

30 April 1993

LW/ng-jr

Summary of General Statements
on Investment, Part III,
Plenary 27 April 1993

At the Plenary meeting on the 27 April 1993 delegations were invited to make general Statements on the investment part of the Charter Treaty.

USA recalled the discussion the same morning on Trade where, it seemed, there was a broad conviction among negotiating parties that there is a need to aim for the legally binding GATT-by-reference-approach, even though it is an imperfect approach.

The need for an overall balance in the Agreement was endorsed by USA.

A central pillar in the Agreement is for the USA a strong and sound investment chapter, in order to give security to foreign private investors who want to invest in countries of Eastern Europe and former Soviet Union. These countries have all been out of the mainstream of development, and this process of establishing protection for investments is not an easy process for them.

USA intends to seek a solid set of investment protection provisions in the final agreement.

USA also intends at the end of the day to have greater access for investors to and availability of resources not only to USA but also to other Western countries and potentially among the Eastern countries.

Returning to the need for all over balance in the Agreement, USA stated that they would be comfortable even with best efforts or a legally binding approach in the trade area, provided that it started on the basis of a GATT-by-reference-approach incorporated into the Agreement. The disposition of the Plenary is clearly to seek higher standards on the trade side. Being the case they could imagine that negotiating parties would also aim high for standards on the investment side. The starting point should be NT and derogation or exceptions herefrom could be only on the basis of pre-existing law, or in the case of the countries in the East who's legislation is still influx. Such exceptions would naturally be scrutinised from both sides (East and West).

USA anticipates further discussions and bargaining with respect to Annexes A and T which would be worth while once the main text of the Agreement is within reach and can be concluded within a reasonable period of time and emphasised that it is time to move forward.

EC would not repeat their opening statement from that morning and in short they stated:

1. that protection of investments is an essential factor in achieving the goals set out in the Treaty;
2. that the text is moving in the right direction and;
3. that they would like undertaking from all parties to ensure that the Agreement becomes a firm and credible instrument to provide stimulus to investment in production, transport and the rational use of energy.

RO stated

1. that they had done their best to achieve progress and were almost proud of the results;
2. that the countries in transition were indeed assisted by the Annexes A and T in order to get in line with the Agreement; and
3. that they would like to attract as many investors as possible by achieving the best conditions possible to guarantee foreign investments in RO; and
4. drew attention to the BA-37, which comprise the views of all delegations - a useful document in ensuring not to reopen closed discussions and a good reminder of points yet to be resolved.

CH emphasised that the investment part is the most important part of the Agreement which to many negotiating parties would be trade-off in relation to other areas and singled out three criteria for increased capital flow in new areas:

1. the principle of NT;
2. free transfer of dividends and;
3. no administrative obstacles to such transfers.

CH reminded the Plenary that investors know what risk to accept and that the need for returns on investments increases with risks assessed, emphasising the importance of guarantees. Furthermore, in their view transitional periods ought to be as short as possible in order to attract investments.

J added that the investment part of the Agreement in their view was the most important part and that the aim should be to secure certainty, stability and transparency. An effective implementation of the Agreement was also considered important.

1. They emphasised that Annex A's should be a binding part of the Agreement, as should be the commitment to "standstill".
2. There should be no exceptions to MFN which should be the minimum standard in the Agreement. They expressed some concern about Article 18 which in their view may allow exceptions to MFN in bilateral or regional agreements as such agreements can supersede the Treaty.
3. Furthermore, they considered treatment of investment in the "post investment" phase an important issue. One should therefore be careful to limit exceptions to MFN or NT in the post investment treatment.

Specific concerns would be addressed later.

CDN said that there should be no doubt about the importance which CDN attaches to the investment part of the Agreement and that it is the part where the greatest benefits are to be expected. CDN furthermore agreed with the three points outlined by J. CDN stated that a great deal of work remained to be done to get the provisions right and mentioned some points of specific concern. CDN concluded that the greatest possible benefits are to be obtained but it is also a considerable challenge bearing in mind that it is a multi-lateral Agreement not only between OECD and non-OECD countries. It would move the goal post in the energy field on a sectoral basis among OECD countries as well.

RUF stressed that this would not be the final statement but more that it should be seen as a start of the discussions. RUF furthermore stated that investment is not the only, but a basic pillar in the Treaty and the starting point of the initiative based on Mr Lubbers' thoughts, based on the natural understanding that the energy area is a key sector of the Russian economy, but trade is considered as important as investment.

They expressed understanding towards the concerns in relation to investments but at the same time indicated that the question of MFN as a minimum seemed less important for those which do not have a full energy cycle within the country. Transition from MFN to NT was pointed out as more vital than all other requirements under transition. It was expressed that providing NT would have to be accompanied by elaboration of a basic energy economy in the country.

They appealed for understanding because their legislative basis is not as fully developed and detailed as in the West, and referred to the comprehensive set of laws needed or affected directly or indirectly by the Agreement.

Alongside underlining the difficulties they face compared to countries with legislation already in place, reference was made to restrictions in in-flow of capital, due to the economic climate and the uncertainties concerning applicable rules in RUF. This did not however seem to affect interest in West Siberia. In fact, even though investment risks presumably were higher than in other countries they noted competition among Western companies to get access to resources in Russia, and even some competition in providing credits.

They stated that they would try to minimise the transitional periods but once more referred to the complex legislative situation. They were therefore hesitant to establish firm deadlines already.

It was pointed out that even if ratified quickly it would be necessary to establish an efficient machinery for implementation.

As to the Annex A's, setting out the exceptions, they noticed a difference between RUF and other countries where changes would not upset the structure or balance in the energy sector. Annex A has a different meaning to RUF than to others;

N stated that it was timely to have this opportunity to discuss the conceptual framework and made reference to their position paper, CONF-52, outlining their concerns relating to the investment part of the Agreement. The thrust of these papers is to divorce the access to resources from flow of capital. N also recalled proposed Articles dealing with access to resources, state participation and ownership to resources. Furthermore, N underlined that the principle of NT in the pre-investment phase could not be accepted. N does not recognise CONF-50 as basis for the discussion as it does not reflect the present stage of negotiations. N confirmed willingness to discuss other arrangements than the Articles proposed by N to meet their concerns on access to resources.

CZ pointed out that governments in relation to allowing increased access for investors in countries in transition might choose between three different approaches. One could: create obstacles, support investments or be neutral. CZ expressed full support for CONF-50 which, though neutral, would create favourable conditions for investments.

In addition they raised a concern regarding the difficulties in obtaining state guarantees for loans for certain categories of countries. In their view that is an obstacle, where access for all countries to guarantees on an equal basis would be welcomed.

Ambassador Rutten summed up that it was an encouraging and positive response from delegations to the proposals in Article 13, based on NT in the pre-investment phase, with certain exceptions to be claimed in Annex A and the standstill obligation. The Chairman noted that one delegation could not accept the principle of NT, but was willing to discuss intermediate solutions to other suggestions made.

The negotiations would now continue towards conclusion and the Chairman - with reference to the USA statement - stressed the importance of the Agreement and appreciated the RUF comment that the investment part of the Treaty was not the only pillar, though an important one.