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Working Group on the Relationship between Trade and Investment

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COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

The following communication, dated 26 June 2002, has been received from the Permanent Delegation of the European Commission.

CONCEPT PAPER ON NON-DISCRIMINATION

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

1. WTO Ministers have recognized at the Doha Ministerial Conference 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. Paragraph 22 of the Doha Ministerial Declaration mentions, inter alia, "non-discrimination" as one of the issues to be clarified in the Working Group on the Relationship between Trade and Investment, in the period until the Fifth Ministerial Conference.

2. Non-discrimination is one of the basic principles of the WTO system and has been addressed in relation to investment during several meetings of this working group since 1997.[1] This submission aims at outlining the EC and its Member States view on how the principle of non-discrimination could be addressed in a multilateral framework on FDI.

3. In this paper we will focus on the 2 principles of MFN and NT treatment, without addressing other standards included in international investment agreements such as "fair and equitable treatment". The concept paper on modalities for pre-establishment already presented by the EC to this working group addresses the principle of non-discrimination in the pre-establishment stage of investment.

I. WHY NON-DISCRIMINATION?

4. Host countries may wish to treat different investors in different ways, for legitimate reasons. Customary international law does not require any host country to guarantee a non-discriminatory treatment to foreign investors wishing to establish their activities in its territory or even to those

[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.

already established. Nevertheless, host countries are consistently removing discriminatory barriers to the entry and operation of foreign investors in their territory. Given the fierce international competition to attract FDI, some countries have even decided to provide specific incentives for foreign investments creating a sort of reverse discrimination against their own local companies, although most countries make the incentives available to both domestic and foreign investors on a non-discriminatory basis.

5. The non-discriminatory treatment of international investment is a necessary condition for the development of a level playing field for FDI worldwide which would improve the allocation of capital and minimize distortions, releasing additional resources. Discrimination on the basis of the nationality of the (ownership, control, or place of residence) investor does not make much sense given the complex organizational structure of today's multinational companies. Moreover, all countries have realized that in order to attract foreign investors they need to provide, as a pre-condition, a predictable, transparent and non-discriminatory regulatory framework, beyond macroeconomic and political stability, infrastructure, labour skills, etc. This is why more than 2000 bilateral investment treaties and a number of other regional and multilateral investment agreements, all including non-discrimination standards to a certain extent, have been concluded. This is also why the EC and its Member States believe that the time is ripe for the consolidation of basic non-discriminatory provisions in a truly multilateral investment framework.

II. MOST-FAVOURED-NATION PRINCIPLE (MFN)

6. The MFN principle is one of the fundamental elements of international investment agreements and of the WTO system. Under the MFN rule host countries must extend to investors from one foreign country treatment no less favourable than they accord to investors from any other foreign country.

7. The stocktaking exercise of existing agreements involving investment has shown that the MFN principle has been widely included in most bilateral, regional and multilateral agreements.

8. Since Bilateral Investment Treaties (BITs) typically cover investments established in accordance with the laws of the host country, the MFN clause applies, as a general standard, to post-establishment treatment of foreign investments. Some other BITs, for instance those concluded by the US and Canada, as well as the NAFTA, also include the MFN principle with respect to the establishment (or admission) of foreign investments.

9. The MFN provision is often included in combination with the national treatment principle. The combined national treatment/MFN obligation usually accords to investors and their investments the better of national treatment or MFN in order to allow them, for instance, to benefit from incentives for FDI.

10. In the GATS, the MFN obligation applies across the board (pre- and post-establishment) to all services sectors unless an exception is contained in the country list of MFN exemptions.

III. NATIONAL TREATMENT (NT)

11. According to the NT principle, the host country is required to treat the foreign investor and his investment operating in its territory in the same or comparable way as a domestic investor or investment.

12. As for the MFN principle, most of the 2000+ existing BITs require host countries to apply the NT standard for the treatment of foreign investments, once these foreign investments have been admitted. The NT principle is regularly included in BITs involving both developed and developing

countries, in general without sectoral exceptions, since it only covers foreign investments established in accordance with the host country's laws and regulations.[2]

13. In the US and Canadian BITs, the NAFTA, the MERCOSUR Colonia protocol, and other recent agreements, the NT (and MFN) standard applies to the establishment of foreign investors in addition to post-establishment treatment. In these agreement the parties usually include their sectoral exceptions to NT (and or MFN) in an annex.

14. In the GATS the NT principle is a specific commitment which only applies to the sectors listed in each member's schedule. The NT obligation refers to treatment, in respect of measures affecting the supply of services, which should be "no less favourable" than that of like national services and service suppliers. The schedule of commitments also enumerates the possible limitations to NT that each Member maintains on each sector. Thus, in the case of "commercial presence" (i.e. mode 3), the NT principle applies to both the pre-establishment and post-establishment stage of investments in the sectors included in each country's schedule.

IV. EXCEPTIONS TO MFN AND NT

15. The coverage of the MFN and NT provisions in any international agreement depends on the extent of the exceptions attached to them. These exceptions can be divided in 3 categories: general exceptions; sector-specific exceptions, and; country-specific exceptions.

1. General Exceptions

16. General exceptions do not usually apply only to MFN/NT provisions but to the whole agreement. The most common exceptions of this type allow the parties to the agreement to derogate from the provisions of the agreement on grounds of public health, order and morals, national security and protection of the environment.

2. Subject-Specific Exceptions

17. Many investment agreements exclude the application of NT/MFN standards on taxation. Some agreements exclude intellectual property or public procurement from their coverage, taking into account that MFN and/or NT obligations already exist in these areas. Moreover, all agreements involving parties which are members of regional integration organizations exclude the application of the MFN principle to measures taken in the framework of regional integration.

3. Country and Sector-Specific Exceptions

18. Some investment agreements include in an annex the sectors with respect to which each party reserves the right to deny NT/MFN (eg. NAFTA, OECD codes of liberalization, etc.).

19. The GATS allows one-off exceptions to the general obligation of MFN by members, which are notified in their country-specific annex. As for NT, members only apply the principle in the sectors included in their scheduled commitments, where they can also specify the conditions and qualifications to NT.

V. CONCLUSION

20. The EC and its Member States support the inclusion of the MFN and NT principles in a multilateral investment framework. The stocktaking of existing provisions in international investment

[2] As stated, for instance, in India's written submission WT/WGTI/W/71, para. 6.

agreements and the discussions in this working group lead us to believe that multilateral investment rules in the primary (i.e. agriculture, fisheries and mining) and secondary (i.e. manufacturing) sectors, which should not stay behind the level of treatment granted to investments in the services sectors by the GATS, could incorporate:

- a general MFN obligation (including possible exceptions) for foreign investments across the board and on all sectors;

- a general NT obligation (including possible exceptions) for all foreign investments established in accordance with the laws and regulations of the host country (as provided for in most existing BITs);

- specific NT obligations for the establishment (i.e. admission) of foreign investments in those sectors listed in each country's schedule of commitments. The schedule of commitments would also enumerate each member's limitations to NT.

21. As in other international investment agreements, especially those covering the pre-establishment stage, general exceptions to MFN/NT, as well as subject- and country-specific exceptions could also be envisaged.

22. It is understood that the relationship with existing non-discrimination provisions covering FDI in the services sectors (i.e. GATS mode 3) as well as with non-discrimination provisions included in bilateral and regional agreements will need to be carefully assessed.

23. The discussions and analyses carried out in this working group seem to confirm that while on the one side the above provisions would go a long way towards improving the legal security and coherence of international investment rules on the other side they would not prevent host countries and in particular developing countries from pursuing their domestic policies.

24. We look forward to hearing other members' views on these and other possible options available to address the question of non-discrimination in the context of a multilateral investment framework.

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