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The following communication, dated 7 April 2003, has been received from the Permanent Mission of Canada.

TRANSPARENCY

I. INTRODUCTION

1. This paper is submitted with a view to building upon the Working Group on the Relationship between Trade and Investment (WGTI) discussion of transparency at its April and July 2002 meetings (summarised in WT/WGTI/M/17 and WT/WGTI/M/18), including the Secretariat paper on the subject (WT/WGTI/W/109) and submissions from the EC (WT/WGTI/W/110), Japan (WT/WGTI/W/112), and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (WT/WGTI/W/129).

2. Transparency underpins a stable and predictable economic environment that enables the flow of productive capital. A commitment to transparency-enhancing policies sends a positive signal to investors about a government's determination to create an investment-friendly business environment. Canada, therefore, believes that in order to maximize the benefits of foreign investment, transparency is a necessary element in any prospective Multilateral Framework on Investment (MFI) in the WTO.

3. Discussion thus far has confirmed that along with non-discrimination, transparency is a fundamental principle underlying the rules-based international trading system of the WTO. Transparency manifests itself differently in various WTO agreements, as well as investment-related agreements elsewhere. However, as noted in the 2002 WGTI Annual Report, transparency obligations do not figure prominently in most existing International Investment Agreements (IIAs), therefore, an MFI anchored in the WTO could indeed fill an institutional "gap."[1]

4. The following submission is divided into three parts: The Case for Transparency; Architectural Considerations and Provisions in a Multilateral Framework on Investment; and Technical Assistance and Capacity Building.

II. THE CASE FOR TRANSPARENCY

5. As noted in the executive summary of the Secretariat paper, transparency enables markets to function efficiently and it underwrites the effectiveness and integrity of a treaty's policy rules and

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[1] Report (2002) of the Working Group on the Relationship between Trade and Investment to the General Council, WT/WGTI/6, p. 7, para. 37.

disciplines.[2] It does this by providing information to economic actors on the laws and regulations under which an economy functions and on the procedures for their administration. Furthermore, a recent study by the Organization for Economic Cooperation and Development (OECD) has observed that lack of transparency can undermine the ability of interested parties – whether domestic or foreign – to participate meaningfully in policy processes.[3]

6. The importance of transparency to an effective trading system was recognized early, most particularly in Article X of the GATT on "Publication and Administration of Trade Regulations", which includes provisions on the publication of a broad range of laws and other measures affecting trade in goods, as well as their administration. GATS Article III applies similar provisions on trade in services. More recently, leaders and heads of State and Government that met at the *International Conference on Financing for Development* in 2002 agreed that, in order "to attract and enhance inflows of productive capital, countries need to continue their efforts to achieve a *transparent*, stable and predictable investment climate."[4] (Emphasis added.)

7. Canada believes that a commitment to transparency benefits all countries regardless of their level of development. Investors, whether foreign or domestic, are more likely to invest where they can readily ascertain the laws that will govern their investments. As noted by the World Bank in *Global Economic Prospects 2003,* "Case studies suggest companies may, for example, be willing to invest in countries with legal and regulatory frameworks that would not otherwise be considered "investor friendly" – provided the companies are able to obtain a reasonable degree of clarity about the environment in which they will be operating."[5]

8. In contrast, a non-transparent business environment raises information costs, diverts corporate energies toward rent-seeking activities, and may give rise to other inefficiencies and distortions. The heightened risk of operating in such a business environment either translates into higher risk premiums (in the case of pricing corporate assets) or imposes additional informational costs on enterprises.[6] Not surprisingly, a growing body of research finds a correlation (i.e., an inverse relationship) between country risk and the rate of return on an investment.[7]

9. The submissions by the European Community (WT/WGTI/W/110) and Japan (WT/WGTI/W/112) confirm that the absence of regulatory transparency is considered to be the most serious obstacle to investment as seen through the eyes of prospective investors. Canadian investors have likewise signalled the importance of transparency to their investment decisions.[8] Hence, for countries hoping to attract foreign direct investment, initiatives to increase regulatory transparency are beneficial for both the country and the foreign investor.

10. Recent empirical evidence suggests that a state that takes steps to increase the degree of transparency in its policies and institutions could be rewarded with significant increases in the level of

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[2] WT/W/WGTI/W/109, Executive Summary, para. 2.

[3] See Joseph. E. Stiglitz, "On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life", Oxford Amnesty Lecture, Oxford, UK, 27 Jan., 1999, as cited in "Transparency in Domestic Regulation: Practices and Possibilities", declassified OECD Trade Committee document no. TD/TC/WP(2001)31/FINAL, available at: http://www.oecd.org/ech.

[4] Paragraph 21 of the United Nations Report of the International Conference on Financing for Development. (http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/392/67/PDF/N0239267.pdf?OpenElement).

[5] Pg 124 of the World Bank Group publication *Global Economic Prospects and the Developing Countries, 2003*.

[6] Chapter 4, pg 124 of "Global Economic Prospects and the Developing Countries, 2003" World Bank Group.

[7] Pg 9 of Joseph F. Francois, "Trade Policy Transparency and Investor Confidence – The Implications of an Effective Trade Policy Review Mechanism." Tinberegen Institute and CEPR: November 1999.

[8] See "Foreign Investment Barriers" – a report by the Canadian Chamber of Commerce, Ottawa, Canada, 31 March, 2000, at: http://strategis.ic.gc.ca/pics/bi/barriers.pdf.

incoming foreign investment.[9] Other studies find that, as efforts are made to foster an investment climate that reduces the underlying risk premium for businesses, investors become willing to accept projects that yield lower returns. The resulting benefit is an increase in investment levels and a national income gain from the reduced risk premium.[10]

11. An important point worth mentioning is that the key policies to further both foreign and domestic investment are in many respects identical[11]; in other words, a transparent investment environment should benefit all investors regardless of their origin. For these, and other reasons, Canada is convinced that a commitment to transparency should be a central tenet of any prospective investment framework.

III. THE RELATIONSHIP BETWEEN TRANSPARENCY AND ARCHITECTURAL CONSIDERATIONS AND PROVISIONS IN A MULTILATERAL FRAMEWORK ON INVESTMENT

12. The Secretariat paper (WT/WGTI/W/109), specifically paragraph five of the executive summary, suggests that the goal of transparency can be affected by the way in which other obligations, commitments, and exceptions are worded in an agreement.[12] Members, therefore, need to consider how best to structure a prospective MFI that provides investors with a clear understanding of those sectors that would, and would not, be open to foreign investment. In addition, the structure should be development friendly, accommodate flexibility, and be fully consistent with a government's right to regulate in the public interest.

13. The administration of laws and regulatory systems has increasingly been the focus of transparency obligations. As paragraph 22 of the Secretariat note points out, detailed prior notification and comment provisions are included in the SPS and TBT agreements. Indeed, it could be argued that underlying the subject matter of both these agreements is transparency in so far as it pertains to complex, technical issue areas in the regulatory regime affecting trade.

14. Likewise, the Agreement on Trade Related Investment Measures (TRIMS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the GATS contain transparency provisions.

15. TRIMS Article 6 reaffirms commitments with respect to Article X of the GATT, as well as notification procedures, including the Ministerial Decision on Notification Procedures adopted on 15 April 1994 (WTO document symbol LT/UR/D-1/5). Under TRIPS Article 63, Members are required to publish, *inter alia*, relevant laws and regulations to enable governments and right holders to become acquainted with them. As has been noted by several delegations, the GATS contains comprehensive transparency obligations that require Members to publish, or otherwise make publicly

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[9] See Zdenek Drabek and Warren Payne, "The Impact of Transparency on Foreign Direct Investment", WTO Staff Working Paper ERAD-99-02, available at: http://www.wto.org/english/res_e/reser_e/erad-99-02.doc.

[10] Pg 9 of Joseph F. Francois, "Trade Policy Transparency and Investor Confidence – The Implications of an Effective Trade Policy Review Mechanism." Tinberegen Institute and CEPR: November 1999.

[11] Pg 33 Saskia K.S. Wilhelms "Foreign Direct Investment and its Determinants in Emerging Economies." African Economic Policy Paper, Discussion Paper Number 9, July 1998 available at: (www.eagerproject.com/discussion9.shtml).

[12] Paragraph 55 of the Secretariat paper states, "…a 'positive list' approach to reservations would in principle result in a less 'transparent' investment regime, insomuch as it would not oblige parties to list all the non-conforming measures that they wish to exclude from certain obligations." In light of this example, Members are referred to Canada's contribution on Non-Discrimination and Modalities For Pre-Establishment Commitments Based on a GATS-Type, Positive List Approach (WT/WGTI/W/130), specifically paragraphs 18, 19 and 21, for a closer examination of transparency and the use of a negative-list approach to scheduling substantive commitments.

available, laws and all relevant measures of general application that affect the operation of the Agreement. The most important of these are contained in Article III (Transparency) and Article VI (Domestic Regulation).

16. The logic of three obligations related to transparency as identified in paragraph 15 of the Secretariat paper (publication, notification and administration) are embodied in these articles.

17. If the objective of a prospective MFI is to foster a stable and predictable investment environment that enables countries to maximize the benefits of long-term foreign investment, then that framework should include transparency provisions at least as comprehensive as those affecting trade-related investment measures under Article X of the GATT (together with subsequent understandings), as well as investment in services industries under the GATS.

18. Thus, whatever the scope and structure of any prospective multilateral framework on investment, existing transparency obligations found in various WTO Agreements can serve as useful models. As Canada has noted, transparency can also be furthered through the structure of the agreement itself.

IV. TECHNICAL ASSISTANCE AND CAPACITY BUILDING

19. Transparency provisions, such as those found in the GATT, GATS, TRIMS, and TRIPS Agreements have provided all Members with valuable "hands-on" experience with implementation that could be transferable to a prospective MFI.

20. Canada recognizes the necessity of providing developing and least developed countries with technical and capacity-building assistance to enable these Members to implement, and thereby benefit from, any prospective transparency obligations. The European Community, in its "Concept Paper on Transparency" (WT/WGTI/W/110), pointed to some of the areas and kinds of assistance that might be required in order to increase transparency, including financing and training of human resources to help countries identify and publicize domestic laws and regulations.

21. Canada believes that it is the developing and least developed countries that are best placed to identify their technical assistance and capacity building needs, and in particular as they relate to transparency. Canada remains ready to contribute to a collective effort to address these needs with a view to assisting developing and least-developed countries in attracting FDI that will contribute to their development.

V. CONCLUSION

22. Canada is a proponent of a trading system with transparency provisions as a core principle. This applies to the multilateral, regional, and bilateral investment contexts. The WTO's general transparency provisions - the obligation to publish, notify and impartially administer all relevant rules and regulations - already apply to investment-related trade issues insofar as they are key provisions of the GATS (specifically mode 3), the TRIPS Agreement, and the TRIMS Agreement.

23. In order to foster a stable and predictable investment environment that enables countries to maximize the benefits of long-term foreign investment, a prospective MFI should include transparency provisions at least as comprehensive as those affecting trade-related investment measures under Article X of the GATT (together with subsequent understandings), as well as investment in services industries under the GATS. Furthermore, Canada is ready to support developing and least developed countries with technical and capacity-building assistance to help those Members maximize the benefits associated with any transparency commitments.

24. In Canada's view, a commitment to undertake transparency-enhancing policies sends a strong signal to domestic and foreign investors about a government's commitment to fostering a stable and predictable investment climate. In return, a country raises its profile as an investment-friendly destination, leading to higher flows of investment.