WHAT IS AT STAKE AT CANCÚN?
AN ILLUSTRATIVE LIST OF THE SECTORS AND POLICIES UNDER THREAT FROM AN INVESTMENT AGREEMENT AT THE WTO

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SUMMARY

WTO member countries meeting next month at the WTO's Fifth Ministerial Conference in Cancún, Mexico, must decide whether to launch negotiations towards a multilateral agreement on investment. Despite widespread opposition to the launch of such negotiations from developing country governments and civil society organisations, rich countries – and in particular the EU – continue to press for an expansion of the WTO's agenda to include an investment agreement which could inflict significant damage on economies and livelihoods across the developing world.

This paper examines some of the sectors and policies which will come under threat if the Cancún Ministerial agrees to launch investment negotiations at the WTO. It provides a brief introduction to the importance of regulatory policies for national investment regimes, and challenges the claim that a GATS-style 'positive list' approach to a WTO investment agreement will offer countries the protection they need to safeguard those policies from liberalisation.

The paper then lists the types of sectors and policies which would be exposed to challenge as a result of a WTO investment agreement. In addition to those sectors which countries keep entirely closed to foreign investors, the paper examines the various screening processes, market access conditions, performance requirements and restrictions on land use which are employed by developing countries to maximise the benefits and minimise the risks of foreign investment to their economies.

The paper concludes that these positive regulations would come under threat from a WTO investment agreement, just as other such policies have already been prohibited as a result of existing WTO rules. The paper calls on the EU and other rich country WTO members to respect developing countries' opposition to a WTO investment agreement, and to abandon attempts to launch negotiations on investment at the WTO's Fifth Ministerial Conference in Cancún.

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1. Introduction

Is it in the interests of developing countries to launch new negotiations on investment at the WTO's Fifth Ministerial Conference this September in Cancún? Despite continuing deadlock within the WTO itself, the last six months have seen progress in the wider international debate on this issue. Indeed, there is now a growing consensus, even among the proponents of a WTO investment agreement, that such an agreement:

- would not lead to an increase in FDI flows to the poorest countries;[1]
- would not see an end to bilateral investment treaties (BITs) or regional accords;[2]
- does not form part of developing countries' own positive agenda for the WTO;
- would place immense strain on the negotiating capacity of developing countries at the WTO.

As a result of these and many other considerations raised at the WTO, the great majority of developing countries continue to oppose the launch of investment negotiations at Cancún. In addition to the statements at the WTO from individual countries such as Brazil, China, Cuba, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, the Philippines, Thailand and Venezuela, the past three months have also seen joint statements from developing country groupings opposing any launch of investment negotiations at Cancún, including the Dhaka Declaration of trade ministers from the 49 least developed countries (2 June), the Grand Baie Declaration of African trade ministers (20 June) and the ACP Declaration on the Fifth Ministerial Conference of the WTO (1 August).

The threats of a WTO investment agreement are now well documented – including in ActionAid's recent report *Unlimited Companies: The developmental impacts of an investment agreement at the WTO*. Such an agreement would provide the framework within which the most sensitive sectors of developing countries' economies could be opened up to competition from the world's most powerful multinational corporations – a level of competition which few are able to withstand. It would also threaten the pro-development policies which developing countries have traditionally used to maximise the benefits of FDI to their economies and to their people.

This paper provides some examples of the sectors and policies which would come under threat if the WTO were to negotiate an investment agreement along the lines currently proposed by developed countries. The list is by no means exhaustive, and the examples given can be no more than an illustration of the wide range of countries where such regulations exist. Nor does the paper deal with sectors or policies which might come under threat if more extensive WTO investment negotiations were launched to include foreign portfolio investment as well as FDI, as proposed by the USA. The aim of the paper is to provide a more concrete understanding of the potential threat of a WTO investment agreement even under the FDI-focused proposals put forward by the EU and Japan, and to bring evidence from other WTO negotiations as to the potential risks of embarking on investment negotiations after Cancún.

2. Opening up sensitive sectors, closing down policy space

Almost all countries keep some sectors of their economy closed to foreign investment. In addition to national security and cultural sectors, which are widely protected in countries at all stages of development, developing countries restrict access to a range of other sectors in order to safeguard vulnerable communities, infant industries or key areas of the economy – just as developed countries did when they were at comparable stages of their development (Chang and Green 2003; Chang 2002).

This cautious approach has persisted despite an overwhelming trend towards liberalisation of foreign investment regimes over the past decade. While the vast majority of regulatory changes made to national investment regimes during the years 1991-2001 served to make those regimes more liberal than before, in 78 cases countries introduced changes which strengthened the protection they afford particular sectors (UNCTAD 2002a). In other cases, protection has been kept constant for sensitive sectors while liberalisation has been pursued in the rest of the economy.

The importance of this cautious approach has been underlined by recent studies of the impact of competition from multinational investors on domestic enterprises. Such studies point to the vast technological superiority which multinational corporations enjoy over domestic firms, and the consequent likelihood that their entry into domestic markets will not stimulate local competition so much as destroy it. Any ‘crowding in’ effects of foreign investment are more likely to depend on vertical linkages and other channels for spillovers to the host economy than on the stimulus to competing firms (Hanson 2001; Agosin and Mayer 2000; Smarzynska 2002).

Yet even in these non-competing sectors of the local economy, neither the crowding in nor the spillover effects of FDI are assured. Saggi’s (2000) survey of the economic literature confirms that “several studies have cast doubt on the view that FDI generates positive spillovers for local firms”. Indeed, displacement of domestic enterprises by competition from multinationals can have dramatic effects on the local suppliers themselves, notably when it leads to concentration of the industry: following their takeover of Brazil’s cooperative dairy sector, Nestlé and Parmalat have dispensed with the services of over 50,000 dairy farmers (Azione Aiuto 2003).

National policies to ensure the positive integration of FDI with the local economy become doubly important, therefore, if developing countries are to capture the gains from foreign investment – and particularly so given the observation that “markets may fail to create efficient linkages” when left to their own devices (UNCTAD 2001). The importance of policy intervention is emphasised further by industry-level evidence that productivity and technology transfer gains from FDI tend to be captured by joint ventures rather than by those domestic firms which do not enjoy such formal links with foreign investors (Aitken and Harrison 1999; Djankov and Hoekman 2000). Conditions of establishment and other investment requirements also function as important factors in the bargaining process for control of rents, where they represent countervailing balances which host countries can employ to offset the market power of multinationals (Morrissey 2000).

Joint venture requirements and equity caps on foreign capital participation are of particular significance in maximising the benefits of foreign investment, now that trade balancing and local content requirements are prohibited under the WTO's TRIMS Agreement. Yet it is precisely these host country requirements on foreign investors which will be targeted for removal under the framework of a WTO agreement on investment. The experience of market access negotiations under GATS has shown how the establishment of any agreement aiming for 'progressively higher levels of liberalisation' creates the framework for the elimination of key government policies on investment, as well as the opening up of ever more sectors to foreign competition (Hilary 2002).

3. Failings of the 'positive list' GATS approach

The experience of GATS negotiations is also crucial to a proper understanding of the 'positive list' approach proposed for a WTO investment agreement by the EU. The positive list was originally designed to provide a more flexible architecture to any agreement, since individual countries formally retain the right to determine which sectors to commit to binding liberalisation, and under which conditions. The reality of the WTO negotiating process, however, exposes developing countries to intense pressure not only to open more sectors than they would themselves choose, but also to withdraw key conditions and requirements on foreign investors.

In the GATS request-offer process, these negotiations have been conducted in secret bilateral sessions, bringing the least powerful countries face to face with the most powerful nations in precisely the way the WTO was supposed to avoid. This exposes poorer countries not only to the far greater negotiating capacity of industrialised countries, in terms of both material and human resources, but also to the full range of extraneous threats and enticements which have become part and parcel of 'negotiations' at the WTO (Jawara and Kwa 2003).

The negative effect of this closed, bilateral process on developing countries has been confirmed by UNCTAD's recent survey of trade delegates involved in the GATS negotiations:

> *Of particular concern to developing countries is the lack of transparency of the ongoing request/offer process within the GATS, which hinders their capacity to evaluate the requests submitted to them by developed country trading partners, and the formulation of their own requests and offers, which is a particularly complex task.* (UNCTAD 2002c)

The added complication, over and above the pressure which such countries already face in bilateral negotiations outside the WTO, is that any liberalisation commitments granted at the WTO must be applied to all WTO members according to the organisation's most-favoured-nation (MFN) principle. This works to accelerate the process of liberalisation in much the same way as the WTO accession process has done, as *demandeur* countries can each target specific sectors of the host country for liberalisation commitments and yet all benefit from the increased market access gained in the negotiations by other *demandeurs*. As a result of their own experience of this process, WTO delegates from countries such as Bangladesh, Brazil, India, Jamaica, Kenya, Malaysia, Thailand and the Philippines have all pointed out that the positive list approach used in GATS does not provide the flexibility needed to protect sensitive sectors or maintain key development policies.

One further problem with the GATS model is that liberalisation commitments registered in national GATS schedules are effectively irreversible, once made. The disciplines for providing compensation to other WTO members for modification or retraction of existing commitments (GATS Article XXI) are designed to be sufficiently punitive to deter countries from taking that step. In this way, and despite its supposedly 'development-friendly' architecture, the positive list acts as a one-way ratchet mechanism, committing countries to ever greater levels of liberalisation and cutting off the possibility of revising investment policies at a later date.

This ‘lock-in’ mechanism is of equal concern in relation to any WTO investment agreement, as it too would aim to bind countries’ liberalisation commitments for the future in the same way. Yet this closing down of future policy space is particularly problematic in relation to investment policy, as countries typically need to modify their investment regime as they climb the development ladder and seek to promote diversification of the economy into new sectors. Without this possibility of modifying investment policies to suit their level of development, developing countries which are heavily reliant on foreign investment face the danger of being caught in the ‘low-level equilibrium trap’ at the bottom of corporate production chains, unable to move up to higher value-added levels of production (UNCTAD 2002b; Milberg 1999). Countries need to be allowed to retain sufficient flexibility in their investment policy regimes to guard against this danger – yet it is precisely that flexibility which a WTO investment agreement would remove.

Botswana, for example, has maintained an open investment regime since independence in 1966, and has benefited greatly from the successful attraction of FDI into mining through enterprises such as the Debswana Diamond Company (a 50-50 joint venture between the government and De Beers) and other partnerships in copper and nickel. Investment of the revenue from exploitation of its natural resources into health, education and infrastructural development has brought Botswana the distinction of being the only country yet to graduate out of the category of least developed countries (LDCs).

Having reached the status of a middle income developing country, the government of Botswana is now proposing to introduce a set of performance requirements on foreign investors. These conditions would require foreign companies to engage in the transfer of technology and in training programmes, as well as employing nationals in management and supervisory positions. The introduction of these conditions is explicitly intended to develop a local skills base and ‘crowd in’ domestic investment, as well as providing for more effective screening of FDI (UNCTAD 2002d).

Under a WTO investment agreement, Botswana would not be able to contemplate the introduction of new conditions in any sectors it had committed for liberalisation at the WTO. Claims that the GATS positive list approach would still allow policy space for development since countries retain the formal right not to make liberalisation commitments in the first place (EC 2003, 2002) fail to address the reality of the WTO’s negotiating process. GATS has provided a framework through which WTO members seek progressively higher levels of liberalisation in the service sectors of other member countries, just as the proposed WTO investment agreement would provide a similar framework for liberalisation of the industrial and agricultural sectors. Once a country yields to the pressure to commit a sector under such a framework, it thereby forfeits the possibility of introducing new requirements on foreign investors in that sector in the future.[3]

4. Sectors and policies under threat from a WTO investment agreement

In most countries, the majority of sectors kept closed to foreign investors are service sectors. This paper does not include service sectors in its analysis, however, as there is already an extensive literature dealing with services liberalisation at the WTO in the context of GATS. Indeed, it has become much easier to ascertain how a WTO investment agreement would work to increase liberalisation in restricted sectors as a result of experience of the current round of GATS negotiations –

and in particular as a result of the leaked publication of the EU's requests to other WTO member countries that they should commit their service sectors to binding liberalisation under GATS.[4]

This paper focuses instead on the additional threat which a WTO investment agreement would pose developing countries over and above the ongoing services negotiations at the WTO.[5] The examples below illustrate some of the industrial and agricultural sectors which countries currently protect from foreign investment, as well as the conditions and requirements places on foreign investors in those sectors where investment is allowed.

It should be stressed that all the countries mentioned below welcome foreign investment, and have undertaken significant liberalisation of their investment regimes in recent years in order to embrace it. Where restrictions have been maintained, therefore, they are designed to achieve specific policy objectives. It is those policy objectives which would come under threat through the framework of an agreement on investment at the WTO.

Note on sources[6]

4.1 Closed sectors

The clearest restriction on foreign investment into a sensitive sector is total closure of that sector to foreign participation. Given the extent of liberalisation in recent years, relatively few sectors are now designated as wholly closed to foreign investors. Those which do remain closed should be regarded as particularly sensitive, whether for social, environmental or economic reasons, as this brief set of examples indicates.

Thailand, one of the countries to have used foreign investment to greatest success, prohibits FDI in rice farming, animal farming, forestry from natural forests, fishery for marine animals and various other sensitive sectors. **India** also protects its agriculture sector from foreign investment, despite its major programme of investment liberalisation in other sectors (including agriculture-related sectors) over the past 12 years. **Uganda** also prohibits foreign investment in agriculture, although flexibility has been allowed in the establishment of tea and coffee plantations.

In the agricultural sector, **China** prohibits foreign investment in the breeding of certain high-quality Chinese varieties of crops, livestock and fishery, fishing in China's territorial waters, as well as the development and production of genetically modified seeds. China also maintains a ban on foreign investment into the processing of Chinese green tea and other specialist teas. **Indonesia** excludes foreign investors from germ plasm cultivation as well as forestry concessions.

Like many countries, **Tanzania** prohibits FDI in the armaments industry, as well as in manufacturing hazardous chemicals and explosives. Zanzibar has its own investment code within Tanzania, which among other sectors excludes foreign investors from the manufacture of ice cream. **The Philippines** also prohibits FDI in the manufacture of firecrackers and pyrotechnic devices, as well as small-scale mining and the utilisation of marine resources.

Ethiopia (at present a WTO observer) is another country which prohibits foreign investment in its defence industries, as well as in bread baking, grain milling, manufacture of wood products for the domestic market and the tanning of hides and skins. **Botswana** also reserves bread baking and sorghum milling for domestic enterprises, along with the manufacture of cement, school furniture and uniforms (although medium-scale investment may be allowed in these sectors if undertaken through a joint venture with a domestic partner).

Several countries exclude foreign investment from sectors which are reserved for state-owned enterprises. In addition to many service industries, **Mexico** prohibits foreign investment in oil and other hydrocarbons, basic petrochemicals, radioactive minerals and the generation of nuclear energy. Similarly, **Costa Rica** maintains state monopolies in the extraction of hydrocarbon and radioactive minerals, oil refining and alcohol distillation.

4.2 Screening processes (approvals and licences)

More widespread than outright prohibition of FDI is the requirement that foreign investors must undergo a process of screening before they are allowed to establish new activities. This still allows for control over foreign investment into sensitive sectors, as well as providing flexibility for the government to negotiate terms and conditions under which certain investments will be approved. Indeed, screening is a powerful tool for governments both to direct FDI into the sectors of the economy in which they wish to use foreign capital, and to determine how it is used.

Mauritius is another of the African countries to have used FDI successfully in achieving substantial development progress over the past three decades, diversifying away from its traditional reliance on sugar into manufacturing, tourism, port services and financial services, its offshore banking sector now being one of the principal channels for foreign investment into India. The country bases its foreign investment policy on the approvals process rather than on codified guidelines or regulations, with all new investments required to obtain formal authorisation prior to establishment. While FDI is not specifically prohibited in any part of the economy, therefore, the government of Mauritius uses the screening process to discourage foreign investment in sectors such as traditional agriculture, while promoting it in others.

Uganda, a more recent African success story, employs a licensing system for foreign investors. In approving a licence application, the government may assess the investor's ability to meet the official set of investment 'objectives', including the generation of foreign exchange, use of local inputs, employment creation, technology transfer and contribution to regional development. A secondary licence is required for investments in sensitive sectors such as fishing, mining, forestry, coffee and pharmaceuticals.

Other countries employ screening for specific economic, environmental or national security purposes. **Ecuador** requires all investors wishing to establish operations in the fishing sector to gain prior approval from the National Fishing Institute, the body responsible for the protection of fishing resources. **Egypt** requires foreign investors to obtain prior approval from the government for any investment in military products, tobacco or the Sinai. **Lesotho** operates an industrial licensing system for all businesses employing more than 10 people, and discourages foreign investment into small-scale manufacturing below that limit.

Thailand operates a two-tier system of approvals. Any investment in businesses related to national security, art, culture and tradition or the environment (including manufacturing sugar from sugar cane, salt farming, mining and wood fabrication) require prior approval from the Cabinet, and Thai nationals must constitute at least 40% of the board of directors. In those sectors in which 'Thai nationals are not yet ready to compete with foreigners' (such as lime production, flour production from rice, marine animal culture and managed forestry) government approval is required for majority foreign ownership. Specific conditions may be attached to the approvals process, relating to capital, loans, technology, assets, residency of foreign directors and repatriation of funds.

4.3 Market access conditions (joint venture requirements, equity caps etc)

Whether by means of an approvals process or as a legal requirement, many countries have traditionally required foreign investors to form partnerships with domestic enterprises as a means of integrating foreign investment with the local economy. Conditions of access have taken the form of requirements on the type of legal entity to be established (such as joint ventures) or limitations on foreign capital participation (such as equity caps). As noted above, these conditions have taken on extra importance now that the WTO's TRIMS Agreement has prohibited the use of trade-related investment measures in WTO member countries.

China is the classic example of a country which has successfully employed joint venture requirements in its strategy for deriving maximum benefit from foreign investment. Joint ventures were the only form of foreign investment allowed into China during the first phase of its post-1978 opening to the world economy, and they remain a requirement in some sectors even now that the government permits wholly foreign-owned enterprises in many fields. Attempts to portray joint venture requirements as a 'restriction' on investment are confounded by the fact that China has headed the list of developing country recipients of foreign investment for many years, and has been tipped to overtake the USA as the world's number one recipient of FDI inflows in the statistics for 2002.

Indonesia is another country which has made use of joint venture requirements on foreign investors, particularly in those sectors of the economy which are reserved for small-scale enterprises. The importance of such enterprises for poverty reduction is widely recognised, and Indonesia has reserved many sectors in the fields of agriculture, fisheries, foodstuffs, toolmaking and garment production exclusively for small-scale producers. However, there is a second set of sectors in which large and medium-scale enterprises are allowed to invest on condition that they enter into partnership with a small business or cooperative. These include several sectors in the fields of animal husbandry, production of food crops, food and drink processing, manufacture of agricultural machinery, silk spinning and small-scale mining.

The Philippines also seeks to protect small-scale enterprises from overwhelming foreign competition, setting equity caps on foreign capital participation as a means of controlling the presence of investors in sensitive sectors. Foreign ownership is restricted to a maximum of 40% in all non-export firms capitalised at less than US$200,000, as well as in natural resource extraction, military hardware and commercial deep sea fishing.

In addition, both the above countries require foreign investors to divest a proportion of their shares to nationals of the host country after a certain period of operation. The Philippines allows foreign companies full ownership of rice and maize processing enterprises for 30 years, but after this time requires the foreign investor to reduce its equity participation to 40%. Indonesia requires all foreign investors to divest up to 5% of their shares to Indonesian nationals after 15 years of operation.

India maintains a system of equity caps in several sectors. In addition to a broad range of service sectors, foreign investors face varying equity caps in mining for coal, diamonds and precious stones, oil exploration and refining, the defence industry and activities related to atomic minerals. India permits wholly foreign-owned entry into the tea sector (including tea plantations, which require prior government approval), but requires the company to divest 26% of its equity to domestic ownership within five years.

India also maintains a 24% equity cap in its small-scale industries (SSI) sector. In addition, where a manufacturing sector is reserved for SSIs, foreign investors wishing to gain entry to that sector must obtain a prior licence and undertake to export at least 50% of their production each year. The importance of such measures in protecting small-scale enterprises from competition from foreign multinationals was emphasised 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.*

Other countries maintain equity caps both horizontally and in particular sectors. **Ghana** restricts foreign ownership of companies publicly listed on the stock exchange to 75%, but operates a specific 50% cap on foreign ownership of tuna fishing vessels. Similarly, **Chile** requires all vessels fishing in the country's Exclusive Economic Zone to have majority Chilean ownership, although exceptions can be made for distant waters.

Some developing countries also place minimum capital requirements on investors, either across the board or in individual sectors only. In certain cases this policy has the aim of ensuring that the investments bring with them not only greater amounts of capital but also technology which would otherwise be unavailable within the host economy. Minimum capital requirements are employed by WTO member countries such as **Ghana**, **Tanzania** and **Uganda**, as well as countries with WTO observer status such as **Ethiopia**, **Vietnam** and **Uzbekistan**.

4.4 Performance requirements

In addition to the market access conditions outlined above, developing countries have traditionally employed a range of other measures to maximise the spillover benefits of foreign investment. These include the many incentives offered to foreign companies if they invest in certain geographical areas or sectors, such as the tax holidays and other subsidies provided by countries such as Angola, Brazil, Colombia, Costa Rica, Ecuador, Egypt, Ghana, India, Nigeria, Pakistan, Singapore and Thailand. Other incentives are available to export-oriented foreign investors, or to those companies which commit themselves to skills and technology transfer, research and development or the location of their headquarters in a particular country (UNCTAD 2000).

These incentives have not always been successful in channelling the right type of foreign investment to the desired areas or sectors, however, and they often represent a considerable loss to the potential revenue of the host country. For this reason, many countries also impose certain performance requirements on foreign investors as a condition of access to the market, whether to encourage employment of local staff in senior positions, to ensure the transfer of technology to domestic producers, or to guard against capital flight.

Some of the most commonly used performance requirements on foreign investors have already been banned under the WTO's TRIMS Agreement – most notably, the local content and trade balancing requirements which have traditionally formed part of developing countries' policy regime to promote linkages with the domestic economy and offset macroeconomic imbalances caused by foreign investment. At the same time as resisting the introduction of new investment negotiations at the WTO, some developing countries are also seeking to amend the TRIMS Agreement so as to regain the necessary flexibility to implement their development policies (Brazil and India 2002).

Yet there are still several ways in which countries explicitly encourage foreign investment projects which contribute to the development of the host economy. Both **South Africa** and **India** actively favour investors which undertake to engage in technology transfer to domestic firms, while **Malaysia** determines the level of foreign equity allowed in the specific sectors of mining and processing of mineral ores according to the level of technology proposed.

Likewise, many countries wish foreign investors to contribute to the training of their own nationals, providing for direct transfer of skills and technology expertise to the host country population. **Indonesia** requires foreign investors to operate training programmes for this purpose, with the aim of replacing foreign workers with Indonesian nationals wherever possible, particularly at management level. In **Brazil**, all companies employing three or more persons must ensure that Brazilian nationals constitute at least two thirds of the firm's total number of employees, as well as two thirds of the total payroll (although foreign specialists whose expertise is not available in the domestic labour market are excluded from this calculation). **Chile** requires foreign enterprises to ensure that at least 85% of their staff are Chilean nationals.

Several developing countries maintain limits on the repatriation of profits and capital by foreign investors as a means of guarding against capital flight. In **Chile**, capital can only be repatriated after one year from the date of entry, while **Brazil's** Central Bank reserves ultimate discretion over the regulation of remittances. Foreign investors in **South Africa** may repatriate funds freely, but face restrictions on local borrowing and access to credit.

4.5 Restrictions on land use

It is not only the opening of sectors or the closing down of policy space that are threatened by the investment agreement proposed for the WTO. Restrictions on land ownership or lease titles, including stipulations that foreigners may not lease land for agricultural or other specified purposes, have also been identified as barriers to the entry of foreign investment. As such they could be targeted for elimination under the liberalisation framework of an investment agreement, just as restrictions on land use have already been targeted in the GATS negotiations at the WTO.

In addition to the restrictions already mentioned above in relation to investment in agriculture, forestry and mining, several countries operate land use controls in favour of their own nationals. Many countries such as **Ghana**, **Lesotho**, **Uganda**, **the Philippines** and **Solomon Islands** prohibit ownership of land by foreign companies, while others such as **Pakistan** and **Malaysia** will authorise acquisition of real estate only through case-by-case screening and approval of individual applications. In **Thailand**, foreign businesses are allowed to purchase up to 1,600 square metres for residential use only. Some countries operate particular controls on ownership or use of agricultural land: **Malaysia** restricts ownership of such land to Malaysian citizens, while **Egypt** prohibits the construction of industrial plant on agricultural land.

Other countries restrict foreign ownership of land along coastlines or adjacent to national borders; **Mexico**, for example, maintains such a ban for all land up to 50km from the coast and up to 100km from the country's frontiers. On a smaller scale, **Costa Rica** reserves the first 200 metres of beachfront as state property, but may grant concessions for development of all but the first 50 metres subject to environmental impact assessments. At least 50% of the development capital for such concessions must be provided by local enterprises, while individual foreign investors must have resided in the country for a minimum of five years prior to taking out the lease.

The threat to regulations such as these is a particular concern for organisations working to defend land rights, as restrictions on land use are often maintained for reasons of social justice and environmental protection. There has already been considerable deregulation of land use laws and practices in many countries as the result of pressures on investment regimes over the past decade. Any further pressure to liberalise land ownership or lease practices in developing countries would carry great risks for the most vulnerable communities.

4. Conclusion

It should be noted that many countries allow for great flexibility in the implementation of investment policies such as those described above. Governments will sometimes be prepared to relax restrictions on foreign investors if the gains from a particular investment are considered sufficient to justify such a relaxation of the rules.

Under a WTO investment agreement, by contrast, countries would lose the flexibility to introduce regulatory policies on investment in any sector which had been committed for liberalisation. Moreover, even under the GATS-style positive list approach described above, developing countries will come under intense pressure to commit more and more of their agricultural and industrial sectors to liberalisation, just as they have come under pressure to commit their service sectors under GATS. An investment agreement at the WTO would act as the framework not only for opening up more sectors of developing country economies to competition from multinational corporations, but also for tilting the balance of power still further in the multinationals' favour.

Even pro-liberalisation commentators have questioned the benefit of WTO investment negotiations for developing countries. In particular, World Bank staff have expressed their doubts as to the intrinsic value of a WTO investment agreement for such countries, arguing that the only rationale for its introduction might be as a bargaining tool for concessions in areas of genuine interest to developing country WTO members themselves (Newfarmer 2003; Hoekman and Saggi 1999).

In reality, however, no one would seriously suggest that developing countries should agree to a new set of unwanted and potentially damaging negotiations simply in order to seek gains in other areas of the WTO's negotiating programme. Developing countries are already being asked to grant market access concessions across a wide range of existing trade negotiations, as a result of which they have more than enough bargaining collateral to make their own demands. More pertinently still, developing countries have their own bitter experience of false 'trade-offs' at the WTO, and many have already rejected EU attempts to link reform of its Common Agricultural Policy with progress on investment negotiations at Cancún.[7]

If a WTO investment agreement offers nothing to developing countries but threatens to undermine their attempts to maximise the development benefits of foreign investment, it has no place in a Doha 'Development' Agenda. The rich countries of the industrialised world should respect the opposition of the vast majority of developing countries to launching investment negotiations at the Cancún Ministerial. They should abandon attempts to impose their expansionist agenda on an unwilling WTO membership, and concentrate instead on the genuine development priorities identified by developing countries themselves.

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NOTES

[1] Even the June 2003 submission to the WTO from Canada, Costa Rica and Korea acknowledged that "a multilateral framework for investment in the WTO would not *guarantee* greater investment flows" (Canada et al. 2003) – but argued for investment negotiations to be launched at Cancún regardless. The UK government, one of the key proponents of a WTO investment agreement within the EU, has likewise conceded that such an agreement "will not guarantee increased or redirected investment flows" (UK 2003). This retreat from earlier claims that the poorest countries would benefit the most from a WTO investment agreement is in part attributable to the World Bank's conclusion that any increased FDI flows resulting from multilateral rules at the WTO would be "virtually nonexistent for low-income developing countries" (World Bank 2003).

[2] That BITs will continue to be signed alongside any multilateral rules has also been conceded following acknowledgement by the World Bank (2003), as well as UNDP (2003).

[3] For more on the failings of the GATS positive-list approach, see also Hardstaff (2003).

[4] The full texts of all the EU's requests to 109 other WTO member countries can now be viewed online at www.gatswatch.org, or at www.polarisinstitute.org. For an analysis of the requests made to developing countries, see Joy and Hardstaff (2003).

[5] It should be noted that there is still no clarity within the WTO as to how any new WTO investment agreement would co-exist with GATS – in particular, whether there would be one WTO agreement for investment in the agricultural and industrial sectors and another (GATS) dealing with services, or whether the provisions and commitments for commercial presence of service suppliers under mode 3 of GATS would be incorporated into a new investment agreement covering all sectors; for more detail, see reports and minutes of the WTO's Working Group on the Relationship between Trade and Investment; also Japan (2003).

[6] This section has been compiled from a wide range of sources, including the texts of national investment codes themselves, legal guides and other sources. Among the latter, particular use has been made of UNCTAD's Investment Policy Reviews (available online at: http://r0.unctad.org/ipr/), the UNCTAD-ICC series of investment guides (http://r0.unctad.org/en/pub/investguide.en.htm), as well as other commercial guides and resources for investors. While every effort has been made to ensure that details are accurate at time of publication, no responsibility attaches to the information given.

[7] For more on this particular 'deal', see Hardstaff and Rice (2003).