendly strategy...

The WTO's principle of national treatment requires host countries to treat foreign investors at least as well as they treat their own domestic firms (i.e. a policy of non-discrimination). As already noted, governments need to be able to protect their fledgling industries from foreign competition. An investment agreement based on the national treatment principle threatens to expose the industrial and agricultural sectors of developing countries to direct competition from the world's most powerful multinationals, and to undermine many of the pro-development conditions and requirements placed on foreign investors to contribute to the domestic economy.

...developing countries will be over-burdened...

Many developing country members of the WTO are simply unable to cope with another set of complex negotiations on top of a Doha work programme which is already struggling under its own weight. Several countries' delegations in Geneva comprise no more than two or three permanent officials, who face a constant struggle just to attend the more than 1,000 meetings which take place at the WTO each year.

Expanding the WTO's agenda to include a new set of highly complex and contentious negotiations would put it beyond the reach of many developing country delegations, who would therefore risk not being able to defend their own positions during the negotiating process. Moreover, the distraction of embarking on a raft of new negotiations could also paralyse the negotiations of real importance to developing countries such as those on agriculture, as developing country delegates are instead forced to spend all their time defending themselves against the aggressive agenda of the EU.

....the proposed WTO investment agreement does not address the needs of poor communities...

Whilst a multilateral investment agreement would impose a new set of obligations on host countries, there are no parallel disciplines on investors and home countries. However, as the case studies in this report show all too clearly, poorly regulated foreign investment can have extremely damaging effects on local communities and economies alike. There is nothing in the proposals for multilateral investment agreement that would correct this imbalance or address the negative impacts on poor people.

However, foreign investment can make a positive contribution to economic and human development by bringing capital, technology, employment and tax revenue to developing countries. Developing countries must be supported in their attempts to maximise the developmental benefits of foreign investment, and in their requirements that multinational investors contribute to that overall goal.

5. The positive alternative: making foreign investment work for development

The case studies outlined in this report demonstrate how poorly regulated foreign investment already causes severe damage to the rights and livelihoods of local communities in countries across the world. The solution is not a WTO investment agreement which further increases the rights of multinational corporations over developing countries.

Multinational companies are already able to exert considerable pressure on governments to relax or disregard existing laws, and many governments have failed in their duty to uphold people's rights in the face of corporate demands. To ensure that foreign investment works in the service of development, not against it, there needs to be proper regulation of investment at both the national and international levels.

5.1 National regulation

ActionAid is working in many countries to ensure that people's rights are recognised and protected, as well as calling for increased government accountability. Governments should integrate foreign investment into national development strategies so as to maximise its benefits and minimise its negative effects. Governments need to attract foreign investment which supports domestic production and the development of services. They should therefore target investment which provides high quality jobs, training and technology transfer, as well as benefits for the economy as a whole.

Governments also need to protect their people from exploitation or other injury as a result of foreign investors' actions in the host country. As well as extending national legal provisions for sanctions against companies for breach of national laws, governments should also guarantee legal redress for people and communities affected by corporate activities, and extend legal liability to directors for any breach of national laws by their company. Governments should also uphold existing laws governing foreign investment, particularly in relation to the rights of local communities.

Developing countries need to be able to implement their own investment policies if they are to act in the best interests of all their peoples. Yet these policies have already come under attack from the WTO agreements listed in section 3, and would be undermined still further if the WTO were to negotiate an investment agreement as the EU hopes. For national regulation of investment to be effective, the WTO's liberalisation agenda must be challenged and held in check.

The responsibility to ensure that foreign investment works to the benefit of development does not lie exclusively with the host country, however. The government of an investor's home country also bears a responsibility to ensure that foreign investments made by companies operating out of its territory do not violate international norms.

This responsibility beyond the national borders of the home country is increasingly being realised as a key element in the regulation of foreign investment. The OECD's recently adopted Bribery Convention, for instance, requires all OECD countries to introduce national legislation making it a criminal offence for any company to bribe a foreign official, with punishment for those found guilty to include prison sentences as well as substantial fines. The Convention also requires OECD governments to tighten up the accounting and auditing of companies operating out of their countries, so as to expose any 'off the books' transactions used to conceal bribery payments abroad.

ActionAid is also calling on multinationals to account for their actions in developing countries. Together with other non-governmental organisations, ActionAid has alerted the world to the problems surrounding 'conflict diamonds', the proceeds from which have been responsible for fuelling war and human rights atrocities across Africa. To date more than three million people have died as a result of wars funded by diamonds. ActionAid has been campaigning for the diamond industry to implement a certification scheme to end the illegal trade in conflict diamonds. A scheme came into affect on 1st January 2003 and ActionAid is now pushing to ensure that the scheme is independently verified and certified.

5.2 International regulation

Multinational corporations by their very nature require international oversight. Even those national governments which are genuinely committed to protecting their people's rights often fail to enforce basic standards on foreign investors – either because they are afraid of losing the investment, or because they are unable to stand up to the overwhelming bargaining power of the multinationals concerned. Companies whose annual sales far exceed the entire economic output of most developing countries can only be regulated effectively on an international basis.

Nor is it enough to leave multinationals to practise self-regulation through voluntary codes of conduct, as proposed during the 1990s. This promotion of 'corporate social responsibility' as an alternative to binding corporate accountability failed to deliver the commitment needed in companies' foreign investment performance, with many firms treating it as no more than a public relations exercise. The OECD's own survey of 233 voluntary codes of conduct revealed how selective most were even in their inclusion of core ILO standards such as living wages or trade union rights (OECD 1999). As confirmed by UK Foreign Secretary Jack Straw in September 2001:

> "We must do what we can to encourage corporate responsibility. But we cannot leave companies to regulate themselves globally, any more than we can do in our own national economies."

There are already several international standards which apply to investment operations, including codes which govern specific aspects of individual industries as well as cross-sectoral standards such as the ILO Declaration on Fundamental Principles and Rights at Work. National governments have a duty to ensure that these rights are upheld in all circumstances.

However, there are also international codes which have been introduced specifically to promote better regulation of foreign investment. The first of these, adopted by the United Nations in 1980, is the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. These rules aim to combat price fixing, collusive tendering and other abuses on the part of companies which enjoy a dominant market position. As such, the rules need to be global in their application, since many of the anti-competitive activities of international cartels take place on a global scale.

Secondly, the UN Human Rights Sub-Commission has now developed a set of Draft Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises. These principles outline the obligation of multinationals to promote human rights "within respective spheres of activity and influence", and call for regular monitoring of companies' adherence to the principles. Even though concerted UN attempts to introduce a binding code of conduct on multinationals were quashed by developed country governments in the early 1990s, there is hope that the current draft principles could provide the basis for a binding set of rules.

The recent spate of fraud and corruption scandals involving global giants such as Enron, WorldCom and Andersen has underlined the urgent need for the strongest possible regulation of multinationals at the international level. ActionAid believes that there should be a legally binding framework, outside the WTO, which establishes obligations for multinational corporations based on internationally agreed standards.

Any such framework must have effective mechanisms for enforcing corporate liability at both national and international levels, as well as formal monitoring systems which include civil society participation. Legal redress must be made available internationally for people and communities who are affected by corporate activities but unable to obtain such redress through their own country's legal system. Only through such a system will people's rights be afforded the priority which is their due under international human rights law.

6. ActionAid's recommendations

1 ActionAid calls on the UK government to end its support for an agreement on investment and the other so called 'new issues' at the WTO Ministerial Conference to be held in Cancun in September 2003.

2 To this end, the UK government should ensure that the EU unilaterally drops its insistence on a WTO investment agreement and negotiations on the other new issues.

In addition:

3 In the run-up to Cancun, neither the UK nor any other developed nation should attempt to persuade developing countries to trade off their interests as regards investment negotiations in the hope of gains in other areas such as the agriculture negotiations.

4 The current review of the TRIMs Agreement must not be used by the UK (or the EU) to extend the investment issue at the WTO. The UK government should call for a review of the development impacts of investment components in the TRIMs and TRIPs Agreements, as well as in GATS and the ASCM.

5 The UK government should support the establishment of a binding international regulatory framework on multinational corporations, outside the WTO, that will strengthen the ability of developing countries to manage foreign investment to the benefit of the poor.

6 The UK should base its policy positions on a better understanding of the impacts of foreign investment. To this end, the UK government should commission (or facilitate) a multilateral, independent and open assessment of the social, developmental and environmental impacts of foreign investment in developing countries.

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