

**Working Group on the Relationship
between Trade and Investment**

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COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

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CONCEPT PAPER ON DEVELOPMENT PROVISIONS

This concept paper is intended as a suggestion on the development provisions that could be included in a Multilateral Investment Framework. It should not be read as a text proposal.

1. Paragraph 22 of the Doha Ministerial Declaration mentions “development provisions” among the issues to be clarified by the Working Group on the Relationship between Trade and Investment (WGTI), in the period until the Fifth Ministerial Conference. WTO Ministers have recognised at the Doha Ministerial Conference that the development dimension should be incorporated as a central and cross-cutting element of the Doha Development Agenda (DDA). The EC fully supports the objective of having sustainable development appropriately reflected in the DDA, as provided for in paragraph 51 of the Doha Declaration and, in this context, believes that the provisions of a multilateral investment framework should take into account the specific needs and constraints of developing countries.

2. The development dimension is a horizontal concern that has been addressed in the WGTI in the context of specific discussions on scope and definition, transparency, non-discrimination and pre-establishment commitments¹. In addition to the written submissions already presented² and the statements made during past meetings, this submission outlines some views on how a multilateral framework on FDI could incorporate development provisions.

3. In this paper we will outline some ideas on the concept of flexibility for development, existing development provisions, in particular in the GATS, and technical assistance.

¹ See, for instance WT/WGTI/W/19, W/22, W/23, W/28, W/29, W/30, W/33, W/34, W/36, W/37, W/42, W/51, W/54, W/68, W/71, W/75, W/79, W/84, W/89, and W/104.

² In particular, EC submissions WT/WGTI/W/84, W/89 and W/102.

I. INVESTMENT AND DEVELOPMENT

4. Investment liberalisation should be seen as part of the broad process of regulatory reform that developing countries (as well as developed countries for that matter) have to go through in order to create an enabling business environment, while retaining their ability to regulate for public purposes.

5. It is undisputed that FDI can bring important developmental benefits to recipient countries, in the form not only of capital but also technology, knowledge, improved access to export markets, etc. An inflow of FDI can be especially important in order for developing countries to be able to reap the benefit of potential market access opportunities created by open trade policies and future unilateral or negotiated liberalisation. As a consequence, attracting foreign direct investment has become an objective of particular importance for many developing countries. In parallel to unilateral domestic reforms most countries have concluded bilateral and regional investment treaties for the purpose of promoting and protecting investment flows with their partners.

6. At the same time, while most developing countries recognise the merit of providing an open and transparent investment climate in order to attract FDI, some of them also feel the need to maintain certain investment policies and measures aimed at promoting the development of specific sectors, regions, filling technology gaps or protecting minorities and cultural heritage. Regardless of the effectiveness or appropriateness of any specific policy, it is our firm conviction that any development policy and measures can and should be compatible with a multilateral investment framework.

7. By saying this, we believe not only that a MIF can and should be compatible with development objectives and policies, but in fact it could actually support them. Let us not forget that developed countries are both sources and destinations of the greater part of FDI flows world-wide. However, developing countries are those who most need FDI in order to make up for their lack of domestic capital and technology. A MIF would certainly benefit developing countries in particular by improving the legal security, transparency and credibility of their domestic framework.

8. Thus, should a MIF include meaningful provisions that enhance transparency, predictability and non-discrimination for FDI, those who will mostly benefit from it will be developing countries.

II. THE CONCEPT OF FLEXIBILITY

9. We wish to underline that flexibility for development is an important concept that should be taken into account in the negotiation of a MIF. However, if flexibility is understood as the right of a government to discriminate among investors, it will not be effective as a means to enhance development. Flexibility instead can be useful if it is seen as a broader concept which combines an appropriate policy space that governments require to pursue their national development objectives with the quest for an appropriate stable, predictable and transparent FDI framework through which firms are encouraged to operate.

10. Flexibility is to make up for insufficient financial and human resources and, in particular, institutional weaknesses which put heavy restraints on developing countries. Flexibility may typically involve: lower levels of commitments; asymmetrically phased implementation timetables; exceptions from obligations in certain areas; flexibility in the application of – and adherence to – disciplines.

11. As already discussed in this Working Group, international investment agreements can include each, or a combination of these approaches and instruments.

III. SOME DEVELOPMENT PROVISIONS THAT ALREADY EXIST IN THE WTO

12. The WTO system includes a number of development provisions throughout the different agreements. The WTO Committee on Trade and Development (COMTD) has classified the different special and differential (S&D) treatment provisions in the following 6 categories³: (i) provisions aimed at increasing the trade opportunities of developing countries; (ii) provisions under which WTO members should safeguard the interests of developing country members; (iii) flexibility of commitments, of action, and use of policy instruments; (iv) transitional time periods; (v) technical assistance; (vi) provisions relating to least-developed country members.

13. A number of these provisions already apply directly or indirectly to FDI, as the WTO Secretariat explains in its paper WT/WGTI/W/119.

A. FLEXIBILITY AS THE UNDERLYING PRINCIPLE: THE EXAMPLE OF GATS

14. The GATS is probably one of the most “development-friendly” agreements in the WTO system because of its structure. The GATS architecture has a “built-in” mechanism, which has the same effect as and even stronger than a S&D provision, by providing complete flexibility in making commitments.

15. In fact, Article XIX spells this out by recognising that the negotiation of specific commitments shall take place with due respect for national policy objectives and the level of development of individual members. Moreover, it recognises developing countries’ right to open fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their development situation.

16. It has been noted that “*The GATS does not adopt the traditional concept of Special and differential treatment, according to which, to a large extent, all developing countries are treated the same. It rather addresses the concerns and needs of developing countries through providing appropriate flexibility on an individual basis. Such flexibility is reflected in numerous provisions of the Agreement as well as in its basic structure, which allows each Member to undertake liberalisation commitments in a manner consistent with its development needs. Such commitments are always negotiated on a case-by-case basis*”⁴.

17. We entirely share this appreciation. This is why we support the GATS-type approach as a useful model for a MIF. It is also evident that most developing countries have made ample use of the flexibility provided by Art. XIX GATS by taking fewer, and less comprehensive commitments than developed countries.

18. In the end, under this system, each country draws its own balance between the need to offer a stable, predictable and transparent policy framework to foreign investors and the need to retain a margin of flexibility necessary to pursue its specific national development objectives.

IV. TECHNICAL ASSISTANCE

19. As suggested in our submission WT/WGTI/W/102, Technical assistance and capacity building should be foreseen for the pre-negotiation phase, during the negotiations as well as the implementation of provisions that required specific additional resources for developing countries.

³ WT/COMTD/W/77 and Rev.1 and Add. 1-4.

⁴ WT/COMTD/W/77 and Rev.1 and Add. 1-4.

20. In the case of, for instance, transparency provisions, the benefits of the provisions included in a MIF would be greatly enhanced by promoting investment opportunities in a pro-active manner. Host and home countries, could benefit from transparency provisions included in a MIF, respectively as a way to inform about investment opportunities in their territory and to the advantage of their investors. Transparency and dissemination of information on investment laws and regulations, should be an important element of investment promotion for all countries and in particular developing countries.

21. As we have pointed out in document WT/WGTI/W/110, technical assistance for the specific goal of improving transparency and investment promotion could build on existing projects and offer support to officials and investment promotion agencies from developing countries in terms of know-how as regards (i) identification of national legislation concerning investment, (ii) dissemination of information, and (iii) strengthening the capacity to upgrade regulatory frameworks and to maintain this upgrading.

V. CONCLUSION

22. Rather than only including specific development or S&DT provisions, which can certainly be useful in certain cases, we believe that the development dimension should be incorporated in the overall structure of a MIF. The end result of a MIF should be development friendly. However, the level of commitments of each country will determine the value added of an MIF for itself and its real contribution to the improvement of FDI conditions world-wide to the benefit of development.

23. A MIF should have among its key objectives, the promotion of development and the growth of the capacity of developing countries to attract FDI flows and also to become sources of FDI.

24. As to the coverage, the agreement could focus on FDI, which is the most stable form of capital, it is widely acknowledged to be essential for development and it is one of the main engines of world trade and growth.

25. A flexible, GATS-type structure based on positive commitments could be used for market access and NT provisions at the pre-establishment stage. This mechanism would allow some countries to take phased commitments on market access and NT which would be adapted to their level of development. The level of commitments of developing countries would be commensurate to their level of development and there would be no obligation for them to liberalise sectors. Moreover, each developing country would be able to attach to its market access and NT commitments possible conditions related to its development objectives.

26. Technical assistance should be foreseen for developing countries for all the stages, i.e. the pre-negotiation phase, the negotiation as well as for the implementation of provisions that required specific additional resources.

27. The right of members to regulate 'in order to meet national policy objectives' should be explicitly recognised, as well as possible exceptions for public interest (for example: security, protection of public moral, public order and consumers, exercise of governmental authorities) and restrictions to safeguard the Balance of Payments in accordance with IMF rules.

28. The question of investors' behaviour and their responsibility vis-à-vis host countries could also be addressed. As mentioned in our submission WT/WGTI/W/81, there is a concern of developing countries that MNEs apply high standards of behaviour, so that host countries can be in a position to reap most benefits from FDI. In our view the OECD Guidelines for multinational enterprises provide a useful example of how to ensure that MNEs conduct their activities in a responsible manner and in harmony with the policies of the countries in which they operate.

29. We look forward to continuing our discussions on the possible development provisions to be included in a MIF and to hearing other Members' views and suggestions on all the options available.
