

no new rights for big business at the wto

a friends of the earth international position paper, august 2003

introduction and recommendations

Friends of the Earth International believes that efforts by major countries to launch investment liberalization negotiations at the World Trade Organization (WTO) are deeply misguided and will inappropriately grant rights to multinational investors at the expense of citizens, communities, and the environment.

At the WTO's Fifth Ministerial in Cancun in September 2003, WTO member states will decide whether to proceed with investment negotiations based on an "explicit consensus" concerning the "modalities" for those negotiations. The agreement to make such a decision at Cancun was the result of intense pressure from the European Union (EU) and other developed countries during the WTO Ministerial in Doha in 2001 to agree to the launch of negotiations on global rules for investor rights. Investment is one among four "new" issues, also named the "Singapore issues" after a 1996 WTO Ministerial, that would require an explicit consensus at Cancun to move forward.

At Doha, the negotiating power of the powerful WTO members overcame the resistance of the many developing country members that do not want these negotiations to take place. The question

to be faced at Cancun is whether these rich countries continue to press their investment demands, at the behest of multinational corporations and despite the continued objections of civil society and most developing countries. We believe that the EU proposal to adopt "procedural modalities" at Cancun – addressing such issues as the timeframe for negotiations and the process for conducting negotiations over particular sectors – does not deal with the fundamental problems with an investment agreement and only serves to mask the underlying agenda of developed countries.

We object to a WTO investment agreement because such an agreement will place the rights of multinational corporations foremost, will severely undermine policies to protect the environment and the public interest, and will put a halt to development policies to reduce poverty and economic inequality. **The WTO should therefore explicitly decide in Cancun against pursuing any investment negotiations and should also change its past policies that provide excessive rights to multinational investors.**

Specifically:

- The WTO should reject the launch of negotiations of an investment agreement, including

any negotiations based on a so-called “bottom-up” approach.

- The WTO should therefore reject any attempt to launch investment negotiations based on “procedural modalities” or any other vague framework.
- The WTO should reexamine the commitments already made under the provisions of the General Agreement on Trade in Services that are in fact multinational investment disciplines (Mode 3 - “commercial presence”) and explicitly reject any further such commitments.
- The rules in the WTO Agreement on Trade Related Investment Measures (TRIMS) that undercut the ability of governments to pursue development, community-oriented and environmental policies should be abandoned.
- Rules to regulate multinational businesses and provide rights for citizens and communities must be negotiated outside the WTO context.

the failed investment agreement model

In attempting to launch WTO investment negotiations, major countries are engaged in an effort to revive the core elements of the Multilateral Agreement on Investment (MAI), abandoned in 1998. Those negotiations failed after facing criticism from citizens and NGOs around the world that they provided substantial rights to multinational investors at the expense of the environment and the public interest, and

without providing any rights to citizens and communities.

Recent experience with the NAFTA Chapter on Investment (Chapter 11) and other investment treaties has demonstrated the threat that this kind of agreement poses to the public interest. Under NAFTA Chapter 11, both Canada and Mexico have lost investor rights cases involving environmental protections – in one case, a local community’s opposition to a hazardous waste site, and in the other, an attempt to regulate transboundary transport of toxic PCBs in a manner consistent with an international environmental agreement. The United States has been faced with substantial NAFTA challenges of environmental and other measures totaling over US \$1 billion in demanded compensation, including the recent threat of a case challenging California mining laws aimed at protecting the environment and indigenous lands.

The impact of other bilateral investment treaties has been felt in countries such as Argentina, faced with an onslaught of investment cases following efforts by the government to address its economic collapse, and Bolivia, faced with an investment case after a water privatization scheme by Bechtel in Cochabamba ended in failure amidst substantial public opposition. Meanwhile, the filing of claims by corporate investors in international arbitration under investment agreements is increasing at an alarming rate. Significantly, this rapid rise in the use of investment agreements not only undermines the specific government actions that are challenged, but also places a chilling effect on future efforts to protect the environment and the public interest.

the myth of benefits for development and the environment

Despite claims that developing countries would benefit from an investment agreement, the EU and its allies have been unable to demonstrate in any way that a multilateral agreement on investment is necessary and that it should be included in the WTO. Recent analyses by the World Bank in *Global Economic Prospects 2003* has shown that bilateral investment treaties have not led to increased foreign investment. Moreover, there is no empirical evidence demonstrating that foreign direct investment leads to sustainable and equitable development. The UN Development Programme's (UNDP) report, *Making Global Trade Work for People* (2003), found that there is "no clear correlation between the volume of foreign direct investment and development success."

Further, an increasingly large percentage of foreign investment does not represent new and constructive investment in the real economies of developing countries, but rather acquisitions of already existing public and private entities, including public service providers. As the UNDP report notes, mergers and acquisitions reached more than 70% of the share of all foreign direct investment in developing countries during the 1990s. The UNDP report concluded that "the volume of foreign investment is far less important than how it is directed by source and host countries . . ."

Unfortunately, foreign investment has all too often created serious environmental and social damage around the world, including in such critical sectors as oil and gas production, mining, and forestry. Unconstrained capital flows have contributed to conditions that frequently obstruct appropriate environment and development policies.

Moreover, multinational corporations already have extremely broad rights and opportunities to operate globally, and have gained economic and political power that is greater than that of many countries. By contrast, citizens and communities lack the critical rights needed to address the impacts of these corporations.

Further, the development experience of many countries has demonstrated the importance of government intervention to promote domestic industry and place conditions on foreign investment. Most, if not all, developed countries have made use of policy tools, such as performance requirements, to ensure that incoming investment would help to develop infant industries, enhance export capacities, and promote inward technology transfers. Yet developed countries now seek to "kick away the development ladder" by denying developing countries the right to use identical policies. While we believe that the economic development of developed countries has not been pursued in environmentally and socially sustainable ways, we also believe that the investment proposals being promoted at the WTO will inappropriately restrict the ability of developing country governments to diversify and develop their economies.

Finally, many developing countries, led by India, have resisted the launch of WTO investment negotiations. Indeed, on August 1, 2003, the trade ministers of the 77-member African, Caribbean and Pacific (ACP) Group of countries adopted a declaration stating that there is no basis for the commencement of negotiations on the "Singapore issues," including an investment agreement. There is stark lack of consistency between the objection of developing countries to investment negotiations and the continued efforts of some developed countries to portray the current WTO talks as a "development round."

greater rights for big business, overriding the public interest

Protection of the environment and promotion of social and economic equality depend on government action to ensure that patterns of investment promote, rather than undermine, sustainable development. Yet the introduction of investment rules at the WTO would exacerbate the negative impacts of foreign investment by granting multinational companies increased rights, while also restricting the ability of governments to create strong regulatory frameworks and rights for citizens and communities. A WTO investment agreement would address the full range of economic sectors, encompassing manufacturing, natural resource extraction, agriculture and even services (an investment agreement would overlap the already existing General Agreement on Trade in Services).

In all of these sectors, many of the most important efforts to protect people and the environment would be in direct contradiction of a WTO investment agreement.

- “Non-discrimination” rules and disciplines on performance requirements can prohibit the use of preferences for local development, including preferences for local inputs that are used to promote sustainable production and environmental protection.
- “Non-discrimination” disciplines can also forbid measures to protect the natural resource rights of local and indigenous communities, and allow multinational companies to claim the same rights to control over resources as the

communities where the resources are located.

- “Non-discrimination” rules also can be used to challenge environmental and public interest policies that create a competitive disadvantage or investment barrier for foreign investors, even without any discriminatory intent.
- “Non-discrimination” and other market access disciplines can also lead to basic public service sectors such as water supply being forced open to multinational companies.
- Pre-establishment and market access rights could forbid the use of ecological limitations on investment.
- Rules in investment agreements concerning expropriation and minimum investor treatment can be used to challenge environmental and other public interest protections that interfere with the business activities or profits of foreign investors.
- Disciplines concerning transfers of funds can prohibit the use of capital controls that can be critical to creating a stable context for sustainable development.

In addition to the threats posed to a wide range of domestic policies, investment rules will also create significant risks for multilateral environmental agreements (MEA) and international human rights and labor rights agreements. As a case under NAFTA Chapter 11 has already demonstrated, even “non-discrimination” rules can be successfully used to challenge the implementation of an MEA

– in that case, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes – despite the fact that the MEA clearly calls for some of the measures employed. It is therefore evident that the investment negotiations have the potential to seriously and inappropriately undermine MEAs.

We are also concerned that the Most Favored Nation (MFN) principle could, even inadvertently, make all existing bilateral investment treatments (BITs) multilateral by requiring that countries treat all foreign investors no worse than they must treat foreign investors covered by a BIT. Given the far-reaching and stringent disciplines in most BITs, similar to those found in NAFTA Chapter 11, public policies would be severely undercut throughout the world.

In response to concerns about the impacts of a WTO investment agreement on public interest policies, the EU and other governments have asserted that investment negotiations at the WTO would be flexible and limited in scope. Yet past experience with other investment agreements, other WTO agreements, and the WTO system itself demonstrate that the EU's assurances are far from convincing. Even supposedly limited non-discrimination disciplines provide substantial rights to multinational investors and can be used to inappropriately challenge environmental and development policies. A so-called positive list, or bottom-up, approach, to the negotiating process has led to GATS negotiations in which major developed countries have placed significant pressure on developing countries to make undesired concessions. State-to-state disputes at the WTO and in other trade fora have been the venues for tribunal decisions that have directly attacked environmental and public interest policies.

There is also no reason to believe that an investment agreement will not exceed its original mandate. Major corporate lobby groups, such as the International Chamber of Commerce (ICC), have continued to press for the broadest possible investment agreement with the strictest rules possible. The ICC has called for a broad definition of investment that would include portfolio investment and intellectual property rights; high standards of investment protection, including restrictions on "indirect expropriation" due to public interest regulation; unrestricted transfer of funds (i.e. prohibitions on capital controls); and a direct investor-to-state dispute settlement mechanism. In keeping with the broad approach demanded by business, the US and other governments have already pressed for a broad definition of covered investments, including portfolio and other forms of capital investment.

The only expression of industry concern regarding WTO investment negotiations has come from corporate lobbies, such as the U.S.-based Business Roundtable (BRT), worried that the outcome of WTO investment negotiations could complicate their drive for the most comprehensive and stringent rules possible. For the BRT, anything less than the far-reaching investment rules found in recent bilateral free trade agreements negotiated by the United States would be unacceptable. Those agreements go so far as to prohibit the use of capital controls and include an extreme definition of investment that covers such items as derivatives, futures and options.

In an attempt to defuse tensions over the launch of WTO investment negotiations and their possible impacts, the EU has proposed that the WTO adopt a set of "procedural modalities" in

Cancun to guide the negotiating process, but avoid addressing controversial substantive areas until later. However, given the likely political pressure for stringent investment rules, and given the serious threat to the public interest posed even by a limited investment agreement, we believe that an agreement on “procedural modalities” for negotiations inappropriately opens the door to perilous negotiations. We therefore urge WTO member countries to reject any vague and open-ended set of guidelines for negotiating an investment agreement that, without question, will have serious global consequences.

the wto’s already existing investment rules

While the WTO should not initiate negotiate of an investment agreement, it must also confront the serious problems in already existing agreements, particularly the General Agreement on Trade in Services (GATS). Mode 3 of the GATS covers commercial presence – essentially foreign direct investment – by foreign service suppliers and thus, in essence, establishes an investment liberalization agreement for service sectors.

As with the proposed WTO investment agreement, the key disciplines of the GATS provide multinational investors substantial rights that can undermine efforts to protect the environment and the public interest, including the right to make choices concerning the public provision of services. In addition, negotiations concerning disciplines on domestic regulation may lead to rules that require countries to remove regulatory protections that are more burdensome than “necessary” to trade in services. The WTO should reexamine the commitments already made under Mode 3 and explicitly reject any further such commitments.

We also believe that the WTO Agreement on Trade-Related Investment Measures (TRIMS) inappropriately restricts the right of countries to adopt policies for development and environmental purposes. For example, policies to require multinational investors to use a certain percentage of domestically produced content are violations of the TRIMS rules, even though such policies are often critical tools for local development and can also be used in important ways to promote sustainable production and protect the environment. Moreover, despite a review of the TRIMS agreement mandated in Doha in order to address long-standing developing country concerns, no changes have been agreed at the WTO to provide the flexibility needed to pursue locally oriented development policies.

the right kind of investment agreement: rules, not rights, for big business

Finally, we note the critical importance of adopting rules outside the WTO context to regulate multinational businesses and provide rights for citizens and communities. Indeed, we agree with the ultimate intent of the paper submitted to the WTO by India and China, together with other developing countries, asserting the need to develop multilateral binding rules for corporate accountability. The impact of global corporate activities is such that we need a constraint on the already overwhelming rights enjoyed by multinational corporations. However, we strongly believe that the WTO is not the proper forum for such rules. Rules governing multinational corporate behavior should be negotiated in a multilateral social and environmental forum, not one such as the WTO dominated by commercial interests.

We conclude by noting that the international trade system is under intense criticism, including from its developing country members. The members of the WTO should not attempt to extend the WTO's unfair and unsustainable rules to massive new areas of the global economy. Investment negotiations in particular should be explicitly rejected by the WTO at its Cancun Ministerial. Otherwise, we will see the granting of rights to already powerful multinational corporations, and the corresponding continuing erosion of the rights of citizens and communities to protect themselves and their environment.

Friends of the Earth International
E-mail: info@foei.org
<http://www.foei.org>