

Statement on Investment for the April WTO Investment Meeting



On April 14 – 15 2003, the WTO Working Group on the Relationship between Trade and Investment (WGTI) will hold one of their last meetings before the WTO-ministerial in Cancun. CIEL, IATP, Oxfam, PSI, TWN, and WWF, as well as more than 60 NGOs and social movements meeting this week in Geneva, are concerned that this meeting constitutes another step towards negotiating a WTO agreement on investment, which would be adverse to sustainable development.

Therefore, CIEL, IATP, Oxfam, PSI, TWN, and WWF¹ call upon WTO Members to reject any proposals to start negotiation of an international investment agreement in WTO and to refrain from taking any decision at the Cancun Ministerial that would bring about the commencement of such negotiations.

Introduction

While Foreign Direct Investment (FDI) can play a positive role for achieving sustainable development, for example by facilitating access to capital, technologies and markets, there is no conclusive evidence that FDI automatically leads to growth and development.

Even the EC,² one of the main proponents of multilateral rules on investment in the WTO, acknowledged that:

- “there is no mechanical relationship between the presence of FDI and the transfer of technology”; and that
- “it has never been suggested that the establishment of such rules was key to enhancing the attractiveness of host countries to FDI. Rather they would make a limited but valuable contribution by enhancing legal certainty for investors”.

¹ CIEL (Center for International Environmental Law), IATP (Institute of Agricultural and Trade Policy), WWF (World Wildlife Fund for Nature), PSI (Public Services International), Oxfam International and TWN (Third World Network).

² Note by the WTO Secretariat, Report on the Meeting of 7 and 8 March 2001, WGTI/M/14, p.6.

As UNCTAD points out, the benefits of FDI “hinge on the use of various strategic policies.”³ Moreover, unregulated FDI flows can bring about serious economic and financial problems. High import content or profit outflows, for example, result in loss of foreign exchange and thereby contribute to balance of payments difficulties and increase external debt.

Within this context, we strongly believe that no investment negotiations should be launched at the WTO for the following reasons:

1- Wrong forum

WTO is the wrong forum to negotiate a multilateral framework for investment: There is the danger that WTO rules for investment would:

- severely restrict vital policy space to ensure that investment promotes, rather than endangers, sustainable development;
- be negotiated in a way that forecloses the effective participation of developing countries; and
- be enforced through WTO dispute settlement procedures, which are inappropriate to investment and developing country needs.

Restriction of Policy Making Space

To realize the potential benefits of FDI and minimize costs, it is crucial that governments retain the right to carefully regulate FDI at the national level. Such regulation may include strategies to attract good quality investment, that develop productive capacity, including: performance requirements to ensure positive spill-over effects to the local economy; incentive mechanisms to direct FDI into priority areas determined by the host country in question; screening mechanisms to discriminate on the basis of the investment’s likely contribution to development goals; strategic decisions to enable local participation, ownership and control in selected sectors or in the economy overall; and other regulations to protect particularly vulnerable groups in a society, public health and the environment.

However, the application of so-called “core principles” of non-discrimination in the WTO such as national treatment and MFN would directly infringe on a country’s capacity to regulate foreign investors. For instance, national treatment, while potentially useful for trade negotiations in the area of goods, is completely inappropriate and highly damaging for regulating investment, because it aims at treating domestic and foreign investors in the same way, ignoring the fact that foreign and domestic investment are fundamentally different in nature.

Moreover, developed country members will insist on additional provisions that are adverse to developing countries’ interests such as pre-establishment rights, further limits on performance requirements, rights to compensation and unhindered repatriation of profits. Furthermore, the more intrusive obligations of expropriation and general treatment are likely to be pressed on developing countries as part of the program of “progressive liberalization” at the WTO.

Existing WTO regulations on investment in the General Agreement on Trade in Services (GATS)⁴ and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁵

³ UNCTAD, Trade and development report 2002

⁴ During the Uruguay Round, proponents of a services agreement raised expectations that an international agreement on services trade would increase FDI inflows to developing countries’ service sectors. However,

are already going down that route. In the GATS negotiations investment regulations and performance requirements have become a target for further liberalisation.⁶ The situation is similar for the Agreement on Trade Related Investment Measures (TRIMS). The TRIMS explicitly constrains governments' use of certain regulatory practices, which aim at securing benefits from investments and promoting sustainable development.

A recent study released by UNDP states that “the TRIMS agreement does not give developing countries the policy space they need to use certain development policy instruments –such as local content and other performance requirements- that could enhance their value added, employment and trade competitiveness.” It continues by saying that “in negotiations on a multilateral investment agreement, industrial countries will seek to reduce the choice of development instruments available to developing countries such as performance requirements” and that “an investment agreement under the current world trade regime will likely considerably limit developing countries' policy autonomy.”⁷

Lack of Effective Participation

Experience has shown that WTO agreements, while negotiated by all member countries, are in the end finalized by a mere handful of countries. This process has repeated itself in the Doha Preparatory Process and at the Ministerial itself where overnight closed meetings of approximately 20 members yielded a result that all members were obligated to follow. Equal and effective participation by all members in the WTO has been an arduous struggle for developing country members. A solution regarding this endemic problem is still far from reach.

Previous adverse experience such as on Trade-related Intellectual Property Rights (TRIPs) have shown that agreements negotiated under time pressure, without full participation of developing countries, create enormous problems down the road, further undermining the credibility of the WTO as a negotiating forum. The TRIPs negotiations are also a historical warning against WTO negotiations on issues that are not directly trade related.

Developing countries' lack of ability to effectively participate in WTO deliberations and decision-making processes has also become evident during the WGTT's discussions on investment. This is exhibited by the fact that the majority of the written contributions to these discussions have come from industrialized countries, specifically the demanders of the issue. The power imbalance, the ambitiousness of the existing WTO agenda and the lack of resources of

to date, many developing countries have not yet seen any increases in FDI let alone any positive effects thereof. Given inconclusive evidence, there is a need to assess the effects of GATS commitments on FDI flows and their impacts on developing countries more broadly. See Communication from Cuba, Dominican Republic, Haiti, India, Kenya, Pakistan, Peru, Uganda, Venezuela and Zimbabwe on Assessment of Trade in Services, S/CSS/W114, 9 October 2001.

⁵ Similarly, during the negotiations of the TRIPS Agreement, industrialized countries suggested that such an agreement would foster economic development by attracting FDI and increasing the use of technology in developing countries. Again, the issues surrounding the TRIPS Agreement have clearly proven detrimental for developing countries.

⁶ The GATS-request of the European Union leaked to the public show that the EU targets a wide variety of investment measures and performance requirements such as laws on profit remittances and repatriation, laws on national priority in purchasing assets or ownership of land, laws on hiring local personal and joint venture requirements.

⁷ Making Global Trade Work for Poor People, Kamal Malhotra and others, published by UNDP, Rockefeller Foundation, Rockefeller Brothers Fund, Wallace Global Fund, Heinrich Boll Foundation, 2003, pp244 and 248

many of the developing country members make it impossible for weaker members to arrive at an informed decision given the short time frame to Cancun.

In spite of the fact that an investment agreement at the WTO will have serious impacts on people's lives and the environment, both in developed and developing countries, civil society has been excluded from the decision making process, both at national and WTO level. As a result, the outcome will most likely be an investment agreement that reflects the interests of influential Northern WTO Members and their companies, while paying lip service to the interests of the developing world.

Inappropriate Dispute Settlement Understanding

Any investment rules developed in the WTO would most likely be enforceable through the WTO's dispute settlement system. Whilst proponents of international investment rules consider the effectiveness of the WTO's dispute settlement as one of the main reasons to place new issues under the umbrella of the WTO, this very argument gives rise to serious concerns for developing countries. The existing WTO dispute settlement system is highly imbalanced. Should the proponents for investment rules succeed, this imbalance will worsen with the inclusion of enforceable investment provisions that are harmful to development, environment and human rights.

2- Wrong focus

Sustainable Development should be the central goal of any international framework for investment. Unfortunately, discussions at the WGTI have so far failed to take a pro-sustainable development approach. It is unlikely that this will occur given that trade liberalization and pro-sustainable development investment policies can often be at odds with each other. The WTO has yet to prove that it will be able to transcend its mercantilist roots.

The World Bank, in its Global Economic Prospects Report 2002, warned against the potential cost for developing countries of agreeing to bilateral or regional investment rules without any proof that these constraints on their regulatory power would lead to higher and better quality investment. According to empirical evidence, the share of FDI received by developing countries is relatively unaffected by the signing of a Bilateral Investment Treaty (BIT). Other factors such as political stability or market access into developing countries are much more important determinants of foreign investment.

Major proponents of such an agreement have disregarded this question and have attempted to shift the discussion away from a debate about whether a multilateral framework on investment should be negotiated under the WTO, to a debate about the probable content of any such agreement.

Moreover, industrial countries have not shown any willingness to respond to genuine development concerns expressed by developing countries. Their objective is clearly to provide a constraint-free investment environment for their own companies rather than create an environment conducive to high-quality investment in the developing world.

This is why the proposal put forward by several developing country members⁸ to put binding obligations on home countries and multinational companies so as to improve their investment

⁸ China, Cuba, India, Kenya, Pakistan, Zimbabwe.

practices and enhance transparency has not been taken up by any of the proponents of a WTO agreement on investment.

Instead of pushing for a pro-investor agreement at the WTO, industrial countries should work towards improving the quality of foreign investment flows into developing countries by monitoring and regulating domestically the activities of their own multinational companies.

3- Wrong priority

The so-called Doha Development Agenda should be about rebalancing the whole of the WTO agreements, which is biased towards the interests of industrial countries to the detriment of the developing world. The lack of meaningful progress on TRIPs, agriculture, special and differential treatment and implementation which are of vital interest to developing countries requires a halt in attempts to launch new negotiations on issues that most of them feel they do not need and cannot afford.

Conclusion

In the run up to Cancun, the pressure to start negotiations on WTO-investment agreement will become intense.

It is clear from what we have said so far that an investment agreement at the WTO would have adverse implications for sustainable development. There is no evidence to date that suggests that developing countries have had the time, the resources and the assistance to “better evaluate the implications of closer multilateral cooperation for their development policies and objectives” regarding investment as mandated in the Doha Declaration.

CIEL, IATP, Oxfam, PSI, TWN and WWF call on all WTO members to refrain from launching of negotiations of an investment agreement in the WTO.

We also call on developed countries to address key issues of interest to developing countries currently on the WTO agenda, such as TRIPs, agriculture, services, implementation and special and differential treatment, and to reform existing WTO rules and agreements that already give too many rights to foreign investors (TRIMs and TRIPs).

Signatories

CIEL (Center for International Environmental Law)

IATP (Institute of Agricultural and Trade Policy)

Oxfam International

PSI (Public Services International)

TWN (Third World Network)

WWF (World Wildlife Fund for Nature)