

COMMUNICATION FROM CANADA

The following communication, dated 2 July 2002, has been received from the Permanent Mission of Canada.

DEVELOPMENT PROVISIONS

I. INTRODUCTION

1. Canada considers that policies conducive to attracting foreign investment, such as transparent and non-discriminatory administrative norms and legal standards, are an essential condition for economic growth. The benefits of foreign investment, such as technological innovation and increased productivity, are most fully realized when local capacities, physical infrastructure, as well as policies of the host government reinforce the way in which the productive capacity of an economy is enhanced through investment, whether it be of domestic or foreign origin.

2. Far-reaching changes in the direction and magnitude of world trade and investment in recent years have brought increased economic growth to many countries. There is broad agreement among all Members of the Working Group on the Relationship between Trade and Investment (WGTI) that foreign direct investment has played, and will continue to play, an essential role in the development process. Although trade and investment liberalization is recognized as important for economic growth, we are still grappling with how best to encourage liberalization across countries that are at various stages of development. The inclusion in international investment agreements of principles and provisions aimed at promoting benefits from international investment flows to all Members is essential. The successful elaboration of such principles and provisions in the context of such a framework, in addition to technical assistance and capacity building, would help encourage foreign investment and promote economic growth and prosperity in developing and least-developed countries.

3. The potential provisions addressing development issues will depend on the architecture, scope and disciplines of any multilateral investment agreement. For example, an agreement with comprehensive obligations may necessitate greater flexibility and development provisions than would an agreement that contains only limited disciplines or commitments. However, the balance between substantive obligations for the liberalization and protection of investments on the one hand, and development provisions on the other, must be struck in a way as to ensure that flexibility does not translate into discrimination. As well, there is a need for a high degree of transparency to ensure that investors are fully cognizant of the conditions governing the treatment of their investments. Finally, technical assistance and capacity building will be required to ensure that developing and least-developed countries are able to participate fully in the negotiation and implementation of any multilateral investment framework.

4. In considering how development provisions might be elaborated in the context of a potential multilateral framework on investment, Canada has found it useful to consider the guidelines set down by Ministers in paragraph 22 of the Doha Declaration. What follows is an attempt to illustrate possible means by which flexibility for development could be incorporated into a prospective investment framework, without seeking to prejudge the form or operation of any eventual development provisions or the architecture and scope of an investment agreement; such an elaboration will be a matter for potential future negotiations. Canada's contribution is made without prejudice to its position in any future negotiations toward a multilateral framework on investment.

A. ANY FRAMEWORK SHOULD REFLECT IN A BALANCED MANNER THE INTERESTS OF HOME AND HOST COUNTRIES, AND TAKE DUE ACCOUNT OF THE DEVELOPMENT POLICIES AND OBJECTIVES OF HOST GOVERNMENTS AS WELL AS THEIR RIGHT TO REGULATE IN THE PUBLIC INTEREST

5. Ministers' direction that any framework should reflect in a balanced manner the interests of home and host countries is predicated on the earlier acknowledgement by Members of the importance of securing transparent, stable and predictable conditions for long-term cross-border investment that will contribute to the expansion of trade. Capital-importing countries equally have an interest in attracting high-quality, productive foreign investment. Capital-exporting countries have an interest in securing market access opportunities for investments in capital importing countries, as well as greater protection for established investments. To the extent that developed and developing countries participate to varying degrees in both inward and outward foreign direct investment, all countries share these interests.

6. As is evident from the Doha Declaration, countries place great importance on ensuring that their ability to govern and regulate in the public interest is preserved. Countries need to preserve their ability to maintain or establish measures in key sectors or policy areas (e.g., culture, regional development, aboriginal affairs). In addition, there is recognition that the extent and pace of liberalization may differ between Members at different levels of development. We note that GATS Article XIX:2 states: "The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors." Canada believes that recognition of the right to regulate, flexibility with respect to key sectors or policy areas, as well as recognition that the process of liberalization should take into account differing levels of development, should be key elements in any agreement on investment.

7. There are a variety of architectural and scope-related elements that appear in investment agreements, and which would arguably appear in a multilateral investment framework, which provide signatories with the necessary flexibility to pursue national policy goals. Such architectural and scope-related elements are normally applicable to all signatories and speak to publicly-defined interests issues, including development-related concerns.

8. A comprehensive multilateral investment framework should include non-discriminatory treatment, which is to say national treatment and most-favoured-nation (MFN) treatment, for investments across the lifetime of an investment. National treatment is a standard principle of non-discrimination in many existing investment treaties, and requires that foreign investors and their investments be treated no less favourably than domestic investors and their investments in like circumstances. In the context of a multilateral investment framework, MFN would mean (subject to possible exception, such as for economic integration) that no Member would receive treatment less favourable than that granted to any other Member.

9. In discussing modalities, the WGTI will have to assess how alternative approaches to commitments (positive and/or negative lists) could be used with respect pre-establishment and post-establishment. Both approaches provide ample flexibility for development purposes. Under a

positive list approach, certain obligations apply only to sectors scheduled, along with specified limitations. Under a negative list approach, reservations and exceptions are taken with respect to obligations of general applicability. Both approaches enable a country to maintain non-conforming measures and to adopt discriminatory measures where necessary. While some WTO Members prefer a positive-list approach for national treatment with respect to pre-establishment, a negative-list approach has been used for MFN in the GATS and for post-establishment national treatment in most bilateral investment agreements. Both positive-list and negative-list approaches can accommodate, in either lists of commitments or reservations, phase-out periods or transition periods.

10. With respect to exceptions to obligations undertaken in any prospective multilateral framework on investment, since it would operate within the context of the other WTO agreements, the general exceptions listed under GATT Article XX and security exceptions under GATT Article XXI, as well as general exceptions listed under GATS Article XIV and security exceptions under GATS Article XIV*bis*, could be examined for their potential applicability to an investment agreement.

11. Moreover, just as GATT Articles XII and XVIII:B permit certain restrictions on trade in goods, and GATS Article XII permits certain restrictions on trade in services, where a country is facing serious balance-of-payments problems, provisions could be built into a prospective framework on investment to permit certain restrictions on investment under particular conditions and circumstances. Such exceptions would have to be applied in a transparent and non-discriminatory manner.

12. Under these various scenarios, while developing and least-developed countries would retain the flexibility to take national developmental policy-related decisions regarding the projected establishment or acquisition of an investment, investors would understand the reasons for such decisions. The host country would maintain policy flexibility and the international investment community would gain the benefit of transparency and predictability.

B. THE SPECIAL DEVELOPMENT, TRADE AND FINANCIAL NEEDS OF DEVELOPING AND LEAST-DEVELOPED COUNTRIES SHOULD BE TAKEN INTO ACCOUNT AS AN INTEGRAL PART OF ANY FRAMEWORK, WHICH SHOULD ENABLE MEMBERS TO UNDERTAKE OBLIGATIONS AND COMMITMENTS COMMENSURATE WITH THEIR INDIVIDUAL NEEDS AND CIRCUMSTANCES

13. In considering the special developmental, trade and financial needs of developing and least-developed countries, perhaps the most significant point is that these considerations refer to their “individual” needs and circumstances. This is significant because it draws attention to the fact that developing and least-developed countries cannot be dealt with as though they comprised a monolithic, homogeneous group. This much is evident even from the differentiation in the use of the qualifiers “developing” and “least-developed”. Beyond the recognition that these countries, as a whole, require special and differential treatment to assist them in attaining their developmental goals, there must also be an acknowledgement that, individually, they may require differing treatment based on their specific objectives and needs. Some have argued in previous meetings of the WGTI that bilateral investment agreements are more amenable to this kind of consideration, and that a multilateral framework would be too unwieldy to accommodate such a disparate variety of needs and objectives. This argument runs counter to the spirit of the Doha Development Agenda, which places the needs and interests of developing and least developed countries at the heart of the Doha Work Programme. In addition to the potential development provisions outlined in the previous section, there are a number of possible mechanisms that would allow developing and least-developed countries to implement a prospective multilateral investment framework commensurate with their individual needs and circumstances.

14. Consideration might be given to phase-in periods for compliance that would allow developing and least-developed countries time to build up the capacity necessary to comply with more

comprehensive obligations. Alternatively, flexibility for developmental purposes could be accommodated by means of phase-out periods for existing non-conforming measures.

15. Consideration could also be given to a mechanism whereby developing and least-developed countries could be granted a grace period allowing them to make adjustments to their lists or schedules. This type of flexibility would obviate concerns that failure to list a measure, or conversely inappropriate scheduling of a commitment, would lock a country into an obligation that would be contrary to its developmental policy objectives. Any such provision would require the most rigorous transparency disciplines to ensure that it was not being applied in an arbitrary or discriminatory fashion.

16. Arguably, the purpose of providing provisions such as phase-ins and grace periods is to allow developing and least-developed countries time to make domestic adjustments/preparations for when their markets are opened to international competition. Such an approach could be complemented by external mechanisms to ensure that the necessary adjustment takes place. Consideration could be given to providing targeted capacity building and/or trade-related technical assistance during the adjustment period to help ensure that the adjustment takes place.

C. DUE REGARD SHOULD BE PAID TO OTHER RELEVANT WTO PROVISIONS

17. As Canada noted in its previous submission on “scope and definitions”, any prospective investment agreement in the WTO would co-exist and interact with a number of other agreements within the WTO system, including the TRIMs and the GATS, as well as with other international agreements on investment. Other WTO agreements are particularly relevant insofar as they contain both investment-related and development-related provisions. Our objective should be to ensure that any development provisions elaborated in the context of a prospective multilateral framework on investment draw on and complement development provisions in the existing agreements, such as the provisions contained in Article XVIII of GATT 1994, among others. Thus, for example, development provisions for non-services sectors should assess the adaptability of the development provisions in the GATS, since this agreement covers, among modes of services delivery, commercial presence.

II. CONCLUSION

18. Canada is committed to actively participating in technical assistance and capacity building activities so that developing and least-developed countries can have in place an appropriate policy framework conducive to attracting foreign direct investment to their economies. The development provisions of a prospective multilateral framework on investment will reflect the eventual scope, structure and substantive obligations of that framework. Regardless of the architecture, the elaboration of the development provisions should be guided by two fundamental principles. These are flexibility and transparency. This will ensure a closer approximation to the optimal balance between countries’ need to retain the ability to maintain or apply measures for national policy objectives and investors’ interest in transparent, stable investment regimes. Canada believes that technical assistance and capacity-building could be most constructive in assisting with this process.
