German NGO Forum on Environment and Development

Documentation of the International Conference:

The Controversy about a New Investment Agreement in the WTO

Social and Ecological Implications and Alternatives

Bonn, 28-29 April 2003

German NGO Forum on Environment and Development

Dokumentation der Internationalen Konferenz:

"Die Kontroverse um ein neues Investitionsabkommen in der WTO vor der Ministerkonferenz in Cancún - sozial-ökologische Implikationen und Alternativen"

Veranstaltet vom Forum Umwelt & Entwicklung und dem Evangelischen Entwicklungsdienst (EED) am 28./29. April 2003 in Bonn

Documentation of the International Conference:

"The Controversy about a New Investment Agreement in the WTO in the Run-up to the Ministerial Conference in Cancún - Social and Ecological Implications and Alternatives"

Organised by the German NGO Forum on Environment & Development and the Church Development Service; Bonn, 28-29 April 2003

Herausgeber:
Forum Umwelt & Entwicklung
Am Michaelshof 8-10
53177 Bonn
Telefon: +49-(0)228-35 97 04
Fax: +49-(0)228-92399356
E-mail: info@forumue.de
Internet: www.forumue.de

Evangelischer Entwicklungsdienst (EED)
Ulrich-von-Hassel-Str. 76
53123 Bonn
+49-(0)228-8101-2315
+49-(0)228-8101-160
eed@eed.de
www.eed.de

Die internationale Konferenz ist Teil des vom Umweltbundesamt im Rahmen des Umweltforschungsplans des Bundesumweltministeriums finanzierten Forschungsvorhabens „Integration von Umweltaspekten in eine neue WTO-Runde". Sie wurde gemeinsam mit dem Evangelischen Entwicklungsdienst (EED) veranstaltet und durch die Nordrhein-Westfälische Stiftung für Umwelt und Entwicklung unterstützt.
Der Inhalt der Tagungsbeiträge gibt nicht unbedingt die Meinung der Herausgeber wieder.

Verantwortlich:
Jürgen Maier

Redaktion:
Antje Schultheis, AG Handel des Forum Umwelt & Entwicklung
Tobias Reichert, AG Handel des Forum Umwelt & Entwicklung

Fotos:
Susanne Lehmann, AG Handel des Forum Umwelt & Entwicklung

Layout:
Bettina Oehmen

Herstellung:
Knotenpunkt GmbH, Buch

Bonn 2003

Inhalt/Contents

Vorwort 4

Preface 5

Die Kontroverse um ein neues Investitionsabkommen in der WTO 6

The controversy about a new agreement on investment in the WTO 16

International investment agreements as instruments to impose the interests of corporations 26

Environmental aspects of an investment agreement in the WTO-System - Executive summary 31

Comment on Stefanie Pfahl's paper 39

FDI - is not automatically good for development 43

The role of foreign direct investment in development 44

A sustainable FDI framework in the Doha development agenda 50

International investment policy and sustainable development 51

Annex 1: Conference programme 57

Annex 2: List of participants 59

Annex 3: Literature 61

Annex 4: Joint statement by European Civil Society Groups against an agreement on investment in the WTO 65

Annex 5: Concept paper on policy space for Development 68

Vorwort

Kurz vor der fünften Ministerkonferenz der WTO in Cancún hat die Kontroverse um ein multilaterales Investitionsabkommen an Schärfe gewonnen. Über 70 Entwicklungsländer stehen den Verhandlungen über ein solches Abkommen im WTO-Kontext wegen der negativen Auswirkungen kritisch bis ablehnend gegenüber. Zudem haben mehr als 100 NGOs im März 2003 eine internationale Erklärung unterzeichnet, in der sie sich deutlich gegen den Beginn von Verhandlungen aussprechen.

Zahlreiche Fallstudien über im Ausland getätigte Investitionen zeigen, dass kommerzielle Investitionen oft im Konflikt mit sozialen und entwicklungspolitischen Interessen der betroffenen Länder stehen. Zu den Auswirkungen von Investitionen auf die Umwelt gibt es bislang kaum Untersuchungen. Im Rahmen eines vom Umweltbundesamt geförderten Projekts hat das Forum Umwelt und Entwicklung deshalb eine Studie über die möglichen Konsequenzen eines Investitionsabkommen auf die Umwelt erstellen lassen. Die Literaturrecherche von Stefanie Pfahl zeigt, dass die Konsequenzen nicht eindeutig abgeschätzt werden können. Somit sind Skepsis und Vorsicht geboten, zumal keine verbindlich geregelten Mechanismen für Umweltverträglichkeitsprüfungen in einem neuen Investitionsabkommen vorgesehen sind.

Vor diesem Hintergrund organisierte das Forum Umwelt und Entwicklung zusammen mit dem Evangelischen Entwicklungsdienst im April 2003 eine internationale Tagung über die ökologischen und sozialen Implikationen eines Investitionsabkommens im Rahmen der WTO. Anliegen der Tagung war es, das konfliktreiche Thema in einem breiteren Kreis von Interessierten zu diskutieren. Dabei wurden die Konfliktlinien zwischen den Befürwortern und Gegnern des Abkommens sichtbar. Insbesondere durch die heterogene Zusammensetzung der TeilnehmerInnen konnte die Tagung einen kritischen Dialog zwischen Zivilgesellschaft, Vertretern der EU-Kommission sowie Bundesregierung anregen und leistete dadurch einen Beitrag zur stärkeren Wahrnehmung des Themas in der Öffentlichkeit.

Die wesentlichen Inhalte der Tagung waren:

- Ökologische Auswirkungen eines Investitionsabkommens;
- Die Folgen eines Investitionsabkommens für Entwicklungsländer;
- Die grundsätzliche Frage, ob Auslandsinvestitionen den Königsweg für eine nachhaltige Entwicklung darstellen;
- Die Alternativen zu einem multilateralen Investitionsabkommen und das demokratietheoretische Problem, dass ein Investitionsabkommen die Regulierungsmöglichkeiten für nationale Regierungen massiv beschneiden würde;
- Deutschlands Beitrag zu einer nachhaltigen Investitionspolitik.

Neben den Beiträgen der Tagung enthält diese Dokumentation eine Zusammenfassung von Nicola Sekler, die sowohl in Deutsch als auch in Englisch vorliegt und die wesentlichen Argumente der ReferentInnen sowie die Kernaussagen der Beiträge systematisch zusammenfasst. Im hinteren Teil der Dokumentation befinden sich wertvolle Hintergrundinformationen wie eine ausführliche Literaturliste und die obengenannte Erklärung der NGOs.

Unser besonderer Dank geht an unsere außerordentlich engagierten Praktikantinnen Jana Hönke, Elena Sahm und Jessica Cockburn, die durch ihre enorme Einsatzbereitschaft maßgeblich zum Gelingen der Konferenz beigetragen haben.

August, 2003
Antje Schultheis für das Forum Umwelt und Entwicklung

Preface

Shortly before the 5th Ministerial Conference of the WTO the controversy about a multilateral investment agreement has intensified. In fear of such an agreements' negative impact, more than 70 developing countries expressed criticism or disapproval of such an agreement within the WTO. Earlier this year more than one hundred NGOs worldwide jointly declared their opposition to a start of negotiations towards a new investment agreement.

Numerous case studies of past foreign investments show that there often is a direct conflict between the commercial investment and the social and developmental interests of the targeted countries. Yet there has not been any study on the environmental impact of foreign investment. On request of the Federal Environmental Agency, the German NGO Forum on Environment and Development therefore commissioned a study on the subject. The resulting literature research by Stefanie Pfahl shows that the environmental impact of foreign investment is not easily predictable. One should therefore remain cautious on this issue, especially in particular since it has not intended to include binding mechanisms for environmental impact assessment in a new agreement on investment.

In light of this the German NGO Forum on Environment and Development and the Church Development Service (EED) organised an international conference on the possible ecological and social impact of a new agreement on investment. The aim of the conference, which took place in Bonn in April 2003, was to discuss this controversial subject within a broader circle, and to clarify the perspectives of opponents and proponents of a new WTO agreement. The conference was thereby able to promote a critical dialogue between representatives from the EU Commission, the Federal Government, NGOs, and the interested public.

The major subjects of discussion during the conference were:

- the ecological impact of an agreement on investment,
- the impact of an agreement on investment on developing countries,
- the question whether foreign investment presents a suitable way to achieve sustainable development,
- alternatives to a multilateral agreement on investment with a special focus on democratic aspects,
- Germany's contribution to a sustainable investment policy.

Apart from the presentations of the speakers this documentation contains the written contributions to the conference, and additionally a summary by Nicola Sekler that presents the main arguments and key statements of these contributions. Additional information such as a selection of recent literature and important documents are given in the annex.

We thank all those who helped with the preparation and realization of the conference, especially our interns Jana Hönke, Elena Sahm, and Jessica Cockburn, for their commitment and enthusiasm.

August, 2003
Antje Schultheis, German NGO Forum on Environment & Development

Die Kontroverse um ein neues Investitionsabkommen in der WTO

Nicola Sekler, WEED (Weltwirtschaft, Ökologie & Entwicklung), Deutschland

Zusammenfassender Bericht von der Internationalen Tagung „Die Kontroverse um ein neues Investitionsabkommen in der WTO vor der Ministerkonferenz in Cancún - sozial-ökologische Implikationen und Alternativen", veranstaltet von der Projektstelle Handel, Umwelt und nachhaltige Entwicklung des Forums Umwelt und Entwicklung und dem Evangelischen Entwicklungsdienst (EED) am 28. und 29. April in Bonn.

Die Diskussion über ein multilaterales Investitionsabkommen ist nicht neu. Bestrebungen dieser Art gab es zuletzt auf OECD-Ebene. Die in diesem Kontext geführten Verhandlungen über das sog. Multilaterale Investitionsabkommen (MAI) waren 1998 gescheitert. Meinungsverschiedenheiten unter den OECD-Mitgliedstaaten und öffentlicher Druck, haben einen weitreichenden Vertrag verhindert, der einseitig die Interessen Transnationaler Konzerne gefördert und wirtschaftspolitische Gestaltungsspielräume der Mitgliedstaaten drastisch eingeschränkt hätte. Schon damals war allerdings klar, dass es zu einer Neuauflage auf anderer Ebene kommen könnte. Genau dies droht nun auf multilateraler Ebene im Rahmen der Welthandelsorganisation (WTO): Auf der nächsten Ministerkonferenz in Cancún/Mexiko im September 2003 soll die Entscheidung fallen, ob die Agenda der derzeit laufenden Welthandelsrunde noch um die sogenannten neuen Themen (Investitionen, Wettbewerb, öffentliches Beschaffungswesen, Handelserleichterungen) erweitert wird. Die institutionelle Aufhängung bei der WTO hätte weitreichende Folgen: nicht nur gäbe es hier eine verschärfte Durchsetzungskraft der Rechte durch das Streitschlichtungsverfahren, sondern zusätzlich bedeutete dies eine Stärkung der durch ein Demokratiedefizit gekennzeichneten WTO und ein völkerrechtlich verbindliches Festschreiben von Regelungen, die sich nach den Interessen von Transnationalen Konzernen (TNC) richten.

Die Positionen bezüglich eines internationalen Rahmenwerks für Investitionen könnten im Vorfeld widersprüchlicher nicht sein und die Entscheidung, ob die Verhandlungen nach der fünften WTO-Ministerkonferenz in Cancún offiziell aufgenommen werden oder nicht, verspricht spannend zu werden. Stärkste Befürworterin ist die Europäische Union mit einem sehr großen Interesse, ihren Konzernen einen erweiterten Marktzugang zu ermöglichen (Liberalisierung) und einen verbesserten Schutz von Eigentumsrechten der Unternehmen (Investitionsschutz) zu erreichen. Auf der Gegenseite steht eine stetig wachsende Gruppe von Entwicklungsländern mit Indien als starkem Wortführer. Sie befürchten eine Einschränkung ihres entwicklungspolitischen Handlungsspielraums und beklagen, dass Rege-

lungen, die Unternehmen zu ökologisch und sozial verantwortlichem Handeln verpflichten, überhaupt nicht vorgesehen sind.

Ziel der internationalen Konferenz in Bonn war es, einen kritischen Dialog zwischen Zivilgesellschaft, Vertretern der EU-Kommission und Bundesregierung sowie internationalen Organisationen zu ermöglichen und dadurch einen ersten Schritt zur stärkeren Wahrnehmung des Themas Investitionsregelungen in der Öffentlichkeit zu leisten. Bislang beschäftigten sich nur wenige Experten mit der Problematik, die sich bei der Diskussion um ein Investitionsabkommen in der WTO ergibt. Im Verlauf der Tagung kristallisierte sich wieder die Frage heraus, ob und in welchem Umfang Regulierungsmöglichkeiten für nationale Regierungen durch ein solches Abkommen erhalten bleiben.

Auf dem Programm der Tagung standen die ökologischen, ökonomischen und sozialen Folgen von ausländischen Direktinvestitionen (ADI), das Spannungsfeld zwischen Regulierung und Liberalisierung sowie alternative Ansätze zu einer Investitionsregulierung. Über 80 TeilnehmerInnen aus dem In- und Ausland waren gekommen. Neben zahlreichen VertreterInnen von NGOs und ATTAC waren auch Gewerkschaften und staatliche Entwicklungs- und Investitionsgesellschaften sowie Bundestagsabgeordnete anwesend, so dass die Debatte sehr lebhaft verlief und die Konfliktlinien deutlich zum Vorschein traten.

Internationale Investitionsabkommen - ein wichtiger Baustein in der neoliberalen Globalisierungsstrategie?

Im Eröffnungsreferat ordnete Peter Fuchs (WEED, Weltwirtschaft, Ökologie und Entwicklung) die Diskussion um ein Investitionsabkommen in den Gesamtkontext einer neoliberalen Globalisierungsstrategie ein, deren Ziel es ist, die Macht Transnationaler Konzerne zu stärken und staatliche Steuerungsmöglichkeiten einzuschränken. Liberalisierungsdruck im Süden steht einer zunehmenden Abschottung der Märkte sowie Subventionspolitik im Norden gegenüber. Die Tendenz, Regelungen zur Festigung dieser Asymmetrie auf multilateraler Ebene festzuschreiben, nehme stark zu. Der neo-gramscianische Wissenschaftler Steven Gill bezeichnet diese Entwicklung mit „neuem Konstitutionalismus".

Die grundsätzliche Argumentationslinie bezüglich Investitionen lautet: zu einer erfolgreichen Entwicklungsstrategie sind sie unabdingbar und der wirtschaftliche Erfolg stellt sich dann quasi automatisch ein. Fuchs führte an, dass zahlreiche einschlägige Theorien bestätigen, dass dem nicht so ist, sondern vielmehr müssen bestimmte Rahmenbedingungen und Regulierungsmechanismen vorhanden sein, um Investitionen positiv zu nutzen. Dies dürfte den heutigen Industrieländern deshalb nicht fremd sein, weil sie auf ihrem Weg zum wirtschaftlichen Erfolg eben solche Mechanismen genutzt haben, die sie heute Entwicklungsländern verwehren. Hierbei bezog sich Fuchs v.a. auf den Ansatz des Ökonomen Chang, der in seinem Buch „kicking away the ladder" das Spannungsfeld zwischen Liberalisierung und Regulierung aus wirtschaftshistorischer Perspektive beleuchtet.

Nicht nur im Zusammenhang mit Investitionen herrscht in weiten Kreisen das Dogma vor, dass multilaterale Regeln notwendig seien. Wichtig sei allerdings die Frage - so Fuchs - welche Regeln brauchen wir und wer braucht sie? Er verwies darauf, dass es schon heute zahlreiche verbindliche Regelungen zu Investitionen gibt. Neben den 2099 bilateralen Investitionsabkommen und einer ganzen Reihe regionaler Abkommen, existieren auch innerhalb der WTO schon Verträge, in denen Schutz und Rechte von Investoren festgeschrieben sind.

Zum Stand der internationalen Debatte um ein „MAI-light" in der WTO verwies Fuchs nachdrücklich auf die Position der Eu-

ropäischen Union, die das Thema vehement vorantreibt. Dabei wird sie hauptsächlich von Japan, Kanada und Korea unterstützt. Wirtschaftsverbände wie die International Chamber of Commerce (ICC) oder der Bundesverband Deutscher Industrie (BDI) stellen z.T. sehr weitgehende Forderungen wie einen Investor-to-state Klagemechanismus, der Unternehmen die Möglichkeit eröffnet, gegen das Empfängerland Klage zu erheben. Auf der Seite der Gegner eines Investitionsabkommens innerhalb der WTO ist vor allem Indien zu nennen, dem sich aber vermehrt andere Gruppen von Entwicklungsländern anschließen. Neben der Überfrachtung der laufenden Verhandlungsrunde und daraus folgenden Kapazitätsproblemen für kleine Delegationen befürchten sie eine starke Einschränkung ihres entwicklungspolitischen Handlungsspielraums. Zudem kritisieren sie, dass sozialen oder ökologischen Auflagen für transnational agierende Unternehmen nicht vorgesehen sind. Der indische Delegierte bei der WTO in Genf geht sogar soweit, dass er fordert, nicht länger Zeit zu verschwenden und die Diskussionen über Investitionen abzubrechen. Die USA nimmt in diesem Prozess eine Sonderstellung ein: sie zeigt sich sehr zurückhaltend, fordert aber gleichzeitig sehr weitreichende Regelungen, ähnlich den in ihren bilateralen und regionalen Abkommen schon umgesetzten.

Trotz der kontroversen Situation im Vorfeld der Entscheidung in Cancún stellte Fuchs klar, dass eine WTO-Ministerkonferenz ihre eigenen Regeln kenne und Industrieländer durch politischen Druck und „Zugeständnisse" in den Bereichen TRIPS oder Landwirtschaft die Entwicklungsländer zur Zustimmung bewegen könnten. Deshalb plädierte er zum Abschluss dafür, durch Kampagnenarbeit und politische Bündnisse im Vorfeld von Cancún gegen das drohende Investitionsabkommen in der WTO zu mobilisieren und diese als Entwicklungsrunde bezeichnete Welthandelsrunde als das zu entlarven was sie sei: eine Entwicklungsrunde für Multis.

Ausländische Direktinvestitionen - ökologisch unbedenklich?

Stefanie Pfahl stellte eine im Auftrag des Forum Umwelt und Entwicklung verfasste Studie zu den Umweltaspekten eines WTO-Investitionsabkommens vor, die anschließend von Elisabeth Tuerk vom Centre for International Environmental Law (CIEL) aus Genf kommentiert wurde.

Die Analyse von Daten und Studien ergab, dass Direktinvestitionen sowohl positive als auch negative Auswirkungen nach sich ziehen, letztere aber durch entsprechende nationale Regulierungen beschränkt werden können. Ein Zusammenhang zwischen niedrigen Umweltstandards und Investitionszufluss konnte quantitativ nicht nachgewiesen werden. Pfahl betonte, dass es bei der Durchführung der Studie außerordentliche Schwierigkeiten gab, da das Datenmaterial sehr lückenhaft ist. Dies ist ein Beleg dafür, dass eine weitere Analyse der ökologischen Dimension von ADI notwendig ist, um klare Aussagen machen zu können. Gerade die Belege für die behaupteten positiven Auswirkungen stehen nach wie vor aus.

Auf der regulatorischen Ebene wurden schon bestehende Abkommen auf ihre Folgen für den Umweltbereich hin betrachtet. Grundsätzlich ist nicht klar, wie sich multilaterale und bilaterale Regelungen zueinander verhalten werden. Tuerk vermutet eine Koexistenz der unterschiedlichen Ebenen, wobei unklar ist, in welchem Maße dann die WTO-Prinzipien der Inländerbehandlung und Meistbegünstigung zum Tragen kommen. Die sich daraus ergebende Unberechenbarkeit wirkt sich auch auf Umweltregelungen und ihre Anwendbarkeit aus.

Wichtig im Zusammenhang mit den Auswirkungen von ausländischen Direktinvestitionen auf die Umwelt ist das Streitschlichtungsverfahren. Das Beispiel NAFTA zeigt seine einschneidende Wirkung: In diesem Freihandelsabkommen zwischen USA, Kanada und Mexiko wurden Umweltgesetze

von Unternehmen mittels Investor-to-state Verfahren angegriffen, weil durch ihr in Kraft treten ein Gewinnverlust befürchtet wurde und dies einer schleichenden Enteignung gleichgesetzt wurde. Bekannte Mängel in ökologischer Hinsicht weist auch der bei der WTO angesiedelte Streitschlichtungsmechanismus auf. Ein wichtiger angeführter Unterschied zwischen einem Investor-to-state und einem State-to-state Verfahren ist die Tatsache, dass Unternehmen im Gegensatz zu Staaten nicht mit einer Gegenklage rechnen müssen und so aggressiver auftreten können. Zwar ist im Moment die Klagemöglichkeit für Investoren in einem WTO-Abkommen nicht vorgesehen, doch Pfahl und Tuerk äußerten ihre Bedenken, ob dies auf Dauer so bleiben würde. Denn, so wurde betont, das Zustandekommen eines solchen Investitionsabkommens ist ein Prozess, dessen Ende offen ist. Auch die EU kann und wird nicht garantieren, was am Ende dieses Verhandlungsprozesses steht.

Aufgegriffen wurde zudem die Problematik des Unterschieds zwischen Warenhandel und Investitionen: Letztere haben durch ihre langfristige Präsenz einen anderen Charakter als der Warenhandel. Das eröffnet den Investoren Einflussmöglichkeiten vor Ort, denen aber auch Verantwortlichkeiten gegenüberstehen sollten. Für eine im ökologischen Sinne zukunftsfähige Entwicklung, waren sich Elisabeth Tuerk und Stefanie Pfahl einig, müssen Unternehmen zur Verantwortung gezogen werden und Maßnahmen wie Screening von Investitionen nach Qualität und Umfang oder Auflagen bzgl. Umwelttechnologie möglich sein.

Ausländische Direktinvestitionen - ökonomisch sinnvoll?

Aus ökonomischer Sicht wird häufig vereinfachend davon ausgegangen, dass ausländische Investitionen zu einer Erhöhung des Kapitals und damit zu positiven wirtschaftlichen Effekten beitragen. Chien Yen Goh vom Third World Network, Malaysia, zeigte in seinem Beitrag auf, dass und warum diese Annahme falsch ist. Seit Ende der 80er bzw. Anfang der 90er Jahre nehmen private Kapitalzuflüsse in Entwicklungsländer stark zu, während gleichzeitig staatliche Entwicklungshilfe immer mehr zurückgefahren wird. Ein Merkmal ausländischer Direktinvestitionen ist eine sehr starke Konzentration auf Länder des „Nordens" und auf sehr wenige Länder des „Südens". Ein hoher Anteil der Investitionen fließt in die Übernahme schon bestehender lokaler Unternehmen, schafft keine neuen Produktionskapazitäten und Beschäftigungsmöglichkeiten. Den möglichen positiven Auswirkungen von ADI wie Schaffung von Arbeitsplätzen oder Technologie- und Wissenstransfer, stehen laut Goh folgende negative Auswirkungen gegenüber:

- ➔ Durch den Rücktransfer von Gewinnen in das Mutterland wird häufig mehr Kapital exportiert als importiert, was zu einer Verschlechterung statt zu einer Verbesserung der Zahlungsbilanz führt. Zahlungsbilanzprobleme bilden wiederum die Ausgangssituation für Finanzkrisen mit ihren entsprechend negativen sozialen Auswirkungen.
- ➔ ADI werden im Vergleich zu spekulativeren Investitionen wie Portfolio gerne als stabil bezeichnet, da Produktionseinheiten nicht so schnell außer Landes geschafft werden können. Stattdessen wird von Investoren allerdings ein anderer Weg gewählt: Kredite werden im Empfängerland aufgenommen und exportiert. Dieser Vorgang trägt zu einer zunehmenden Fragilität der Finanzmärkte bei und kann daher ganz ähnliche Auswirkungen wie spekulatives Kapital nach sich ziehen.
- ➔ Das prozyklische Verhalten von ausländischen Direktinvestitionen führt bei Finanzkrisen zu einer Verstärkung derselben.
- ➔ Fließt zu schnell zu viel fremdes Kapital ins Land, so spricht man von einer Denationalisierung, aus der ökonomische und soziale Probleme resultieren.

Regulierungen bezüglich Quantität und Qualität von Kapitalzufluss und Kapitalabfluss (Kapitalverkehrskontrollen) - so Chien Yen Goh - könnten einige der negativen Effekte im Vorfeld verhindern. Die Stärkung lokaler Firmen und der lokalen Wirtschaft durch joint venture Auflagen, Importbeschränkungen für Vorprodukte oder die Verpflichtung zur Reinvestition eines Teils ihrer Profite wären entwicklungsdienliche Maßnahmen, deren Verbot aber gerade auch Inhalt eines WTO-Investitionsabkommen sein soll.

Zur Veranschaulichung des eher theoretischen Ansatzes von Chien Yen Goh dienten eindrucksvoll Beispiele, die Adriana Ramos de Almeida vom Instituto de Estudos Sócio-Economicos (INESC) aus Brasilien in einem Kommentar anschloss. Brasilien liegt, was den Umfang an ausländischen Direktinvestitionen anbelangt, nach China und Mexiko an dritter Stelle in der Gruppe der Entwicklungs- und Schwellenländer. Bemerkenswert ist diese Position vor allem deshalb - so Ramos de Almeida -, weil Brasilien keine Investitionsverträge mit anderen Ländern abgeschlossen hat. Dies hat seinen Grund zum einen darin, dass Brasilien seinen Markt selbst als offen bezeichnet, und zum anderen, dass es sich nicht durch eine feste Bindung seinen Regulierungsspielraum einschränken möchte. Laut Ramos de Almeida bewegt sich Brasilien in seiner Investitionspolitik zwischen extremer Liberalisierung auf der einen und rigider Regulierung auf der anderen Seite. Die Folge von Liberalisierungsbestrebungen Ende der 90er Jahre war ein vermehrter Kapitalzufluss, der sehr schnell seine negativen Auswirkungen zeigte: die Auslandschulden verzehnfachten sich. Das Ziel, durch ausländische Direktinvestitionen die Wirtschaft Brasiliens weltweit konkurrenzfähig zu machen, wurde nicht erreicht: der erhoffte Technologietransfer blieb aus, ein großer Anteil der Investitionen floss in die Telekommunikation und den Energiesektor und das Zahlungsbilanzdefizit stieg an.

Investorenschutz oder Regulierung - gibt es einen Königsweg zur zukunftsfähigen Entwicklung?

Diese Frage war Gegenstand der Diskussion zum Abschluss des ersten Tages. Podiumsteilnehmer waren Prof. Yash Tandon vom International Southgroup Network und SEATINI aus Simbabwe, Peter Wahl, Mitglied des Koordinierungskreises von Attac Deutschland, sowie Carlo Pettinato als Vertreter der Europäischen Kommission. Schon durch die Anfangsstatements wurde unmissverständlich klar, dass die Positionen der Diskussionsteilnehmer nicht unterschiedlicher hätten sein können.

Yash **Tandon** betonte, dass doch für Entwicklungsländer das eigentliche Ziel Entwicklung sein muss und nicht die Attraktivität für ADI. Er gab dabei deutlich zu verstehen, dass für ihn ADI - ob reguliert oder geschützt - grundsätzlich kein Weg zur Entwicklung ist. Die wahren Beweggründe für privaten Kapitalfluss liegen seiner Meinung nach in einer Krise des neoliberalen Systems im Norden. Neue Märkte müssen erschlossen werden, um die Profite weiterhin steigern und damit im globalen Wettbewerb bestehen zu können. Liberalisierung von Handel und Investitionen oder Forcierung der Privatisierung seien dabei Mittel, um Konzerninteressen zu stärken und Zugang zu Märkten und Ressourcen zu erhalten. Durch Regulierungsmöglichkeiten - so Tandon - würden die Folgen dieses einseitig dominierten Systems für Entwicklungsländer zwar abgemildert, der Liberalisierungskurs grundsätzlich aber unterstützt. Deshalb müssen nach Meinung von Tandon andere, durch mehr Eigendynamik geprägte Wege gefunden werden, um das Entwicklungsproblem des Südens nachhaltig zu lösen. Als Vertreter des Südens kritisierte er stark das Ungleichgewicht in den schon bestehenden WTO-Abkommen. Bevor dies nicht beseitigt ist und Versprechen der Doha-Entwicklungsrunde etwa im Agrarbereich nicht eingelöst sind, mache es keinen Sinn, neue Themen in die überfrachtete Agenda aufzunehmen.

Nach Carlo **Pettinato** von der EU-Kommission ist das eigentliche Problem die ausgeprägte Konzentration der ADI im Norden: 4/5 fließen nicht in Entwicklungsländer, weil dort das Risiko für Investitionen als zu hoch eingeschätzt wird. Ein Multilaterales Abkommen kann nach Meinung der EU zur Lösung beitragen: es bietet Planungssicherheit und Rechtsschutz für Investoren und kompensiert damit die fehlende Transparenz nationaler Regelungen. Dies sei insbesondere in der gegenwärtigen Lage der Weltwirtschaft wichtig und führe zu einem erhöhen Kapitalzufluss in den wirtschaftlich schwächsten Ländern (LDC). Im Gegensatz dazu sind makroökonomische Stabilität, Investorenpflichten und soziale und ökologische Standards nach EU-Position Elemente, die auf nationaler Ebene geregelt werden müssen und demnach nicht in eine multilaterale Lösung gehören. In folgenden Punkten behauptet die EU, den Entwicklungsländern entgegenzukommen: 1. Keine Aufnahme von Portfolio-Investitionen 2. Ein flexibles Modell mit Positivlistenansatz, d.h. jedes Land kann selbst wählen, welche Sektoren es öffnet, 3. Die Gewährung von Technischer Hilfe und capacity building im Verhandlungsprozess und bei der Implementierung. Die laufende Welthandelsrunde biete eine Chance für Entwicklungsländer und ein Scheitern würde ihnen am meisten Schaden bringen. Er verwies im Laufe der Tagung mehrmals darauf, dass dann die Verhandlungen auf bilateraler Ebene weitergeführt werden, auf der Entwicklungsländer eine weitaus schlechtere Verhandlungsposition hätten. Die SIA (Sustainability Impact Assessment) werden als Mittel gesehen, um mögliche negative Auswirkungen eines Investitionsabkommens zu vermeiden und einen Schritt in Richtung eines zukunftsfähigen Investitionsabkommens zu machen.

Vehement gegen diese Politik der Gewinnmaximierung und Risikominimierung für Transnationale Konzerne sprach sich Peter **Wahl** aus und forderte eine Priorität der Entwicklung mit entsprechenden Steuerungsmöglichkeiten für die Länder des Südens. Er zeigte die unterschiedlichen Interessen auf, die sich hinter ADI und Entwicklung verbergen. Während Entwicklung eines Landes Grundbedürfnisbefriedigung, Armutsreduktion, Zugang zu Ressourcen und Investition in Humankapital bedeutet, sind Ziele von Investitionen Gewinnmaximierung, Erschließung neuer Märkte, Nutzung von Wettbewerbsvorteilen sowie von billigen Ressourcen und Arbeit. ADI, so sein Schluss, können gut und schlecht für Entwicklung sein, wichtig seien die Rahmenbedingungen: Sie müssten nationalen Regulationen unterliegen und sozial und ökologisch eingebettet sein, um positive Effekte auf die wirtschaftliche Entwicklung zu haben.

Zentraler Gegenstand der anschließenden Diskussion war die Argumentationslinie der EU. Zunächst betraf dies die Nachhaltigkeitsprüfungen (SIA). Nicht nur das methodische Vorgehen war Gegenstand der Kritik, sondern auch die Tatsache, dass bis heute nichts dergleichen für ein Investitionsabkommen durchgeführt wurde und trotzdem die Verhandlungen vorangetrieben werden. Es wurde angemahnt, dass die EU beweisen müsse, dass Investitionen an sich und die vorgeschlagene Art und Weise, sie zu regeln, entwicklungspolitisch, ökologisch und sozial sinnvoll sind. Dass weder die momentan laufende Welthandelsrunde, noch das von der EU vorgeschlagene Modell zur Regelung von Investitionen als „entwicklungsländerfreundlich" bezeichnet werden kann und darf, wurde noch einmal an mehreren Punkten deutlich gemacht. Zusagen wie technische Hilfe oder capacity building würden einzig und allein dazu dienen, ungleiche Strukturen zu beschönigen und das Flexibilitätsmodell würde keineswegs Flexibilität für Entwicklungsländer bedeuten, sondern den Handlungsspielraum zusätzlich einschränken. Wie bei dem Dienstleistungsabkommen GATS würde auch hier eine Verhandlung mit dem Ziel der Liberalisierung auf bilateraler Ebene fortgeführt.

Fazit dieser sehr lebhaften und konträren Podiumsdiskussion des ersten Tages muss wohl sein: *den* Königsweg zu einer zukunftsfähigen Entwicklung gibt es nicht. Dennoch gibt es wichtige Argumente, die

gegen den von der EU propagierten Weg sprechen. Für die Entwicklung eines alternativen Weges benötigt man Zeit. Denn, wie wohl allen TeilnehmerInnen klar geworden sein dürfte, der Themenbereich Investitionen und Investitionspolitik ist zu komplex, als dass eine entwicklungspolitisch, sozial und ökologisch sinnvolle Lösung auf der Hand liegen würde.

Alternative Ansätze zur Regulierung von Investitionen

Im Mittelpunkt des zweiten Tages stand die Diskussion um mögliche Alternativen zu einem Investitionsabkommen in der WTO. In ihrem Vortrag fasste Clare Joy von World Development Movement (WDM) noch einmal die wichtigsten Kritikpunkte des ersten Tages zusammen, die die Basis für alternative Ansätze in Sachen internationaler Investitionspolitik bilden: Überlastung der Entwicklungsländer durch die Verhandlungsmasse in der WTO, Einschränkung ihres entwicklungspolitischen Handlungsspielraums und Konzentration von Abkommen auf die Ausweitung der Rechte von Transnationalen Konzernen, ohne diesen Pflichten aufzuerlegen. Wichtige Ansätze zu Alternativen in Clare Joys Vortrag waren:

➔ Die eingeschränkten Steuerungsmöglichkeiten für Entwicklungsländer sind nicht nur unter einem entwicklungsökonomischen Gesichtspunkt kontraproduktiv. Wichtig ist hier auch ein demokratietheoretischer Aspekt: nicht nur ein demokratischer Prozess beim Zustandekommen von Abkommen müsste eine Selbstverständlichkeit sein - so Joy -, sondern auch, dass Regelungen nicht so weitgehend sein dürfen, dass demokratisch gewählte Regierungen unterminiert werden und Kommunen die Freiheit verlieren, sich für oder gegen Investitionen zu entscheiden. Als Beispiel für die Erhaltung einer gewissen nationalen Souveränität nennt sie joint ventures: durch einen bestimmten Anteil inländischen Kapitals ist noch so etwas wie eine nationale Rechenschaftspflicht und eine grössere Einflussmöglichkeit von nationalen Regierungen vorhanden. In diesem Zusammenhang fordert Clare Joy, dass Transnationale Konzerne zu mehr Transparenz und zur Offenlegung von Spenden an Parteien verpflichtet werden müssen.

➔ Das von der EU als Alternative propagierte flexible Modell stellte sie an vielen Stellen als weder entwicklungsländerfreundlich noch flexibel dar. In den entscheidenden bilateralen Verhandlungen wird der Druck auf die wirtschaftlich schlechter gestellten Entwicklungsländer so stark sein, dass mehr Zugeständnisse gemacht werden, als ursprünglich beabsichtigt. Wichtig ist die Tatsache, dass die Verhandlungen zu Investitionen nicht losgelöst stattfinden, sondern im Gesamtrahmen der WTO, wo durch sehr unterschiedliche Interessenslagen z.B. im Agrarbereich ein hohes Druckpotential vorhanden ist. Ist ein Sektor einmal geöffnet, lässt sich dies nach WTO-Recht praktisch nicht mehr rückgängig machen, was nachfolgende Regierungen sehr stark in ihrem Handlungsspielraum einschränkt. Betont wurde vor allem auch, dass das flexible Modell ein kontinuierlicher Prozess sein wird, d.h. es wird immer wieder neue Verhandlungsrunden mit dem eigentlichen Ziel einer vollständigen Liberalisierung geben. Stattdessen fordert Clare Joy Flexibilität in einem positiven Sinne, d.h. die Möglichkeit für Entwicklungsländer, ADI auf nationaler Ebene ihrer jeweiligen Entwicklungsphase entsprechend regulieren zu können, um die lokale Wirtschaft fördern und u.a. Arbeitsplätze schaffen zu können.

➔ Vorrangiges Ziel müsse demnach nicht nur die Verhinderung eines neuen Investitionsabkommens sein, sondern auch das Zurückschrauben des Status Quo an Regelungen, insbesondere des TRIMS. Dennoch - so Claire Joy - bräuch-

ten wir internationale Regelungen, die den Wettbewerb um ADI durch weltweit gültige soziale und ökologische Standards regulieren und Transnationalen Konzernen verbindliche Pflichten auferlegen, die Praktiken wie z.B. Steuerentzug einen Riegel vorschieben.

Am Ende betonte Clare Joy nochmals, dass im Laufe der Tagung so viele Beweise und Argumente gegen ein Abkommen unter dem Dach der WTO und Ansätze für Alternativen genannt wurden, dass es nun an den Befürwortern - allen voran der EU - liege, zu beweisen, dass ein solches Abkommen in der WTO notwendig sei. Wichtig für die Weiterentwicklung von Alternativen ist, dass verschiedene Bereiche eingebunden werden, wie z.B. die Ansätze zu verbindlichen Regeln für Unternehmen, und endlich - sowohl auf Kampagnen- als auch auf Politikebene - eine Kohärenz hergestellt wird.

Wie könnte ein sozial-ökologisches internationales Investitionsregime aussehen?

Zum Abschluss der Tagung trafen VertreterInnen aus unterschiedlichen Bereichen zusammen, um darüber zu diskutieren, welchen Beitrag Deutschland zu einem sozial-ökologischen internationalen Investitionsregime leisten könnte. Den Stellungnahmen der einzelnen TeilnehmerInnen des Podium folgten dementsprechend Forderungen an die Bundesregierung, die vom Publikum anschließend sehr engagiert kommentiert wurden.

In dem breiten Spektrum der während der Tagung dargestellten Positionen - von der totalen Ablehnung von ADI bis hin zu der Überzeugung, dass ADI per se gut sind - positionierte sich Dr. Margit **Köppen** als Vertreterin der IG Metall bezogen auf ihren heutigen Kenntnisstand zwischen den beiden Extremen. Direktinvestitionen seien nicht immer, automatisch und in jedem Umfang gut. Dennoch ist sie überzeugt, dass es Investitionen gibt, die einen Entwicklungsbeitrag durch die Schaffung von Arbeitsplätzen, Technologie- und Wissenstransfer oder Stärkung der lokalen Wirtschaft leisten können. Daraus ergibt sich ihrer Meinung nach Handlungsbedarf auf zwei Ebenen: 1. minimale Standards im sozialen und ökologischen Bereich mit einem Übergang von der Freiwilligkeit zur Verpflichtung und 2. die Sicherung eines im entwicklungspolitischen Sinne besseren Outputs bei Direktinvestitionen für Entwicklungsländer.

Im Mittelpunkt des Eingangsstatements von Dr. Ulf **Jaeckel** vom Bundesumweltministerium stand die Frage, wie ADI dazu beitragen können, die globale Umweltsituation zu verbessern. Hierzu sieht er kurzfristig die multilaterale und bilaterale/regionale Ebene als Orte, an denen Leitplanken in ökologisch sinnvollem Sinne eingezogen werden können. Es könnten dies sein: Dialogprozesse zwischen Zivilgesellschaft, Regierungs- und Industrievertretern, sogenannte „soft laws" wie freiwillige Verhaltenskodices für Transnationale Konzerne und Umweltverträglichkeitsprüfungen zu potentiellen Auswirkungen. Seiner Meinung nach von zentraler Bedeutung auch für die zivilgesellschaftlichen Kräfte wäre zum jetzigen Zeitpunkt Überlegungen darüber anzustellen, was in ein Investitionsabkommen eingebracht werden müsse, falls die offiziellen Verhandlungen nach Cancún beginnen.

Chien Yen Goh vom Third World Network betonte in der Schlussrunde, dass ein Investitionsabkommen in der angedachten Form eine extreme Asymmetrie zwischen kapitalexportierenden Industrieländern und kapitalimportierenden Entwicklungsländern zementieren würde. Daraus resultierende ökonomische Krisen würden nicht nur Armut verursachen, sondern zögen auch schonungslosen Umgang mit den wenigen verbleibenden Ressourcen und damit Umweltprobleme nach sich. Er fordert die Bundesregierung auf, den Respekt vor der nationalen Souveränität, den sie durch die Ablehnung des Irakkrieges bewiesen hatte, jetzt auf die ökonomische Souveränität auszuweiten. Jedes Land müsse selbst entscheiden

können, welchen Weg es gehen möchte, und dies ist unter den gegebenen Voraussetzungen in einem Investitionsabkommen in der WTO nicht möglich.

Greenpeace, so Jürgen **Knirsch**, ist der Meinung, dass Investitionen geregelt werden müssen. Allerdings sei die WTO das falsche Forum, um ein sozial-ökologisches Investitionsregime zu garantieren. Als Alternative wäre seiner Ansicht nach an eine Art Rahmenkonvention zu denken, die Verpflichtungen für Unternehmen wie die von Greenpeace empfohlenen Bhopalprinzipien enthält. So könnten Menschenrechte geschützt, höchste Umweltstandards - beispielsweise durch Einführung des Vorsorgeprinzips mittels einer Umweltverträglichkeitsprüfung (UVP) -weltweit garantiert und das Recht auf Öffentlichkeit gewährt werden. Er fordert von der deutschen Regierung, Alternativen zu einem Investitionsabkommen in der WTO zu bedenken und entwickeln, z.B. auch auf Grundlage von Auswertungen schon bestehender bilateraler Investitionsabkommen.

Tillmann Rudolf **Braun** vom Bundesministerium für Wirtschaft und Arbeit (BMWA) plädierte in der ganzen Diskussion um Kosten und Nutzen von Direktinvestitionen und Vor- bzw. Nachteile eines liberalen Investitionsregimes für mehr Realismus. Seiner Meinung nach bringe ein multilaterales Abkommen weder Gedeih noch Verderb, sondern nach dem Motto „it´s easier to attract ADI than to gain from it" hängt der Erfolg eben ganz von den Rahmenbedingungen ab, die das Empfängerland selbst setzen muss. Dies gelte sowohl für den ökologischen Bereich, als auch im Zusammenhang mit der Absorptionsfähigkeit der lokalen Wirtschaft und eventuell eintretenden spill-over Effekten. Im Gegensatz zu den KritikerInnen, die die nationale Handlungsfähigkeit durch ein Abkommen in der WTO stark eingeschränkt sehen, ist für Braun eine Beteiligung der Öffentlichkeit durch eine große Transparenz der Königsweg.

In der anschließenden Diskussion auf dem Podium standen zunächst Bilaterale Investitionsabkommen (BITs) im Mittelpunkt, verbunden mit der Frage, was insbesondere die GegnerInnen an einem Engagement gegen BITs hindere. Allein von der Bundesrepublik Deutschland wurden bereits 136 solcher Verträge mit anderen Ländern abgeschlossen, wobei deren Reichweite zum Teil über Vorschläge für ein WTO-Investitionsabkommen übertrifft. Es kristallisierte sich heraus, dass neben einer gewissen Lethargie im Bereich Investitionspolitik nach dem Erfolg durch das Scheitern des MAI 1998, auch die mangelnde Öffentlichkeit ein Problem darstelle. Man war sich aber einig, dass dies ein Versäumnis darstelle und ein näheres Studium dringend notwendig sei, um aus den Erfahrungen auf bilateraler Ebene zur Entwicklung alternativer Ansätze beitragen zu können. Braun wies noch darauf hin, dass ein Grund für die Existenz der vielen deutschen Abkommen darin liege, dass sie Voraussetzung für die Vergabe von Investitionsgarantien durch die Bundesregierung sind.

Folgende Themenbereiche wurden in der darauffolgenden, sehr lebhaften allgemeinen Diskussion aufgegriffen:

Die von Braun angepriesene Transparenz durch Beteiligung der Öffentlichkeit wurde sehr stark in Frage gestellt. Begriffe werden hier mit unterschiedlichen Inhalten gefüllt und so gehe es zivilgesellschaftlichen Kräften, die Transparenz fordern, nicht nur darum, Transparenz für staatliche Politik zu erreichen, sondern vielmehr auch und vor allem um die Transparenz von Unternehmen. Als Beispiel wurde die Kampagne „publish what you pay" angeführt, die aus dem Bergbausektor kommt und Unternehmen verpflichtet, ihre Verträge mit Regierungen offen zu legen.

Im Themenkomplex Verpflichtungen für Unternehmen trat der bestehende Dissens zu Freiwilligkeit und Verbindlichkeit auch in der Diskussion zu Tage. Während von Regierungsseite z.B. die OECD-Leitsätze als Errungenschaft mit guten Kontrollmöglichkeiten angepriesen wurden, waren sich NGO-VertreterInnen und Gewerkschaften einig, dass dies keine ausreichende Regu-

lierung sei. Die Asymmetrie wurde offensichtlich: einem massiv durchsetzbaren Rechtssystem auf multi- und bilateraler Ebene zum Schutz von Unternehmensrechten stehen freiwillige Selbstverpflichtungen ohne Sanktionsmechanismen gegenüber. Die Einrichtung nationaler Kontaktstellen, an denen Beschwerden bei einer Verletzung der OECD-Guidelines eingebracht werden können, wurde zwar von allen Seiten begrüßt, die Handhabung und Effektivität allerdings sehr unterschiedlich beurteilt. Von Dr. Ulf Jaeckel wurde im Zusammenhang mit bilateralen Investitionsabkommen die mangelnde Bereitschaft von Entwicklungsländern beklagt, sowohl Umweltaspekte als auch Sozialaspekte in Abkommen mit einzubeziehen. Verbunden damit war die Kritik an der Zivilgesellschaft, im Namen von Entwicklungsländern nach Umweltstandards zu verlangen, obwohl das Interesse im Süden gar nicht vorhanden sei. Dem wurde allerdings heftigst widersprochen, denn - laut Chien Yen Goh - sind Entwicklungsländer sehr wohl an Umweltaspekten interessiert. Nur nicht in der Art, wie sie eingeführt werden sollen, nämlich als weiteres Mittel zur fortschreitenden Liberalisierung. Bemerkenswert - so Jürgen Knirsch - sei in diesem Kontext, dass die letzten großen Umweltabkommen nur mit Hilfe von Entwicklungsländern zustande gekommen seien. Verschiedene Theorien wurden darüber aufgestellt, was die EU wirklich umtreibe und warum vor allem sie so stark auf ein Investitionsabkommen in der WTO dränge. Geht es darum, dem amerikanischen, sehr weitgehenden bilateralen Modell etwas entgegenzusetzen? Ist das Ziel eine Machterweiterung der EU durch Verlagerung der Zuständigkeit für Investitionspolitik von nationaler Ebene auf EU-Ebene? Gilt es, die Macht der Konzerne weiterhin auf Kosten von Entwicklungsländern auszuweiten, oder - geht es, wie von Braun anmerkte, darum, lieber europäisches Gedankengut als amerikanisches in die Welt zu tragen?

Fazit

Die Tagung hat die Probleme und Gefahren eines „MAI-light" und die unterschiedlichen Positionen klar aufgezeigt. Die Beweislast für die Notwendigkeit Investitionsabkommens in der WTO liegt nunmehr bei den Befürwortern, also allen voran bei der EU. Sehr deutlich wurde, dass der Druck auf die Gegner eines solchen Abkommens wie Indien bei den Verhandlungen im September in Cancún außerordentlich groß werden wird. Geht es doch darum, die laufende, bei der WTO-Ministerkonferenz in Doha 2001 begonnene Welthandelsrunde zum Erfolg zu führen - wie der Repräsentant der EU-Kommission immer wieder betonte. Für die Zivilgesellschaft im Norden bedeutet dies, dass politischer Druck auf die EU und die nationalen Regierungen dringend notwendig ist. Die Tagung stellte nicht nur einen wichtigen Schritt zur inhaltlichen Auseinandersetzung mit einem Investitionsabkommen in der WTO dar, sondern ließ am Rande auch genügend Raum für Vernetzung, Strategiefindung und Koordination gemeinsamer Aktionen im Hinblick auf Cancún.

The controversy about a new agreement on investment in the WTO

Nicola Sekler, WEED (World Ecology, Economy & Development), Germany

Summary report on the international conference: " The controversy about a new investment agreement in the WTO in the run up to the fifth Ministerial Conference in Cancún/Mexico. Social and Ecological Implications and Alternatives." *organised by the German NGO Forum on Environment and Development and the Protestant Church Development Service (EED) on the 28th and 29th April in Bonn.*

The debate over a multilateral agreement on investment is not new. Previous efforts in this direction were made at OECD level. The negotiations held in this context on the so-called Multilateral Agreement on Investment (MAI) failed in 1998. Disagreement among the OECD member countries and public pressure prevented a far-reaching agreement that would have been biased towards promoting the interests of transnational corporations and would have drastically restricted the policy space for developing countries. However, it was already obvious at the time that a revamped version of the agreement could surface at other levels. This is precisely what is now looming on the horizon at multilateral level in the context of the World Trade Organization (WTO). At the forthcoming Ministerial Conference in Cancún/Mexico in September 2003, it is to be decided whether the agenda of the round of world trade negotiations currently under way is to be extended by the four so-called "Singapore issues" (investment, competition, public procurement, trade facilitation). Embedding an MAI-like agreement in the WTO would have far-reaching consequences. Regulations which are oriented towards the interests of the transnational corporations (TNC) would be made binding in accordance with international law and linked to a powerful enforcement mechanism, the Dispute Settlement Understanding. Additionally, this would mean boosting the WTO, which is already marked by a deficit in democracy.

The positions regarding an international framework on investment could hardly be more controversial, and the outcome of the decision whether or not the negotiations are to be officially commenced after the Fifth WTO Ministerial Conference in Cancún is by no means clear. The strongest proponent is the European Union, which aims at enabling its corporations to gain better market access (liberalisation) and achieving improved protection of their property rights (investment protection). The opponents comprise a group of developing countries with India as a vocal leader. They fear a restriction of their policy space for development and complain that no provisions whatsoever are made for regulations obliging companies to act in an ecologically and socially responsible manner.

The aim of the conference was to facilitate a critical dialogue between civil society, representatives of the EU Commission and the German Government as well as internatio-

nal organisations and to make a first step towards greater perception of the issue of investment regulations among the broader public. So far, only a handful of experts have addressed the problems arising from the debate over an agreement on investment in the WTO. In the course of the meeting, the issue once again crystallised as to whether and to what degree the policy space for regulation would be maintained for national governments by such an agreement. The agenda covered the ecological, economic and social impacts of Foreign Direct Investment (FDI), the area of tension between regulation and liberalisation as well as alternative approaches to investment regulation. The meeting was attended by more than 80 participants from Germany and abroad. In addition to the numerous representatives of NGOs and of ATTAC, trade unions and government agencies as well as Members of the Federal Parliament were present, so that a lively debate emerged and the lines of conflict became obvious.

Investment Agreements - an important element of the neo-liberal globalisation strategy

In his introductory presentation, Peter Fuchs (WEED, World Economy, Ecology and Development) assigned the debate on an agreement on investment to the overall context of a neo-liberal globalisation strategy aimed at boosting the power of transnational corporations and curbing the regulatory options of governments. Pressure for liberalisation in the South is confronted with an increasing protection of markets and subsidy policy in the North. According to Fuchs, the trend towards establishing regulations to define this asymmetry at the multilateral level is growing strongly. Neo-Gramscian scholar Steven Gill refers to this development as "new constitutionalism ".

The basic line of argumentation with regard to investments is that they are indispensable to a successful development strategy and that economic success will then be quasi automatic. Fuchs remarked that numerous relevant theories confirmed that this was not the case and that, instead, certain framework conditions and regulatory mechanisms had to be in place to benefit from investments. Today's industrialised countries should not be unfamiliar with this, for on their way to economic success, it was precisely these mechanisms that they used, mechanisms they deny the developing countries today. Here, Fuchs above all referred to the approach made by the economist Chang, who examines the area of tension between liberalisation and regulation from an economic history perspective in his book "Kicking Away the Ladder".

In wide circles, the dogma that multinational regulations are necessary does not only prevail with regard to investments. Nevertheless, Fuchs stressed the importance of clarifying what rules are needed and who needs them. He pointed out that a large number of binding regulations on investment already exist today. In addition to the 2,099 bilateral agreements on investment as well as numerous regional agreements, agreements have also already been introduced within the WTO prescribing the protection and rights of investors.

Regarding the status of the international debate on a "MAI light" in the WTO, Fuchs highlighted the position of the European Union, which is vehemently pressing for the issue, being supported in its endeavours by Japan, Canada and the Republic of Korea. Industrial associations such as the International Chamber of Commerce (ICC) or the Confederation of German Industry (BDI) raise particularly far-reaching demands, such as an investor-to-state dispute mechanism that would give companies the opportunity to start an arbitration process against the host country. Among the opponents against an agreement on investment within the WTO, mention should above all be made of India, which is, however, increasingly being joined by other groups of developing countries. In addition to an overloading of

the ongoing round of negotiations, resulting in capacity problems for smaller delegations, opponents of the agreement above all fear that the policy space for development will be curbed considerably. Furthermore, they criticise that no provisions are made for social or ecological requirements to be met by companies operating on a transnational basis. The Indian delegate to the WTO in Geneva even goes so far as to demand that no more time be wasted and debates on investment be stopped. The USA assumes a special status in this process by displaying a very reserved attitude but simultaneously calling for very-far reaching regulations similar to those already implemented in its bilateral and regional agreements.

In spite of the controversial situation in the run-up to the decision in Cancún, Fuchs stressed that all WTO Ministerial Conferences have their own rules and could result in approval among developed and developing countries by political pressure and "concessions" in the areas of TRIPS and agriculture. This is why he concluded his lecture by advocating campaigning activities and political alliances to rally support against the impending agreement on investment in the WTO in the run-up to Cancún and expose this round of trade negotiations in the WTO, which is referred to as a development round, as what it really was: a "corporate development round" for the transnationals.

Foreign direct investment - ecologically no cause for concern?

Stefanie Pfahl presented a study commissioned by the Forum Environment and Development on the environmental aspects of a WTO agreement on investment. Elisabeth Tuerk of the Centre for International Environmental Law (CIEL) in Geneva subsequently commented on it.

The analysis of data and studies revealed that direct investment entails both positive and negative results, but that the latter can be restricted by appropriate national regulations. A link between low environmental standards and the inflow of investment could not be demonstrated quantitatively. Pfahl stressed that conducting the study met with considerable difficulties since there are enormous gaps in the data base. This shows that a further analysis of the ecological dimension of FDI is needed in order to make clear statements. In particular, proof of the claimed positive impacts is still to be found.

At the regulatory level, already existing agreements were examined with regard to their impact on the environment. It is generally not clear how multilateral and bilateral regulations are going to relate to each other. Tuerk suspects that a co-existence of the different levels will materialise, with the degree to which the WTO principles of national treatment and most-favoured-nation treatment will have an effect yet having to be established. The imponderability resulting from this also affects environmental regulations and their applicability.

One important aspect in the context of the impacts foreign direct investment has on the environment is the arbitration procedure. The example of NAFTA demonstrates its far reaching effect. In this free trade agreement between the USA, Canada and Mexico, environmental laws were attacked by companies through investor-to-state disputes since they feared that the implementation could result in a loss of profits, and this was considered to be "creeping expropriation". The arbitration mechanism established in the WTO also bears well-documented deficiencies with regard to ecological aspects. One important difference referred to between an investor-to-state and a state-to-state dispute is the fact that, unlike states, companies do not have to reckon with counter-action, which means that they can act more aggressively. While dispute mechanisms are currently not provided for investors in a WTO agreement, Pfahl and Tuerk had their doubts whether this would permanently be the case. For, as they stressed, the development of such an agreement on investment

is an open-ended process. Even the EU can and will not guarantee what the outcome of this negotiating process is going to be.

The issue of the difference between trade in goods and investment was also addressed. Owing to its long-term presence, the latter has a different character from that of trade in goods. This opens up opportunities for investors to gain influence at local level that should also be offset by responsibilities. Elisabeth Tuerk and Stefanie Pfahl agreed that companies have to be called to account and measures such as screening of investments with regard to quality and volume as well as standards pertaining to environmental technology have to be possible to ensure sustainable development in an ecological sense.

Foreign direct investment - sensible from an economic angle?

From an economic perspective, the notion is frequently put forward in a simplifying manner that foreign investment contributes to an increase in capital and, hence, to positive economic impacts. In his presentation, Chien Yen Goh of the Third World Network, Malaysia, demonstrated why this assumption is wrong. Since the end of the eighties or the beginning of the nineties, private capital inflow has been growing considerably in developing countries, while official development aid has simultaneously been cut back more and more. One of the characteristics of foreign direct investment is its very strong concentration on the countries of the North, and a very small number of Southern countries. A major share of investment goes into buying up already existing companies, so that it generates no new production capacities or employment opportunities. According to Goh, the possible positive effects of FDI, such as the creation of jobs or transfer of technology and knowledge, are offset by the following negative impacts:

- By re-transferring profits to the home country, more capital is frequently exported than imported, which results in a deterioration of the balance of payment rather than in its improvement. In turn, balance of payment problems may evolve into financial crises with their corresponding negative social effects.

- In comparison to speculative investment such as portfolio, FDI is often referred to as stable, since the production units cannot be removed from a country so quickly. Instead, however, investors seek another strategy. Loans are taken out in the host country and exported. This process contributes to an increasing fragility of the financial markets and can therefore result in very similar effects to those of speculative capital.

- The pro-cyclical behaviour of foreign direct investment aggravates financial crises.

- If too much foreign capital flows into a country too quickly, one refers to a denationalisation, which results in economic and social problems.

According to Chien Yen Goh, regulations regarding the quantity and quality of capital inflow and outflow (capital transfer controls) could prevent some of the negative impacts in advance. Boosting local companies and local industry by joint venture requirements, import restrictions for primary products or an obligation to reinvest part of the profits made by foreign investors would constitute measures conducive to development. A WTO agreement on investment however, would aim at banning these measures.

Chien Yen Goh's rather theoretical approach was illustrated impressively by examples Adriana Ramos de Almeida of the Instituto de Estudos Sócio-Economicos (INESC) in Brazil presented in her commentary. In terms of foreign direct investment, Brazil is in third position after China and Mexico in the group of developing and newly industrialised countries. Ramos de Almeida

points out that what is above all remarkable about this position is that Brazil has not signed any agreements on investment with other countries. The reasons for this are that Brazil regards its economy as an open one and that it does not wish to restrict its policy space by establishing lasting ties. According to Ramos de Almeida, Brazil's investment policy is fluctuating between extreme liberalisation on one side and rigid regulation on the other. Moves towards liberalisation in the late nineties resulted in an increased capital inflow that was soon to reveal its negative effects: foreign debts rose tenfold. The goal of making Brazil's economy competitive on a world scale with the aid of foreign direct investment was not achieved. Technology transfer that had been reckoned with failed to materialise, a major share of investment flowed into telecommunications and the energy sector, and the balance of payment deficit increased.

Investor protection or investor regulation? How to foster sustainable development?

This question was the topic of the discussion at the end of the first day. Prof. Yash Tandon of the International Southgroup Network and SEATINI of Zimbabwe, Peter Wahl, member of the Co-ordinating Committee of Attac Germany as well as Carlo Pettinato as a representative of the European Commission were on the panel. The introductory statements left no doubt that the positions of the participants in the debate could hardly have differed more than they did.

Yash **Tandon** stressed that the real goal for the developing countries had to be that of development, not attractiveness for foreign direct investment. He expressed in clear terms that in his opinion, FDI, irrespective of whether it be regulated or protected, generally does not represent a strategy for development. In his view, the true motives for private capital flows are a crisis that the neoliberal system in the North is experiencing. New markets have to be opened up to continue to increase profits and thus be able to hold one's own in international competition. In this context, liberalising trade and investment or forced privatisation were the means required to boost corporate stakes and maintain access to markets and resources. Tandon held that options for regulation would mitigate the impact of this system, which was dominated by only one side, on the developing countries, but that they would also generally support the liberalisation course. This is why Tandon and others see a need to seek other approaches featuring more self-dynamics to solve the development problems of the South. As a representative of the South, he strongly criticised imbalances in the already existing WTO agreements. Before these had not been removed and the promises of the "Doha Development Agenda", for instance in the agricultural sector, had not been fulfilled, there was no point in adopting new issues in the already overloaded agenda.

According to Carlo **Pettinato** of the EU Commission, the true problem is the marked concentration of FDI in the North: 4/5 of it does not flow into the developing countries, because the risk is thought to be too high to invest there. In the opinion of the EU, a multilateral agreement can contribute to solving the problem: it offers planning security and legal protection for investors, compensating for the lacking transparency of national regulations. Pettinato maintained that this was particularly important given the current situation of the world economy and would result in an increased flow of capital into the Least Developed Countries (LDC). The EU's position is that, in contrast, macroeconomic stability, obligations to invest and social and ecological standards are elements that need to be dealt with at national level and therefore do not belong to a multilateral solution. The EU claims that its proposals are meeting the requirements of the developing countries with regard to the following aspects:

1. no adoption of portfolio investments
2. a flexible model with a GATS-type positive list approach, i.e. each country can decide for itself which sectors it wishes to open up
3. providing technical assistance and capacity building in the negotiating process and in implementation.

The current round of trade negotiations offers an opportunity for developing countries, and its failure would harm them most, Pettinato claimed. In the course of the meeting, he pointed out several times that the negotiations would then be continued at bilateral level, which would leave the developing countries with a considerably poorer negotiating position. SIA (Sustainability Impact Assessment) was regarded as a means of preventing possible negative effects of an agreement on investment and moving towards a sustainable agreement on investment.

Peter **Wahl** spoke vehemently against this policy of maximising profits and minimising risks for transnational corporations and demanded that development with corresponding control options for the countries of the South be given a higher priority. He showed the different interests underlying FDI and development. While the development of a country means satisfying basic needs, poverty reduction, access to resources and investing in human capital, the goals of investors are to maximise profits, open up new markets and benefit from competitive advantages and cheap resources and labour. He arrived at the conclusion that FDI could be good and bad for development, but that the framework conditions were of importance. They had to be subject to national regulations and be socially and ecologically integrated to ensure positive effects on economic development.

The key subject of the subsequent discussion was the EU's line of argumentation. The first issue touched upon was Sustainability Impact Assessments (SIA). Criticism was levelled not only at the methodical approach, but also at the fact that so far, nothing of the kind has been carried out for an agreement on investment and nevertheless the EU continues to push for negotiations. The EU was called upon to prove that investment itself and the proposed way of regulating it made sense from a development policy, ecological and social perspective. Once again, several aspects were referred to that demonstrated that neither the ongoing round of trade negotiations nor the model proposed by the EU to regulate investment were "friendly to developing countries". Undertakings to provide technical assistance or capacity building solely served the purpose of glossing over unequal structures, and the flexibility model meant anything but flexibility for the developing countries. Rather, it additionally restricted their policy space. Just like with the GATS, negotiations were being continued here bilaterally with the aim of liberalisation.

The conclusion that has to be drawn at the end of this very lively and controversial panel debate of the first day is that there is no ideal way to sustainable development. Nevertheless, important arguments speak against the course proposed by the EU. Developing an alternative course requires time. For what all participants ought to have become aware of is that the thematic field of investment and investment policy is too complex to suggest any easy solution that would make sense from a development policy, social and ecological perspective.

Alternative approaches to regulating investment

The second day centred on the debate on possible alternatives to an agreement on investment in the WTO. In her presentation, Clare Joy of the World Development Movement (WDM) once again summed up the most important critical aspects of the first day that form the basis for alternative approaches regarding international investment policy: an excessive strain on the de-

veloping countries owing to the volume of issues to be negotiated at the WTO, a restriction of their policy space for development and the concentration of agreements on extending the rights of transnational corporations without imposing any obligations on them. Important approaches to alternatives that Clare Joy's presentation included were:

- ➔ The restricted policy space for developing countries is not only counterproductive from a development perspective. What also counts here is a theory of democracy aspect. According to Joy, not only must a democratic process go without saying in the preparation of agreements, but so must the demand that regulations may not be so far-reaching that democratically elected governments are undermined and communities lose their freedom of opting for or against investment. She refers to joint ventures as an example of retaining a certain level of national sovereignty. Thanks to a certain share of national capital, something resembling national accountability and greater influence of national governments is still there. In this context, Clare Joy demands that transnational corporations be obliged to observe more transparency e.g. the declaration of donations to parties.

- ➔ She demonstrated that in many respects, the flexible model proposed by the EU was neither "friendly to developing countries" nor flexible. In the crucial bilateral negotiations, pressure on the economically weaker developing countries is going to be so strong that more concessions will be made than originally intended. What is important is that the negotiations on investment do not proceed separately but in the overall context of the WTO, where very different interests, for instance in the agricultural sector, ensure that a high potential for pressure exists. Once a sector has been opened up, WTO law makes it virtually impossible to reverse the process, which imposes considerable restrictions on subsequent governments' policy space for development. Also, it was above all stressed that the flexible model will be a continuous process, i.e. there will be new rounds of negotiations again and again with the ultimate aim of complete liberalisation. Instead, Clare Joy calls for flexibility in a positive sense, i.e. the possibility for developing countries to be able to regulate FDI at national level according to their respective development phase in order to promote local industry and also to create jobs.

- ➔ Thus the chief goal must not only be that of preventing a new agreement on investment but also to wind down the status quo of regulations, in particular with regard to TRIMS. Claire Joy said that we nevertheless need regulations to govern competition for FDI in accordance with internationally valid social and ecological standards and impose binding obligations on transnational corporations that would put an end to practices such as tax evasion.

Finally, Clare Joy once again stressed that so much proof and so many arguments had been put forward against an investment agreement in the context of the WTO and such a large number of approaches to alternatives had been referred to that it was now up to the advocates – first and foremost the EU – to prove that such an agreement was necessary in the WTO. What is important for the development of alternatives is that different areas are integrated, such as approaches to binding regulations for companies, and that, at last, coherence is achieved both at campaign and at policy level.

What could a social-ecological international investment framewok look like?

To conclude the meeting, representatives of different areas came together to discuss the contribution Germany could make to a

social-ecological international investment framework. Correspondingly, the statements made by the individual participants of the panel debate were followed by demands addressing the German Government that were then very emphatically commented by the audience.

Within the wide range of positions presented during the conference, ranging from a total rejection of FDI to the conviction that FDI is good per se, Margit Köppen, the representative of IG Metall, positioned herself between the two extremes with reference to her present level of information. She said that while foreign direct investment was not always and automatically good irrespective of its volume, she was convinced that investments did exist that were contributing to development by creating jobs, by transfer of technology and knowledge and by enhancing local industry. In Margit Köppen's opinion, this results in a requirement for action at two levels: first, minimum standards in the social and ecological field with a transition from voluntarism to obligation and, second, ensuring that direct investments in developing countries yield a better output in a development policy sense.

The issue of how FDI could contribute to improving the global environmental situation was at the centre of the introductory statement by Dr. Ulf **Jaeckel** of the Federal Ministry of the Environment. In this context, he regards the multilateral and bilateral/regional levels as areas in which guiding devices could be established in the short term in an ecologically meaningful way. These could constitute of: dialogue processes between civil society, government and industrial representatives, so-called "soft laws" such as voluntary codes of conduct for transnational corporations and environmental impact assessments. In his opinion, considerations on what would have to be adopted in an agreement on investment if the official negotiations were to start after Cancún were a central issue at this stage.

In the final round, **Chien** Yen Goh of the Third World Network stressed that an agreement on investment as discussed at the meeting would reinforce an extreme degree of asymmetry between capital-exporting industrialised countries and capital-importing developing countries. Not only would crises resulting from this cause poverty, but they would also entail a ruthless treatment of the few remaining natural resources, and hence environmental problems. He called on the German Government to now extend respect for national sovereignty that it had demonstrated by rejecting the war on Iraq to economic sovereignty. Every country had to be able to decide for itself what course it wished to pursue. Given the current conditions, this is not possible in an agreement on investment in the context of the WTO.

According to Jürgen **Knirsch** of Greenpeace, investment does have to be regulated. However, he claims that the WTO is the wrong forum to guarantee a social-ecological investment regime. In his view, an alternative would be to consider a sort of framework convention containing commitments for companies resembling the Bhopal Principles put forward by Greenpeace. For example, this approach could ensure the protection of human rights, guarantee top-level environmental standards world-wide, for instance via the introduction of the precautionary principle with the aid of an environmental impact assessment, and maintain the right of public access to information. He calls on the German government to consider and develop alternatives to an agreement on investment in the WTO, e.g. also on the basis of evaluations of already existing Bilateral Investment Treaties (BITs).

Throughout the debate on the cost and benefit of direct investment and the pros and cons of a liberal investment regime, Tillmann Rudolf **Braun** of the Federal Ministry of Industry and Labour (BMWA) called for a more realistic attitude. In his opinion, a multilateral agreement will be neither for better nor for worse. Rather, following the motto that "it´s easier to attract FDI than to gain from it", success depends fully on the framework conditions the host country itself

has to set. In Tilman Rudolf Braun's view, this applies both to the ecological sector and to the context of local industry's capacity to absorb as well as spill-over effects that might arise. In contrast with critics holding that the national policy space for development is severely restricted by an agreement in the WTO, Braun regards public involvement via a high level of transparency as the ideal approach.

The first issue the subsequent panel debate focused on was BITs in connection with the question of what prevented opponents in particular from campaigning against BITs. Germany alone has already signed 136 of these agreements with other countries the scope of which is partly in excess of the proposals on an agreement on investment within the WTO. It became apparent that, in addition to a certain degree of lethargy in the area of investment policy in the wake of the failure of MAI in 1998, the lack of publicity also presented a problem. However, there was agreement that this had to be remedied and that closer examinations were urgently required to contribute to the development of alternative approaches on the basis of experience at bilateral level. Mr. Braun also pointed out that one reason for the large number of German agreements was that they were preconditions for the award of investment guarantees by the Federal Government.

The following topics were addressed in the subsequent, very lively general discussion:

Braun's extolling of transparency by involving the public was strongly questioned. Here, different contents were being assigned to terms. Civil society groups calling for transparency are not only campaigning for transparency regarding government policy but also, and above all, for the transparency of companies. An example referred to was "publish what you pay", which comes from the mining sector and obliges companies to disclose their agreements with governments.

In the thematic complex of commitments for governments, the existing dispute on voluntarism and regulations with a binding character also came to the fore in the discussion. While the government side praised the OECD Guidelines as an example of an achievement offering good control options, the NGO representatives and trade unions were in agreement that it was not a sufficient regulation. The existing asymmetry was obvious. Voluntary initiatives without any sanctioning mechanisms were faced by a legal system to protect corporate rights at multilateral and bilateral level with considerable powers to assert itself. The establishment of national contact points that complaints could be addressed to if the OECD Guidelines were violated was welcomed by all sides. Assessments of their handling of complaints and their effectiveness differed considerably.

In the context of bilateral investment treaties, Dr. Ulf Jaeckel complained of the lack of readiness among developing countries to adopt both environmental and social aspects in agreements. He linked this to criticising civil society for calling for environmental standards in the name of the developing countries although this objective was not shared by the South. However, this was rejected in the strongest terms, for, according to Chien Yen Goh, developing countries are indeed interested in environmental aspects. What they are not enthusiastic about is the way in which they are supposed to be introduced, i.e. as a further means of progressive liberalisation. Jürgen Knirsch said that it was noteworthy in this context that the most recent major environmental agreements had only materialised thanks to the support of the developing countries.

Various theories were put forward on what was the true driving force behind the EU and why it was above all so keen to have an agreement on investment established in the WTO. Is the issue at stake of countering the American, very far-reaching bilateral model? Is the goal that of extending the power of the EU by transferring the respon-

sibility for investment policy from national to EU level? Is the aim that of continuing to extend corporate power at the expense of the developing countries, or is it that of preferring to spread the European philosophy throughout the world rather than the American approach, as put forward by Mr Braun?

Conclusion

The conference clearly demonstrated the problems and threats of a "MAI light" as well as the different positions on this issue. It is now up to the advocates of an agreement on investment within the WTO to come up with proof of a need for it. This above all applies to the EU. What became very clear was that pressure exerted by the opponents of such an agreement, such as India, is going to be very considerable during the September negotiations in Cancún. After all, what is at stake is to successfully conclude the ongoing round of trade negotiations in the WTO commenced at the Ministerial Conference in Doha 2001 – as stressed repeatedly by the representative of the EU Commission. For civil society in the North, this means that there is an urgent need for political pressure on the EU and the national governments. Not only did the conference represent an important step in terms of debating the contents of an agreement on investment in the WTO, but it also offered sufficient scope for networking, identifying of strategies and co-ordinating of joint campaigns with a view to Cancún.

International investment agreements as instruments to impose the interests of corporations

Peter Fuchs, WEED (World Ecology, Economy & Development), Germany

The already broad agenda of the world trade round threatens to be extended even further at the forthcoming Ministerial Conference of the World Trade Organisation (WTO) in Cancun/Mexico (10th-14th of September 2003). The European Union aims at launching negotiations on a Multilateral Investment Framework (MIF), or, as the critics call it, on a new Multilateral Investment Agreement (MAI) in the WTO. To help understand the political context of this notion, a brief overview will be given, which details the investment contracts already existing on bi-, plural, and multilateral levels.

From BITs...

Many European as well as other governments have negotiated in the past and continue to negotiate bilateral trade and investment agreements which often go beyond existing WTO rules. Currently there are more than 2000 bilateral investment agreements which contain no social or environmental safeguards. It is important to take a closer look at these bilateral agreements, and not focus exclusively on the WTO.

From the outset, the focus of BITs has been on investor protection; that is on the protection of investments against nationalization or "expropriation", on assurances for free expatriation of profits; and on provisions for (mostly non-transparent) dispute-settlement mechanisms between investors and host countries. Most European BITs do not go as far as to grant investors a *right of establishment*; this right typically remains subject to national laws and

regulations. However, the USA in its BITs also locks in entry and establishment rights as far as possible. An investment agreement within the WTO would not weaken or substitute any of these questionable BITs; it would only reinforce them and add an additional layer of investment rules.

...to NAFTA...

The North-American Free Trade Agreement between the USA, Canada, and Mexico (NAFTA) extended the term "investment" to include new forms of financial activity. Chapter 11 of the agreement grants investors from NAFTA-countries the right to take legal action against national governments ("investor-to-state dispute resolution"). Investor claims are brought against the government of the state in which the rules were violated and must be submitted either to the UN Commission for International Trade Law (UNCITRAL) or to the International Centre for the Settlement of Investment Disputes (ICSID). Both bodies are composed of three judges who pass sweeping final judgments. Since they deliberate behind closed doors, no information about claims filed or ongoing proceedings is made public. Decisions are only published once the case is settled.

NAFTA introduces a system of cash compensation for violations of the agreement. Since all compensations awarded to investors are paid out of the state treasury, it is essentially the taxpayers of the respective countries who would be footing the bill!

Selected NAFTA Chapter 11 Cases

After six years of NAFTA experience some conclusions may be drawn. Two US-organizations, "Public Citizen's Global Trade Watch" and "Friends of the Earth," have analysed all 15 known investor-to-state claims filed so far and published their findings in a report entitled "Bankrupting Democracy"[1]. All in all, the total damages claimed by 15 corporations from NAFTA-signatory governments amount to more than 13 billion dollars. Four investor complaints were upheld and awarded a total of 514 million dollars in cash compensation. Two cases were dismissed in favour of the accused governments (Mexico and USA). The remaining cases are still pending. The North-American Free Trade Agreement "is really more of an investment protection agreement than a trade agreement," concluded the authors.

The most important cases from the NAFTA investor-to-state system demonstrate the unusually broad definition of the term "investment" and the system's far-reaching political, social and environmental consequences:

- NAFTA can override the national laws of its member states
- Corporate suits are used to challenge or reverse democratic decisions taken by local, regional or national legislative bodies to protect the environment and public health
- The scope of political action taken by legitimate democratic institutions (parliaments and governments) is limited or subverted entirely
- Policies that promote the local or national economy can be stopped
- The government's economic policy is subordinate to the interests of private corporations

[1] "NAFTA Chapter 11, Investor-to-State Cases: Bankrupting Democracy. Lessons for Fast Track and the Free Trade Area of the Americas", Washington D.C., September 2001. See: www.tradewatch.org

...to the MAI

With globalisation progressing rapidly and cross-boundary direct investments growing from 60 billion dollars (1985) to over 300 billion dollars by the mid-nineties, the Organization for Economic Cooperation and Development (OECD) decided that the time had come to take a big leap forward and draw up an internationally binding agreement on investor rights.

After difficult and lengthy internal negotiations, the draft for a Multilateral Agreement on Investments (MAI) was made public in February 1998. It was closely modelled on NAFTA rules. Like NAFTA, MAI was not concerned with investors' responsibilities but only with expanding their rights. No serious consideration was given to principles of environmental protection and social security which appeared in the draft agreement only as non-bindig declarations of intent. A wave of protests initiated by numerous NGOs and trade unions swept the world. This widespread opposition and pressure exerted on national governments eventually prompted the French government to drop out of the negotiations: Thus the MAI had failed - ...but the idea of an investment protection agreement was far from dead.

The neo-liberal concept of one-sided investment liberalisation and investor protection - combined with a flagrant disregard for investor obligations and development needs - was already pushed into the WTO, when, during the Uruguay Round of (GATT-) trade negotiations (1986-1993), powerful business interests and Northern governments managed to get three agreements accepted as elements of the future WTO trading regime. These agreements - the TRIMS, GATS and TRIPS Agreements - are the first milestones on a road in the wrong direction, which the EU and others now want to build up even further. Critics of an expansion of WTO-power through new investment negotiations are not arguing in favour of keeping the *status quo*. Far from it! We stress that there is an urgent need to assess and fundamentally change the already existing rules:

- **The WTO-Agreement on Trade-Related Investment Measures (TRIMS)**
  Due to the resistance of developing countries during the Uruguay Round, the TRIMS Agreement did not become as far-reaching as the EC, US, Japan and Canada wanted it to be, namely a comprehensive investment agreement. However, the TRIMS Agreement refers to and reinforces existing provisions under the GATT (General Agreement on Tariffs and Trade), which prohibit laws, policies or administrative practices that favour local products. It prohibits, for instance, the use of government incentives or requirements *vis a vis* transnational corporations (TNCs) to encourage the use of domestically made products as a way of creating or protecting local jobs ('local content policies'). The TRIMS Agreement thus constitutes an additional restriction on development strategies of the type used in the past by the rich countries themselves. These proven strategies have now been outlawed for developing countries.

- **The General Agreement on Trade in Services (GATS)**
  The GATS contains rules for four different so-called "modes of supply" in services trade. The third mode refers to the provision of services through the presence of foreign subsidiaries of service providers and thus regulates foreign direct investment of TNCs in the services sector. Because of this third mode, the GATS can be called a first multilateral investment agreement.

  Under GATS today there still remains some limited flexibility for governments to decide which sectors of their service economy they want to open up to foreign competition. However, developing countries - and in particular those with profitable markets - face a lot of pres-

sure to open up their economies to foreign investments and to limit their regulatory freedom according to the needs of big business. Such countries may find themselves facing choices such as: "Open up your water sector for European water TNCs or we will not give you any additional market access to European agricultural markets."

Negotiations under GATS aiming at further liberalisation of trade and investment in services are well under way as part of the current WTO negotiations. Although the economic, social and environmental impact of the GATS has not been studied thoroughly, the EU keeps pushing for its expansion.

- **The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)**
  The TRIPS Agreement makes the protection of intellectual property (patents, copyrights, trademarks, trade secrets etc.) an integral part of the WTO trading system. This would have been unthinkable without the concerted efforts of US-based corporate executives from the pharmaceutical, software and entertainment industries before and during the Uruguay trade round. In the 1980s, a small group of CEOs of US-TNCs formed a so-called "Intellectual Property Committee (IPC)". Together with their European and Japanese counterparts, these TNC representatives successfully lobbied their governments to strengthen the global protection of intellectual property (IP) through a binding agreement - which became the TRIPS. At the same time, they managed to sideline other interests, such as distributional and consumer interests, development needs and in particular the need for technology transfer to developing countries. TRIPS raises the price of information and technology by extending the monopoly privileges of rights-holders; it requires states to make dramatic changes in their domestic IP policies and to play a much greater role in the enforcement of monopoly privileges. As the researcher Susan K. Sell puts it: TRIPS "benefits the few at the possible expense of the many. (...) The industrialized countries built much of their early economic success on appropriating others' IP. With the TRIPS accord, this option is foreclosed."

New investment negotiations in the WTO to be decided in Cancún...

The 5th Ministerial Conference of the WTO in Cancún will not only assess the state of play in the current round of negotiations, but there will have to be a decision on one contentious question, which will be at the heart of the debate: Should the agenda of the WTO round be extended to include negotiations on the so-called Singapore issues (investment, competition, public procurement, trade facilitation)?

A „development round" with ever more agenda items of the North?

The new world trade round in the WTO which began at the end of 2001, is already dealing with a very broad agenda, including: agriculture, services, market access for non-agricultural products, WTO rules on subsidies and anti-dumping, TRIPS, and some environmental aspects. The use of 'Development' rhetoric has increased since the last Ministerial Conference in Doha/Qatar, and the euphemism "Doha Development Agenda" was chosen to be the official designation of the round . However, developing countries are still waiting in vain for their concerns to be addressed adequately (e.g. implementation problems of the old WTO agreements; market access, in particular in agriculture and textiles; Special and Different Treat-

ment; concerns with regard to TRIPS and access to medicines as well as questions related to biodiversity.)

Instead of prioritising the concerns of developing countries the EU (and with it the German Ministry for Economics and Labour - BMWA) vigorously pursues its own agenda by urging other WTO-members to start negotiations on the Singapore issues.

From Doha to Cancún

Just as a reminder: The final declaration of the WTO Ministerial Conference in Doha contained no obligatory negotiation mandate on the Singapore issues. Rather it specified that negotiations will be launched if there will be an "explicit consensus" among WTO members at the 5th Ministerial Conference in Cancún about the modalities of the negotiations. Particularly on pressure from India, it was explicitly noted in Doha that according to this agreement, each WTO member country has the formal right to refuse the consensus and consequently prevent the beginning of negotiations. This will be bitterly fought out both in advance to Cancún and most likely during the conference. Apart from the rather tactical differences between the EU and the USA - especially over the question of the range of a MAI in the WTO - it will be decisive whether a more powerful developing country (India, China, or recently Brazil under Lula) or an alliance of developing countries will arise with the goal of blocking this attempt by the industrialised countries to set the WTO-agenda even further according to their corporations' wish list.

Refusal of a „MAI light"

Also within Europe the opposition to the launch of investment negotiations is increasing speaking up: The "Seattle to Brussels" network ("S2B-Network") initiated support within numerous organisations for a "Communal declaration of the European civil society against an investment agreement in the WTO" and formulated a clear refusal against the EU's strategy to push for an "MAI light" (see appendix). There is some hope, that these and many additional initiatives will develop further in 2003 a strong case against any WTO investment agreement.

Environmental Aspects of an Investment Agreement in the WTO-System – Executive Summary

Stefanie Pfahl, Free consultant, Germany

Background

The question of integrating an investment agreement into the WTO has been discussed since the first Ministerial Conference (1996) in Singapore. Some members suggested that the then newly established WTO Agreement on Trade Related Investment Measures (TRIMs) was not sufficient to deal with the expected growth in demand for cross-border investment activities. Namely, the European Union and Japan were asking for a full-fledged agreement that would guide the liberalisation of foreign direct investment (FDI) in order to complement the efforts in liberalising trade in goods and services. As no agreement could be reached to start negotiations, investment became part of the so-called "Singapore issues."[2] Working groups have been established to discuss the relationship between these issues and the multilateral trading system with a view to negotiate agreements or more binding accords at a later stage and integrate them into the system. Many Developing Countries are opposed to a multilateral investment agreement in the WTO, because they fear it will prevent them from implementing policies directing FDI at domestic developmental goals. Based on many examples in developing and developed countries, NGOs have been consistently warning of the negative developmental and environmental consequences of liberalised FDI policies.

Although the failure to conclude a Multilateral Agreement on Investment (MAI) under the auspices of the OECD in 1998 temporarily reduced the political pressure towards establishing a multilateral agreement aiming at a broad-scale liberalisation of national investment regimes, the issue has picked up momentum once again. At the most recent WTO Ministerial Conference (2001) in Doha, the main proponents for a comprehensive investment liberalisation agreement were again the EU and Japan. Despite considerable opposition by the majority of the Developing Countries and a significant lack of interest by other developed countries, the EU has been successful in getting the issue included in the "Doha Development Agenda," of the current round of WTO negotiations. At the next WTO Ministerial Conference in September 2003 in Cancun, all of the WTO members will have to decide by explicit consensus, whether and how actual negotiations about an investment agreement and the other Singapore issues will officially take place.

[2] Other Singapore issues are competition policy, transparency in government procurement and trade facilitation

FDI and the Environment

Although significant knowledge gaps regarding the impacts of FDI on the environment remain, recent developments show that the negative impacts of FDI are likely to exceed the positive effects of the goal to improve resource efficiency. Generally, FDI and other forms of investment such as short-term and portfolio investment grew enormously over the past decade. In 2001, FDI inflows amounted to US$ 735 billion and FDI outflows to US$ 621 billion. Although both figures dropped by more than 50 % compared to those of 2000, the level of FDI is still quite high compared to levels in the early 1990s. For example, in 1990 FDI inflows came to US$ 203 billion and outflows were US$ 233 billion. About 75 % of FDI went to developed countries, while the bulk of FDI that has been attracted by Developing Countries went to a small number of countries, such as China, Thailand, Mexico and Brazil.

At the same time, environmental degradation increased significantly in these countries despite serious efforts to reduce resource consumption and emissions. In spite of considerable efforts and achievements in the area of energy efficiency, emissions of CO_2 and other greenhouse gases are still rising, because economic growth, i.e. additional production and consumption, compensated the gains in energy and resource efficiency. Moreover, infrastructure needs, absolute resource demand and sprawling settlements contribute to the loss in biodiversity and deforestation. Hence, the anticipated decoupling of resource use from economic development has yet to be achieved.

It must be cautioned that the relationship between FDI and the environment is rather complex, because interactions can have various positive and negative as well as direct and indirect effects. For example, FDI can facilitate the transfer of environmentally

friendly technology and knowledge in support of cleaner production processes. At the same time, by financing industrial activities or large scale infrastructure projects, for example, it can contribute to permanent environmental damages, especially when the host country lacks the regulatory capacity that ensures adherence to environmental standards. Quite often, these problems are exacerbated not necessarily due to the lack of strict environmental standards or law, but due to the lack of monitoring and enforcement capacity to oversee investment activities or the conduct of transnational corporations (TNCs) in environmentally sensitive sectors. An objective general assessment of the environmental impacts of FDI is hampered by the fact that the empirical analysis of such claims (like FDI enhances technology transfer and the economic and social development of the host countries) turn out rather ambiguous results. The same is true for claims that prospective host countries tend to lower environmental standards in order to attract FDI and subsequently turn themselves into pollution havens.

Examples from various sectors and industries illustrate the potential negative effects that FDI can have on the natural environment of a host country. These cases suggest that companies seem to prefer locating in countries with low environmental standards or where those standards are poorly enforced. In addition, some examples suggest that the competition for investment amongst potential host countries also contributes to lax monitoring or the relaxation of standards. However, it needs to be stressed that these developments depend on the legal and political framework in the host and home countries. Quite often, public pressure in home countries encourages enterprises to adopt a more environmentally friendly production process, which will continue down their supply chain. The case of tropical timber is an example where consumer demand initiated and supported the development and implementation of independent labelling schemes, like the forest stewardship council (FSC) which certifies timber from sustainably managed forests.

Concerning technology transfer and technology diffusion, the sectoral case studies and overviews offer a clear result. The positive environmental effects of technology transfer seem to be limited. Mining, for example, is by nature a sector where technology transfer and diffusion is restricted, as mining technology can hardly be used outside the mining sector. And when mines are run by TNCs, it can also be assumed that the majority of the economic benefits flow back to the home country. Although China, for example, offers a case in point for some of the positive effects in terms of improved resource efficiency in the context of FDI, it became clear that these positive effects depend on active support and promotion either by the companies, governments or consumers.

Finally, when it comes to preventing negative environmental impacts of FDI, the ambiguous results of the empirical analysis suggest that a large gap exists between the approaches of economic researchers and those of environmentalists. Whereas the economic analysis concentrates on narrow or partial environmental measures, environmentalists are concerned with the management of entire ecosystems and long-term sustainable development of societies as a whole. This observation indicates that the conflict between proponents of liberalised FDI and those of environment related standards and performance requirements originate from fundamentally different policy principles. Thus, in order to draw concrete policy recommendations for environmentally safe investment policies, it is necessary to take into consideration the competing principles of FDI on the one hand and environmental protection and sustainable development on the other.

The WTO, Investment and the Environment

The "Doha Development Agenda" does not, in fact, take into account any of the concerns mentioned above. The "pre-negotiation" mandate of the Doha Development Agenda lists only the following points for clarification:

- ➔ scope and definition of investment;
- ➔ transparency;
- ➔ non-discrimination;
- ➔ modalities for pre-establishment commitments based on a GATS-type positive list approach;
- ➔ development provisions;
- ➔ exceptions and balance-of-payments safeguards;
- ➔ consultation and the settlement of disputes.

The analysis of the recent contributions to the WTO Working Group on Trade and Investment illustrates not only the neglect of the environmental dimension in the members' deliberations on the promotion of FDI. It also shows that a number of crucial questions scope and institutional structure of such an agreement that remain to be clarified before major issues such as the development dimension and dispute settlement can be addressed. When discussing exceptions, specific development provisions, and performance requirements, WTO members had not clarified how the agreement could contribute to the general aim to enhance FDI to support economic growth. Similarly, no in-depth discussion took place pertaining to the nature of performance requirements that are important to developing countries and their specific national development strategies. As a consequence, there is an imminent danger that the regulatory competency of governments to ensure that FDI is environmentally sustainable or supports the development policies of the host countries will be significantly restricted by the general principle of liberalisation.

The lack of legal clarity points to the crucial need for the reform of the WTO dispute settlement system. An investment agreement in the WTO would open a myriad of complex legal questions related to the WTO agreements containing investment related rules as well as the rules of other accords like those of NAFTA and bilateral investment agreements. The current dispute settlement system is not capable of addressing these issues, because they need to be decided on a political level. With investment agreements, the need for an open and accountable system that is capable of interpreting technical information becomes abundantly clear–especially in the case of environmental protection. Technical questions regarding how specific provisions or production measures affect the environment or the economic performance of an investment are likely to lie in the centre of disputes. Thus, dispute settlement panels will not only have to assess whether specific WTO rules are applied correctly, as it is the case in disputes over specific measures aiming at trade in goods or services, but also the long-term impacts of investments. In this context a panel would have to delineate the impact of environmental performance requirements from non-environment related requirements, that affect the investment and decide whether they are justified for public policy reasons. Such a task is far more complex and likely to over-burden the current dispute settlement system, which usually consists of panels of trade policy experts that are not familiar with technical aspects of either environmental standards or long-term investment calculations.

NAFTA - A Negative Example

The investment rules of the North American Free Trade Agreement (NAFTA) have the potential for conflict, due to vague rules regarding the regulatory competencies of host governments and broad-scale investment protection. The NAFTA rules include provisions that treat governmental regulations that reduce the financial performance

of the investment as expropriation. Hence governments are required to pay financial compensation to the enterprise if they introduce new regulations with the respective effects. Indeed, several disputes in the realm of NAFTA have become public, in which companies challenged environmental standards on the grounds of expropriation.

Owing to these experiences, the fear that the "investor-to-state" dispute settlement system of NAFTA could be used to challenge the environmental laws of host countries seems justified. It certainly increases the uncertainty for regulators and might discourage further regulation initiatives. Two basic concerns are raised by these cases:

1. the process grants foreign investors the possibility to circumvent or side-step policies and measures serving the purpose of safeguarding public policy goals by using an non-transparent and secretive arbitration process that does not even include the right of appeal,
2. the cases can be initiated without the consent of Parties and this opens the possibility for private investors to strategically use this dispute settlement system and its wide-ranging expropriation clause to challenge evolving environmental standards and other public policy goals.

There is indeed another rather disturbing result that arises from these cases. The fact that performance requirements are prohibited means that their implementation can be defined as expropriation, which results in foreign investors being favoured over domestic investors. The latter usually have to observe governmental measures aimed at public policy goals, while NAFTA-protected foreign investors are exempt from many regulatory changes that are inevitable as societies and economies develop and grow. This is inappropriate because the life span of investments usually covers several years or even decades of economic engagements in foreign economies.

No Investment Agreement in the WTO

Although it is not clear whether a WTO investment agreement would contain similar rules as NAFTA, there is uncertainty as to whether the NAFTA rules could apply in the WTO context, because the WTO members have not clarified the relationship between these various agreements. Whatever decision may be taken on this, the analysis shows that the WTO is not the appropriate forum for an international investment agreement for at least two general reasons:

1. WTO principles and rules, such as *national treatment*, *most-favoured nation* and its dispute settlement system are not capable of supporting a sustainable international investment regime, because they do not allow for a balance between investors' rights and obligations. In addition, WTO members have not yet found any solutions for the settlement of potential conflicts between bilateral investment agreements and a multilateral WTO investment agreement.
2. FDI activities fundamentally differ from international trade and the exchange of goods and services, because they usually establish a longer-term relationship between the investor and the host countries. As a consequence of these relationships, which usually involve physical presence by foreign companies or foreign ownership of companies in the host country, the investor not only acquires rights to explore economic opportunities but also has an obligation to take over certain responsibilities and accept country-specific regulatory schemes and rules of conduct.

There have been a number of suggestions for integrating environmental and sustainability concerns into international investment frameworks. They stress that not only the institutional dimension but also the procedural aspects of this goal have to be considered. An environmentally sustainable multilateral investment agreement needs to

acknowledge that international rules for trade liberalisation cannot be applied to FDI, due to the fundamentally different impact and integration of FDI on the host economy as compared to the impact of trade in goods and services. Longer-term FDI is dynamic in the sense that it can adapt to changes in the economic and political environment of the host country. This also implies, among other things, that investors adhere to international as well as national regulations, particularly in regards to the maintenance of competitive markets, and that governments must retain the flexibility to alter specific FDI relevant requirements as the political, social, environmental and economic conditions change.

Since the underlying principles of the WTO – national treatment and MFN – cannot facilitate this specific aspect of FDI, they are inappropriate for a multilateral investment agreement. Should countries decide that they need a multilateral investment framework, it would be more appropriate to follow an incremental approach modelled after the development of MEAs. A first step could be the establishment of a framework agreement outside the WTO, containing provisions on basic institutions and thereby creating an organisational structure that defines the process to achieve the specific goals of FDI. Over time and as more knowledge accumulates, and parties become more familiar with the issues, the regime could be developed towards more binding or detailed rules.

From a political point of view, the major challenge for this approach will not just be the maintenance of predictability and flexibility, but also the integration of policy aspects, such as trade, development and environment, that are already being dealt with in other international fora. Because of its resources and expertise, the UN system is the most appropriate institutional framework for developing the multilateral agreement on sustainable investment.

Conclusions and Recommendations

The inter-linkages between FDI and its environmental impacts need to be examined in more detail

The systematic analysis of the environmental impacts of FDI to date cannot confirm the assumptions regarding the flow of FDI to those countries with low environmental standards, (the *pollution haven* or *industrial flight hypotheses*). Examples from various sectors illustrate that FDI can have positive as well as negative environmental impacts. The sectoral overview suggests that the existence and enforcement of the environmental policy framework in the host country plays a major role in determining the environmental impacts of FDI. Therefore, the first step to prevent negative environmental impacts of FDI is the establishment, monitoring and enforcement of national environmental policies.

However, there seems to be a significant knowledge gap between impacts on the micro-economic and the macro-economic level. The environmental effects of FDI on the macro-level of a political system still need to be explored in more detail and probably over a longer time horizon. This is necessary because there are clear signs that the competition for FDI, as well as rules on the protection of investor rights, impede the formation and strengthening of national environmental policies.

Investment fundamentally differs from trade in goods and services

Productive FDI fundamentally differs from trade in goods and services (the WTOs primary concern). In contrast to trade in goods and services, FDI establishes a long-term relationship between the investor and the host country that integrates the investor into the national policy framework of the host country. The economic purpose of long-term FDI are not comparable to the trade

in goods and services, and therefore an international investment agreement cannot be based on the same rules.

A balance between public policy goals and investor protection needs to be achieved

Currently, BITs and international investment agreements such as NAFTA grant wide-ranging privileges to foreign investors that in case of post-establishment relations go as far as discriminating against domestic investors, which are not necessarily eligible to financial compensation for "regulatory expropriation". Experiences with existing agreements reveal that the one-sided protection of investor rights hardly reaps any economic or developmental benefits for the host countries. It can be questioned if countries should engage in multilateral investment agreements at all, if FDI only enhances the economic benefits of the investor.

Legitimate regulation for sustainable development

From a sustainable development and environmental perspective there are many reasons why governments need flexibility to regulate FDI. Benefits accrue to the host countries only when the goals of the investment agreement are linked to the goal of sustainable development. To ensure that FDI serves the purpose of sustainable development and enhancement of environmental protection, governments need to retain regulatory capacity. Thus, it is also important that the WTO members engage in a discussion of "legitimate" regulation of FDI and perhaps establish codes of conduct.

Necessary environmental performance requirements

It is irrefutable that environmental performance requirements must be correlated with the specific geographic, climatic, economic and developmental situation of the host country. The preceding analysis suggests that the following elements need to be included in an international investment agreement:

- screening of FDI according to its environmental and sustainability impacts;
- the application of appropriate best practices;
- and the formulation of investor guidelines for environmental quality investment that support technology diffusion and promote general development goals of the host country.

Investors should be held accountable for the impacts of their investments and international investment agreements should foresee liability clauses regulating financial compensation in case investors do not apply existing environmental standards. Another indispensable element is the acknowledgement of multilateral environmental agreements and their specific rules and incentive measures targeted at more environment friendly economic development.

The WTO dispute settlement system cannot address the issues that need to be resolved on the political level

Important issues like the relationship between a future WTO investment agreement with other WTO agreements and existing international investment agreements are far from being resolved. There is no guidance on how to interpret the potentially vague rules on performance requirements and expropriation in order to integrate sustainability issues. This is especially true of the *national treatment* and *most-favoured nation principles*. Moreover, the dispute settlement system is non-transparent and does not provide for the participation of all affected parties. Without this clarification and reform the dispute settlement procedures can lead to considerable legal and economic insecurity that may permanently paralyse the regulatory capabilities of governments.

The WTO is not an appropriate forum for negotiating a multilateral agreement on investment

The analysis of the current discussion of an investment agreement in the WTO clearly shows that WTO rules cannot accommodate the requirements of an investment agreement that is sustainable from an economic, social and environmental point of view. FDI is simply not a trade issue. Moreover, the institutional structures of the WTO cannot, at least not on the basis of the current rules, handle future issues regarding the relationship between different investment agreements or legitimate regulatory constraints on FDI. Thus, the WTO is not the appropriate forum for hosting an international investment agreement.

A multilateral FDI regime could be negotiated in the UN-Context

Bringing FDI into a country is not a goal in itself. It must be the legitimate right of governments to benefit from offering an investor the opportunity to increase his or her economic benefits more than elsewhere by allowing him or her to explore advantageous cost structures. In turn, governments should retain the possibility of directing FDI in ways that serve specific public policy goals of the host country. Regulatory flexibility is an integral part of any investment agreement aiming at sustainable development. This includes the ability to set performance requirements. Since the UN is the only global forum that can cover all dimensions of sustainable development, such an international investment agreement could be negotiated under its auspices.

Comment on Stefanie Pfahl's paper

Elisabeth Tuerk, CIEL (Centre for Environmental Law), Switzerland

Introduction

Firstly, I thank the organisers for inviting me to this conference. I enjoyed the very interesting and enriching discussion that has taken place so far. Let me say a few words on CIEL, to allow participants to better understand the context, within which I will be making my comments: CIEL is a non-profit law firm, with offices in Washington DC and in Geneva. The main focus of the Geneva office is on monitoring developments in the WTO; amongst these issues, investment is becoming increasingly important. Specifically, CIEL aims to "keep investment out of the WTO", i.e. we work to avoid that WTO Members take a decision to launch negotiations on investment in WTO at the September Cancun Ministerial Conference.

My comments are:

- From a legal/regulatory perspective, i.e. an organisation being concerned with impacts of international law on domestic regulatory functions/prerogatives;
- From a Geneva perspective, i.e. from somebody who tries to follow the discussions of negotiators;
- From an organisation that is against possible negotiations on investment in the WTO.

Thank you for study and its presentation. This is a very valuable contribution to our discussion. I agree with many of the things mentioned, most importantly, the call to keep investment out of the WTO.

My comments will be mainly on the study, but I will also be picking up on the discussion that has taken place today in the conference; I will divide

- first, practical inter-linkages;
- then regulatory inter-linkages

I will focus on the latter, and try to identify lessons to be learnt from past experiences with investment liberalisation.

Practical Inter-linkages

I very much enjoyed reading the study; maybe this was because it really provides some value added to the debate in Geneva, which is very much an abstract debate, i.e. not looking at practical implications.

To date, the study suggests that it is not possible to confirm the claims that investment will be beneficial for the environment nor is it possible to clearly dismiss claims that investment may bring about threats for the environment. Thus, what may be needed is more investigation into these aspects, i.e. there is a need to conduct a thorough and comprehensive assessment of the effects of investment on environment.

It is also interesting to note that out of the three sectors reviewed, two are more or less services sectors, they would therefore be covered by the WTO's General Agreement on Trade in Services (GATS): this is the case with "tourism" which is clearly a service and also with "mining" (as many commercial activities related to mining are "services" rather than "production of goods"), thus there is a link to the GATS which also covers investment. So this is certainly an area that needs further exploration!

But actually, the more important link between investment and services/GATS is that one of the main arguments, which the demandeurs of a WTO investment agreement use to "talk developing countries into" agreeing to negotiate investment rules in the WTO is an argument taken from the GATS Agreement: namely that the bottom up scheduling approach (which DG Trade is suggesting for pre-establishment commitments) provides enough and adequate flexibility for developing countries. But I doubt that, and in the Geneva services negotiating process it is getting increasingly clear that the claimed flexibility is merely "theoretical", but I am sure that we will be hearing more on that particular argument in the course of the conference.

Thus, to sum up:

- It is good to have a discussion on practical inter-linkages;
- It would be great to have this discussion in Geneva;
- Maybe this is not the case, because actually many of the practical inter-linkages have not yet been explored;
- There is an urgent need to do that!
- From this results a call for a thorough and comprehensive assessment of implications as an input into decision making;

Regulatory Inter-linkages

Such a thorough assessment should also look at the regulatory implications: In that case, there is already some data out there, in effect, one can look at experiences with investment liberalisation/protection agreements and what has been their implication on domestic regulatory prerogatives;

The most prominent example is NAFTA, but also many of the bilateral investment treaties offer examples. There is much jurisprudence out there, decisions taken by the ill-famous investor – state arbitration tribunals, which highlight the challenges for domestic regulatory prerogatives. And many of these challenges occurred against national environmental regulation/laws.

When looking at these experiences, one has to distinguish between experiences with provisions (obligations in NAFTA/BITS) which are clearly on today's WTO agenda, i.e. notably non-discrimination obligations; and those which are not. Or better: not yet! Because: what is important to note when talking about possible implications of negotiations is to bear in mind that the negotiating proposal of one country, i.e. the demandeur, is only a proposal and does not guarantee the outcome! Thus, what I want to say is that when analysing potential regulatory implications of a WTO investment agreement, it is important to go beyond the "so-called" limited approach to an investment agreement suggested by the European Communities. Whilst the latter focuses on non-discrimination and does not suggest any investor – state dispute settlement system, the US has already stated that they would like to see an investment agreement with "high standards of protection" which would most likely include provisions on expropriation, minimum standard of treatment etc. It is also important to note that the ICC (International Chamber of Commerce) has clearly stated that they would like to see an investor – state clause in the WTO legal texts.

A little side remark on dispute settlement: actually not a remark, but rather a question to the person who had made remarks on dispute settlement before: First, I fully agree that there are important difference between the WTO DSU (Understanding on the Settlement of Disputes) and the arbitration procedures as integrated in investment treaties. And honestly, I have much less problems with the WTO as with the other process (despite the fact that from a sustainability and civil society point of view also the WTO process suffers from serious deficiencies). From the legal perspective, one of the main problems with the Investor to State system is that it induces private corporations to aggressively interpret the respective provisions. (Unlike governments in a state-state dispute settlement system, corporations can easily put forward very aggressive interpretations, because they can be sure that this legal argument won't be used against them. This is not the case with governments in State to State dispute settlement processes). Second, I don't agree – or maybe don't understand the argument that case law and jurisprudence are nothing to look at / not relevant when it comes to the development of new law. I just would like to point out that a) WTO law is inherently vague (due to its political nature) and therefore interpretation plays a crucial role and b) in the context of the European integration process, the European Court of Justice was an important driver of the integration process.

But coming back to investment and regulatory implications/constraints for domestic environmental laws and regulations.

Let's start with national treatment – a provision which forms the corner stone of the EC proposal: In the NAFTA context, this provision has been found to be violated by a domestic environmental law. That was the case in the SD Meyers case, involving a Canadian ban on the export of a chemical. The investor, was a US company in the waste management business. Specifically, the company engaged in the export of the chemical PCB from Canada to the US to its disposal facilities there. So as a response to the Canadian export ban, which deprived this corporation from undertaking these exports, the company launched an investor – state claim against Canada. In that claim it alleged – amongst many other arguments - the violation of the national treatment provision, claiming that the Canadian authorities had closed the borders to favour Canadian PCB waste disposers. And the tribunal found that the Canadian regulatory measure was indeed discriminatory in intent.

So I am just flagging this to show that also a provision such as non-discrimination, which by many is considered the corner stone of WTO policies, and which by many is viewed as comparably uncontroversial – can cause significant problems for environmental regulations.

I don't need to flag the potential problems when it come to the other basic obligation, namely market access or right to establishment. Even if this obligation would take the nature / form of a so-called "specific commitments" (I have already raised my doubts in that regard before) there are serious concerns. Specifically, the right to screen investment is crucial from an environmental point of view. There are legitimate reasons for a country / a society to decide to have no foreign investment in a particular sector, because of the environmental threats it entails.

But let's now go a step further and just have a quick look at two provisions/obligations that are frequently discussed in the context of investment agreements and their impact upon regulatory prerogatives:

Expropriation and minimum standard of treatment. Both are inherently vague and dangerous concepts. Expropriation is maybe the better known. Whilst a narrow understanding of expropriation might have made sense in the early days of investment regulation and protection, the concept to which it has developed throughout the years is far from reasonable, and inherently dangerous. Specifically, today (as for example set out in NAFTA) expropriation does not only mean

"direct" expropriation, but also "indirect" expropriation or measures "tantamount to expropriation". And according to the US concept of "regulatory" taking, this can also include governmental regulatory measures. Thus, a governmental regulatory measure that reduces the value of the investment, i.e. reduces the business opportunities a corporation had expected to exploit, could be seen as an expropriation.

A quick example of a case, where expropriation has proven difficult for environmental legislation: the best known case maybe is Metalclad, a case between a US company in the waste management business, against Mexico. There are several extremely disturbing aspects in this ruling (i.e. how the arbitrators ruled on the scope of authority of Mexican municipalities, which was contrary to the understanding put forward by Mexican authorities; or how the panel concluded that the same factors that led the violation of the minimum standard of treatment provision also automatically led to a violation of the expropriation clause); What – from an environmental point of view – is maybe one of the main disturbing features – is the arbitrators' (rather confusing) ruling that when analysing whether or not a governmental action amounts to expropriation, there is no need to investigate into the regulatory intent, i.e. the reason for which the regulator had undertaken this measures. All that needs to be analysed is the extent of the interference. So why a government decides to undertake a regulatory action, i.e. to protect the environment, human health, the public welfare is irrelevant, all that counts is the extent of the business opportunities an investor is deprived of.

Thus, experience with NAFTA case law suggests that if any WTO agreement would go as far so as to incorporate expropriation provisions - something that cannot be clearly ruled out – this would give rise to serious concerns.

Conclusions

Thus, to sum up:

I am sure the study will provide valuable input for policy makers:

- For example, it may kick off some debate on the practical effects of investment on the environment. And to date: the study concludes that many of the claimed positive effects cannot be proven, neither can the threats of negative effects be clearly dismissed. So in my view, the lesson learnt is to first undertake a comprehensive assessment, and then make decisions as to whether or not to negotiate international investment rules.
- The study also provides valuable input as regards regulatory implications – an issue which I believe to be of fundamental importance. Here the lesson learnt from NAFTA case law is that also benign concepts, such as national treatment can prove problematic for environmental regulation and that problems would be even bigger if one included more far reaching concepts such as minimum standard of treatment (I didn't discuss this one) or expropriation. What is interesting to note here too is that NAFTA parties today actually realise the Pandora's box they have opened, and through interpretative statements aim to limit and narrow down these concepts. So they try to "remedy" errors they have made.
- But I think WTO parties, have the chance to not make this errors in the first place and first of all that would mean to refrain from negotiating investment rules in the WTO. And I very much hope that this will be the case, and again – that is one of the points where I fully agree with the conclusions offered in Stefanie's study. Thank you very much.

FDI - is not automatically good for development

Peter Wahl, ATTAC, Germany

If not embedded and politically regulated, FDI:

- don't go where they are most needed
- press for deregulation (labour-, consumer rights, environment etc.)
- ruin national competitors/infant industries
- technology transfer effects are limited (commodification of intellectual property rights, prevention of the establishment of an autonomous research basis etc.)
- create balance of payments problems (repatriation of profits + increase of imports)
- Leave a country after having used tax exemptions and other privileges ("hit and run strategy")
- absorb resources if special infrastructure is provided or even create indebtness
- their products are targeting mainly elites and middle classes and do not reach the poor
- are inefficient as a developmental strategy, because if they reach developmental effects, it is mainly through the "horse apple effect".

Making FDI work for development requires:

1. Priority must be given to development - not to investor interests.

2. A "balanced" approach has to take into consideration the imbalanced, asymmetric reality.

3. Rules are not enough. Active regulation is needed.

4. FDI must be embedded in a national development strategy.

5. Performance requirements are not an exemption but a general need.

6. Regulation of FDI cannot be left to developing countries alone, given the power of TNCs (no „Pontius Pilatus approach"). TNCs must be regulated both from their home country and from the host country.

7. A multilateral investment regime must strengthen the position of the host countries under a development perspective.

8. A multilateral order must develop mechanisms for the use of regulatory incentives (for instance through differentiated taxation of FDI).

9. The WTO in its present shape is the wrong place and the GATS the wrong instrument for a multilateral regulation of FDI.

10. There is a need for an international supervision of TNCs in view of practices such as tax exemption, transfer pricing etc. with the possibility of sanctions.

11. Non binding standards are inefficient.

The role of foreign direct investment in development

Yash Tandon, SEATINI, Zimbabwe

The real issue is development, not FDI

The issue is not FDI, but finance for development. Whether FDI is a source of development finance, and how significant it is, is an open question. Sometimes the issue of FDI is presented as a closed book – it is taken as an axiomatic truth that FDI is the hen that lays the golden eggs. But is this really the case?

Alternatively, a more *qualified* proposition is made (e.g. in the Oxfam Briefing paper no. 46, April 2003), that *"properly regulated" FDI* can bring growth, jobs, technology, skills, market access and development; that its negative effects must be balanced with its good effects; or that FDIs must be "sequenced," or be subject to some kind of Tobin Tax. These are all nice words. However, they have no basis in the hard reality in which the George Bushes and Tony Blairs of the Global Empire can do what they want to do, and an obliging Congress/ Parliament (and indeed, eventually the ordinary people in the North) all fall in line "in defence of the Empire" and their own "good life." FDI is a weapon (one among many) in the economic arsenal of the Empire in its overall strategy of control of the resources and markets of the South.

Putting to question the four canonical „truths" about FDI

The reigning orthodoxy about FDIs boils down to four canonical "truths":

1. FDIs are necessary for the development of the Third World. Without FDIs there will be no real growth. FDIs bring *inter alia* efficient management of resources, technology, a culture of competition and access to global markets.
2. Nobody is forcing the South to seek FDIs; the governments themselves want them.
3. The private sector is the engine of growth; hence countries in the South that have depended on the state to develop their economies must privatise state assets as fast as possible.
4. However, FDIs can have some negative effects. Hence, it is necessary to work out correct "policy" strategies that minimise the negative effects of FDI flows while maximising their positive contribution.

This list of unwarranted conclusions (*non sequiturs*) are administered to the policy-makers of the Third World in pseudo-scientific language. On closer analysis, they turn out to be nothing but a string of ideologi-

cal propositions, extensively proliferated (almost like religion) with massive funding from the donors (for workshops in the South) and the Investment division of the United Nations Conference on Trade and Development (UNCTAD). The purpose, evidently, is to argue that the developing countries must open their doors to FDI and trade liberalisation "for their own good," for that is the only hope they have to get out of the vicious cycle of poverty.

There is, in fact, no evidence that FDI brings development, just as there is no evidence that liberalisation, in general, brings development (see below on lessons from Mexico, East Asia and Argentina). Some countries in the third world have indeed managed to grow, especially in Asia, but whether this is an outcome of FDI flows remains at best an open question (see below for lessons from India, Malaysia and China).

The truth about FDIs

The truth about FDIs is more complex. Contrary to received wisdom of neo-liberal orthodoxy, it is the Western economies that need to export capital for their own survival rather than the countries of the South that need capital. This is so because the Western economies continually face crisis of profitability, and they go through periodic cycles of booms and busts. When the economies are in crisis, there are only two routes by which they can try to get out of the crisis.

One is to take measures *in their own countries* to restore profitability. These measures include:

- Increase productivity – apply new technology to production.
- Rationalise production at global level through mergers and acquisitions.
- Bring prices of stock closer to real value of assets (asset stripping).
- Pass the burden on to the weaker sections of their society (for example, commercialise pensions so that these funds are used by the corporations to boost their profitability, which is the main reason for the present crisis in the pensions systems in the West, especially in the UK and the Scandinavian countries).
- Create new instruments to cushion risk (for example, derivatives).
- Promote a war economy (for war instantly destroys existing weapons and boosts production of replacements amounting to billions of dollars).

A second set of measures the Western governments take to bale their corporations in crisis is to *shift the burden over to the countries of the South*. These measures include:

- Force the South to liberalise their trade. This is aimed at capturing the markets of the South for their corporations (the main role of the WTO).
- Force the South to liberalise the flow of capital. This is aimed at capturing investment opportunities in the South, especially access to natural resources (the main role of the IMF and the World Bank).
- Force the South to privatise and liberalise their public services, such as water, health, energy, education, etc. and government procurement (the main role of GATS provision of the WTO, and the so-called "new issues").

The main reason for the West to want to export their capital, thus, is to capture the markets (for goods, services and government procurement) and resources (especially oil and gas, but also other natural resources), and take advantage of "cheap" labour of the South. However, *like many aspects of South-North relations, the reality is reversed, presented up-side-down*. For example, in the realm of international politics it is the Iraqis who are the "terrorists," whereas the

Americans and the British are the "liberators," a "truth" so widely propagated in the dominant media (CNN, BBC) that it is not only the people of the Empire who believe this incredible "logic," but even (many) people in the South. It is the same with the question of FDI. The South is made to believe that it is they who need FDI, and that the North will "bring" FDI to the South, provided the South "learns" how to govern themselves "democratically" as laid down by their politicians and intellectuals in the North.

The irony is not only governments, but also many intellectuals in the South, are persuaded by the inverted (up-side-down) logic of FDIs promoted by the governments, the IMF/WB "experts," and the universities of the North. Many intellectuals in the South fall into the trap of "learning" from the North about, for example, how to "regulate" foreign investments so that they are "development and environment friendly," and how to avoid the risks of "derivatives" and unregulated flow of capital (this usually follows a crisis, as in East Asia and Argentina that, not long before then, were treated as "models" of development).

For the large part, even this kind of sophistry has yet to enter the vocabulary of the crude agents of FDI in the South. The orthodoxy about FDI has become so ingrained in the psyche of policymakers that *rational dialogue about FDI is almost impossible*. At its most crude, an opposition to FDI could provoke a reaction on the part of its protagonist, of surprise and utter incredulity: "So where are you going to get capital from?" or, with a bitter tongue-in-cheek irony, "Oh, so you think your country can develop without outside capital!" The one opposed to FDI is immediately made to feel as if he/she were a worthy candidate for a mental asylum.

The problem of definition of FDI

One problematic aspect about the debate on FDI is that its definition is as elusive as itself. What is FDI? All we can find is a presumption that FDI, irrespective of what it means, must be attracted to stimulate growth.

There is, first, the need to distinguish between money and capital, and between capital and FDI. *Money* is basically a means of exchange and an accounting mechanism for storing accumulated assets. *Capital* is money when used in production with other factors of production such as labour power and land. But *FDI* is more than money or capital. It is a package of capital, technological know-how, management specific to a particular type of production of goods or services, market knowledge and access, and contacts. Here we are in agreement with the British publication, the *Economist*, which defined FDI as follows:

> *„The point about FDI is that it is far more than mere "capital": it is a uniquely potent bundle of capital, contacts, and managerial and technological knowledge. It is the cutting edge of globalisation.* (The Economist, February 24, 2001).

FDI is the *specific form imperial capital takes at this time* in the historical evolution of Capitalism, having passed through its various other forms – such as industrial capital, finance capital (a merger of bank and industrial capital), portfolio capital, and speculative capital (these two forms are still extant). In the present time, FDI is the specific form that imperial capital takes in its effort to capture markets or sources of materials in competition with rival claimants.

FDI is falsely marketed to the developing countries as a "solution" to their underdevelopment. Development itself is a complex phenomenon. Its reduction to an economic

phenomenon has been one of the most egregious faults of neo-liberal economics. And further narrowing down of the narrow economic doctrine into FDI as a source of development is reductionism pushed to its absurdity.

The truth about FDIs in Africa

There is an argument that Africa has fallen behind other countries because it does not have conditions adequate to attract FDI.

The truth is that Africa has done more to oblige overseas investors than almost any other continent, and yet investments have gone primarily to countries like Angola because of its oil and in spite of over three decades of instability in the country. Nothing has come to those countries – such as Zambia – that have liberalised their investment regimes. The former Zambian President, President Chiluba, often complained that six years after he took all the required steps that was asked of him (including large scale privatisation of state owned enterprises, and generous incentives to foreign capital), no FDI had come to his country.

As for South Africa, which has rapidly liberalised its trade and investment regimes since independence, capital has left the country rather than coming in. As the London *Economist*, in a special survey of South Africa in its issue of 24 February 2001, recorded:

> *"And by the standards of other countries, South Africa has lured relatively little foreign direct investment: $32 per head in 1994-99, compared with $106 for Brazil, $252 for Argentina, $333 for Chile. At the same time, money has been leaving South Africa: the $9.8 billion it invested abroad in 1994-99 exceeded the inward flow by about $1.6 billion. … And its big companies, long confined by apartheid's isolation, are now anxious to seek stock-exchange listings abroad. … So in the past few years, Anglo American (mining), Billiton (mining), Old Mutual (insurance), South African Breweries and Dimension Data (a hugely successful information-technology company) have all sought primary listings elsewhere."*

The New Economic Partnership for Africa's Development (NEPAD) recorded that in the 1990s, regulatory and other reforms have been introduced by a number of governments to make their economies more attractive to foreign investors. Today, these regulatory conditions are on a par with those in other developing countries. For example, many more countries now allow profits to be repatriated freely or offer tax incentives and similar inducements to foreign investors. Many African countries have investment promotion agencies (IPAs), to assist these investors. And yet, no FDI has come to Africa (in fact, capital has flown out of Africa). A former Minister of Finance of an African country said: we have removed our shirt and trousers to attract FDI; what more do they expect us to do?

Learning from Mexico, East Asia and Argentina

In 1995, Mexico faced a payments crisis, and there was a run on the banks. The economy took a downward spin, and the middle classes took the brunt of the crisis. As for the "distressed" American banks, they were baled out by the US Treasury. The "tequila factor" reverberated disconcertingly for several months in the region. Since 1995, Mexico further liberalised its trade and investment regimes. It is facing massive de-industrialisation and joblessness. Even its agriculture is now in crisis.

Then came the 1997/8 East Asian crisis. In the 1990s the Thai government had liberalised capital flows partly as a result of

pressure from the IMF. Much of the funds came through the banking system on short call (ranging from overnight calls to six months duration), and were lent long to the private sector enterprises. The collaterals offered by the private sector turned out to be extremely questionable in terms of value because they were largely based on inflated property prices. So when the crunch came following a speculative run on the Baht in August 1997, the foreign investors panicked and started withdrawing their funds from Thailand; so the banks began calling back their loans, and of course the private sector could not pay them. They defaulted. In trying to shore up the Baht, the central bank depleted most of the country's reserves. In the follow-up many of the banks were liquidated, or consolidated, and the state decided to take over the burden of repaying the loans. In other words, private debts were turned into public debts. Soon the Thai crisis undulations rippled across to Indonesia, the Philippines, Malaysia and Korea. According to the *Economist*:

> *„For much of the region, the crisis destroyed wealth on a massive scale and sent absolute poverty shooting up. In the banking system alone, corporate loans equivalent to around half of one year's GDP went bad - a destruction of savings on a scale more usually associated with a full-scale war."*

Then came the collapse of Argentina. Argentina has long been modelled by the IMF/WB experts as the paragon of the Washington Consensus, an exemplary country that had abolished trade barriers, had opened itself up to the free inflow and outflow of capital, had tied its currency to the mighty US dollar (the Currency Board Automatic Adjustment Mechanism), had privatised practically everything, from banks to malls, to attract FDIs. In December 2001 the "model" collapsed like a pack of cards. The country simply disintegrated in a morass of economic, social and political chaos following the default on $155 billion of debt (the largest in history).

Learning from India, Malaysia and China

India, Malaysia and especially China have often been referred to as countries that have done well through attracting FDI. The truth about these countries, however, is that they are extremely cautious about FDI.

India, for example, has consistently opposed the idea of bringing the issue of liberalising investments to the WTO. India is very protective about its economy, which is largely in the hands of small and middle scale manufacturing, service and agricultural enterprises that would be under threat if they liberalised FDI flows along the lines the World Bank and the IMF have been pushing its government.

Malaysia, too, is very careful about FDI. Its maverick President (Mahathir Mohamed) is known to be a relentless opponent of liberalisation and of the IMF/World Bank policies. He has kept his country out of a debt situation (which is what enables IMF and the donors to dictate policies to the South) and he managed to protect his country from the effects of the Thai crisis in 1997/98 by, pointedly, going against the advice of the IMF, and maintaining a low interest rate (the IMF advised high interest rate to Thailand and Indonesia, whose problems were thus compounded) and a fixed exchange rate.

China has received considerable amount of FDI. However, it has a much more tight-fisted and closely negotiated and monitored investment regime than most African countries. Besides, a lot of the foreign direct investment is not "foreign" in the normal sense of the word; it is from the Chinese people living in Hong Kong, Singapore, Malaysia and Indonesia. It is more like Africans living in the USA or Europe sending their savings back to Africa for investments.

Conclusion

There are no "good" or "bad" FDI outside of national policy. In other words, it is only in relation to national policy that FDIs can be described as good or bad. *All FDI is inherently problematic*. It does not come as a matter of charity; it comes to make profits, to make use of local resources, to take advantage of cheap or skilled labour, or to capture the local market against other foreign competitors, indeed even against local enterprises. There is no evidence that FDI transfers technology. All that happens is a pseudo-transfer or adaptive transfer, and as a price for this, the TNC secure control over production and the market.

Contrary to received "wisdom" of IMF/WB "experts," Africa does not suffer from "low savings rate," leaving an "investment gap" that has to be filled by FDI. On the contrary, Africa's savings rate is high. However, those savings are not described as "savings" in the dominant economic literature. They are described, by some accounting convention, as dividends, interest on loans, debt payments, etc. These then are externalised, and when they come back, in another guise, they are described as "fresh investments," or "FDI." As the South African example shows (cited above), capital leaves Africa by the drove.

The question of FDI cannot be reduced to a technical or managerial issue. In other words, it is not a question of "regulating" FDI. FDI must be seen as an essential instrument in the armoury of the Empire to control and, if possible, own the natural resources of the South in order primarily to get their own corporations out of the crisis of profitability they face.

FDI is no solution to Africa's development. On the contrary, it is a problem. The issue, to repeat, is not FDI, but finance for development. And the primary source of development finance is the savings of the people. These must be prevented from leaving Africa, especially in the form of massive debt payments, which is one of the main reasons for Africa's persistent poverty.

A sustainable FDI framework in the Doha development agenda

Excerpt of the presentation by Carlo Pettinato, European Commission - DG Trade, Belgium

Developing countries especially LDCs are excluded from FDI flows

Reasons:

- Perception of high risk and legal insecurity
- Lack of transparency and information of opportunities
- Unpredictability of unilateral policy reforms
- Governments hostages to vested interests

Problems that a multilateral framework can address

- Non-transparent patchwork of rules
- Inconsistency with GATS (and MEAs?)
- Need for Technical Assistance & Capacity Building
- Promotion of Corporate Social Responsibility practices
- Subsidy wars and anti-competitive practices?

Issues that a multilateral framework cannot directly address

- Political stability
- Macroeconomic stability
- Education and skills of host country
- Infrastructure
- Domestic regulation, including:
  - Social & Environmental standards
  - Rights or Obligations of Investors
- Capital account liberalisation

The EU agenda for WTO negotiations on investment

- Scope: FDI
- Main principles: Transparency and Non-discrimination
- Pre-establishment: based on positive commitments (GATS-type)
- Development provisions
- State to State dispute settlement
- Technical assistance / Capacity building

Conclusion

- The Doha agenda, different from MAI, provides an opportunity for all countries
- In case of failure, the main losers would be Developing Countries
- No multilateral FDI rules would result in bilateralism
- A Multilateral Framework for FDI can be sustainable

For a further elaboration see: „Concept paper on policy space for development", Annex 5.

International investment policy and sustainable development

Alternatives to a new investment agreement within the WTO

Clare Joy, World Development Movement, UK

I would like to start by saying thank you to the organisers for inviting the World Development Movement to participate in the session this morning. This thanks extends beyond being asked to participate. For yesterday I was made aware of the fact that being here and this session in particular is a real wake-up call for those of us working for a more just trading system. Fifteen months ago, Yash Tandon, Chien Yen Goh and myself were actually together on a panel at another event in New York – at the alternative summit to the World Economic Forum. Similar to today's panel, the title of that discussion was, "Foreign Direct Investment: A Blessing or a Curse for the South and some alternatives".

This has forced me to reflect a little on changes, in this work, since then. And from a campaigning perspective how have the messages and the debate about alternatives progressed? How was this reflected in our discussions yesterday, where the policy prescriptions that we feel are fundamental to development were being discussed? Yesterday, in our discussions about global investment rules, we constantly moved between how the proposed WTO deal in investment will place limits on essential government policy making space and considering precisely the kind of regulations (that this new deal will limit) that are necessary in order to promote sustainable development. The point I am making here is that we need

to be aware, when discussing alternatives, that in our opposition to a new WTO agreement on investment, we are outlining the kind of measures that government must preserve the right to use in domestic policy making. This is a critical building block in our proposals for 'what we want'.

In the following 15 minutes I would like to try and bring this into a more concrete 'demands' and 'campaigning' framework.

There are three levels on which I would like to tackle this:

- First, thinking about messages and examples. How does an alternative agenda tie into work that we are already doing opposing the WTO deal in investment? Here I would like to outline some basic examples.
- Second, what lessons can we draw from the GATS debate about how proponents of these deals, i.e within the European Commission, frame the alternatives debate.
- Thirdly, what connections do we need to make with initiatives that seek to control the power of corporations, and propose alternatives in this work.

How does an alternatives discourse tie into work that we are already doing opposing a WTO deal on investment?

1. Reflecting on our messages

What messages came out of discussions yesterday and what does linking alternatives into our work actually mean? It was very clear yesterday, that there are a number of messages relating to our position opposing an investment deal in the WTO. However, a key concern is the impact that a binding liberalisation deal on investment in the World Trade Organisation will have on countries' abilities to regulate foreign companies operating inside their borders. This is based on the evidence-backed policy claim that the ability to regulate foreign companies is a key part of any sensible development strategy. Our fear is that the current plans to include investment in the WTO will severely undermine the ability of governments and communities to regulate the market for social and economic purposes. In addition to raising this concern, we have very concretely outlined the kind of regulations that we believe are necessary in order to ensure that foreign direct investment can be beneficial to a host country's economy. It is in these regulations that our alternatives begins and we need to start acknowledging the fact that alternative proposals are already a key part of our opposition. When governments and decision-makers ask us 'what we want', we should be telling the to listen more closely to our opposition. We are opposing an investment deal in a WTO because by its very nature it will suppress regulations that are essential to development policy making and are critical alternatives to the current neoliberal economic paradigm. Which moves me onto more specific examples.

2. The right to regulate

What are the kind of regulations that we consider to be essential to development policy making and which will be undermined by the proposed WTO deal on investment? Many of these were adequately alluded to yesterday, however, let me pick up on a couple of examples that were given yesterday in this 'alternatives' context.

We have discussed regulations obliging foreign investors to abide by *local content requirements*. This refers to the ability of governments to limit the numbers of foreign personnel or imported inputs in the production process of foreign companies operating inside their borders. These regulations can be designed to ensure transfer of technology and know-how, or backward linkages into the domestic economy, so that other local industries, possibly engaged in the supply of materials essential for the production process, benefit from the presence

of a multinational investor. A key problem associated with multinational companies is their preference for sourcing key products from abroad, even when there are domestic companies that can fulfil their requirements. For example in the water industry, foreign utility companies often use foreign construction firms to construct pipelines, rather than domestic firms.

Another example that we have already discussed is the requirement that foreign companies form *joint-ventures* with domestic companies – thereby effectively working in partnership with the domestic firm. This can be important for ensuring basic technology transfer, and also for accountability purposes. For example, it is more possible for communities to consider holding domestic companies accountable through national courts in the event of environmental or social abuse, than it is for them to hold to foreign companies accountable, who, by their very nature exist above national laws.

Another example of a government regulation on foreign companies is the imposition of *price controls*. Many governments maintain the right to change the cost of processes associated with FDI activity. Often these regulations develop over a period of time as the government and host community realise problems created by a particular kind of investment. For example, in Thailand, over the last couple of years, there has been enormous resistance from communities to the expansion of foreign retail chains. Over the last decade, large European supermarkets, such as Tesco, Carrefour and Royal Ahold have been steadily increasing their presence in Thailand. The impact of these large stores on local shops and local suppliers (a significant part of the domestic retail economy) has been to completely undermine them. In response to protests from various communities affected by new stores, Thai Government made a series of proposals that involved increasing the advertising costs for foreign supermarkets and increasing the tax payments that foreign suppliers to these supermarkets should pay – a move clearly designed to encourage the supermarkets to use domestic suppliers. However, price controls, such as these, are precisely the kind of mechanisms that will be undermined by a WTO deal on investment because they are seen to be discriminatory to foreign companies. That was the retail sector, so it is actually already covered by the GATS - however, it provides us with useful examples of how WTO investment measures undermine core development policy alternatives.

3. The right to refuse

Finally, an alternative investment paradigm is not just about maintaining space to regulate once FDI enters a country. As Yash Tandon said yesterday, alternatives to the WTO investment deal must have community accountability, democracy and vision at their core. Preserving the ability to regulate ensures that governments have space to act when communities, directly affected by the incoming company, make demands, raise concerns and submit proposals. However, as Yash pointed out, this is not just about policy prescriptions. It goes deeper than this. If communities in a certain area do not want investment or want to reject a certain kind of proposed investment, and develop more locally-based initiatives and industry – then governments must be able to act on this and reject FDI outright. Acknowledging the right to refuse certain kinds of investment and thus maintain space to develop community based alternatives outside of the FDI-led development paradigm is critical to any alternatives discourse. The material for this more 'bottom-up' approach to development exists in many forms the world-over. And this is something that Yash will pick up later.

So, in summary, yesterday's discussion touched on the regulations that will be undermined by a WTO deal on investment. These threatened government policy measures, are the building blocks for the content of our work on investment alternatives. These are not new ideas and as was importantly pointed out by many contributors yesterday, these industrial development regulations were used by industrialised countries

throughout their economic development, and also by many developing countries over the years. While they are not the whole solution and are not used all the time, they are used by some governments some of the time for certain critical development objectives. We need to be clear about that, but we also need to be clear about the fact that it is essential that governments maintain the right to use these policies in order to respond to the demands of their people.

What lessons can we draw from the GATS debate?

As has already been pointed out, a lot of the GATS debate is focused on this issue of basic services. However, the GATS does not only cover basic services. There is also significant concern about the impact that the current negotiations will have on 'investment' regulations in sectors such as retail, tourism, banking and broadcasting. When countries fully commit a service sector, such as retail, to the GATS rules, they effectively lose their right to place the kind of conditions on foreign companies that we have been discussing here over the last days.

There is at least one lesson to learn from this GATS work when discussing alternatives to the WTO's proposed investment deal. We must not be fooled by EU´s idea of an alternative! The EU´s response to our concerns about an investment deal is that everything is going to be fine because this is a flexible deal. What do they mean by flexible? They mean that rather than being top down it is going to be bottom up. That means that countries say, over time, which parts of their economy is covered by the rules – and ever increase this, as time goes by, through further negotiations. We really need to challenge this proposition that everything is going to be fine in this flexible treaty.

There are five short, sharp rebuffs to this flexibility myth.

1. *Pressure*. Flexibility is related to economic and political clout; the more economic clout you have, the more you get from a country.
2. *WTO agreements do not exist in isolation to each other.* Developing countries are already struggling to get what they want and should have from other WTO agreements, such as agriculture. The EU is trying to create trade-offs between its desire for an investment treaty and minimal commitments in other areas, such as agriculture, which should have been implemented several years ago.
3. *Lack of information*. How can countries use flexibility, when there is still no evidence of the kind of impacts these sort of investment rules will have on the domestic economy. What evidence would be used in decision-making?
4. *Never ending process*. You might not commit today, but you have to commit at some point in the future. For example, in the GATS, the whole point of GATS is progressive liberalisation. You have to keep coming back to the negotiating table and increasing your commitments to the agreement. Transferring this to the proposed investment deal means that you might not have to commit fully this time round, but next time there will be pressure on you to commit more completely.
5. *Uncertainty*. One of the problems with the GATS is the uncertainty. Nobody is quite sure what the rules mean and listening to the debate yesterday, particularly some of the things I heard from negotiators, this uncertainty exists in the investment discussions as well. For example, there is no sort of clear ideas about some basic concepts such as what constitutes non-discrimination. This is a problem in the GATS, and a problem which is not going to go away, when transferred to an investment deal at the WTO.

I have run through this quickly as we did not touch on this yesterday and our capacity to rebuff these claims from the negotiators is important. Flexibility is not an alternative, and we really need to challenge this in our work in our sort of policy debates that we are having this moment.

Developing alternative rules for controlling corporations: which fora

It is clear that with alternatives we have already got ideas about what sensible investment might look like. And there are places where those ideas have been taken forward. I am just going to list a couple:

- Principles for a fair agreement on investment have been developed by a UN expert working group – the UNCTAD Commission on Investment, Technology and Related Financial Issues (October 2001). These could form the basis for a set of core principles and an eventual agreement on international investment.

- For dealing with abuses of corporate market power, this has been recognised for some time and has been included in agreements such as UNCTAD Rules for Control of Restrictive Business Practices and the OECD Guidelines on Multinational Enterprises.

- On the issues of standards, liability and redress – essential in the context of investment alternatives, a UN sub-commission on the Promotion and Protection of Human Rights has been mandated to develop a code of conduct for companies based on human rights standards, including draft principles.

- A number of organisations, including Friends of the Earth International, who are here today, have proposed possible international mechanisms to regulate the activities of investors and provide legal recourse for people affected by such activity.

In our work challenging the WTO's investment deal and in our call for more responsibilities to be placed on investors, we should be liking up with initiatives that propose an alternative paradigm to the WTO's – one that seeks to control, rather than enhance, the power of large corporations.

In conclusion, I would argue that we actually need to be much bolder when it comes to our alternatives work. There is a fear that we don't know enough. Yet we are prepared. This comes from our critique – and the impacts of the WTO deal, our broader WTO work on other agreements such as GATS and the alliances that we form with other initiatives seeking to control multinationals. We are prepared. Our alternatives exist. The problem is that they are being conveniently ignored and the political will to consider them seriously is severely lacking. Many of our proposals are precisely the kind of tools that would be undermined if the EU gets its way in the WTO and starts talks on investment deal.

Abschlussplenum/Final panel

A social and ecological international investment regime: What is Germany's contribution?

von links nach rechts:
Chien Yen Goh (TWN), Ulf Jaeckel (BMU), Margit Köppen (IG Metall), Maike Rademaker (Financial Times), Tilmann Braun (BMWA), Jürgen Knirsch (Greenpeace)

Main results of this panel are summarized in the article of Nicola Sekler, see page 16-25.

The controversy about a new investment agreement in the WTO in the run-up to the Ministerial Conference in Cancún

Social and Ecological Implications and Alternatives

CONFERENCE PROGRAMME

Monday, April 28th, 2003

11:00 Welcome
- Antje Schultheis & Tobias Reichert, Working group on trade, Forum on Environment and Development
- Dr. Ulf Jaeckel , Federal Ministry of Environment (BMU)

11:30 **Foreign direct investment between liberalisation and regulation. The current international debate**
Peter Fuchs, World Economy Ecology and Development (WEED)

13:00 Lunch

14:00 **Social and ecological impacts of foreign direct investment and investment rules within the WTO - Presentation of the study: Environmental Aspects of an Investment Agreement in the WTO System**
Dr. Stefanie Pfahl, Consultant, Germany

Comment:
Elisabeth Tuerk , Centre for International Environmental Law (CIEL), Geneva

15:15 Coffee

15:45 **Social and ecological impacts of foreign direct investment and investment rules within the WTO - The challenges for the south**
Chien Yen Goh, Third World Network (TWN)

Comment:
Adriana Ramos de Almeida, Instituto de Estudos Sócio-Econômicos (INESC), Brazil

17:00 Coffee

17:30 **Debate:**

Investor protection or investor regulation? How to foster sustainable development?

- Prof. Yash Tandon, International South Group Network (ISGN), Uganda
- Peter Wahl, ATTAC-Germany
- Carlo Pettinato, European Commission

Chair: Michael Frein, Protestant Church Development Service (EED), Germany

19:30 Dinner

20:30 Musical Evening Programme in the Bistro of the Conference venue
Rolf-Römer-Jazz-Trio (see extra sheet)

Tuesday, April 29th, 2003

8:15 Breakfast

9:00 **International investment policy and sustainable development - Alternatives to a new investment agreement within the WTO**
Clare Joy, World Development Movement (WDM), United Kingdom

Discussion

10:30 Coffee

10:45 **Panel discussion:**

A social and ecological international investment regime: What is Germany's contribution?

- Chien Yen Goh, Third World Network (TWN)
- Dr. Margit Köppen, German Metal Workers Union
- Jürgen Knirsch, Greenpeace; Germany
- Dr. Ulf Jaeckel, Federal Ministry of Environment (BMU)
- Tillmann Rudolf Braun, Federal Ministry for Economic Affairs and Labour (BMWA)

Chair: Maike Rademaker, Financial Times Deutschland (FTD)

12:45 Close of the Conference

13:00 Lunch

15:00 Strategy-meeting for German and international NGOs in the run-up to the 5th Ministerial conference of the WTO in Cancún/Seattle-to-Brussels-Network-Meeting until April, 30th

Simultaneous interpretation (English/German) will be provided.

TeilnehmerInnenliste
List of participants

NAME	ORGANISATION
Averbeck, Christiane	Rat für Nachhaltige Entwicklung
Bach, Amandine	WIDE
Bergin, Carol	Initiative Colibri
Bertoldi, Frank	Attac, Bonn
Blanke, Svenja	Friedrich-Ebert-Stiftung
Braun, Tillmann Rudolf	Bundesministerium für Wirtschaft und Arbeit
Brocchi, Davide	Attac, Deutschland/Kulturattac
Büsing, Harald	Universität Oldenburg
Campbell, Patricia	Permanent Mission of Nicaragua to the WTO
Chien Yen Goh	TWN
Chytrek, Dennis	Universität Hamburg
Cockburn, Jessica	Forum Umwelt und Entwicklung
Dally, Andreas	Evangl. Akademie Loccum
Eberhardt, Pia	WEED
Ebner, Andreas	Attac, Spanien
Eckelmann, Ulrich	IG-Metall
Efler, Michael	Mehr Demokratie e.V.
Eisenblätter, Peter	Terre des hommes
Elliesen, Tillmann	Redaktion Entwicklung und Zusammenarbeit
Frein, Michael	EED
Fuchs, Peter	WEED
Gauper, Ortrun	Ver.di
Gehne, Katja	
Göpel, Maja	Universität Hamburg/Attac
Goeser, Helmut	Bundestag, Fachbereich Wirtschaft, Gutachter
Haack, Alexander	Universität Hamburg
Hanhoff, Ingrid	UBA
Helmchen, Constanze	Institut für Organisations-kommunikation
Herding, Wiebke	BUND
Herrmann, Brigitta	Deutsche Kommission Justitia et Pax
Hermanns, Uwe	Uni Kassel
Heydenreich, Cornelia	Germanwatch
Hoedeman, Olivier	Corporate Europe
Hönke, Jana	Forum Umwelt und Entwicklung
Ilge, Burghard	BothENDS
Höring, Uwe	EPD
Jaeckel, Ulf	BMU
Joy, Clare	WDM, UK
Kaiser, Gregor	BUKO Pharmakampagne
Kelk, Steven	Corporate Europe
Kerkow, Uwe	Freier Journalist
Klemm, Ulrich	Dt. Investitions- u. Entwicklungsgesellschaft
Knipper, Marita	WDR HF-PG Wirtschaft
Knirsch, Jürgen	Greenpeace

Kowalzig, Jan	BUND
Köppen, Margit	Ig Metall
Kumar Singh, Pushpendra	ActionAid Alliance
Krüger, Lydia	Universität Thier
Läufer, Daniel	Germanwatch
Lehmann, Susanne	Forum Umwelt und Entwicklung
Maes, Marc	11.11.11.
Maier, Jürgen	Forum Umwelt und Entwicklung
Mayer, Arnd	Eurosolar
Martens, Jens	WEED
Matthias, Volker	Attac, Göttingen
Mitchell, Eve	Friends of the Earth
Möller, Ruth	SPD
Neumann, Jan	
Neyer, Judith	Urgewald
Nitzpon, Daniel	Attac Leipzig
Obenland, Wolfgang	WEED
Oesterheld, Werner	Nord-Süd-Netz
Pettinato, Carlo	EC
Pfahl, Stefanie	Adelphi Research
Piepel, Klaus	Misereor
Plank, Leonhard	Attac Österreich
Podlinski, Nicole	EED
Rademaker, Maike	Financial Times, Deutschland
Ramos de Almeidas, Adriana	INESC, Brazil
Reichert, Tobias	Forum Umwelt und Entwicklung
Reimer, Jule	Redaktion Umwelt und Landwirtschaft
Rusnok, David	DEG
Schilder, Klaus	WEED
Schöler, Arne	
Schultheis, Antje	Forum Umwlet und Entwicklung
Scurfield, Elizabeth	Quaker Council for European Affairs
Sekler, Nikola	WEED
Tandon, Yash	SEATINI
Thomsen, Sigrid	Oxfam-Berlin
Trublin, Celine	Agir Ici
Tscherner, Ulrike	Attac
Tuerk, Elisabeth	CIEL
Wandel, Alexandra	Friends of the Earth Europe
Wahl, Peter	WEED
Wesselius, Erik	Corporate Europe Observatory
Wiggerthale, Marita	Germanwatch
Weizsäcker, Ulrich Von	
Wolff, Luciano	EED
Ziemeck, Karin	FES

A choice of critical links and literature

Jana Hönke

Overview on the „new issues" in the WTO

- Doha Round Briefing Series: The Singapur Issues, Vol. 1. no. 6, 2003 by the International Institute for Suatainable Development (IISD) and the International Centre for Trade and Sustainable Development (ICTSD)
  http://www.iisd.org/pdf/2003/wto_doha_singapore_issues.pdf
- Seattle to Brussels Network (2002): Investment and competition negotiations in the WTO - What is wrong with it and what are the alternatives?
  http://www.s2bnetwork.org/S2B-InvestmentWTO-Brochurefinal.pdf
  Collection of articles of diverse European NGOs, which gives a good overview of european civil society positions on the issue. Shortly available in German at http://weed-online.org/pubs/matlist.htm
- Centre of International Environmental Law (CIEL): Briefing on FDI and sustainable Development (2002)
  http://www.ciel.org/Publications/investment.pdf
- Martin Khor : WTO - The New Threats to Developing Countries and Sustainability, TWN Briefings for WSSD No.13.
  http://www.twnside.org.sg/title/jb13.htm

Links to selected websites

- Centre for International Environmental Law (CIEL)
  http://www.ciel.org/Tae/WTO_InvestAgree_27Mar03.html
  NGO with focus on environmental law / multilateral environmental agreements. Reports on the series of meetings addressing possible future WTO rules on investment and other "new issues" 18th-21st of March, Geneva.
- Centre for International Trade, Economics and Environment (CUTS)
  http://cuts.org/ifd-project-osn.htm
- International Institute for Sustainable Development (IISD)
  http://www.iisd.org/trade/investment_regime.htm
  Research institute, advancing policy recommendations on international trade and investment, economic policy, climate change, measurement and indicators, and natural resource management to make development sustainable. IISD's work on international investment rules in the WTO, the NAFTA (Chapter 11) and elsewhere and focuses on the sustainability of investment and trade
- International Investment Rules Project
  http://www.nautilus.org/enviro/Investment.html

The Project collaborators are the Nautilus Institute, the International Institute for Sustainable Development, the Singapore Institute for International Affairs, and ECOS Fundacion Uruguay. It aims to build support for a new approach to global market governance with a sustainable international investment regulation. Extensive collection of relevant links to NGOs working on the issue, existing standards & guidelines, documents etc..

- Third World Network (TWN)
  http://www.twnside.org.sg/trade.htm
  Current news and analysis of the WTO negotiations and the WTO agreements, from the perspective of developing countries. Categories "General investment issues" and "New issues in the WTO" especially recommended.
- Trade Observatory
  http://www.tradeobservatory.org/Library/index.cfm
  Up-to date document collection – Categories „Finance and Investment" and „Investor Rights" as well as „WTO Ministerial – Cancún" especially interesting.
- UNCTAD Work Program on International Investment Agreements
  http://r0.unctad.org/en/subsites/dite/iia/index.htm
  Addresses key concepts and issues relevant to international investment agreements and published a useful series of papers on different aspects of international investment agreements
- Working group on new issues in the WTO by Federal Trust, Uk.
  http://www.fedtrust.co.uk/newissues.htm
  The Federal Trust for Education and Research is a British think tank that recently established an expert working group on the new issues in the WTO to explore the need for and scope of any negotiation on WTO rules on the Singapore Issues. The working group brings togethert representatives of law firms, NGOs, business and academia and will present its final report and recommendations in June 2003.

- *World Economy, Ecology & Development (WEED)*
  http://www.weed-online.org/
  Extensive documentation of the MAI Campaign 1998 (subsection "andere Themen").
  Publications on the prospected investment agreement in the WTO are forthcoming, of which especially an outline for presentations on investment in the WTO and a roleplay on the same issue is recommended.
- *Website on corporate accountability provided by WEED*
  http://www.corporate-accountability.org/
  Documents, research and an extensive link list on corporate accountability
- *Working Group on Trade / NGO Forum on Environment and Development*
  http://www.forumue.de/themenundags/handel/index.html
  Background informations on the WTO Ministerial in Cancún, especially on the "new issues" by the Working Group on trade of the NGO Forum on Environment and Development.
  This list of links and literatur can be found there.
- *World Wide Fund for Nature (WWF)*
  http://www.panda.org/about_wwf/what_we_do/policy/trade_and_investment/trade_pubs.cfm
  Environmental critique of trade and investment policies, selected documents.

Declarations

- Joint Statement by European Civil Society Groups against an Agreement on Investment in the WTO (2002)
  (http://www.s2bnetwork.org/investmentstatement.htm)
- NO INVESTMENT NEGOTIATIONS AT THE WTO, Declaration of Non Governmental Groups and Civil Society Movements (from Geneva meeting 20.03.2003) http://www.twnside.org.sg/title/twninfo11.htm
  Available in German through handelsprojekt@forumue.de

A choice of recent literature

Coulby, Hillary (2003): Investment, competition and government procurement: Positive Alternatives to the WTO Agenda, Oxfam GB discussion paper.
(available through OXFAM UK: amorgan@oxfam.org.uk)

DGB-Bildungswerk/ terre des hommes/ WEED (2003): Auslandsinvestitionen und Unternehmensverantwortung zwischen ökonomischer Liberalisierung und sozial-ökologischer Regulierung: Perspektiven und Strategien von NGOs und Gewerkschaften, Dokumentation einer Tagung von Dez. 2002 in Berlin, forthcoming.
(To order through WEED: www.weed-online.org.)

Erklärung von Bern u.a. (2002): Investitionsschutz um jeden Preis? Vom NAFTA zum MAI zur WTO.(http://www.evb.ch/cm_data/Investistionsschutz.pdf)

Greenfield, Gerard, (2001): TRIMS, in: Briefing Paper Series: Trade and Investment, Vol. 2, No. 1, Canadian Centre for Policy Alternatives, www.policyalternatives.ca

Lal Das, Bhagirath (2002): A critical analysis of the proposed investment treaty in WTO. (http://www.twnside.org.sg/title/ana-ch.htm)

Mabey, Nick & McNally, Richard (1998): Foreign direct investment and the environment – from pollution havens to sustainable development, WWF-UK Report.
(http://www.wwf-uk.org/filelibrary/pdf/fdi.pdf)

OECD (2003): The Investment Architecture of the WTO, Paris.
(www.oecd.org)

Pfahl, Stefanie (2003): Environmental aspects of an investment agreement in the WTO-system, forthcoming.
(To order through handelsprojekt@forumue.de)

Seattle to Brussels Network 2002: Investment and Competition Negotiations in the WTO - What's wrong with it and what are the alternatives?, Berlin/Brüssel. (www.s2bnetwork.org)

Sell, Susan K. (1999): Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights, in: Cutler, A. Claire/Haufler, Virginia/Porter, Tony (Ed.): Private Authority and International Affairs, New York 1999

Sekler, Nikola / Drillisch, Heike (2003): Bilaterale Investitionsabkommen und Investitionsgarantien, WEED-

Arbeitspapier, forthcoming.
(To order through WEED: www.weed-online.org.)

Singh, Ajit (2001): Foreign Direct Investment and International Agreements: A South Perspective, South Centre.
(http://www.southcentre.org/publications/occasional/paper06/toc.htm)

Tandon, Yash (2000): Seatini. (http://www.seatini.org/reports/)

UNCTAD (2001): Environment, UNCTAD Series on issues in international investment agreements, New York and Geneva.
(http://r0.unctad.org/en/subsites/dite/iia/index.htm.)

UNCTAD (2000): International Investment Agreements: Flexibility for Development, UNCTAD Series on issues in international investment agreements, New York and Geneva. (http://r0.unctad.org/en/subsites/dite/iia/index.htm.)

Von Moltke, Konrad (2000):, IISD, 76 pp. (http://www.iisd.org/publications/publication_list.asp?themeid=7)

World Development Movement (WDM) (1999): Making investment work for people: an international framework for regulating corporations.
(http://www.wdm.org.uk/cambriefs/wto/TNCs.htm)

WWF International (2001): No Investment Agreement within the WTO: Re-directing Investment to Promote Sustainable Development.
(http://www.panda.org/downloads/policy/investment_qris.pdf)

Joint statement by European Civil Society Groups against an agreement on investment in the WTO

As members of European civil society, we call on our governments and the European Commission to drop their proposals for investment negotiations within the World Trade Organisation (WTO) as they reflect the narrow commercial interests of EU multinational companies and undermine EU goals of poverty reduction and sustainable development.

The introduction of investment negotiations in the WTO has been consistently opposed by thousands of groups in civil society and by most of the WTO's members in the preparatory phase to the WTO Ministerial Conference in Doha in 2001. The EU's partial success in securing agreement to consider this issue at the next Ministerial Conference in Cancun in September 2003 reflected the exercise of negotiating power by the minority of powerful members over the majority of developing country members. This was a process of forced acquiescence, not consensus.

The aims of the proposed agreement on investment are essentially unchanged from the failed Multilateral Agreement on Investment (MAI), abandoned in 1998. The central aim to remove so-called 'barriers' to foreign investment does not reflect the most urgent priorities in the global economy. Recent experience with the NAFTA Chapter on Investment and other investment treaties has demonstrated the threat that this kind of agreement poses to the public interest. As shown by examples such as the misbehaviour and corporate abuse of Enron, there is no lack of power or rights for multinational companies. What is lacking are the enforceable rules that will ensure that all companies abide by internationally agreed environmental, social, labour and human rights standards and corporate accountability to the societies within which they operate.

At the heart of the proposed negotiations is the restriction of governments' right to regulate in the public interest. In particular, the development experience of OECD countries and the Asian 'tiger' economies has demonstrated the importance of government intervention to promote domestic industry and place conditions on foreign investment. The EU's investment proposals will restrict the powers of developing country governments to maximise the benefits and minimise the costs of foreign investment, thereby restricting the ability of the poorest nations to diversify and develop their economies.

The rights of foreign investors are accorded priority over the promotion of poverty reduction. "Favourable investment" conditions in many cases are accompanied by unfavourable working conditions, including exemptions from national labour laws and shrinking social protection. This affects in particular women workers, who in many developing countries find themselves in the majority of labour intensive, export-oriented zones without social security and other social benefits.

Similarly, at the heart of sustainable development is the need for governments to intervene to ensure that patterns of investment promote, rather than undermine, sustainable development. The need for

ecological limits, for example, could be challenged as an 'unnecessary barrier' to foreign investors; and the creation of incentives for sustainable use by local communities could be challenged as discriminating against foreign investment. The promotion of poverty reduction and sustainable development should be at the heart of any international agreement on multinational companies, not liberalisation.

The international trade system is under intense criticism, including from its developing country members. The EU's trade policies, and the WTO itself, have lost the confidence of civil society. Deep reform is the overwhelming priority. The EU should not attempt to extend the WTO's unfair and unsustainable rules from trade in goods to huge new areas of the global economy, such as investment and government procurement - each accounting for more economic activity than international trade.

The EU has been unable to prove that a multilateral agreement on investment is necessary and that it should be included in the WTO.

Members of European civil society reiterate our call to

- fundamentally re-orient the rules of the trade system to promote poverty reduction and sustainable development and to
- withdraw poposals for investment negotiations in the WTO.

Instead, the EU should take a leadership role in initiating a new system of multilateral rules on international companies, including enforceable rules on corporate accountability.

Signatories:

1. Abergavenny and Crickhowell Friends of the Earth local group, Wales
2. Africa Faith and Justice Network - AEFJN
3. Afro-Asian Institute Salzburg, Austria
4. AGEZ - Arbeitsgemeinschaft Entwicklungszusammenarbeit, Austria
5. AITEC (Association internationale de techniciens, experts et chercheurs), France
6. Anti-Globalisation Network, UK
7. Arbeitsgemeinschaft Christentum und Sozialdemokratie ACUS, Austria
8. Arbeitsgemeinschaft Gerecht Wirtschaften für Frieden und Bewahrung der Schöpfung, Austria
9. ARGE Weltläden, Austria
10. Attac Belgium (Flandres & Wallonia)
11. Attac France
12. Attac Germany
13. Attac Hungary
14. Attac Ireland
15. Attac Italy
16. Attac Sweden
17. Attac Switzerland
18. Banana Link, Great Britain
19. Berne Declaration, Switzerland
20. Betriebsseelsorge St. Pölten, Austria
21. BothENDS, the Netherlands
22. Buendnis fuer Eine Welt/OeIE, Austria
23. CADTM, Belgium
24. CADTM, France
25. Campagna per la Riforma della Banca Mondiale, Italy
26. Cardiff Friends of the Earth local group, Wales
27. CC OMC, France
28. CEDETIM (Centre d'études et d'initiatives de solidarité internationale), France
29. CEE Bankwatch Network
30. Center for Encounters and Active Non-Violence, Austria
31. Centre National de Coopération au développement, Belgium
32. Centro Nuovo Modello di Svilippo (Italy)
33. Christliche Initiative Romero (CIR), Germany
34. Corporate Europe Observatory (CEO), the Netherlands

35. Dachverband entwicklungspolitischer Organisationen in Kärnten- (Umbrella Network of Development Policy Organisations in Carinthia), Austria
36. EAWM Austria (Evangelischer Arbeitskreis für Weltmission)
37. Halton Friends of the Earth Group, England
38. HORIZONT3000, Austria
39. Humanistische Plattform, Austria
40. Germanwatch, Germany
41. Gesellschaft für bedrohte Völker, Austria
42. GLT Commercio e Finanza-Rete di Lilliput, Italy
43. Gloucestershire Green Party, Great Britain
44. Greens Against Globalisation, UK
45. Green Party of Wales/Plaid Werdd Cymru, UK
46. Grünalternative Jugend Wien, Austria
47. Grüne Bildungswerkstatt Vorarlberg, Austria
48. Friends of the Earth Europe, Belgium
49. Informationsgruppe Lateinamerika (IGLA), Austria
50. Initiative Colibri, German Node of GlobeNet3, Germany
51. Initiative Netzwerk Dreigliederung (Initiative Network Threefolding), Germany
52. Istitut de recherches de la FSU, France
53. Institut pour la Relocalisation de l'Economie I.R.E., France
54. International Coalition for Development Action (ICDA), Belgium
55. Intermon Oxfam, member of Oxfam International
56. Klimabündnis, Austria
57. Leeds Central World Development Movement, UK
58. Leeds Friends of the Earth, Leeds, UK
59. MIJARC, International Movement of Catholic Agricultural and Rural Youth, seat in Brussels, Belgium (38 member movements worldwide)
60. Milieudefensie/Friends of the Earth Netherlands
61. Nicaraguakomitee Ansfelden, Austria
62. Norges Naturvernforbund/Friends of the Earth Norway
63. Novib, member of Oxfam International
64. Oesterr.Lehrer/innen Initiative (Independent Teachers Association, OeLI-UG), Austria
65. OPEN POORT, cultural centre for children, Holland
66. Oxfam GB, member of Oxfam International
67. Oxfam Germany, member of Oxfam International
68. Oxfam Ireland, member of Oxfam International
69. Oxfam Solidarity, Belgium, member of Oxfam International
70. Salzburg Forum against MAI/ WTO, Austria
71. Salzburger Gruppe, Evangelische Arbeitsgemeinschaft für Kirche und Gesellschaft - Austria
72. Save the Children, UK
73. Solagral, France
74. SOL-Austria
75. SOMO, the Netherlands
76. South East Essex Green Party, UK
77. Southwark Green Party, UK
78. Steuerinitiative im ÖGB, Austria
79. SÜDWIND - Entwicklungspolitik, Vienna, Austria
80. Titta Vadalà, Italy
81. Transfair, Austria
82. TRIALOG - EU Enlargement and NGDOs, Austria
83. TRIKONT, Austria
84. Überparteiliche Salzburger Plattform zur Förderung des Sozialstaates, Austria
85. UBV, Utbildning för Biståndsverksamhet (Education for Aid Activities), Sweden
86. Unabhängigen Gewerkschafter/innen im Öffentlichen Dienst (UGÖD), Austria
87. Verein Solidarität Global, Austria
88. Vorarlberger LehrerInnen-Initiative (VLI), Austria
89. VIRUS, Austria
90. Welthaus Innsbruck, Austria
91. Wiener Friedensbe-wegung/Friedensbüro Wien, Austria (Viennese Peace movement/Peacebureau Vienna, Austria)
92. Weltladen-Dachverband (German Worldshop Association), Germany
93. Weltladen Lienz, Austria
94. Weltumspannend arbeiten, Austria
95. WIDE (Women in Development Europe), Austria
96. WIDE (Women in Development Europe), Belgium
97. Working Group Against MAI and Globalisation, Turkey
98. World Economy, Ecology & Development (WEED), Germany
99. World Development Movement, UK

WORLD TRADE ORGANIZATION

WT/WGTI/W/154
7 April 2003

(03-1901)

Original: English

Working Group on the Relationship between Trade and Investment

COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

The following communication, dated 3 April 2003, has been received from the Permanent Delegation of the European Commission.

_____

CONCEPT PAPER ON POLICY SPACE FOR DEVELOPMENT

1. The Doha Declaration states in paragraph 22 that any future investment framework "should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest". This paper addresses some of the concerns expressed in this working group regarding the need of host countries, and in particular of developing countries, to preserve policy space for the purpose of regulating in the public interest and for development purposes.

2. The EC fully supports the view that developing countries should maintain their right and their policy space to pursue their policies and that no international agreement should prevent them from doing so. Following the previous EC paper on the "Impact of international investment rules on current national policies" that we presented in June 2000[1], we would like to deepen the discussion about the right to regulate of host countries and the possible impact that a multilateral "Investment for Development Framework" (IDF) would have on the policies of developing countries in particular. During the last 4 meetings of the Working Group on the Relationship between Trade and Investment (WGTI) some options for investment rules that would allow policy flexibility have been presented and discussed. However, some members still fear that any investment framework would prevent developing countries from pursuing particular policies. We feel that the time has come to try to clarify and substantiate these statements. In particular, it would be useful to start by giving concrete examples of the policies that have been brought forward as impeded by the possible rules that have been proposed in the WGTI by several members. This paper aims at giving a concrete contribution to this debate.

3. In the last part of this paper we also comment briefly on the argument that has been put forward a few times in this group according to which FDI produces a "crowding-out" effect on domestic investment. Although this argument is not directly linked to the negotiation of an IDF, it seems to us that it has been used consistently to imply that an investment framework would increase the supposed negative effect that FDI can produce on host countries. First, we have found no evidence in real life that there is any "crowding-out effect" problem caused by FDI. Second, we do not see how an IDF would amplify any such feared negative effect caused by FDI in host countries.

[1] Communication from the European Community and its Member States WT/WGTI/W/84 of 16 June 2000.

I. WOULD A MULTILATERAL FRAMEWORK RESTRICT "POLICY SPACE" FOR DEVELOPMENT?

4. A few members have often referred[2] to the flexibility (and thus, potential benefits) that bilateral investment agreements provide to their economies as opposed to the believed inflexibility (and implied damages) that multilateral investment rules would impose on their policy space. This striking difference is not corroborated by any evidence, as far as we know. The only explanation given was that in most bilateral investment treaties concluded by these countries "national treatment and MFN treatment were accorded with respect to the post-establishment phase once investments had been admitted in accordance with the applicable policy framework", and that "bilateral investment treaties provided protection of foreign investment and did not deal with market access issues".[3]

5. One could conclude from the above that, according to these members, their policy space would be impeded mainly by pre-establishment rules. This will be the main focus of this paper.

6. We should also ask ourselves: what are host country development objectives? Are they universal or do they differ from country to country? Some of them, such as generation of employment and income growth, seem to be universal. We also know that some policies are applied specifically by some countries to develop particular regions, or to protect minority groups, or to promote local small and medium enterprises. Some of these policies are pursued through positive discrimination in favour of these regions, groups or sectors. It has also been argued by some developing countries that mandatory performance requirements imposed on foreign investors are essential policy tools for development.

7. We believe that the intended objectives of these instruments are better achieved through means other than performance requirements.[4] Backward linkages and technology transfer through foreign investment depend mainly on the absorption capacity of the host country. For instance, governments can maximise backward linkages and technology transfers by providing better domestic skills, capabilities, supplier networks and infrastructure.[5] Having said this, the point is whether a multilateral framework would prevent countries from using these instruments or not. In particular, we should analyse whether pre-establishment rules would prevent the use of these policies, in light of the fact that BITs, most of which do not include pre-establishment rules, are regularly concluded by many developing countries.

1. Some concrete examples

8. Paragraph 22 of the Doha Declaration refers to "pre-establishment commitments based on a GATS-type, positive list approach", among the issues to be addressed by this working group in the period until the next ministerial conference. Thus, assuming that a future multilateral framework would include pre-establishment rules based on a GATS-type, positive list approach, would developing countries be prevented from pursuing their general or specific policies?

9. Under the GATS-type approach, members first decide, for each sector, whether to take commitments or not. If a member decides not to take any commitment in a given sector, it remains free to be as open or as closed to foreign investment as it chooses, at any given time. If it decides to take commitments in a given sector, then the member may include in its schedule of commitments limitations to National Treatment (NT) and Market Access (MA). The limitations to the NT principle and MA can also be included as horizontal commitments, which means that they may apply to all sectors of the economy, and not just to one specific sector. Even after taking commitments, a member may still

[2] See for instance statements in WT/WGTI/M/8 paras. 47-49, and WT/WGTI/M/18, para. 74.

[3] Ibid.

[4] See EC statement in WT/WGTI/M/19, para. 65.

[5] See UNCTAD World Investment Report 1999: Foreign Direct Investment and the Challenge of Development

modify or withdraw any commitment in its schedule, provided it follows certain procedures[6]. Indeed, this may not always be straightforward in practice, but WTO members will be able to draw lessons from the GATS experience. Under this system, each member has to strike its own balance between providing certainty (thus, increasing the possibilities of attracting FDI) and retaining flexibility. The following examples show how certain specific policies can be dealt with under the GATS-type approach.

A. POLICIES AIMED AT INCREASING EMPLOYMENT

10. Employment-generation is an objective that most countries wish to pursue throughout their economy. The different policies adopted by governments to maximise employment generation through investment may vary. UNCTAD lists[7] the following among the policy tools to generate employment: (1) measures to attract FDI in general (improving the regulatory framework; liberalisation; targeted promotion; (2) targeting specific employment-intensive industries or promoting FDI in specific regions through incentives; (3) fiscal incentives linked to employment generation; (4) industrial parks or export processing zones.

11.In addition, the following have been listed as policies to upgrade employment and skills, particularly in developing countries: (1) use of official development assistance to implement training programmes; (2) promotion of public-private training partnerships by granting tax deductions and subsidising training costs.

12.The above policies are generally applied in a non-discriminatory way and do not restrict market access. To the extent that these conditions are fulfilled, these policies would not even need to be listed as limitations to NT and MA in the schedule of commitments of the member that applies them. However, even if a country decided to discriminate in favour of its own domestic enterprises, for instance by providing them with special tax exemptions, it would not be required to remove these advantages under the GATS-type approach. If the country wished to have the possibility to offer such fiscal advantages for its domestic enterprises it could include them as horizontal limitations to NT if they applied to the whole economy, or it could include them as sector-specific limitations to NT if they were limited to specific areas of activity.

B. POLICIES DESIGNED TO GENERATE AND TRANSFER TECHNOLOGY

13. Technology transfer from FDI is maximised when the host country provides local capacity to absorb it. Some countries try to encourage domestic companies to develop indigenous technology by providing them with a protected domestic market in which FDI is restricted or completely prohibited. Others require foreign investors to establish partnerships with local partners through joint ventures, as a condition for their access to the market. Although most countries have realised that these policies do not work[8] and are gradually removing them, some may still wish to maintain these restrictions or conditions to FDI.

14. Would the GATS-style approach prevent them from maintaining these instruments? No. They could either keep a sector "unbound" from NT or they could include specific limitations on MA such as joint venture requirements or other technology transfer requirements, insofar as they constitute market access restrictions.

15. Market-friendly measures aimed at promoting technology transfer, such as providing incentives for specific high technology industries, if applied in a non-discriminatory manner would not even need to be included as limitations to NT or MA in the schedule of commitments.

[6] GATS Article XXI.

[7] UNCTAD, World Investment Report 1999, p. 278.

[8] As demonstrated by empirical research. Cfr. T. H. Moran, Parental Supervision: The New Paradigm for Foreign Direct Investment and Development, Institute for International Economics, 2001; S. Urata and H. Kawai, Intrafirm Technology Transfer by Japanese Manufacturing Firms in Asia, The role of Foreign Direct Investment in East Asian Economic Development, eds. Takatoshi Ito and Anne O. Krueger, 2000; International Finance Corporation and Foreign Investment Advisory Service, Foreign Direct Investment: Lessons of Experience, No 5, World Bank Group, 1997; A. Kokko and M. Blomstrom, Policies to Encourage Inflows of Technology Through Foreign Multinationals, World Development 23, no. 3 (March) 1995.

C. POLICIES AIMED AT PROTECTING MINORITIES

16. Some governments grant specific advantages to ethnic or linguistic minorities, in terms of preferential treatment such as positive discrimination. Whatever the reasons are for adopting such policies (protection of diversity, cultural heritage, improving social conditions, equal opportunities, etc.), the question is whether they could be maintained or not under a GATS-type approach.

17. The GATS experience clearly shows that these policies could perfectly be included as limitations to NT in any given country's schedule of commitments. Thus, it seems safe to conclude that these policies that address particularly sensitive concerns could also be preserved without interference, in the presence of pre-establishment rules based on a GATS-type approach.

D. OTHER HOST COUNTRY POLICIES

18. A country might wish, for some reason, to completely exclude FDI in certain sensitive sectors. Would the GATS-style approach prevent the host country from doing so? Again, the answer is no. The GATS shows that a number of developing countries have kept "unbound" some sectors of their economy. This does not necessarily mean that they are completely closed to FDI in those sectors, but simply, that they remain free to take all the measures they wish on those sectors, whenever they like, even if the measures are not in conformity with NT and MA, subject to MFN and transparency principles.

19. It has been said in this working group that "Developing countries needed to retain the ability to screen and channel foreign investment in accordance with their domestic interests and priorities[9]. We would like to know from those members that have implied that this ability to screen foreign investment would be impeded by any pre-establishment rule, if the GATS has prevented them from screening foreign investment in the services sectors. In our view the answer is no. One of our examples (D) in the annex shows that it is possible for members to include, in their schedule of commitments, the right to screen the entry of foreign investors.

II. WOULD A MULTILATERAL FRAMEWORK REALLY INCREASE THE "CROWDING-OUT" EFFECT ON DOMESTIC INVESTMENT?

20. Some members brought into debate a fear that FDI can produce a "crowding-out" effect on domestic investment. Some have argued that, if this is so, an investment framework should not be negotiated since the crowding-out effect would be further enhanced, damaging first and foremost developing countries. We would like to briefly reflect on this assumption.

21. The first question to be asked is: does FDI really "crowd-out" domestic investment? Supposing it does, is the host country really affected negatively? We have not seen any compelling evidence supporting this view[10]. In our view, foreign investment would actually displace domestic investment if the two were perfect substitutes. Even in this case, the total output in the host country is likely to remain unchanged. If FDI and domestic investment were complementary, there would be a growth in total investment and output in the host country[11]. FDI would "crowd out" in cases where it outcompeted domestic investments, although the latter could find better investment opportunities in other areas of the economy. Some may still argue, following the "infant industry" argument, that FDI may, in a specific sector, establish all the capacity that can be sustained by the available market, and that this would in consequence crowd out domestic investments, even if these potential investments would

[9] See WT/WGTI/M/18, paras. 74 and 137.

[10] See for instance: UNCTAD WIR 1999; OECD, "Foreign Direct Investment for Development, Maximising Benefits, Minimising Costs", 2002; Saggi, Kamal. "Trade, Foreign Direct Investment, and International Technology Transfer." World Bank, May 2000; Sharma, Kishor, "Export Growth in India: Has FDI Played a Role?", Economic Growth Center at Yale University, July 2000; B. Smarzynska, "Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers through Backward Linkages", World Bank working paper, 2002.

[11] For instance, according to the World Bank working paper "Trade, Growth, and Poverty", by D. Dollar and A. Kraay (2001), a one percentage point increase in FDI inflows as a share of GDP would result in a positive effect on average incomes over the course of a decade of around 10 per cent.

also have had over time a potential comparative advantage. Even in this specific case, it is acknowledged that FDI tends to stimulate competition and promote domestic investments.

22. Leaving this aside, what can definitely be observed today is that almost every country in the world is striving to attract FDI and devoting increasing resources to investment promotion. This is also reflected in the Trade Policy Review Mechanism, in which most WTO members are eager to show the openness of their investment regime to FDI. Thus, it is not plausible to conclude that most countries in the world would be wrong in trying to attract FDI as they do not realise that their companies risk being crowded out by foreign investors.

23. Even admitting that FDI crowds-out domestic investment, the second question to be asked is: what would be the impact of a multilateral framework on this? There are 2 alternative possibilities. Either: (1) a multilateral framework would enhance FDI flows, thus, allegedly increasing the risk of crowding-out domestic investment; or (2) a multilateral framework would not significantly increase FDI flows, hence with no impact on the "crowding-out" effect. What cannot be said is that, at the same time, a multilateral framework will increase the risk of "crowding out" domestic investment but it will not increase FDI flows for developing countries.

24. In any case, one of the merits of the GATS-type approach is that it would allow those members that were willing to take, on a sector-by-sector basis, pre-establishment commitments, allowing the entry of foreign investors and perhaps at risk of "crowding out" their domestic investment, to do so only of they wished. Others, who would prefer not to risk the crowding-out effect in certain sectors or even in the whole economy, could simply keep those sectors or their whole economy "unbound", or, in other words, free from FDI. It would be a choice left to each government. Their policy space would be preserved.

III. CONCLUSION

25. All countries have legitimate reasons for preserving their right to regulate the activities of domestic and foreign investors. The reasons may be different: development objectives, protection of environment and health standards and other public interests. Some countries may not make any difference in their regulations between domestic and foreign operators while others might wish to differentiate the treatment and conditions in which national and foreign companies operate within their territory.

26. We wish to emphasise that an Investment for Development Framework can and indeed must be shaped in a way not to inhibit any country's policy space for development or, in general its right to regulate. The purpose of this paper is to try to move this fundamental debate towards a more concrete level, rather than continuing an abstract discussion between those who maintain that any investment rule would undermine their policy space and those who reply that this would not be true. We look forward to addressing in an open-minded way any other examples that other members may provide, in order to move this debate forward. In particular we would welcome the possibility of discussing any specific development policy or programme that some countries feel might be threatened by an investment framework.

27. As for the possible "crowding out" effect of FDI on domestic enterprises, we are not persuaded that it would be enhanced by an Investment for Development Framework. Having said this, we are willing to further discuss and deepen the analysis of the "crowding out" effect and on its possible relation with a future investment framework. This framework, as we see it, should leave each country free to strike its own balance between an appropriate policy space required to pursue national development objectives with an appropriate stable, predictable and transparent FDI framework through which firms are encouraged to operate. This balance can be reflected in each country's schedule of commitments. (...)