European Services Forum

ESF03-28

Mr Pascal Lamy
Member of the European Commission
Trade Commissionner
European Commission
Rue de la Loi, 170
B - 1049 - Brussels

Brussels, 30th April 2003

Subject: **ESF call for an effective launch of negotiations of a Multilateral Agreement on Trade and Investment**

Dear Mr Lamy,

Removal of trade barriers in market economies should include, in our view, the removal or reduction of barriers to foreign direct investment, transparency of national investment regimes and improving levels of investment protection.

This would help to facilitate Foreign Direct Investment (FDI) flows which now form an indispensable element of modern trade activities. International investments are an increasingly important driving force in domestic economic development.

Countries with a sound and reliable legal framework for foreign direct investment would benefit economically because stable and business friendly conditions are often more important than traditional investment promotion activities in attracting foreign direct investment.

The EU is the world's biggest receiver and exporter of FDI, and statistics show clearly that, over the last four years, the larger part of FDI is related to services, with 60% of the EU FDI outflows in the services sectors, and 75% of the EU FDI inflows in the year 2000 (source: European Commission).

Two factors are of high importance in guiding foreign direct investment decisions for all sizes of companies: a secure and stable legal environment, and sound local infrastructure.

These conditions will have to be fulfilled before most companies will consider any substantial investments. The host Government's attitude to foreign direct investment and to business in general is also important, as is the financial infrastructure. In addition, the quality of public governance, and the quality of the administration that affects legal security and stability are also important factors for foreign investors.

Today, international investment activities are governed by over 2100 Bilateral Investment Treaties (BITs), regional agreements such as the North-American Free Trade Agreement (NAFTA), and to varying extent by multilateral agreements within the framework of WTO, i.e. Trade-Related

Investment Measures (TRIMS), Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS).

Extensive though it is, this patchwork arrangement is felt to be insufficient by internationally investing companies and most governments of market-orientated countries, as well as national and international trade related organisations.

The European services industry values very much the provisions of the GATS, and in particular Article I, subparagraph 2 (a) – cross border supply -and 2 (c) – commercial presence, as well as Article XVI, subparagraph 1 and its footnote n° 8. These provisions ensure market access for the investments of services companies. That said, they do not guarantee investment protection. Furthermore, many services companies also need to use hardware and other goods to ensure effective operations. This is true for many service sectors, notably telecommunications, IT, environmental, energy, distribution, and transport. The GATS does not cover market access to, or protection of, this necessary hardware for “hybrid” companies.

That is one of the reasons why ESF strongly favours the launch of negotiations of a multilateral framework of rules on trade and investment. ESF adopted a Preliminary Position Paper in November 1999 and would like to take this opportunity to reiterate its call for the launch of negotiations on this issue.

A WTO Agreement on Trade & Investment could provide the necessary legal framework to help overcome the present patchwork of rules on investment. This is also reflected in Para. 20. of the Declaration concluding the fourth WTO Ministerial Conference in Doha in November 2001.

"Recognising the case for multilateral framework to secure transparent, stable and predictable conditions for a long term cross-border investment, particularly foreign direct investment, 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 of modalities of negotiations".

A WTO agreement on trade and investment, including investment protection, would show the willingness of governments to create a more stable environment for foreign direct investment. Such an International Agreement would create a climate of trust that will make positive investment decisions easier and more likely.

Such an agreement would contribute, without any doubt, to more sustainable development because it could help to reverse the drop of foreign direct investment in developing countries since 1999.

ESF welcomes the good atmosphere which prevailed within the WTO Working Group on the Relationship between Trade and Investment (WGTI) and notes with satisfaction that many constructive proposals have been tabled by many trading partners since the Doha Ministerial, both from developed and developing countries, as foreseen in paragraph 22 of the Doha Declaration.

ESF welcomes the various contributions on all the specific issues like scope and definition; 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 between Members.

ESF would like to underline that to make a WTO Agreement on Trade and Investment effective, it must address companies' needs. If the WTO Agreement on Investment is to have the intended positive effects of facilitating increased foreign direct investment flows, it should:

- Be legally binding and based on the fundamental legal principles of most favoured nation and of national treatment (i.e. non-discrimination);
- Contain:

- ✓ A stand-still against the introduction of new barriers on to investment;
- ✓ Post investment protection;
- ✓ Protection of all material and intellectual property of the company;
- ✓ Effective protection against direct expropriation as well as against indirect expropriation through discriminatory treatment;
- ✓ A mechanism for compensation in the case of expropriation
- ✓ Independent and binding disputes settlement mechanisms;
- ✓ Right of the company to determine its own ownership structure and provisions on legal, regulatory and administrative transparency;
- ✓ The resolving of possible conflicts between the Agreement, Bilateral and /or Regional Investment Treaties.

- Promote scheduling of concrete specific commitments by WTO members, to further open their markets to foreign direct investment.

ESF proposes that the WTO State-to-State dispute settlement mechanism should be applicable to all cases of non-compliance with the Agreement, as for any other WTO agreements. In addition, to ensure an effective protection of investors´ rights, ESF believes that an “investor-to-state” dispute settlement provision should be included in the Agreement. An “investor-to-state” dispute settlement could be dealt with either by the WTO Dispute Settlement Body, if the host state of the investment agrees, or by an international arbitration body. Alternatively disputes, where expropriation and compensation might be under discussion between an investor and a state, could be managed, as is already the case for the large majority of the BITs, by independent dispute settlement mechanisms like that of the United Nations, of the World Bank or of the International Chamber of Commerce (ICC). These mechanisms have shown their efficiency and independence over the years and, hopefully, should not be seen as an attempt to call in to question the sovereignty of countries which, in many cases, have already accepted their competences.

A legally-binding, comprehensive WTO agreement on rules for investment should pave the way for better market access, appropriate transparency of national regulations, high standards of investment protection and substantial economic growth worldwide including sustainable development.

ESF urges all WTO Negotiating Parties to build on the momentum existing on this issue in Geneva and to adopt all resolutions needed to start negotiations on a WTO Multilateral Agreement on Trade and Investment at the Fifth WTO Ministerial Conference in Cancun in September 2003.

ESF will continue to monitor this issue and would welcome the opportunity to forward its comments on the various negotiating proposals in due course.

Attached is the list of ESF Members who support this Position Paper.

Yours sincerely

Sir Iain Vallance
Chairman

List of ESF Members Supporting the
Position Paper on Trade and Investment – 28th April 2003

Accenture
Architects' Council of Europe –ACE
Association of Commercial Televisions - ACT
Association of European Airlines – AEA
ARD
Arup Group Ltd
AVIVA (CGNU)
AXA
Barclays PLC
British Telecommunications plc
Budesverband des Freien Berufe – BFB
Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
Confederation of Bristish Industry - CBI
Comité Européen des Assurances - C.E.A.
European Council of the Liberal Professions – CEPLIS
Clifford Chance
Comité de Liaison des Géomètres Européens – CLGE
Commerzbank AG
Deutsche Telekom AG
DHL Worldwide Network SA
EDS Europe, Middle East & Africa
Ernst & Young
Espacio y Entorno (Architect)
Eurelectric - Union of the Electricity Industry
EuroCommerce
European Association of Cooperative Banks – EACB
European Banking Federation – FBE
European Community Shipowners' Association – ESCA
European Express Association – EEA
European Federation of Engineering and Consultancy Association – EFCA
European Film GATS Steering Group
European International Contractors - EIC
European Public Telecom Network – ETNO
European Retail Round Table – ERRT
European Savings Banks Group – ESBG
Federation of European Consultancies Associations - FEACO
Fédération des Experts Comptables Européens – FEE
Federation Européenne des Fonds et Sociétés d'Investissement - FEFSI
Fédération de l'Industrie Européenne de la Construction – FIEC
Federation of Professional Industry and Services Organisations in Italy - FITA
France Telecom
Free and Fair Post Initiative - FFPI
Gide Loyrette Nouel
Herbert Smith
International Air Carrier Association - IACA/ACE
IBM Europe, Middle East & Africa
International Federation of the Phonographic Industry – IFPI
International Financial Services, London - IFSL
KPMG
La Poste
Lloyd's of London
Marks & Spencer plc
Metro AG
Microsoft Europe, Middle East & Africa
National Bank of Greece
H-J Pohl . Dr J. Bauer – Rechanwälte
Posten AB
PostEurop
Poste Italiane S.p.A.
PricewaterhouseCoopers
PT - Palvelutyönantajat ry - Employers' Confederation of Service Industries, Finland
Royal Ahold NV
Royal Bank of Scotland – RBS
Siemens AG.
Société des Auteurs et Compositeurs Dramatiques – SACD
Suez
Svenskt Näringsliv (Confederation of Swedish Enterprise)
Telefónica SA
TPG
TUI A.G.
UNICE
UNICE WTO Working Group
Universal Music International
UNIQA Versicherungen AG
Vivendi Environnement
White & Case LLP
Züblin