New Issues = Old MAI

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Remember the proposed MAI – the Multilateral Agreement on Investment? It's back again wearing a trendy "development" T-shirt and claiming it has been converted to moderation. Don't believe it. Proposed new agreements on investment and competition in the WTO, among others, will threaten development options, undermine community and producer organisations, and speed the commercialisation and privatisation of public services.

The MAI was the brainchild of the OECD, the club of the world's richest nations, and source of most of the world's foreign investment. It aroused popular opposition throughout the OECD and Third World when the secrecy of its negotiations was breached. When exposed to critical analysis, it was seen for what it was: an enforceable charter of rights for transnational corporations.

The ensuing uproar brought the MAI's defeat in 1998 – the first big public victory of what is now called by journalists the "anti-globalisation" movement. But the MAI's sponsors didn't go away. The European Union (EU) announced it would try to get an investment agreement in the WTO. That was highly ironic: the reason the OECD – an organisation that rarely develops treaties – had taken up the MAI, was that a proposal for a "Multilateral Investment Agreement" (MIA) in the WTO had been rejected by developing countries.

The EU and US had not allowed that rejection to be complete however. Instead, at the Singapore meeting of WTO trade ministers in 1996, a working group was set up "to examine the relationship between trade and investment". At the same time, another working group was set up "to study issues raised by Members relating to the interaction between trade and competition policy". Note the addition of the words "trade and" in order to rationalise the introduction of non-trade issues into the World *Trade* Organisation. Although the creation of these working groups formally did "not prejudge whether negotiations will be initiated in the future", at developing countries' insistence, from the big powers' point of view they kept the issues on the WTO agenda. They were ready to be revived when the MAI died.

Two other issues were similarly kept warm. A working group was set up "to conduct a study on transparency in government procurement practices", and the WTO's Council for Trade in Goods was directed "to undertake exploratory and analytical work" on "the simplification of trade procedures" – in the jargon, Trade Facilitation.

These four areas are known as the "Singapore Issues" or the "New Issues". They are new because if new agreements arise from them they will add significantly to the constraints placed on countries within the WTO and add to the cost of compliance. Compliance cost is already a major concern to developing countries, under pressure to implement the 60 agreements and decisions overseen by the WTO. For example, Harvard economist Dani Rodrik quotes World Bank research to conclude that

> It has been estimated that it costs a typical developing country US$150 million to implement requirements under just three of the

> WTO agreements: customs valuation, sanitary and phytosanitary measures (SPS) and intellectual property rights (Trade-Related Aspects of Intellectual Property Rights – TRIPS). As the World Bank's Michael Finger points out, this is a sum equal to a year's development budget for many of the least developed countries. ("The Global Governance of Trade as if Development Really Mattered", by Dani Rodrik, October 2001, United Nations Development Programme, p.26.)

At the Doha, Qatar, meeting of trade ministers last November which launched the current negotiating round, the New Issues were amongst the most bitterly fought agenda items. According to Philippine sociologist, Walden Bello, the New Issues were "at the top of the agenda of the trading powers in Doha". The pre-meeting draft of the all-important ministerial declaration defining the new round was produced by Mike Moore and other allies of the big powers (principally the US, EU and Japan). It was roundly condemned by developing countries for being biased against their positions, in part because it included an immediate start to negotiations on the New Issues.

Third World countries overwhelmingly opposed their inclusion. For example, before the Doha Ministerial meeting began, the African, Caribbean and Pacific (ACP) group of states declared: "We affirm that ACP States are not prepared at this time to engage in negotiations on Singapore issues" (Press release, "Position of the ACP Group in view of the WTO Conference", Brussels, 7/11/01). Most of this group are Least Developed Countries (LDCs – the poorest in the world), small and island economies. Third World leaders India and Malaysia were similarly opposed. ACP priorities were development issues, flexibility to take into account develop needs, eradication of poverty, and the enormous outstanding problems they have in implementing the existing agreements – and lack of reciprocal implementation, particularly in agriculture, by the trading powers. The group representing Least Developed Countries made similar statements. China and the "Group of 77", representing 133 developing countries, declared that rather than the New Issues, "proposals of the developing countries to redress the development deficit in WTO must constitute first priority for any additional negotiations" ("Declaration by the Group of 77 and China on the Fourth WTO Ministerial Conference at Doha, Qatar", Geneva, 22 October 2001).

The ACP Group also stated: "We reiterate our call for the elimination of the continued use of coercive and unilateral economic measures, against developing countries, which contravene international law and constitute a violation of WTO rules." It was strong-arm tactics of such a nature that enabled the EU and US to force the New Issues into the Doha round. One by one, the developing countries were silenced, with only India publicly resisting in the end. The EU refused to make even a highly ambiguous concession on agriculture[1] unless the New Issues were included in the new round.

However the developing countries won a fragile victory: negotiations for agreements on the New Issues will not begin until after the next WTO Ministerial, in Cancun,

[1] "Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support."

Mexico, and then only if there is "explicit consensus" (no WTO member opposing). In the meantime there are discussions as to what the agreements should contain. Given the ability of the big powers to coerce, amply demonstrated at Doha, the risk is high that negotiations on agreements around these issues will begin after the next Ministerial, expected in September 2003.

So what are these agreements likely to contain?

Investment

Because of the obvious sensitivities both in the OECD and the developing countries to an investment agreement, advocates like the EU, US and Japan have been coy about what they want such an agreement to contain. Their communications rarely mention the MAI – perhaps it is bad taste to mention the dead! Their strategy is to begin with a relatively unambitious "framework" agreement, which they undoubtedly will wish to augment in future negotiations.

The EU has been the leader in the push for the framework. Its public agenda for a "basic framework of multilateral rules on Foreign Direct Investment" is available on its web site at http://europa.eu.int/comm/trade/miti/invest/conswtoag_inv.htm.

The EU wants to focus on Foreign Direct Investment (FDI) rather than all investment. FDI is long-term and has the intention of having control over an enterprise. The standard IMF definition uses a minimum of 10% ownership to indicate FDI. This low threshold highlights the difficulty there is in drawing a distinction between forms of investment. Loans from a parent company to a subsidiary (and vice versa) are also counted as FDI, further clouding the distinction, and making it likely that the agreement would be extended to other forms of investment (as is the case with most bilateral investment agreements). In contrast, portfolio investment includes small shareholdings (less than 10% ownership), bonds and other debt securities. Other forms of investment include trade credits, loans, currency and bank deposits; and financial derivatives. Most of these are short term. (According to Statistics New Zealand, at 31 March 2002, there was $48.3 billion of FDI in New Zealand, $58.2 billion of portfolio investment, $58.8 billion of "other investment", and $6.1 billion in financial derivatives, making a total of $171.4 billion.)

As well, the EU wants an agreement to cover "non-discrimination, transparency and predictability of domestic laws applicable to FDI". Non-discrimination would include "national treatment". This forces governments to treat foreign investors at least as well as domestic investors. Rules and assistance aimed at fostering economic development by helping local companies would not be legal unless available to foreign investors on at least as favourable terms. This was one of the most controversial aspects of the MAI – it puts a community-based non-profit organisation like Plunket[2] or a community work trust on the same footing as a huge transnational corporation.

The EU tiptoes around the explosive issue of rules for protection of investment, including expropriation, saying only that it "could also be discussed, if WTO Members

[2] Plunket is something of a New Zealand icon, almost a century old, which provides community-based nursing and volunteer maternity and baby health care. It was set up to "help the mothers and save the babies", and was a major influence in reducing New Zealand's infant mortality rate.

found it useful. Any such rules, however, must not affect a host country's right to regulate, in a non-discriminatory manner, the behaviour of firms in its territory." In NAFTA, expropriation provisions have allowed companies whose profits have been affected by government actions, such as to improve environmental standards, to sue the governments for compensation. Awards have been in the tens of millions of US dollars. The effect is to undermine the ability of both national and local government to regulate the behaviour of foreign investors.

Central to the NAFTA cases was the equally controversial ability of individual investors to take action to sue the governments in question. The venues for these cases are secretive arbitration tribunals whose members are nominated by the parties involved and whose hearings and decisions are available only to the parties unless they approve otherwise. The EU is not suggesting this, though Taiwan is. Instead the EU proposes using the WTO's dispute settlement mechanism. This at least provides a little screening: it is government-to-government, which means an investor can take NAFTA-like actions only if its government is willing to do so on its behalf. But the nature of the WTO mechanism is heavily criticised for the narrow trade-expert orientation of its panels, and the lack of openness of its processes.

Protection of investment also is likely to restrict the ability of countries to control investment flows and the remittance of profits and interest overseas. This is important both to manage balance of payments problems, and as a discipline on blackmail "capital flight" tactics by investors when a government wishes to make rules that suit its citizens but not investors.

The general approach of the EU to the sector coverage of an investment framework agreement is to copy the GATS (General Agreement on Trade in Services). The GATS, for most purposes, covers a sector (like health, education, water, electricity, transport, accountancy, and so on) only if the country "commits" to that sector. However, some conditions of the agreement apply to all sectors, and there is an expectation of progressive liberalisation – that countries will steadily increase the sectors they commit. It is very difficult ever to withdraw a commitment.

That is a reminder that GATS is an investment agreement itself, applying only to service industries – about half of the world's FDI stocks according to the EU. As more people become aware of its implications, particularly to speed the commercialisation of public services, it is becoming a focus of opposition to the WTO. Another investment agreement within the WTO is the Agreement on Trade-Related Investment Measures (TRIMs). It is one of the agreements most resented by developing countries because it outlaws a number of the investment regulations used to force benefits from FDI by high-growth East Asian economies. These regulations include local content requirements and requirements to export a proportion of production.

An agreement on investment is likely to lengthen this list of banned performance requirements and pick up the deregulatory "market access" requirements from GATS. It is also likely to curtail or remove the ability of countries to screen investment as New Zealand still does (weakly) when land or fishing quota are involved. Indeed, both the EU and US have indicated their dislike for performance requirements (e.g. "The relation between investment and competition policy", a communication from the EU to the Working Group on the Relationship between Trade and Investment, 5/11/98;

"Where are we on foreign investors' behaviour?", a communication from the EU to the Working Group on the Relationship between Trade and Investment, 20/9/99; "Relationship Between Investment and Competition Policy", a communication from the US to the Working Groups on Trade and Competition, and Trade and Investment, 24 September 1998).

Like all agreements supported by the major economic powers, the investment agreement proposed has the characteristic that it aims to restrict the powers of governments and remove restrictions on the rights of investors. There is a place for an international investment agreement, but its objective would be to control the behaviour of transnational corporations, prevent incentive auctions to attract them, restrict the ability of fast-moving capital (hot money) to damage economies, and allow countries to manage their balance of payments. Such an agreement should have economic, social and environmental development as its objectives, not liberalisation. It is not going to come from the WTO.

A point not often admitted about multilateral investment agreements (and the EU's proposal for a competition agreement) is that their orthodox economic rationale is flimsy. There is an accepted (though overstated) economic rationale for trade agreements: that countries have an interest if left to themselves to maintain tariffs even though they may all be better off if they all remove the tariffs together. Thus cooperation through a mutually negotiated cut in tariffs is required to improve everyone's position – resolving the so-called "prisoners' dilemma". (In fact the theory allows that some may be losers in this process, but that the winners could compensate the losers and both would still be better off. But of course the rules don't force the winners to compensate the losers. In practice, tariffs have a useful role in economic development not accounted for in this rationale; and negotiations are rarely mutual, being dominated by the ruthless and the powerful; so the rationale is much more contentious than economists would have us believe.)

The prisoners' dilemma doesn't apply to investment. The orthodox rationale for more investment is that it is good for the recipient and good for the investor. So no international agreement is required for it to happen. If a country considers foreign investment is good for itself, all it has to do is open its gates (and as New Zealand knows, make itself attractive by cutting taxes, undermining social services, weakening labour laws, and much else). So there are only two reasons for an investment agreement: to protect the country and to protect the investor. The first requires an international agreement to prevent individual countries being picked off; the second can be done bilaterally or even unilaterally. What the EU, US and the OECD (in the MAI) propose is solely to protect the investor, at the expense of the country and its people. The effect is to deny foreign investment to those who are not prepared to deregulate and provide a feather bed for foreign investors. The alternative is outlined above.

Even some convinced free traders are opposed to the "new issues" being part of the WTO. A prominent example is Jagdish Bhagwati, the chief economic advisor to the GATT during the Uruguay Round that led to the formation of the WTO. In an interview after Doha, he told an interviewer: "These issues have no relation with trade liberalisation. Like IPRs [Intellectual Property Rights], which essentially is a question of some companies seeking rent in the form of royalty for their patents, the Singapore issues are non-trade issues" (*The Times of India*, "Upbeat on Doha", by Priya Ranjan

Dash, 30/12/01). He and a number of others including Hoekman (quoted below) see such issues as overburdening the WTO agenda, threatening the success of trade negotiations.

Competition

Competition as an area for international regulation is almost entirely new, though there have been bilateral and voluntary agreements, and studies by a number of UN bodies and non-governmental organisations. In principal, an agreement on competition is urgently needed. As transnational corporations grow and merge (by far the most common form of FDI is now mergers and acquisitions) competition is reduced, and market power with all its abuses increases. Small and weak economies are particularly vulnerable. Such economies often have less resources than the companies themselves. Many of these practices occur across borders. Decisions made in New York, London or Tokyo can cause hardship or even undermine economies in New Zealand, Vietnam or South Africa. It is sensible to have international agreements to exchange information on anti-competitive practices, and indeed some developing countries have asked for such cooperation.

Instead, a WTO competition agreement is likely to be little more than a companion (or a substitute) for an anti-development investment agreement.

Again, the EU is leading the charge for such an agreement. Its objectives can be seen at http://europa.eu.int/comm/trade/miti/compet/conswtoag_comp.htm.

It is revealing that its first objective is to "Reinforce and support the process of trade and investment liberalisation through commitments by countries to transparent and non-discriminatory competition polices." In other words, it sees competition as a way to speed the process of deregulation.

Again, it wants "non-discrimination" including "national treatment". In some ways national treatment (treating foreign corporations as well or better than locals) is even more obnoxious here than in an investment agreement. Economies of scale lie behind most modern products, and particularly those with high added value which countries are especially keen to produce. For obvious reasons, small and developing economies find it hard to develop economies of scale. One way is to restrict competition, at least until an industry, or a producer, is strong enough to survive against international competition. In some cases that may never happen completely. Air New Zealand is an example of a company that was not surviving without government intervention after its domestic market had been deregulated. Fonterra (and the Dairy Board before it) has exemptions from New Zealand's competition rules for a similar reason. So do the remaining producer boards, and it will be revealing (if sad for producers) to watch what happens to those like ENZA (pipfruit marketing) which have lost this status.

The large industrial economies had effective protection from competition long after their industry took root, through explicit or informal rules, or from being first into a market. That greatly helped their development. They are now proposing to kick away the ladder they used, to prevent other countries from ascending it. The effect in the long run is to *lessen* competition. This same hypocrisy is seen in the forceful support by the same major economies for increasing protection of intellectual property (pat-

ents, copyright, and so on), not least through the WTO's TRIPS agreement. The effect is to confer a monopoly on the holder of the intellectual property right. Again, such property rights often did not exist in the years those countries were developing.

Such a competition agreement is therefore primarily aimed at allowing the corporations based in the economic powers to break into new markets. That is how the EU's words, "reinforce and support the process of trade and investment liberalisation", should be interpreted. Indeed, a World Bank paper on the prospects of such an agreement says as much:

> The problem is that the agenda is likely to be dominated by market access issues more than international antitrust. That is to say that the typical dispute is about the interests of major producers in export markets, and not about ensuring the adoption of competition law that is in the interests of the economy as a whole. To oversimplify, trade officials from exporting countries want to force competition officials in importing countries to assist in opening markets. ("Competition Policy, Developing Countries and the WTO", by Bernard Hoekman and Peter Holmes, April 1999.)

It concludes that the WTO is therefore not a good place for such an agreement.

As if to emphasise its single-minded aim, the EU proposes that any international cooperation in sharing information on anti-competitive practices should be voluntary, and there should be no compulsion to share confidential (usually commercially confidential) information. While there are sensitive sovereignty issues on both sides of such cooperation, there is little doubt that the EU is protecting itself in such a limp proposal. Since about 60% of all FDI is sourced in the "triad" of the EU, US and Japan (almost 40% from EU alone)[3], it is those countries that will be the ones most frequently requested for information essential to an international investigation into anti-competitive behaviour. They are retaining the right to refuse to cooperate. On the other hand smaller countries are always more susceptible to political, economic, and even military pressures to share information "voluntarily".

Yet on the other hand it demands of the developing countries "the progressive reinforcement of competition institutions in developing countries", and enhancements in "the capacity of all countries to address anticompetitive practices of an international dimension". Their compliance costs rise while their development options recede and their markets are cornered by triad transnationals.

Just as compelling a reason to reject such an agreement is revealed in other EU and US publications. Both have for many years been eyeing the "state trading enterprises" which have some protection under Article XVII of the General Agreement on Tariffs and Trade (GATT – the original agreement that was expanded into the WTO). These include New Zealand's former producer boards (Dairy Board, Apple and Pear Marketing Board, Wool Board, etc) which had monopoly export rights in order to raise returns to farmers. Fonterra's remaining preferential exporter status is still protected in the same way. The Canadian Wheat Board is a particular target for the EU and US.

[3] In 2000 – World Investment Report 2001, UN, p.11.

A competition agreement would provide the means to destroy remaining producer-controlled marketing organisations, handing them over to agribusiness companies like Nestle, Kraft, Cargill and Conagra. Consequential falls in returns to producers and the loss to New Zealand of added value activities are inevitable.

Not only the producer and marketing organisations are under attack. In a 1998 communication to the WTO's Working Group on Trade and Competition Policy (7/7/98, document 98-2702), the EU explicitly advocates opening to competition other public services which have monopoly positions. It singles out postal services, but a wide range of public services could fall into the same category: education, health, roads, ports, airports, water, public transport. There is therefore considerable concern that a competition agreement would be used as a further means to wear away at the fabric of public services, deregulating and commercialising them into the hands of transnationals. The EU advocates "the application of competition law on the same basis to private and public undertakings", and wants limits on the ability of governments to exempt some sectors from competition policy.

Reinforcing the above market access rationale for competition policy, the EU states:

> … a policy of active competition law enforcement remains essential to ensure effective competition and access to a market on the basis of equality of competitive opportunities. (p.11, op cit.)

Transparency in Government Procurement

The WTO already has a "plurilateral" agreement on Government Procurement – that is, one that all members were not required to sign. Only 28 have done so out of a total of 144 WTO members, with a further seven negotiating accession (according to the WTO web site at 4/11/02). According to the WTO, the Government Procurement agreement "is designed to make laws, regulations, procedures and practices regarding government procurement more transparent and to ensure they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers." In other words, it prevents governments (including local governments) from using their buying power to assist local suppliers, or to encourage voluntary or community groups which may provide services to the public.

Once again, developing countries – and many developed countries – have major concerns about the effect of such an agreement on their development strategies. So the trading powers are soft-pedalling this aspect of it in favour of a focus on "transparency". This keeps the agreement alive, but may have some payoffs from their point of view. "Transparency" may provide a process for transnationals to challenge government buying decisions on the grounds that the processes used for making purchases were not open and clear, or were not followed to the letter. This raises compliance costs and makes the job of governments (including those of overstretched poor nations, and small local authorities) more difficult and more susceptible to corporate pressures.

Trade Facilitation

"Trade Facilitation" covers a host of non-tariff government actions which raise the cost of trade. Many of them are common sense, like simplifying routine customs procedures, inspections and documentation requirements. Transparency of rules and procedures is another aspect.

Some of the risks stem from the reasons for the procedures. If a customs inspection is to prevent pests, plant and animal diseases getting into the country and there is pressure to save costs or time, then the inspection may lose its effectiveness.

For developing countries, compliance costs are once again a big issue. Simplification of procedures often involves automation, requiring the purchase and development of computer systems and training of staff. None of these are simple or cheap. Neither are they likely to be high priorities for a country whose first priority lies in fighting poverty. While the EU promises "technical assistance" to developing countries, compliance is still a burden which continues after any initial assistance has dried up and deflects them from more urgent matters.

Conclusion

Although the EU and US appear to have restrained their ambitions for the New Issues, huge dangers still lurk. They threaten smaller countries like New Zealand, but they also are designed to undermine the development needs of much of the Third World – the great majority of humanity.

We must call upon the New Zealand government to actively oppose the initiation of negotiations for agreements on the New Issues in the WTO Ministerial in September next year, and the permanent removal of investment, competition and government procurement from the WTO's agenda.

The New Issues are yet another example of how the WTO is designed to reinforce privilege rather than encourage development.

A booklet outlining the case against the proposed investment and competition agreements is available from the Seattle to Brussels Network at http://www.s2bnetwork.org/S2B-InvestmentWTO-Brochure-Oct02.pdf.