

**COMMUNICATION FROM CANADA**

The following communication, dated 10 April 2003, has been received from the Permanent Mission of Canada.

**THE INTERRELATIONSHIP AND EMERGING INFRASTRUCTURE OF A  
PROSPECTIVE WTO MULTILATERAL FRAMEWORK FOR INVESTMENT BASED ON  
ELEMENTS IDENTIFIED IN PARAGRAPH 22 OF THE DOHA DECLARATION**

**I. INTRODUCTION**

1. This submission sets out Canadian observations on a multilateral framework for investment that have emerged as a result of clarification of issues identified by Ministers in paragraphs 20-22 – particularly paragraph 22 – of the Doha Declaration. It is based on Canadian submissions and interventions since Doha on these elements, as well as the dialogue and progress that has taken place among WTO members at each meeting of the Working Group on the Relationship between Trade and Investment (WGTI).

2. It is evident from the contents of the 2002 WGTI Report to the General Council (WT/WGTI/6), as well as more detailed individual meeting reports, that the Group has explored many aspects of all the paragraph 22 issues, and indeed has also had the opportunity to deliberate additional issues, in accordance with the Doha Ministerial Mandate.

3. Recalling the basis on which all Canadian papers have been submitted to this Group<sup>1</sup>, this submission is without prejudice to our ultimate position on investment or indeed any other issue in the run-up to the next Ministerial meeting in September in Cancún.<sup>2</sup> Nonetheless, based on recent progress by the WGTI, it is evident to Canada that discussion of the issues singled out for attention by Ministers, as well as additional issues, has facilitated the conceptualization of a realistic, meaningful, and integrated multilateral framework for investment under the WTO umbrella of agreements.

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<sup>1</sup> Canadian submissions as follows: WT/WGTI/W/113 (Scope and Definition); WT/WGTI/W/130 (Non-discrimination and Modalities for pre-Establishment Commitments Based on a GATS-type, Positive List Approach); WT/WGTI/W/131 (Development Provisions); WT/WGTI/W/146 (Exceptions and Balance-of Payments Safeguards); WT/WGTI/W/147 (Consultation and Dispute Settlement); and WT/WGTI/W/155 (Transparency).

<sup>2</sup> See, for example, the iteration of this position in WT/WGTI/W/146, footnote 1.

## II. INHERENT LINKAGES AMONG PARAGRAPH 22 AND OTHER ELEMENTS

4. As a delegation that has made submissions on all elements identified for further consideration by Ministers, in this submission Canada seeks simply to address basic precepts in each, and in so doing point to a few directions that would be most usefully pursued in negotiations. Some of them emerge more definitively when the elements are considered holistically. Thanks to the considerable experience a great many Members have in negotiating investment agreements bilaterally or regionally, not to mention investment provisions in the WTO, it should be pointed out that few of the principles are entirely new to delegations. This is another reason why we feel that negotiating these principles in a comprehensive multilateral forum under the WTO umbrella is overdue.

5. We focus on key interlinkages among each paragraph 22 element, below. In Canada's view, further progress will be best facilitated through the structure and parameters that are inherent in the negotiation of rules deemed mutually beneficial by all Parties.

### A. KEY STRUCTURAL ISSUES

#### 1. Scope and Definition

6. WGTI consideration of a prospective multilateral framework for investment properly commenced with a useful discussion of "scope and definition". In Canada's view, among the important points to recall in this regard are the following: a "scope" article itself would help to anchor a WTO investment framework within the framework of international trade and investment relations more generally, including *vis-à-vis* other WTO agreements themselves. In this regard, the relationship of various provisions of the ASCM, TRIMs and TRIPS agreements, and particularly GATS, that already pertain to investment behaviour will warrant further attention in the course of negotiations to come. Indeed, as negotiations progress, we will be in a better position to discuss and decide how a WTO investment agreement *per se* should function within the WTO family.

7. Definitions, too, shape to a large degree the scope and reach of provisions in an investment accord. For its part, Canada favours starting with a broad definition of investment to better reflect business behaviour in the contemporary world economy. Indeed given the changing dynamics in the way business forms international linkages today, including between home and host entities, any agreement that ignored minority shareholdings and/or strategic alliances risks being an agreement already obsolete.

8. Nonetheless, Canada does not believe that any or all types of investments should fall under the scope of an investment agreement, nor even that all assets that do fall under the umbrella of such an agreement should be covered with respect to all provisions at all times. The precise dividing line between covered and non-covered investments can be made clearer in the course negotiations. Suffice it to say at this stage that Canada addresses this issue in its own investment negotiations in a number of fora already, including with a great many WTO members. In addition, the issues that we should take into account in negotiations have already been successfully identified in the WGTI discussions, including definitions pertaining to investment in existing WTO agreements.<sup>3</sup>

#### 2. Non-discrimination and Modalities for Pre -Establishments Commitments

9. The Canadian submission on these elements discussed these issues together, principally to anchor the discussion of how commitments are made in an agreement to the substantive provisions of

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<sup>3</sup> See WT/WGTI/6, paras. 17-35; also the comprehensive summary of the relevant discussion in WT/WGTI/M17, paras. 43-117.

the agreement itself. As Canada and others noted, the approach to commitments, whether pre-establishment or otherwise, in many respects can determine the scope of the agreement.

10. This discussion does not take place in a vacuum. Non-discrimination is a fundamental principle underlying international trade and investment agreements. At the WTO, investment in services industries encompasses one approach to scheduling commitments; alternatively, among over 2,000 bilateral and regional agreements other approaches are used. In addition, this discussion also naturally leads to a consideration of other issues such as scope and transparency.

## B. OTHER KEY ELEMENTS

### 1. Links to Transparency

11. In paragraph 20 of the Doha Declaration, along with stability and predictability, Ministers highlighted transparency as among the preconditions for a multilateral framework. This is fundamentally important to enhancing prospects for qualitative and quantitative improvements in investment flows, and again has echoes in other WTO agreements. The GATS in particular has important transparency commitments, particularly in Article III, pertaining to investment in services industries. Whatever the structure of an ultimate investment accord, these provisions should also be echoed in an agreement pertaining to investment in goods industries. Finally in this regard, Canada has also maintained that the approach to scheduling commitments will also have a bearing on the inherent transparency embodied in the agreement: an investment agreement predicated on general applicability, with defined exceptions and reservations to selected obligations, is more transparent than an agreement predicated on limited commitments, undertaken only with respect to selected obligations. Canada also believes that in the interests of transparency, consultations on this and other issues should continue with stakeholders, both domestically and through other avenues.

### 2. Consultations and Dispute Settlement

12. With respect to consultations and dispute settlement, Canada believes that any mechanism should lie firmly within well-established WTO norms.

### 3. Exceptions and Balance-of-Payments Safeguards

13. Finally, exceptions and balance-of-payments safeguards are among the issues that will also have to be addressed in a comprehensive accord. Happily, this was a relatively uncontroversial topic when discussed by the WGTI since it was virtually universally accepted that an accommodation of both subjects will have to be part of any negotiations of an investment agreement.

## III. TECHNICAL ASSISTANCE AND CAPACITY-BUILDING: FACILITATING DEVELOPMENT UNDER A WTO INVESTMENT ACCORD

14. Canada recognises that when it comes to all elements of a prospective framework, technical assistance will be necessary for developing and particularly least developed countries. We have been pleased to participate in efforts thus far at which the relative merits of an investment agreement and underlying provisions have been discussed. We also strongly believe that this will reap more rewarding returns to host countries when additional technical assistance and capacity-building can be allocated in a more focused manner towards specific requirements of developing and least developed countries in the course of negotiations. We look forward to hearing from these countries how this can best be facilitated, including with respect to complementing domestic efforts in this regard.

15. In addition to technical assistance and capacity-building issues, Canada noted the importance of embodying the principle of “flexibility”, including with respect to developing countries, in a WTO

investment accord. Indeed in our view, this is an important principle of sufficient importance to all WTO members, and in our negotiations we would work to ensure that consistent with a proper balance of rights and obligations the concept of every economy's right to regulate in the public interest also be captured in a WTO investment agreement.

#### **IV. CONCLUSION – THE EMERGING INFRASTRUCTURE OF A COMPREHENSIVE INVESTMENT AGREEMENT IN THE WTO**

16. In summarising basic tenets with respect to Canada's position on paragraph 22 issues singled out for attention by Ministers at Doha, it becomes apparent how cross-cutting and indeed mutually reinforcing they are. Indeed it is our belief that a nascent structure of an agreement is already evident from the interplay of the elements. This is perhaps not surprising. Most members have a bilateral if not regional approach to agreements on these issues, and as participants in bilateral fora we have a keen appreciation of the value of these agreements, in particular with respect to issues that we have addressed in the WGTI.

17. Rather than hypothetical scenarios, Canada believes that delegates would benefit from a negotiation of a framework that Ministers specifically noted when they mandated WGTI clarification on specific issues. This is a workable aim that should be pursued not only because it can be done, but because it is in our collective interests to do so. We look forward to working on how this can best be achieved in the coming months.

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