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UNICE position on a WTO framework for international investment

I Introduction

UNICE strongly supports launching negotiations on a multilateral framework on investment, which is liberal, transparent, non-discriminatory and stable, and which will produce real added value for companies and for the world economy, as agreed in the Doha Development Agenda in 2001.¹ UNICE considers negotiations on investment to be one of its four priority issues at the WTO along with negotiations on Market Access, Trade Facilitation and Services Liberalisation.

International investment is an area of very high priority for companies and governments alike. The international activities of companies have increased tremendously over the last thirty years. The production of goods and services, the commercial exchange thereof and subsequently the spread of these activities on a global dimension, have led to a situation where trade and investment are natural extensions of one another. Investors seek stable, transparent and predictable markets to reduce the risks inherent to investing their capital.

International investment, and foreign direct investment in particular, is an important source of sustained and sustainable economic growth and development. The increased flows of capital and the growing number of bilateral and regional agreements as well as the fact that an increasing number of countries find themselves not only host to inward investment but also the source of foreign direct investment, demonstrate the interest of governments worldwide to attract and facilitate international investments. Countries attract investment seeking opportunities for industrial and services development, the transfer of technology, skills and standards and employment creation. Moreover, many countries are stepping up the liberalisation of their investment regimes. These efforts should be acknowledged and encouraged further.

In order to maximise the opportunities and benefits of international investment, a global framework of investment rules is called for that will provide a level playing field for investors worldwide while at the same time safeguarding the rights of governments to determine appropriate policies in the public interest.

¹ Paragraph 20 of the DDA: "Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations."

UNICE calls on the Fifth WTO Ministerial Conference in Cancun in September 2003 to effectively launch the negotiations on a multilateral investment framework with an unequivocal decision to set ambitious objectives in order to conclude an agreement by the end of the Doha Development Agenda negotiations in 2005.

II A WTO agenda: towards a multilateral framework on investment

The oft-stated long term goal of UNICE is to achieve a worldwide comprehensive investment agreement guaranteeing full transparency, non-discrimination and national treatment, free access to markets and the full protection of investments.

Currently, the international investment environment is regulated by an array of bilateral, regional and multilateral instruments. Some 2000 bilateral investment protection and promotion treaties feature among the most prominent frameworks in place. Other elements are covered in the WTO agreements on Trade Related Investment Measures (TRIMS), the Trade Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS).

Added value

Central to the position of UNICE is that a WTO framework on investment should deliver added value for companies in developed and developing countries alike. A WTO investment framework should take existing rules and arrangements into account.

The WTO negotiations should, however, not limit themselves to codifying or to simply 'multilateralising' these existing instruments. Business would like to ensure that established rules and procedures included in existing bilateral and regional agreements are safeguarded and can continue to be upgraded. The challenge is to build on what is already available and to produce an agreement that will provide additional opportunities for companies and create real benefits for economic growth and development.

III Investment and development

Research and experience indicate that increased inward investment flows can help promote development, if the appropriate framework is in place. Greater involvement of foreign companies strengthens the private sector contribution to a country's development process by creating productive capacity and employment, by the transfer of expertise and technology and by the introduction of innovative organisational and governance structures. It should be clear that an improved enabling environment for international investment greatly increases the possibility to attract foreign investment capital to a country. Investment can therefore be considered an instrument of development in its own right and UNICE feels there are limited grounds for general provisions, exceptions or derogations for developing countries.

Investment rules alone cannot guarantee increased investment flows. A business case for an investment decision involves many complex variables. However, national and international frameworks of investment rules and the commitment to abide by principles of transparency, non-discrimination, predictability and the rule of law characterise a positive investment climate which will make it easier to attract foreign direct investment.

Development provisions, exceptions and conditionality

Specific and well-defined opt-outs or exceptions are the proper method to take the concerns of developing countries into account. If relevant, these should include time frames leading gradually to full compliance with the agreement. In line with WTO procedures, a regime of granted exceptions should be combined with commitments to stand-still (in order to prevent

new obstacles being introduced) and roll-back (in order to achieve continuous improvement of existing commitments).

Companies must be able to operate in a manner that will enable them to compete effectively in local, regional and international markets. UNICE is very critical of calls to introduce conditionality in a WTO investment framework, which would in effect limit the possibilities of companies to compete effectively. This relates to so-called performance requirements as well as to initiatives to tie a WTO agreement to instruments of corporate social responsibility. With regard to the latter, it would be inappropriate to combine the binding legal framework of the WTO commitments among governments, with the essentially self-regulatory approaches adopted to promote responsible business conduct in the international activities of companies. Conditionality and performance requirements would probably hinder investment especially to developing countries. Research shows that the overall benefits of foreign direct investment are only in part related to the nature of the investment itself, but also - if not more so - dependent on the appropriate host country policies.

Freedom to transfer funds and balance of payment clauses

A framework on investment should include the guarantee to unrestricted transfer of all payments related to the investment covered by the agreement as well as the repatriation of capital, without delay and in freely convertible currency.

It is acceptable to allow for balance-of-payments safeguards that protect countries in cases of severe monetary emergencies. These safeguards should be well defined and specific in order to prevent them from being arbitrarily invoked. They should also be temporary and applied on a non-discriminatory basis in conformity with the overall WTO objective of granting national treatment to FDI.

IV Specific issues for the negotiations

UNICE sees four areas of importance in the WTO negotiations: (1) the definition of investment that will establish the scope of the agreement; (2) WTO principles, transparency and non-discrimination; (3) market access and pre-establishment provisions; and (4) investment protection and dispute settlement.

Apart from the importance of having a broad definition of investment and considering the high standards of protection already offered under most available bilateral investment protection agreements, the highest added value for European business is in the areas of (2) WTO principles and (3) market access. UNICE encourages negotiators to prioritise their negotiations accordingly. Business will analyse and weigh the outcome of the Doha Development Round with respect to investment in this context.

Definition of investment

The Doha Ministerial Declaration refers to long-term cross border investment, and particularly foreign direct investment, as the subject of the negotiations. Since investment takes many forms, European business favours a definition on as wide a basis as can be agreed. A broad, asset-based definition of investment should include the many ways companies structure their investments and the variety of assets involved, including physical assets, intellectual property rights, securities, long-term debt linked to the investment, technology and skills transfer, joint venture holdings and other forms of co-operative contracts as well as projects carried out on a concession basis.

Another important aspect that should be included in the definition of investment of a future WTO agreement is the notion of long-term interest or commitment as the objective of the investor. This implies that European business does not seek either the inclusion of portfolio

investment that is not related to the foreign direct investment or of short-term capital flows into the definition of investment.

WTO principles: transparency and non-discrimination

Transparency

A rules-based framework for investment is highly dependent on accessible information. A WTO agreement on investment should therefore include different elements of transparency: information, notification and administration. All national (including sub-national) provisions affecting rights of entry, establishment requirements and post-establishment operations, should be publicly available and subject to scrutiny and appeal. Any changes should be publicised and notified in a timely manner. Ideally this means at a stage to allow for consideration and review of the proposals, but in any case before the entry into force of the new provisions. The administration of regulations and measures relating to FDI should be objective, reasonable, consistent and impartial and should be accompanied by adequate procedures for appeal and, if necessary, redress.

Non-discrimination: national treatment and most favoured nation treatment

The core of any WTO agreement and essential to the creation of a level playing field for international investment is the inclusion of the principle of non-discrimination between domestic and foreign-owned companies. This means that foreign investors should not be treated less favourably than domestic investors. Furthermore equal treatment should be granted to different foreign investors by the host country.

National treatment obligations should be agreed for all investments already established in the host country (post-establishment).

A general most-favoured-nation obligation should be included for all foreign investments (pre- and post-establishment). If the objective is to create a level playing field, there is no reason to distinguish among investors from different countries of origin.

Market access

European business considers that increased market access for foreign investors will offer the most added value from a multilateral framework on investment. Bilateral and other investment agreements generally concentrate on post-establishment provisions. A WTO agreement should also aim at liberalising the global environment for international investments. Considering the growing importance of investments for the operations of companies as well as for the economic development of countries, there is progressively more evidence that protectionist policies are indeed counterproductive and unnecessary.

Even though the Doha Ministerial Declaration focuses on "modalities for pre-establishment commitments based on a GATS-type, positive list approach", UNICE considers this to be too cautious considering the substantial benefits that increased foreign investments can deliver. Therefore business recommends exploring the possibilities to reach an agreement that will remove discriminatory measures on foreign investment by accepting most-favoured-nation and national treatment following a so-called negative list approach. According to this concept countries liberalise their markets excluding only those sectors explicitly named in the agreement. This would be the most transparent and progressive approach to reach greater market access for investments.

Alternatively, the positive list (GATS-type) approach could be considered where countries only liberalise the sectors of their markets listed in the agreement. The risk of this approach

is that it will lead to an unnecessarily cautious outcome limiting the potential benefits of an agreement on investment for all parties.

The guiding principle in both the negative list as well as the positive list approach should be to liberalise as much as possible. In order to confirm the progressive nature of the agreement, both approaches should include commitments of 'stand-still' and 'roll-back', in order to prevent the inclusion of new exceptions and to guarantee step-by-step liberalisation in the areas where exceptions have been filed.

A multilateral framework on investment should not limit a government's right to regulate nor encroach on areas of policy such as labour or environmental standards which are being dealt with on their own merits in appropriate fora.

Investment protection and dispute settlement

The interrelationship between a WTO agreement and Bilateral Investment Treaties (BITs)

Existing bilateral investment treaties will potentially overlap with an eventual multilateral framework on investment. Even though a multilateral framework will provide greater protection for investment to companies from European Member States that may not have as wide a range of BITs, it is in this area of the negotiations, that European business will specifically scrutinise the results of any WTO negotiations on investment against the yardstick of added value. A WTO agreement on investment should strive to lock in the existing high standards of investment protection and possibilities for dispute settlement offered in BITs. At a minimum, it should contain provisions that recognise and safeguard existing bilateral agreements.

WTO principles and the rule of law

A first and basic level of protection of investment should be established through adherence to the general principles of transparency, non-discrimination, the proper administration of policies and the maintenance of the rule of law. This would create an environment conducive to attracting international investment.

Protection against expropriation

A WTO agreement on investment should provide for strong and effective protection against expropriation, nationalisation or any other measure with similar effect. 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 disinvestment. The agreement should include guarantees for prompt, adequate and effective compensation, payable in freely convertible currencies.

Dispute settlement

UNICE expects the customary WTO state-to-state dispute settlement mechanism to be extended to all aspects covered in a new multilateral framework on investment. The possibility to invoke methods of enforcement ultimately guarantees the effectiveness of the agreement.

A functioning mechanism for investor-to-state dispute settlement is essential for the effective protection of FDI and is therefore a priority for business. UNICE considers this issue to be very sensitive and difficult to cover in the context of the current WTO negotiations. Consideration should first be given to the existing and proven independent procedures now included in BITs such as ICSID, UNCITRAL or ICC arbitration, while in the long run preserving the possibility of establishing an investor-to-state dispute settlement mechanism at the WTO. WTO members should reflect on the different dispute settlement procedures

that could be used to settle disputes between WTO members and investors and will provide adequate policy space for states while guaranteeing security for FDI.

WTO members could recognise the international standards in applicable law and the means of asserting claims and enforcing rights with respect to investments and investment authorisations under these existing arbitration bodies in a multilateral framework on investment. As these mechanisms are included in most BITs, there is no reason why this issue should be a contentious one at the WTO.

V Conclusion

Apart from a broad definition of investment, UNICE identifies three areas of substantive negotiations for investment at the WTO: principles, market access and protection.

UNICE acknowledges that the objectives mentioned in this position paper are ambitious. In view of the existing investment agreements in place, which already cover part of the agenda of the investment negotiations, European business places a high emphasis on the added value of a WTO agreement. UNICE therefore attaches higher priority on results in the areas of WTO principles and market access compared to issues relating to protection.

UNICE believes that investment is both the key to growth and development in all countries and the core factor of any adjustment process. An enabling environment and an appropriate legal framework for investment can help a country attract FDI. UNICE is convinced that a WTO agreement on investment will provide an important framework to maximise the opportunities and benefits of international investment.

Therefore, UNICE attaches great significance to the negotiations in the context of the Doha Development Agenda in order to establish a multilateral framework on investment, which is liberal, transparent, non-discriminatory and stable and which will produce real added value for companies.

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