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Working Group on the Relationship between Trade and Investment

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COMMUNICATION FROM INDIA

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

VIEWS ON MODALITIES FOR PRE-ESTABLISHMENT COMMITMENTS BASED ON A GATS-TYPE POSITIVE LIST APPROACH[1]

1. In the paper on "non discrimination" (WT/WGTI/W/149) India's understanding of the basic differences between the concept of "commercial presence" under the GATS and the concept of investment were highlighted. Given the complex nature of capital flows and investments, application of non-discrimination principle as it exists in goods and services to investment will neither be feasible nor desirable as it will substantially limit the flexibility and policy space available to developing countries.

2. It is often argued that GATS architecture envisages substantial flexibility for developing countries by enabling them to liberalize progressively. However, the issue is not as direct as it is often made out to be. While developing countries were allowed to open up progressively, developed countries, through MFN exemptions, limited market access for developing countries.

3. The concept of pre-establishment national treatment as such does not exist under the GATS. National treatment is available only to the extent that commitments have been taken by Members. As a Secretariat Paper (WT/WGTCP/W/114, paragraph 2) indicates "….it has, of course, to be recalled and emphasized that national treatment is not a rule of general application in the GATS but is dependent on a specific sectoral commitment having been made and on any conditions and qualifications set out therein".

4. National treatment is generally applicable only at the post-establishment stage in almost all the international investment agreements (IIAs). There are only two countries (the US and Canada) that are known to insist on "pre-establishment national treatment" provisions in their bilateral investment treaties (BITs). Except for the recently negotiated BIT between Japan and Korea, all other agreements involving pre-establishment national treatment provisions are essentially in the context of regional trading agreements or involving the US and Canada. An UNCTAD document on national treatment has quoted Patrick Juillard as saying that, in the context of investment, the extension of national

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[1] Members are in the process of learning in the Working Group on the Relationship between Trade and Investment in accordance with the mandate outlined in paragraphs 20-22 of the Doha Ministerial Declaration read in conjunction with the Chairman's statement at the Ministerial Conference. The paper is a contribution to the learning process without prejudice to India's position on the need to establish any multilateral framework on investment within the WTO. India reserves the right to revert to the subject as and when its technical knowledge increases.

treatment from the post- to pre-establishment stage has been considered to be a "revolution" by many countries.

5. National treatment available in BITs, which number over 2000, is subject to the domestic rules and regulations of host countries and, except in very exceptional cases mentioned above, applies to the post-establishment stage only. The host countries preserve their right to make or modify their rules and regulations on foreign investment. Availability of this policy space is the most important development dimension. Many delegations referred to this important aspect in their interventions in the Working Group.

6. Substantial investment flows have taken place to certain countries without national treatment being guaranteed to investment or to investors. Investment flows have taken place based on other considerations like size of host-country market, macro-economic conditions in the host country, availability of skilled personnel and inputs etc.

7. In most BITs, investment is granted national treatment, while investors are accorded only MFN treatment. Nationals of other contracting parties are sometimes accorded national treatment "as regards their activity in connection with investments in its territory". Is it not true that national treatment in such cases is extended not to investors *themselves* but only to the extent these investors are involved in any specific investment activity in the host country – investments which have entered the host country in accordance with its laws and regulations?

8. When certain international instruments envisage national treatment at the entry stage, i.e. at the pre-establishment stage, such instruments are "non-binding" and cover only "investments" and not "investors".

9. Binding national treatment and MFN provisions are available in some regional trading arrangements covering advanced stages of integration. NAFTA, for example, extends national treatment to investors and investments of another contracting party with respect to "the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments". Can such few cases in the context of advanced regional integration efforts be the benchmark for emulation in the WTO where the membership is predominantly low-income developing countries and LDCs, with diverse economic and other backgrounds, and at different stages of development?

10. What about the issue of national treatment at the sub-central level? Pointedly, an UNCTAD document on national treatment asks: "whether a sub-national authority has to extend such preferential treatment to foreign investors on the basis of the national treatment standard, regardless of how it treats investors from outside the sub-division?" Referring to the US BITs the UNCTAD document notes:

> "In US BITs foreign investment and investors are granted treatment no less favourable than that accorded to investors from other States of the US. A foreign investor is to be treated by a United States sub-national authority as if it were an investor from another US sub-national authority for the purpose of compliance with national treatment provisions. Thus if the host sub-national state offers preferential treatment to local investors and does not extend such treatment to out of state investors the foreign investor cannot invoke national treatment to obtain similar preferences.

11. The obvious question that arises is what should be the modalities for treatment of sub-national authorities with constitutional powers to make rules and regulations related to foreign investment?

12. Unlike goods and services, investment essentially involves movement of capital, which tends to move in various ways from home country to third countries and then to host countries. Given the complex nature of capital flows/investments, binding rules on "pre-establishment commitments" will neither be feasible nor necessary. Developing countries need to retain the ability to screen and channel FDI in tune with their domestic interests and priorities. Bilateral investment treaties have been favoured the world over for precisely the flexibility they provide to the host country while at the same time extending necessary protection to foreign investors.

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