UNICE
Union of Industrial and Employers' Confederations of Europe
Union des Confédérations de l'Industrie et des Employeurs d'Europe

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Restatement of UNICE Position on WTO Negotiations on Investment

Introduction

1. European business attaches high priority to the establishment of a global regime in the WTO for foreign direct investment (fdi), which is non-discriminatory, transparent, stable and liberal.

2. The long-term goal of European business is a worldwide investment agreement guaranteeing free access to markets, national treatment, full transparency and full protection of investments. However, European business is aware that free access to markets for investment is not a realistic short term objective for the WTO. The investment agreement envisaged should nevertheless introduce the first welcome steps in this direction. Comprehensive investment protection should be one of the results of an investment agreement in the WTO since there is a common understanding between industrialising and industrialised as well as emerging market countries in this field.

3. Increasingly, access to markets involves investment in some form, but there are no global rules to complement those for trade in goods and services: market realities are only partially reflected by existing WTO provisions. European business believes that appropriate provisions on fdi will be in the interests of WTO members at all stages of development. All countries seek investment in their economies, desirous of the transfers of technology, skills and standards, creation of employment and opportunities for industrial development that it brings. Moreover, many developing countries are already liberalising their investment regimes and these efforts should be encouraged.

4. Investors seek markets which are stable, transparent and predictable to give them the confidence to take the risks inherent in investing their capital. International provisions on investment, demonstrating commitment to multilateral disciplines, would not and cannot of themselves produce investment flows, but should aim to make positive investment decisions both easier and more likely: companies accept the obligation to comply with international law and the law in countries where they are to become corporate citizens, while governments – especially in developing countries – seek support to prevent their lowering of national standards or provision of costly incentives to attract investment. This is a balance worth enshrining through international agreement.

5. The internationalisation of business continues to gather pace. Virtually all governments are involved in or contemplate regional trade agreements, which increasingly tend to cover investment issues as well as trade. They have also entered into bilateral investment treaties with other WTO members, recognising that increasing numbers of countries find themselves not only hosts to inward investment, but also the source of fdi. These developments increase the risk of conflicting requirements being placed on companies, placing unnecessary costs on business and/or diverting scarce government resources. Removal, or at least the reduction, of these inhibitions to investment flows, transparency of national investment regimes and improving levels of investment protection would all add value to the existing situation, especially for smaller companies and countries; and provide a basis for future liberalisation.

6. A multilateral investment agreement should not encroach on governments' right to regulate, nor on areas of policy such as labour or environmental standards which should be – and are

being – tackled on their own merits in appropriate forums. Globally agreed improvements in standards will be applicable to all companies, national and multinational, through the proper application of national treatment.

7. The results of the scheduled review of the WTO agreement on Trade Related Investment Measures (TRIMs) should be incorporated in a more general agreement on fdi as envisaged in this position paper. Similarly provisions of the WTO Subsidies Agreement relating to investment incentives and of the GATS relating to commercial presence should be absorbed into the proposed comprehensive investment agreement to ensure consistency of treatment.

Specific Negotiating Objectives

8. As with the General Agreement on Trade in Services drawn up in the Uruguay Round, the immediate objective should be national treatment as well as to negotiate provisions on the transparent treatment of investors, other than liberalisation of markets as such, which can be tackled later within the resultant framework. To achieve this, the proposed agreement should respect both national sovereignty and applicable international law. Foreign direct investment will need to be defined on as a wide basis as can be agreed. All assets, tangible and intangible, should be covered by the definition. There should be a legal right for foreigners to invest on a most favoured nation basis in those sectors of a national economy published as being open for such investment (bottom-up approach).

9. Within an economy there should be no discrimination between domestic and foreign-owned companies in the application of national law or other regulations including taxation, which should govern the activities of all entities incorporated there. The National Treatment clause should be binding on all levels of government, and any limited exceptions should be subject to strict transparency requirements.

10. All national provisions affecting rights of entry and post-investment operations such as sectors restricted to domestic investors, conditions applying to joint ventures, taxation etc. should be publicly available and subject to scrutiny and appeal. These provisions should be considered “bound” by analogy with tariffs, and the introduction of new measures which could have the effect of tightening conditions for investment or investors or of introducing discrimination between categories of investors should be notified in advance to other WTO parties to allow consideration of their acceptability (as is done, for example, in the WTO agreement on Technical Barriers to Trade, Article 2.9). The implementation of more restrictive measures should not be denied, but should give right to appropriate compensation.

11. Foreign-owned companies should have freedom to make financial transfers of interest, profits and dividends, licence fees and similar payments, as well as unrestricted repatriation of capital. Any restriction of these rights should be temporary, limited to only the most serious balance of payments problems, applied in a non-discriminatory manner, and be subject to multilateral surveillance.

12. Foreign investors must be entitled to operate in a manner that will enable them to compete effectively in local markets. Restrictions on post-investment operations through TRIMS, such as performance requirements, are discriminatory and, as the existing WTO agreement on TRIMS provides, should be progressively eliminated. Allowing for differing levels of development within the WTO membership, there should be a clear commitment to reduction and eventual prohibition of TRIMS and other performance requirements not covered by the existing agreements on a graduated basis. On key personnel, the agreement should take account both of the right of a company to employ the personnel of its choice and the need to respect the host country’s immigration policy.

13. The agreement should include provisions to reduce parties' freedom of action to use incentives and disincentives which are wasteful of government resources and distort international investment flows. The same considerations apply to lowering of standards to attract individual investors. This distortion of competition should be banned on a mfn basis especially to protect developing countries from suspicions of undue pressure by potential investors. Provisions equivalent to the OECD Convention should make extortion and bribery with regard to investment projects illegal.

14. Protection of foreign investors against expropriation or nationalisation should be included in the agreement. So-called "creeping expropriation" caused by progressive erosion of the original conditions under which the initial investment decision was made should also be covered. When such actions occur, expropriations must be for a public purpose, carried out in a non-discriminatory fashion and investors must be provided with an acceptable timetable for divestment. Prompt, adequate and effective compensation should be provided.

15. An effective mechanism for dispute settlement, preferably linked to the existing WTO procedures and maintaining rights under the International Center for the Settlement of Investment Disputes (ICSID), between investor and host countries and between signatories is a basic requirement of any agreement to protect the interests of all concerned. All WTO members should recognise international standards in applicable law and means of asserting claims and enforcing rights with respect to investments and investment authorisations. The agreement should seek to add value to existing bilateral treaties by embodying the most comprehensive provisions they contain. In accordance with existing WTO agreements, disputes should normally be brought between contracting parties, but, as in existing treaty provisions, individual investors should have the right to seek arbitration where their treatment, pre or post-establishment is at variance with the published policy of the host state concerned (see above), and the commitments under the agreement.

16. Like other WTO agreements, the agreement on treatment of foreign direct investment should not only be accepted by all WTO members (with any necessary derogations for developing and least developed countries), but also provide for periodic review and the possibility of negotiations on future liberalisation as and when this can be sustained by WTO members.

Conclusions

17. The legitimate concerns of developing countries to draw a fair share of the benefits of fdi and the needs of international investing companies (wherever their original homebase) for predictability of conditions for their risk capital means that all WTO member countries should perceive advantage in addressing the treatment of fdi in the next Round of multilateral trade negotiations (mtns). The spread of the benefits of globalisation will, in the view of UNICE, be fostered by recognition of the value of WTO-wide rules in balancing the developmental aspirations of non-OECD countries with the ability of multinational enterprises to contribute to the development of all markets where they can operate on a non-discriminatory basis.