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REPORT (2002) OF THE WORKING GROUP ON THE RELATIONSHIP BETWEEN TRADE AND INVESTMENT TO THE GENERAL COUNCIL

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I. INTRODUCTION

1. The Working Group on the Relationship between Trade and Investment was established by a decision taken at the WTO's 1st Ministerial Conference in Singapore in 1996. Between 1997 and 2001, work was based on a Checklist of Issues Suggested for Study which the Group took note of at its meeting in June 1997. At the 4th Ministerial Conference in Doha in 2001, the Working Group's mandate was revised (Annex 1).[1]

II. PROCEDURAL INFORMATION

A. SOURCES AND MATERIALS USED IN THE GROUP'S WORK

2. The work of the Working Group in 2002 has been based on written contributions by Members and the Secretariat, and on statements by Members in the Group's meetings. This material has been supplemented by information received from observer inter-governmental organizations. A list of written contributions provided to the Group in 2002 is attached (Annex 2).

B. MEETINGS HELD IN 2002

3. The Working Group held four meetings in 2002 under the Chairmanship of Ambassador Seixas Corrêa (Brazil), on 18-19 April, 3-5 July, 16-18 September, and 3-4 December. A full account of the discussions can be found in the minutes of the meetings, contained in documents WT/WGTI/M/17, 18, 19 and 20. At its December meeting, the Group adopted its report to the General Council, and discussed its programme of work for 2003.[2]

4. The Working Group received regular updates on the Secretariat's technical assistance activities carried out under the Doha Ministerial Declaration, and focused on the items set out for clarification in paragraph 22 of the Doha Ministerial Declaration. The Group also discussed the issue of FDI and the transfer of technology to developing countries. Provision was made at the meetings for Members to continue their discussions on the Checklist of Issues Suggested for Study.

C. COOPERATION WITH OTHER INTERGOVERNMENTAL ORGANIZATIONS

5. The Doha Ministerial Declaration encouraged the WTO to work in cooperation with other relevant inter-governmental organizations, particularly in providing enhanced support for technical assistance and capacity building. In this regard, all technical assistance activities carried out in 2002 under Paragraph 21 of the Doha mandate have been undertaken jointly by the WTO and UNCTAD secretariats, in some cases in co-operation also with the Agence pour la Francophonie, APEC, IDB/INTAL, SADEC, Secretaria General de la Comunidad Andina, and Banco Centroamericano de Integracion Economica. The IMF, World Bank, UNCTAD, OECD and UNIDO were invited to attend the Working Group's meetings in an observer capacity. These organisations have kept Members informed of their relevant activities and have contributed to the debate in the Group's meetings. The Working Group is appreciative of the valuable contributions to its work made by these inter-governmental organizations.

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[1] WT/MIN(01)DEC, paras. 20-22.

[2] This Report covers the discussion that took place at the Group's first three meetings in 2002. A summary of the substantive discussions that took place at its meeting in December 2002 will be included in the Group's next Report to the General Council.

III. WORK OF THE WORKING GROUP IN 2002

6. This part of the report provides a summary of the discussions in the Working Group pursuant to Paragraphs 20-22 of the Doha Ministerial Declaration.

A. TECHNICAL ASSISTANCE ACTIVITIES PURSUANT TO PARAGRAPH 21 OF THE DOHA MINISTERIAL DECLARATION

7. The Secretariat prepared two overviews of its technical assistance activities in 2002, circulated in WT/WGTI/W/135 and W/151. The OECD provided a written contribution on its capacity building activities in the field of investment which was circulated to the Working Group in WT/WGTI/W/116. UNCTAD briefed the Group regularly on its activities in this field, many of them conducted jointly with the WTO.

8. The central role that technical assistance and capacity building should play in enhancing developing countries' understanding of the implications of a possible investment framework was reaffirmed by the Working Group. It was felt by many that it was only through enhanced technical assistance and capacity building that developing countries could adequately determine their needs and interests, make informed decisions at the 5th Ministerial Conference, exercise their rights in any future negations, and effectively implement whatever agreements might be reached. The programme should be "demand-driven", as developing countries were best placed to identify their specific needs and to clarify their national interests and objectives. It was also felt that the programme needed to focus on human and institutional capacity building, so that developing countries would be in a stronger position to assess their interests and formulate appropriate policy. The point was made that capacity building is very important for developing countries and that it would therefore be necessary to identify an institution in each country jointly with the concerned governments, for creating necessary capacity relating to all issues connected with investment and money flows. The importance of co-operation with other agencies – with UNCTAD in particular – in the delivery of technical assistance was repeatedly underlined.

9. The view was widely shared that the programme should concentrate on three areas in particular: the issue-specific discussions in the Working Group; preparations for possible negotiations; and the implementation of WTO rules. One view was that the programme should be expanded beyond technical and training issues, to encompass human and institutional capacity building in developing countries, and the need to address policy analysis and development. It was important to tailor technical assistance and capacity building to each country's specific needs - in collaboration with national governments and other stakeholders - and to identify factors in the area of investment policy and promotion which act as obstacles to development.

10. The view was also expressed that an effective programme of technical assistance should not be perceived as having a limited time horizon, but rather needed to be a sustained, long-term process of engagement with developing countries if they were to understand - and take advantage of - the implications of FDI for their economic development. For this reason, technical assistance and capacity building in this area would entail an on-going commitment of financial and other resources on the part of the WTO and other agencies lasting well beyond the 5th Ministerial Conference.

11. It was noted that the Doha mandate had instructed the WTO to work in cooperation, where possible, with other agencies, and in particular with UNCTAD. Some made the point that UNCTAD had a critical analytical role to play in assisting developing and least-developed countries to understand the development dimension of a possible investment framework, and that it was important to guarantee that adequate financial resources were found to underwrite its collaboration with the WTO. Cooperation was also urged with other multilateral and regional agencies, such as the OECD and APEC, to leverage each institutions' comparative advantage, and to avoid unnecessary duplication and overlap.

12. In response to concerns that the technical assistance programme be systematically evaluated in order to ensure that it remained both "demand-driven", reflecting the needs and concerns of developing countries, and responsive to the Doha mandate, the WTO and UNCTAD Secretariats were encouraged to carry out detailed assessments of each technical assistance activity based on written comments by participants, and to adjust the programme of future events in light of the comments received.

B. CLARIFICATION OF ISSUES PURSUANT TO PARAGRAPH 22 OF THE DOHA MINISTERIAL DECLARATION

13. Some said that their statements in the Working Group were without prejudice to their doubts regarding the propriety of WTO being the right forum for discussion of an issue whose relationship with trade was only tenuous. In their view, considerable work needed to be done before an informed decision could be taken on whether to proceed with negotiations on modalities, as mentioned in the Chairman's statement at Doha.

2. Scope and definition

14. A Secretariat Note on this subject was circulated in WT/WGTI/W/108. Written contributions were received from Japan, Canada, Korea, the European Communities, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States (WT/WGTI/W/111, W/113, W/114, W/115, W/128, and W/142, respectively).

15. It was noted that the Doha mandate gave guidance in this area, by its reference to "long term cross border investment, particularly foreign direct investment, that will contribute to the expansion of trade". On view, therefore, was that any discussions should focus on investment that was long term and that contributed to the expansion of trade.

16. In this context, one view was that once the developmental effects of different types of investment were taken into account, consistent with the Doha mandate, green field investment would be found to be the most development friendly because it did not crowd out domestic investment. Besides, the definition should take into account the interests of home and host countries in a balanced manner, including the issue of flow of funds. It was also suggested that in order to bring out the development policy implications in relation to these parameters further, studies would have to be undertaken. In this regard, some qualified their observations as preliminary and reserved their right to come back on the issue as more study took place.

(a) Definition of "investment"

17. The definition of investment was seen to play an important role in shaping any overall investment framework. Discussion in the Working Group covered two main approaches to defining investment – a narrow approach, such as the enterprise-based or transaction-based definition, and a broad approach, such as the asset-based definition with options for including or excluding various categories of investment.

(i) Narrow definition

18. One view was that a narrow definition of investment, focused on FDI, captured most closely the terms of the Doha mandate, and would establish clearly and predictably the parameters of any eventual investment agreement from the outset. This would make it unnecessary to further delineate any agreement's scope and coverage through operative provisions. It would allow any framework to be focused on encouraging international flows of productive, long-term investment, which contributed most directly and substantially to economic and technological development, employment and trade growth. One suggestion made in this context was that a distinction should also be made between

different forms of FDI, since it was felt that greenfield FDI – in export-related activity in particular – was generally more beneficial to host-country economies than FDI through merger and acquisition activity.

19. It was felt that FDI was a more stable form of foreign capital flow than portfolio investment. Concerns were expressed that a broad definition of investment would entail the liberalisation of all forms of capital movement, and increase the risk of destabilising short-term flows. These concerns related primarily to the liberalisation of investment, but it also was noted that the stability of foreign investment mattered at the post-establishment stage too, because of its link to incomes, employment, and exports in a host country. In that context, the need for host countries, particularly developing countries, to maintain the right to regulate portfolio investment, in particular speculative short-term capital flows, was emphasised. The best way of ensuring that, it was felt, would be to exclude these investments altogether from the definition of covered investment. Also, including foreign portfolio investment would complicate the process of delineating the parameters of a possible agreement, and could lead to open-ended and unintended policy commitments. A related point made was that the issue of volatility of capital flows was the subject of ongoing work in other organisations, such as the IMF, and short-term portfolio investment should be excluded from further consideration in the WTO until progress was made there on this issue.

20. It was felt also that there was a better understanding among WTO Members of the concept of FDI than of other forms of foreign investment. By narrowing the definition to FDI from the outset, the negotiation and rule-making process would be easier and could be completed more quickly. A narrow definition would also make it easier to harmonise any eventual investment agreement with the commercial presence provisions of the GATS, which used an enterprise-based definition.

21. There was discussion of how best to arrive at objective criteria for defining investment as only those assets which involved a "lasting or controlling interest" in an enterprise. One point of reference was the IMF's criteria for FDI, which was based on the degree of ownership in an enterprise and used a 10 per cent threshold. However, potential problems with the IMF approach – and the need to explore alternative methodologies for defining long-term foreign investment – were also raised. It was suggested that there was a need to examine how portfolio investment that constituted less than 10 per cent of the equity in an enterprise, but nonetheless represented a long-term economic relationship with a host country, could be accommodated. It was also pointed out that that the concept of direct investment transactions – as well as direct investment enterprises – needed to be included in any concept of FDI in order to capture the capital funds that moved between investors and enterprises. One view was that it was best left to individual host countries to define what constituted FDI.

(ii) Broad definition

22. Another view was that the Doha Ministerial mandate, while emphasising FDI, did not exclude the possibility of including other categories of investment. It was felt that a broad, asset-based definition of investment, covering both FDI and portfolio investment, would provide comprehensive, rules-based protection and guarantee high standards of treatment for all categories of foreign investment, thereby encouraging increased international investment flows and creating more efficient international capital markets. Both portfolio and short-term capital also played a role in providing foreign exchange and financing capital formation in a host country's economy.

23. Distinguishing between direct and indirect foreign investment was said to be increasingly difficult in a world of complex financial transactions. Attempts to define FDI in terms of imprecise concepts such as a lasting interest or an ownership threshold would interfere with the development of clear substantive provisions, and was often not intrinsically meaningful. Ownership of only a small proportion of equity could still reflect a lasting interest in an investment, such as in the case of mergers and acquisition activity, while ownership of a large equity stake did not necessarily imply a long-term commitment, especially where institutional investors were concerned. Other

methodological problems included whether it was necessary to meet an ownership threshold only at the time an investment was made, throughout its existence, or at the point of divestment.

24. It was felt that a broad, asset-based definition of investment better reflected the evolving nature of international financial flows and new forms of foreign investment, such as strategic alliances, and using it from the outset in WTO would avoid the subsequent need to renegotiate any framework in order to maintain its relevance. It would also ensure consistency with most existing international investment agreements (IIAs), particularly bilateral investment treaties, which used asset-based definitions.

25. It was felt that taking a broad approach to the definition of investment in a possible framework agreement did not imply necessarily less flexibility for host countries to treat different categories of assets differently, for example in the way in which they regulated investment or made liberalisation commitments. Portfolio investment could still be treated differently from FDI. The eventual breadth and depth of scope of individual commitments made under an investment framework would depend not only on the definition used but also on the framework's substantive provisions, particularly provisions dealing with non-discrimination, pre-establishment commitments, development, exceptions, and balance-of-payments safeguards. Flexibility was best achieved not by narrowing the definition of investment, but through an agreement's substantive provisions and the structure of its specific commitments. For example, concerns about destabilising capital flows could be addressed through provisions that would permit certain restrictions on capital transfers for reasons of balance-of-payments or the stability of financial systems. It was noted, in this regard, that most countries' financial market regulations did not discriminate between foreign and domestic investors.

26. It was noted that under many, asset-based approaches used in IIAs, investment was defined to cover "every kind of asset" and this was usually accompanied by an illustrative (non-exhaustive) list of the categories of assets that were covered. However, options existed for excluding certain categories or sub-categories of assets. Some IIAs explicitly excluded certain investment assets, such as intellectual property, or certain types of transactions, such as capital movements that were mere financial transactions for speculative purposes, commercial contracts for the sale of goods or services, credits granted to a State, or loans that were not directly related to an investment. Some others implicitly excluded them by drawing up closed (exhaustive) lists of covered investments.

27. Different views were expressed on the value of an "open" or "closed" list of the assets to be covered. One suggestion was that using both a list of assets that were included and those that were excluded could enhance clarity, which would be valuable in the context of any prospective dispute settlement provisions and delineate more clearly the potential scope of the agreement. Some doubts were raised about the feasibility of this approach, questioning whether definitive lists could be created in practice without overlap and ambiguity. The point was also made that an article or provision on "scope" – in addition to the definition of investment – could also help to delineate the coverage of a possible framework agreement. The question was raised as to whether portfolio investment is already addressed in the WTO rules by the GATS Annex on Financial Services.

(iii) Hybrid approach

28. One suggestion was the use of different definitions for the pre-establishment and post-establishment stages of investment – a narrow approach for market access and investment liberalization (pre-establishment), covering FDI only, and a broad approach, covering a wide range of assets, for the protection of investment once it had established locally (post-establishment). One view was that the option of using different definitions according to each element of a possible multilateral framework might facilitate a consensus, and should be explored further. Another view was that the use of different definitions for the purpose of delineating different obligations could lead to complex definitions and difficulties of interpretation.

(b) Definition of "investor"

29. Various approaches to defining "investor" in IIAs were examined. A general point was made that the need to define an investor's "nationality" – or legal association with a Member – would be relatively less important in a possible multilateral framework that included an MFN obligation, than in preferential bilateral or regional IIAs where there was a need to exclude investors from third parties. Nonetheless, it could play a role, for example in the context of the rights of individual Members to bring dispute settlement cases. Several issues related to the definition of "investor" were felt to require further consideration.

(i) Natural persons

30. It was noted that the term "natural persons" referred to individuals who invest directly in their own private business, or through the placement of their own portfolio capital in a host country. Their legal association with a party to an IIA was typically defined in terms of "nationality", by reference to the domestic law of the parties concerns. With regard to which categories of natural persons should be covered, one view was that both national citizens and permanent residents should qualify, but that for constitutional or other reasons country-specific reservations or exceptions might need to be accommodated. Another view was that permanent residents should not be included in the definition. The question of the treatment of dual nationals was also raised.

(ii) Legal entities

31. It was noted that the term "legal entity" generally referred to companies. Some IIAs explicitly excluded certain forms of companies such as partnerships, joint ventures, not-for-profit organisations or state-owned corporations from their definition of investor. Determining a legal entity's association with the party to an IIA could be complex. Some IIAs required only that a company was incorporated under the laws of its home country. Others specified that a company must also have its headquarters and engage in real economies activities in the home country, or that the majority of a company's shares be owned by home-country nationals. Such qualifications were employed in part to prevent companies from setting up "mail-box" operations in order to benefit from an IIA. Several questions were raised in this context: whether all types of business entity recognised by applicable law should be covered, including those not requiring formal registration; the treatment of governmental and non-profit organizations; whether any enterprise formed under the law of a party should be considered an investor of that party, regardless of the nationality of the ultimate ownership or control of the enterprise; whether a combination of place of incorporation, administrative seat, and nationality of control or ownership should be used to determine whether an enterprise should be considered an investor of a party; and the possible merits of a "denial of benefits" clause as provided for in GATS Article XXVII.

(iii) Potential investors

32. The question was raised whether "potential investors or investments" should be covered by a possible framework in the context of pre-establishment treatment. One view was that any definition of investor should be broad enough to cover an investor’s act of investing. Specifically, an agreement's provisions should apply to the process of investing – before and after the point in time at which an investment was made – as well as during the life of an investment. Under this view, there was an implicit analogy to trade in goods, whereby goods "seeking to enter" a jurisdiction, as well as foreign goods already in the same jurisdiction, were understood to be covered by WTO agreements. Another view was that any provisions should be limited to regulating the actual entry of investment, without conferring any rights to either potential investors or investors seeking entry.

(c) Related issues

(i) Investment-related definitions in other WTO agreements

33. The need to clarify the relationship between the coverage of the terms "investment" and "investor" in a possible investment framework and concepts used in existing WTO agreements, particularly the GATS and the TRIPs agreement, was raised.

34. One view was that the GATS addressed policies which WTO Members applied, *inter alia*, to the establishment of a "commercial presence" by foreign service suppliers, which corresponded broadly to the concept of pre-establishment treatment for FDI. The GATS approach to definition of investment was narrower than the standard asset-based definition of investment used in most IIAs, but resembled fairly closely an enterprise-based definition. By contrast, the TRIPs agreement adopted a limited, asset-based approach to defining its coverage, accompanied by a closed (exhaustive) list of the intellectual property assets included.

35. Another view was that the GATS did not cover investment *per se*, but 'commercial presence' which was only a mode of service delivery. The GATS did not include pre-establishment national treatment, and national treatment under the GATS was qualified, unlike that under GATT.

3. Transparency

36. A Secretariat Note on this subject was circulated in WT/WGTI/W/109. Written contributions were received from the European Communities, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (WT/WGTI/W/110, W/112, and W/129, respectively).

37. The importance of transparency for creating a predictable, stable and secure climate for foreign investment was underlined by many. It was recalled that Ministers at Doha had emphasized the concept of securing a "transparent" framework for foreign investment. Several Members cited national surveys suggesting that increased transparency in national and international investment rules was a main objective of their business communities. It was also noted that transparency obligations did not figure prominently in most existing IIAs, raising the possibility of an institutional "gap" that might usefully be filled by the WTO.

38. The focus of discussion was not primarily on the benefits of transparency, but on the nature and depth of transparency provisions and on the scope of their application. It was felt that "transparency" in international commercial treaties involved two core requirements: to make information on relevant laws, regulations, and other policies publicly available, and to notify interested parties of relevant laws and regulations and changes to them. There were differing views on whether transparency also involved obligations to ensure that laws and regulations were administered in a uniform, impartial, and reasonable manner. The suggestion that transparency provisions should address investors and home countries as well as host countries was put forward forcefully by some.

39. It was noted that the scope for transparency in a possible investment framework depended not just on transparency provisions themselves, but on the ambition and breadth of the agreement to which these provisions applied. An agreement with limited coverage and disciplines would involve fewer transparency obligations. The question of whether a "positive list" approach to scheduling commitments was inherently more transparent than a "negative list" approach was discussed. The point was made that investment was subject to a far broader range of domestic policies and regulations than trade, which would extend the potential scope of transparency provisions in a possible investment framework.

40. Concerns were raised about the technical and resource capacities of developing countries to meet new transparency requirements in the area of investment, given the difficulties they already faced in complying with existing WTO requirements. Many Members emphasised the need to strike an appropriate balance between pursuing transparency and avoiding the imposition of burdensome obligations on host country governments. A recurring theme was the need to direct technical assistance and capacity building towards host countries' efforts to make their domestic investment regimes more transparent. Another theme was the role that technology could play in enhancing the transparency of investment regimes in a more cost-effective way. What was important for many Members was the need to delineate clearly and precisely the scope for transparency obligations (perhaps in the form of an illustrative list) to avoid imposing open-ended and unrealistic commitments on host countries.

41. It was felt that existing transparency provisions in the WTO - and especially the GATS - offered a useful starting-point for examining the scope for transparency in a possible multilateral investment framework. Since GATS Article III applied to all measures of general application pertaining to GATS rules – including measures relating to the establishment of a "commercial presence" – it was suggested that the WTO already contained transparency obligations in regard to FDI in the services sector. Some felt that GATS Article III provided a useful model that should be examined when considering transparency provision for foreign direct investment more generally. It was also felt that the Working Group should take into account existing work on transparency issues in the GATS Working Party on Domestic Regulation, to get a sense of where GATS provisions were – and were not – working.

(a) Possible transparency obligations

(i) Publication and notification requirements

42. There was broad agreement that the basic publication and notification obligations found across WTO agreements should be generally applicable to any investment framework. GATT Article X:1, TRIPS Article 63(1), and GATS Article III:1 each required WTO Members to publish, or make publicly available, all relevant measures – which typically included laws, regulations, judicial decisions and administrative rulings of general application. The obligation to notify the WTO and other Members of changes to laws and regulations was also present throughout most WTO agreements, although this was generally more complex than the publication requirement.

(ii) Enquiry points

43. It was noted that many of the WTO agreements relating to trade in goods required Members to respond promptly to requests for information and to establish enquiry points to make access to such information easier. Similar "access to information" requirements could also be found in the GATS (Article III:4).

(iii) Prior notification and comment

44. There was no common view on the applicability of prior notification and comment requirements. The observation was made that while most notification obligations in the GATT, the GATS and the TRIPS Agreement came into play only after a measure had been formally adopted, there was also a variety of prior notification requirements in the WTO agreements – ranging from the obligation to notify the WTO and other Members of proposed changes to laws and regulations, to more complex obligations in the SPS and TBT Agreements to allow other Members the opportunity to comment on proposed regulatory changes and to submit reverse notifications. One view was that prior notification – and the right comment – reduced uncertainty and discriminatory treatment in a given market, as all parties had the opportunity to participate in the development of regulations, and was therefore suited to be incorporated in any investment framework. Another view was that the

rationale for prior notification and comment was specific to certain WTO agreements and should not be applied to investment rules. Some felt it would be too ambitious and administratively burdensome for the majority of WTO Members.

(iv) Administrative and judicial procedures

45. There was no common view on whether the concept of transparency should apply to the way investment rules were administered, as well as to the rules themselves. It was noted that general and specific obligations relating to the "uniform, reasonable and impartial" administration of rules and regulations, including, in many instances, the right of appeal and review, could be found throughout the WTO agreements, most obviously in GATT Article X and GATS Article VI. Some felt that transparency in the way that rules were administered was directly related to the transparency of the rules themselves, and that both aspects were equally important to creating a predicable and stable investment climate. Some others felt that the uniform, reasonable, and impartial administration of laws and regulations, while important, did not fall within the purview of transparency as traditionally defined in the WTO system. Moreover obligations related to administrative or procedural transparency would represent an unjustified intrusion into national sovereignty.

(v) Investor and home- country obligations

46. The question was raised as to whether transparency obligations in a possible investment agreement should be extended to foreign investors and to home countries, as well as to host countries. Support was expressed for the view that ensuring transparency in the operations of transnational corporations and foreign investors themselves was an important issue that should be addressed by the Working Group.

(vi) Confidentiality

47. It was noted that the general and specific transparency provisions of WTO agreements typically contained exceptions clarifying that Members were not required to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private. Some felt that a similar confidentiality exception – based on a clear definition of the circumstances under which such an exception could be invoked – was applicable to investment.

(b) Application of transparency obligations

(i) Clarifying the scope of transparency obligations

48. It was acknowledged that the task of identifying and listing all domestic laws and regulations that might be relevant to the operation of foreign investors could pose significant difficulties for many Members. One suggestion was to attach an illustrative list of laws and regulations to which transparency provisions applied in order to clarify their coverage and scope.

(ii) Technical assistance

49. While it was felt that developing countries would benefit significantly from enhanced transparency provisions in a possible investment framework, some expressed concerns that the administrative costs of possible obligations could outweigh any benefits in terms of attracting foreign investors. One suggestion was that special emphasis should be placed on transparency issues when budgeting for future technical assistance and capacity building. It was suggested that a multilateral framework should include clear and detailed provisions for linking the implementation of transparency obligations and procedural reform to technical assistance and capacity building. There

was also a perceived need to assist countries to identify and publish comprehensive lists of all domestic regulations and rules governing foreign investment.

(iii) Technology

50. Some suggested that transparency provisions could be applied more easily and at lower cost by using new electronic information technologies – websites, electronic databases, and Email – and national examples were given to illustrate possible applications. One suggestion was that investment laws and regulations could be made available on databases, contact addresses could be put on websites, and public comment procedures could be run electronically.

4. Development provisions

51. A Secretariat Note on this subject was circulated in WT/WGTI/W/119. Written contributions were received from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Canada, Switzerland, the European Communities, and India (WT/WGTI/W/126, W/131, W/133, W/140, and W/148, respectively).

52. The integration of development provisions into a prospective WTO investment framework was viewed as a horizontal issue, cutting across the other subjects set out for clarification by the Working Group, so that many of the key concepts addressed under this heading were also raised in the discussion on other subjects. The point was made that the seven issues listed for clarification in paragraph 22 did not exhaust the scope for development provisions, and that further discussion would reveal whether certain items should be excluded from the list and whether new items (such as performance requirements) should be added.

53. It was noted that any discussion on the issue of exceptions should fully take into account the developmental needs of developing countries. One view was that certain important studies had highlighted cases where foreign investment might have lowered host-country welfare. Developing countries needed to retain the ability to screen and channel foreign investment in accordance with their domestic interests and priorities. Developing countries also should have the freedom to use performance requirements. Referring to the statements by some to draw a parallel between mode 3 of GATS and investment disciplines, it was noted that GATS did not impose any prohibition on performance requirements.

54. The Group discussed ways in which "flexibility" for development purposes could be integrated into a framework of transparent and predictable investment rules. While views differed over the nature of development provisions, there was wide agreement that such provisions should be complements to, not substitutes for, policy disciplines. There was a widely shared view that development provisions should form an integral part of the legal structure, as well as the substantive provisions, of any investment framework.

55. Much discussion focused on the way development issues were treated in the GATS, and whether its structure and provisions provided a model for a possible investment framework. One view was that a GATS-type positive list approach to undertaking specific commitments was more flexible and development-friendly than a negative list approach to scheduling specific exceptions to general obligations, although some felt that flexibility for development was also a core element of the negative list approach, since, subject to negotiations, sectoral or other exemptions, including for unspecified future development measures, could also be accommodated. The GATS allowed countries not only to phase-in commitments regarding market access and national treatment according to their individual needs and levels of development, but allowed them freedom to attach to these commitments other possible conditions related to development objectives. Attention was also drawn to GATS provisions recognizing the need to pay due respect to individual Members' national policy objectives and their level of development in any process of liberalization.

56. Another view was to doubt the relevance, as well as the effectiveness, of the GATS approach in the case of investment. Some felt the GATS positive list and progressive liberalisation approach would not translate into the kind of open and transparent investment environment that developing countries needed in order to attract FDI. Some felt that the GATS had presented developing country negotiators with problems in a range of areas including MFN exemptions, industrial classifications, the scheduling of commitments, and regulatory issues. Some felt that the GATS was a trade agreement with limited relevance to the regulation of capital flows, and as such could not provide the flexibility needed by developing countries in the area of foreign investment. Others felt that the GATS approach, while based on selective and gradual liberalization, generated pressure on countries to assume broader and deeper commitments over time, building on their initial obligations and narrowing down the flexibility available to them.

57. It was suggested that the main areas where developing countries sought flexibility in a possible investment agreement were in regulating the entry of foreign investment (through general screening, selective restrictions, and conditions on entry) and in using policies to enhance the contribution that foreign investment made to their economic and social development needs and objectives (through performance requirements, investment incentives and preferences for domestic investors). In this regard, some felt on the other hand that performance requirements were a burden for investors and would therefore not necessarily contribute to development.

58. While it was acknowledged that there was no single model of development provisions and that the issue needed to be considered on a country-specific basis according to each Member's needs, various broad options for incorporating development provisions into a possible investment agreement were discussed.

(i) Declaratory statement

59. One suggestion was to include a declaration of intent of the development objectives of a possible investment agreement in its preamble which, while not granting any rights or obligations, could serve as a basis for legal interpretation of whether the agreement's substantive provisions were being applied in conformity with its development objectives. Attention was drawn to the preamble to the GATS in this respect.

(ii) Definitions

60. The definition of investment was felt by some to have significant implications for developing countries. Following discussions in the Group on scope and definition, many reiterated the importance for developing countries of a narrow definition of investment in order to limit any agreement's coverage to long-term cross-border investment, particularly FDI, and to facilitate any future negotiations. Others felt that a broad, asset-based approach would be sufficiently flexible to allow those developing countries wishing to accept obligations across-the-board to do so, while enabling others to limit their obligations though the agreement's substantive obligations and specific commitments. Examples of this approach were to allow screening of the entry of foreign investment to ensure that it complied with a host-country's development needs and objectives, or capital restrictions to be imposed to safeguard the balance-of-payments. In this respect, it was noted that UNCTAD had concluded that development policy objectives and concerns were not necessarily incompatible with a broad approach to definition, given the scope that existed to narrow the coverage of an agreement through its substantive obligations and specific commitments.

(iii) Pre- and post-establishment treatment

61. The issue of whether a possible investment framework should cover pre- as well as post-establishment treatment of foreign investment was felt to be important for developing countries. One view was that developing countries should be allowed more flexibility at the pre-establishment stage which impacted directly on their ability to regulate and place conditions upon the entry of foreign investment. Examples mentioned were general screening, restrictions on certain kinds of entry (e.g., mergers and acquisitions), foreign ownership limitations, quantitative restrictions, compulsory joint ventures, minimum capital requirements, and performance and other requirements. Some felt that developing countries should be exempted entirely from making pre-establishment commitments. Some others felt the use of a positive list approach at the pre-establishment stage could ensure the necessary flexibility.

(iv) Flexibility in the application of general obligations

62. The scope for exceptions to an agreement's general obligations was felt to have an important development dimension. Exceptions relevant to development provisions were grouped into four categories: systemic exceptions, general exceptions (safeguard and escape clauses), balance-of-payments exceptions, and country-specific exceptions that allowed individual countries to exempt themselves from the agreement's rules of general application for particular activities, sectors or measures, sometimes with expectations that these exceptions would be reduced or eliminated over time. It was noted that while some of the exceptions that were available to all Members equally could be invoked more flexibly by developing countries, others were available to developing countries only.

63. Systemic exceptions: The flexibility to take permanent exceptions or "carve outs" from an agreement's disciplines (as opposed to temporary safeguards or transitional mechanisms only) for certain industries, sectors or measures was felt by some to be a key issue. The option to take lower obligations – or no obligations at all – was felt to be relevant to developing countries for a range of investment-related policies including, among other things, general screening, investment incentives, technology transfer and other performance requirements not covered by the TRIMs Agreement, employment policies, land and property ownership, and restrictions on – and conditions attached to – the entry of FDI.

64. General exceptions: Many felt that general exceptions in the WTO – for public interest and security, and for regional integration – should be applicable in any investment agreement. While general exceptions were "general" in the sense that they could be invoked by all Members in well defined circumstances, some flexibility was accorded to developing countries in certain respects. As regards regional integration, for example, GATS Article V:3(a) allowed a flexible interpretation of the conditions that needed to be met in order for developing countries to enter into regional agreements, recognising that regional integration could be important to the capacity-building process of developing countries. In the case of an agreement involving only developing countries, Article V:3(b) authorised more favourable treatment to be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

65. Balance-of-Payments exceptions: It was noted that both the GATT and GATS provided for more flexible access to these safeguard measures for developing countries in recognition of their need to maintain monetary reserves adequate to implement their programmes of economic development.

66. Country specific exceptions: It was noted that the GATS and most IIAs, although not the GATT, allowed individual exceptions to the rule of non-discrimination with regard to particular sectors and/or measures. While some felt that country-specific exceptions could be important in areas such as education, training, employment and environmental protection, they were no substitute for broader systemic exceptions or carve outs for developing countries.

(v) Flexibility in undertaking specific commitments

67. Scheduling country-specific commitments was considered a key issue in giving flexibility and balance to a possible investment agreement for developing countries. It was noted that this approach could apply not only to market-access commitments, but also to one or more of an agreement's substantive provisions, such as national treatment, where these were drafted as specific commitments rather than as rules of general application.

68. A positive list, "bottom up" approach to undertaking country-specific commitments was felt by some to be a preferable way to integrate policy flexibility for development into the basic structure of an investment framework. Some felt that a negative list, "top down" approach was preferable since it would result in a more transparent and comprehensive framework of investment rules, and could also be considered as flexible since subject to negotiations developing countries would have the possibility of a greater number, as well as more comprehensive, reservations to specified provisions of the agreement, including with respect to the policy latitude necessary for future measures.

69. A related question was how specific commitments should be "phased-in" (or specific exceptions "phased-out"). One view was that provisions could be introduced recognizing developing-countries' right to open fewer sectors, to liberalise fewer types of transactions, and to be allowed a grace period in which to make possible adjustments to lists of schedules. GATS Article XIX:2 on "Progressive Liberalisation" was cited in this regard, as an example of how a positive list approach could be structured in a development friendly way. Another view was that in the case of any possible investment agreement, developing countries should be exempt from any obligation to liberalise progressively or phase-in greater specific commitments.

(vi) Flexibility in timeframes for implementation

70. Transitional mechanisms were examined as a way of providing developing and least-developed countries with additional flexibility to phase-in commitments or to phase-out non-conforming measures. It was noted that such mechanisms were designed not to reduce a developing country's general level of obligations or to create permanent rights, but to allow more time for policy reform and for building up the human, institutional and infrastructural capacity necessary to implement an agreement's obligations. Examples cited from the WTO were the TRIMs, TRIPS and SCM Agreements. It was suggested that technical assistance could be linked to an agreement's transitional mechanisms. While many felt that the scope for transitional mechanisms should be explored, subject to clear and precise criteria for their application, some emphasised that such mechanisms should not be seen as a substitute for lower levels of obligations, technology transfer requirements and more flexibile commitments for developing countries.

(a) Specific issues raised

(i) "Development clause"

71. One suggestion was to include a dedicated development provision in the substantive part of any investment agreement, which would carry more weight than declaratory, preambular language, and aim at ensuring that the agreement addressed broader development objectives along with its primary commercial purpose. Attention was drawn in this regard to GATS Article IV, where developing countries' liberalization commitments were linked closely to the strengthening of their domestic services capacity, improvements in their access to distribution channels and information networks, and the reciprocal liberalisation of market access in the sectors and in modes of supplying of interest to their exporters. Some felt that a "development clause" should create permanent carve-out from the application of any agreement's substantive provisions so as to protect development objectives.

(ii) Investor and home-country obligations

72. It was suggested that home-country and investor responsibilities should constitute one element of the development dimension of any investment agreement. All countries, but particularly developing countries, had an interest in ensuring international standards of corporate conduct that would produce more accountability, fairer competition, and greater social responsibility. Some felt that the OECD Guidelines on Multinational Enterprises provided a useful example in this regard of how to ensure that multinational enterprises conducted their activities in a responsible manner and in harmony with the policies of the countries in which they operated. Other examples cited were the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UN's Global Compact. Some felt that there should be a binding code of conduct for investors and multinational corporations, enforced by home countries through a set of precise domestic laws that could be activated by host countries.

73. Another view was that the idea of extending multilateral obligations to investors and home countries went in the wrong direction. Home countries were already free to regulate foreign investors, subject to any international treaties they had entered into, and home countries were not well placed to collect information on business practices outside their jurisdiction. It was further noted that, as a general rule, international agreements only applied directly to states, not to enterprises. Some felt that the issue of state sovereignty, and the right to regulate, also warranted greater discussion in this context.

74. Some felt that investor and home-country obligations were not included among the subjects explicitly set out for clarification in paragraph 22 of the Doha Declaration, and their inclusion could overload the agenda. Some others disagreed with this point of view, noted that "home countries" were mentioned in paragraph 22, and said that in any case in their view the list of issues cited there was illustrative, not exclusive.

(iii) Screening

75. Concerns were expressed by some that pre-establishment commitments might limit developing countries freedom to screen, regulate or channel the entry of foreign investment. One issue raised was the compatibility of MFN and national treatment standards with screening procedures used by some host countries to evaluate the costs and benefits of particular foreign investment. One view was that exceptions – either systemic or country-specific – to pre-establishment commitments would be needed to allow the continued use of screening mechanisms. Another view was that, in principle, screening mechanisms could be consistent with MFN treatment so long as they were based on objective criteria and were applied in a transparent and non-discriminatory way.

(iv) Performance requirements

76. The specific subject of technology transfer was discussed in the context of policy-related technical assistance, but the wider issue of performance requirements was also raised on several occasions in the Group. Differing views were expressed on this subject. One view was that any investment agreement could not be comprehensive without permitting the use of performance requirements, especially in the context of its development provisions. Performance requirements on employment generation, technology transfer, export performance, manufacturing, and research and development were key to developing countries' efforts to attract technology, increase employment, and encourage industrial linkages upstream and downstream. Another view was that performance requirements were not efficient measures. Besides, they were not included among the subjects explicitly set out for clarification in the Doha Ministerial Declaration, and the issue was already being addressed elsewhere in the WTO, in the context of the review of the TRIMs Agreement.

(v) Investment incentives

77. There were differing views on the inclusion of investment incentives as another element in a prospective WTO investment agreement. Flexibility in the definition and application of investment incentives was considered a key development issue by some, which could help to create a more level playing field in attracting and retaining FDI. Others felt that investment incentives did not constitute an optimal policy instrument but rather were a second best solution, and that, like performance requirements, the Working Group had no explicit mandate to discuss the issue.

(b) Technical assistance and capacity building

(i) Technical assistance and implementation

78. Technical assistance and capacity building were viewed as important to enable developing and least-developed countries to put in place appropriate policy frameworks conducive to attracting and managing foreign investment. They could help build capacity in developing countries to identify national interests and establishment investment priorities, to negotiate effectively, and to implement any agreements reached. Related to this was the need to assist developing countries to improve market conditions domestically for attracting and absorbing foreign investment. With a view to promoting developing countries as investment locations, technical assistance could also be directed at improving awareness in home countries and at re-orienting their investment promotion programmes.

5. Non-discrimination

79. A Secretariat Note on this subject was circulated in WT/WGTI/W/118. In addition, written contributions were received from the European Communities, Korea, Japan, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Canada, Mexico, and India (WT/WGTI/W/122, W/123, W/124, W/127, W/130, W/132, and W/149, respectively).

80. It was noted that while the principle of non-discrimination was at the core of most international commercial treaties, its application was typically subject to carefully defined conditions. These could allow governments to give preferential treatment to domestic products, producers and investors, or to certain of their commercial partners but not to others, or to pursue domestic policy objectives that could not be realized without practising some degree of discriminatory treatment. The scope of the application of non-discrimination was also affected by the definition of "investment" in an agreement, the range of assets to which non-discriminatory standards applied, exceptions taken and specific commitments made under the agreement's provisions. It was felt that specific commitments, in particular, could be crucial in qualifying the meaning and scope of application of non-discrimination in any eventual agreement.

81. A distinction was drawn between the application of non-discrimination – and national treatment in particular – at the pre- and post-establishment phases of investment. While many could agree that standards of non-discrimination should apply to investments and investors already established in a market, subject to certain exceptions, the idea of extending a commitment of non-discrimination to investment liberalisation was for some more problematic. Some felt that pre-establishment commitments should not be part of a multilateral approach to investment at all.

82. A distinction was also drawn between MFN and national treatment. Many favoured MFN treatment as a general rule of application for both pre- and post-establishment treatment, as a way of guaranteeing equality of treatment for foreign investments, of creating a more transparent and uniform system of investment rules, and of maintaining consistency with other WTO agreements, including the GATS. There was a difference of opinion on the application of national treatment. While some felt that national treatment should be extended to all stages of investment – its entry, its operation after establishment, and its liquidation – others felt that host countries, particularly developing countries, needed to be able to differentiate in their treatment of domestic and foreign investors, and

in particular to retain the freedom to control, screen and channel foreign investment in line with their national policy objectives.

83. It was suggested that the issue of non-discrimination should be viewed in the context of existing WTO agreements, which often used different approaches to core disciplines such as MFN and national treatment. One view was that any approach taken in the WTO in the field of investment should be compatible with the GATS and should not call into question its basic approach. Another view was that attention needed to be paid to all of the various approaches to non-discrimination in the WTO, and how these could be made compatible under a possible investment framework.

(a) Pre- and post-establishment treatment

(i) Pre-establishment

84. A key issue was whether standards of non-discrimination should apply only to the post-establishment stage of investment or to the pre-establishment stage as well. It was noted that the majority of existing IIAs, and particularly bilateral investment treaties, applied MFN and national treatment as rules of general application, but that most of them covered only the post-establishment treatment of investment, leaving access to a host country and the pre-establishment treatment of investment subject to its national laws and regulations. The GATS was fairly unique in its treatment of admission (market access) and national treatment as specific commitments as well as with respect to its bottom-up approach to scheduling.

85. One view was that the GATS did not deal with pre-establishment national treatment since the obligations of Members were based on specific commitments and since national treatment under GATS was subject to a number of qualifications.

86. The ability to control or place conditions upon the admission and entry of foreign investment was a significant issue for some. It was noted that no existing IIA offered absolute and unconditional rights of entry and establishment. Concerns were expressed that broad investment liberalization commitments could expose developing countries to volatile capital flows and reduce their ability to regulate foreign investment for macroeconomic and balance-of-payments reasons. Another concern was that binding commitments on pre-establishment treatment would diminish developing countries' discretion to screen foreign investment, and to channel FDI towards national industrial, economic or development objectives. Full non-discrimination at the pre-establishment stage would also prevent a host country from reserving certain sectors or industries exclusively for national investors, or attaching special conditions to foreign investment that were not applicable to national investment.

87. One view was that pre-establishment commitments were important to the creation of a transparent and stable framework for the international flow of investment. The fact that the GATS, *inter alia*, dealt with pre-establishment treatment of foreign investment in the services sector meant that there was a need for balance in the WTO rules regarding the treatment of foreign investment in the manufacturing sector. It was also suggested that pre-establishment commitments were not incompatible with developing countries' freedom to screen foreign investment, to regulate for prudential purposes, or to undertake commitments commensurate with domestic needs or levels of development, particularly if a positive list approach to country-specific commitments were adopted.

88. One view was that it was not appropriate to compare "investment" as defined and dealt with under GATS with "investment" as proposed for negotiation under the aegis of WTO. GATS followed an "enterprise based definition" of investment and the definition was closely linked to the mode 3 of service delivery (commercial presence) which, in the context of GATS, has no other purpose than to facilitate service supply. One of the basic characteristics of service delivery in respect of certain categories of services was the need for the "supplier" and the "receiver" of the service to be in contact. Commercial presence was, therefore, the only mode of service delivery in the case of certain types of

services, e.g. banking and insurance. Commercial presence was covered under the GATS only to the extent that it facilitated the delivery of services – and that, too, was subject to various conditions and exemptions. What was of importance was the commitment for market access for specific service sectors undertaken by a Member. Mistaking it as a commitment to "commercial presence" was mistaking the medium for the message.

89. It was noted that a conceptual distinction between the pre- and post-establishment phases of investment was not always easy to make in practice, which raised difficulties when attempting to set a lower standard of treatment for foreign investors entering a market than for those already established. It could blur, for example, when the treatment applied to investment at the pre-establishment stage affected directly an investor's post-establishment operations and activities. Similar conceptual problems could arise when an investment was expanded or diversified in the host country.

90. One view was therefore that it was important to provide non-discriminatory treatment to all three phases in the life of an investment: its entry, its operation after establishment, and its liquidation. Entry was crucial, since it was the point at which governments could deny market access altogether, or attach conditions to it, such as local participation in the ownership and control of an investment, or performance requirements. The conditions that applied to market entry often remained in force throughout the life of an investment. To draw an *a priori* distinction between pre- and post-establishment treatment risked undermining the meaning of non-discrimination and market access.

91. One view was that traditionally in international law, control of entry and establishment had been the prerogative of national governments. Conventionally countries had treated as sovereign the right to control entry and establishment. Only two countries (the United States and Canada) were known to insist on pre-establishment national treatment provisions in their bilateral investment treaties. A very limited number of other bilateral agreements involving pre-establishment national treatment were in the context of free trade arrangements or regional trading arrangements. International investment agreements also, in general, did not envisage national treatment at the pre-establishment stage. When certain international instruments envisaged pre-establishment national treatment, they were non-binding. The OECD MAI envisaging pre-establishment national treatment did not find favour with OECD countries and had to be abandoned. The question was, therefore, how an agreement of this nature, envisaging national treatment and MFN provisions of a binding nature, could be considered in a much more heterogeneous group like WTO.

(ii) Post-establishment

92. There was a widely shared view that the principle of non-discrimination should extend to investment that had been admitted to a host country, incorporating at least the minimum standards of investment protection found in bilateral investment treaties, although some noted that governments typically retained a measure of flexibility by subjecting this principle to a number of exceptions that were either general in nature or that pertained to specific sectors.

93. Concerns were expressed by some that the full application of non-discrimination at the post-establishment stage could restrict a host country's ability to subsidize or provide other benefits exclusively to national investments, or to exercise stricter regulatory control over foreign investments than over national investments. It could affect many development-oriented policies, especially those that aimed at placing performance conditions on foreign investors, or at providing preferential support and protection to infant industries, national producers and investors. Provisions attached to post- as well as pre-establishment treatment should recognize developing countries' right to regulate, to enjoy longer transition periods for adopting obligations and commitments, and to deviate from disciplines in a transparent manner when pursuing justified industrial, technological, and employment objectives.

(b) Standards of treatment

(i) MFN treatment

94. A key theme in the discussion was the distinction between MFN and national treatment. Of the two standards, MFN treatment was generally felt to be less controversial than national treatment, as it did not impinge as directly on a host country's ability to provide support and protection to domestic investment and business interests.

95. One view was that MFN treatment should be a general rule of application at both the pre- and post-establishment stages of investment, subject to any exceptions that a party might lodge. The point was made that MFN treatment was key to creating a level playing field among foreign investors and to designing a more equitable, transparent and stable structure of international rules. It was also noted that MFN was a general rule of application in both the GATT and the GATS, so as a matter of consistency in the WTO system it was felt that MFN treatment should be incorporated in a possible investment agreement as a general obligation for all phases of investment. In fact this approach could be accommodated in a number of ways, depending on the structure of any prospective accord.

96. Some reservations were expressed about a commitment to full MFN treatment at the pre-establishment stage of investment. The suggestion was made that host countries might wish to exercise selective controls over which foreign investments to admit, and on what terms they were to be admitted. The need to maintain flexibility to use screening policies on a case-by-case basis, in order to select foreign investments considered compatible with domestic industrial policy, was noted. Some also felt it important to preserve the option to offer certain foreign investors, but not others, investment incentives and other benefits which could carry over into the post-establishment phase.

(ii) National treatment

97. It was widely noted that including the national treatment standard in a possible multilateral investment framework raised more complex issues than the inclusion of MFN treatment.

98. The application of national treatment to the entry of foreign investment was highly sensitive for many. At the pre-establishment stage of investment, full national treatment would in principle prevent a host-country government from reserving certain sectors or industries exclusively for national investors, or attaching special conditions to foreign investment that were not applicable to national investment. In principle, it would mean a commitment to full openness to foreign investment, which it was noted no jurisdiction to date had achieved. It was suggested that GATS practice should be taken into account in the design of a possible investment framework: foreign service suppliers were granted national treatment in the pre-establishment phase only if market access commitments were scheduled by Members, and then specific conditions could still be attached.

99. It was also noted that the application of national treatment to the post-establishment phase of an investment could limit a host country's ability to protect its domestic investors against foreign competition through the differential application of laws and regulations. When applied in full, it placed foreign investors on an equal footing with national investors, and removed to a large extent the means that a host-country government had of supporting and protecting its own national investors. For example, it would in principle prevent a host-country government from subsidizing or providing other benefits exclusively to national investments, or from exercising stricter regulatory control over foreign investments than over national investments in areas such as environment or employment.

(iii) Other standards of treatment

100. It was observed that many IIAs contained other standards of treatment, such as "fair and equitable treatment", that could have a bearing on the application of the principle of non-

discrimination. However some felt that, while such issues may need to be addressed in the future, they lay outside the current mandate of the Working Group

(c) Related issues

(i) Exceptions

101. It was noted that most IIAs contained exceptions to the rule of non-discrimination, usually subject to carefully defined conditions. These allowed governments to give preferential treatment to domestic products, producers and investors, or to certain of their commercial partners but not others, or to pursue domestic policy objectives that could not be realized without practising some degree of discriminatory treatment. During the discussion of "development provisions", the Group explored the scope for – and possible application of – systemic, general, balance-of-payments and country-specific exceptions. Those mentioned were exceptions relating to screening procedures, national security, development, regional integration, public order, privatization, the balance-of-payments, sectoral reservations, performance requirements, and the movement of natural persons. Similar issues were also raised in the Group's discussion of "exceptions and balance-of-payments safeguards".

(ii) "Right to regulate"

102. Some suggested that the "right to regulate" should be explicitly recognized in a possible investment framework as an exception to the principle of non-discrimination. It was noted that the preamble to the GATS recognized the right of Members to regulate "in order to meet national policy objectives". In some IIAs, the issue of the "right to regulate" arose in the context of investor protection, and the extent to which coverage for "indirect takings" or "regulatory takings" was provided for under an agreement's expropriations provisions. One question raised was whether the concept could be interpreted beyond its original expropriation context (regulatory takings) to include also development and other related concerns.

(iii) "Like" circumstances

103. It was noted that MFN and national treatment were comparative standards. Some believed that the context for comparison was implicit in the terms themselves, and considered that the words "in like circumstances" were unnecessary and open to abuse. Some others felt that the context of comparison should be made explicit through inclusion of the phrase "in like circumstances". It was noted that some IIAs followed the practice of the GATT and the GATS in specifying that they applied only between investments that were "like" or "similar".

(iv) Vested benefits

104. One issue raised was how MFN obligations should be applied in relation to investors or investments that had been granted preferential standards of treatment prior to any negotiation of an investment agreement in the WTO: should the same favourable treatment should be extended to other foreign investors on an MFN basis, or should prior benefits should be protected by taking an exception to the MFN obligation through a "grandfather clause"?

(v) Sub-national entities

105. One question asked was whether treatment accorded to foreign investors by a sub-national state or province would meet the national treatment test only if it were no less favourable than the treatment accorded to the investors of the same state or province, or whether it would be sufficient to accord treatment no less favourable than that accorded to the investors from any other state or province.

6. Modalities for pre-establishment commitments based on a GATS-type positive list approach

106. A Secretariat Note on this subject was circulated in WT/WGTI/W/120. Written contributions were received from the European Communities, Korea, Japan, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, India, and Canada (WT/WGTI/W/121, W/123, W/125, W/127, W130, and W/150, respectively). This subject was raised also in the context of the discussion of "non-discrimination", "scope and definition", "transparency", and "development provisions".

107. One view was that the GATS approach to scheduling market-access commitments and related policy obligations represented a realistic and balanced way of approaching any eventual multilateral negotiation in the area of investment. It integrated policy discipline with flexibility for developing countries, allowing Members to undertake commitments commensurate with their individual development needs and circumstances and to pursue their national economic and social objectives. Some felt it would also make easier the eventual task of integrating a possible investment agreement with the GATS.

108. Another view was that most existing IIAs that covered the pre-establishment stage of investment used a full MFN/national treatment model, based on exemptions from, rather than commitments to, market access and policy obligations.

109. A further view was that neither approach was desirable, given that developing countries were not in a position to accept international policy disciplines over the pre-establishment treatment of foreign investment.

(a) Positive versus negative list approach

110. The comparative merits of the "positive list" approach used in the GATS and the "negative list" approach used in most IIAs were discussed.

111. One view was that the "positive list" approach allowed for selective liberalization of entry and establishment in specific activities under defined conditions, giving host countries more control over the liberalization and rule-making process. It provided them, particularly developing countries, with flexibility to pursue domestic development policies and to harness FDI in ways that contributed to their economic development goals, thus conforming to the Doha Ministerial mandate that any investment framework must allow Members to "undertake obligations and commitments commensurate with their individual needs and circumstances". It was also felt to minimise the risk of making unforeseen mistakes when binding entry and establishment obligations. Experience with the GATS had shown that a positive-list approach was preferable when a new area was for the first time the subject of liberalization at a multilateral level.

112. Another view was that full MFN/national treatment at the pre-establishment phase of investment, subject to a "top down" or "negative list" of exceptions lodged by countries, was preferable. It was felt that the "positive list" approach considerably weakened the scope for market access and the legal guarantee of non-discrimination, which could deter flows of foreign investment to host countries. The "positive-list" approach also required regular updating if it were to remain relevant in an evolving world economy and to assist transparency.

113. One view was that GATS was a complex agreement. Safeguard measures in respect of services had eluded evolution. Protection in respect of goods was possible through tariff and other border measures, while certain modes of services were not amenable to such measures. Given the complex nature of capital flows/investments, application of the non-discrimination principle as it existed in goods and services could not be automatically applied to investment. This was why bilateral investment treaties were preferred by many.

(i) GATS approach

114. It was noted that the GATS was technically a "hybrid" approach, in that it relied on the use of both "positive lists" of commitments and "negative lists" of exemptions for different purposes. Subject to negotiations, it allowed each Member to set out what specific market-access commitments it would undertake, and to schedule those commitments using a "positive-list" approach. Other core policy disciplines of the GATS – notably to avoid certain trade-restricting measures and to apply national treatment – were linked directly to a Member's market-access commitments. Members could then attach conditions and qualifications in their schedules using a "negative-list" approach, to both their obligation to avoid certain restrictions and to apply national treatment in scheduled sectors.

115. It was noted that the GATS MFN obligation also had important implications for pre-establishment treatment, and that this was a rule of general application. Subject to any (in principle, temporary) exemptions that Members listed on a "negative list" basis at the time of entry into force of the Agreement, the GATS required a Member to grant MFN treatment unconditionally with respect to any measures affecting trade in services in all sectors where it permitted the entry of foreign service suppliers, regardless of whether it had scheduled the sectors as specific commitments.

(ii) Market access

116. One view was that any investment agreement should include a separate provision on "market access", modelled on the GATS (Article XVI), dealing with certain restrictions applied to investors. It was noted that the absence of similar provisions in a possible investment agreement could give rise to inconsistencies with GATS schedules. Another view was that the scheduling of discriminatory and non-discriminatory market access limitations in the GATS had already been the source of confusion among Members – which raised doubts about replicating it in the context of investment.

(iii) Progressive liberalization

117. One view was that to the extent pre-establishment treatment in a possible investment agreement was based on a "positive list" approach, it should include an obligation on progressive liberalisation such as existed in the GATS. Although in practice WTO Members engaged in similar rounds of negotiations to liberalize trade under the GATT, they were under no obligation to do so. It was noted in this context that the GATS allowed greater flexibility for individual developing-country Members to open fewer sectors, liberalise fewer types of transactions, and progressively extend market access in line with their development situation and, when making access to their markets available to foreign service suppliers, to attach conditions aimed at increasing the participation of developing countries in world trade.

118. Another view was that WTO Members, particularly developing countries, should be under no obligation to further extend market-access commitments in future negotiations in the area of investment.

(b) Related issues

(i) Industrial classification

119. It was noted that a "positive list" approach to scheduling market access and related commitments would give rise to the need to devise a common approach to industrial (or sectoral) classification. One suggestion was to follow the GATS example of scheduling specific commitments based on a detailed classification of activities, and in this regard to consider using the United Nations Central Product Classification (CPC) system or the Harmonised Commodity Description and Coding System (HS).

(ii) Methods for negotiation

120. Regarding the method for negotiating commitments, one suggestion was a "request and offer" format as already used in the GATT and the GATS, and in other international investment agreements.

(iii) Modification of schedules

121. With regard to modifying schedules of market access commitments in a possible investment framework, it was noted that the GATS contained rules in this area which could form the basis for further discussion.

7. Exceptions and balance-of-payments safeguards

122. A Secretariat Note on this subject was circulated in WT/WGTI/W/137. Written contributions were received from Japan, Korea, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Canada, and the European Communities (WT/WGTI/W/138, W/143, W/144, W/146, and W/153, respectively).

123. The Working Group examined ways in which general, security, and regional integration exceptions as well as balance-of-payments safeguards might be incorporated in a prospective WTO investment framework. The view was broadly shared that similar formulations to the kind of general and security exceptions found in the WTO were applicable to any future investment framework. It was affirmed that flexibility for governments to respond to public, security, or balance-of-payments concerns needed to be an integral part of any investment framework, reflected in its basic structure as well as its relevant provisions. At the same time, as in the relevant GATT and GATS Articles, it was felt there needed to be clear conditions attached to these provisions to ensure that they did not involve arbitrary or unjustifiable discrimination, or create disguised restrictions. As in the GATT and the GATS, additional flexibility should be provided to developing countries in meeting those objectives.

124. It was noted that exceptions and safeguards worked in combination with an agreement's definitions, general obligations, and specific commitments to define its scope.

(i) General and security exceptions

125. It was noted that most IIAs – as well as the WTO itself – contained general exceptions that were permanently available for any Party to use, subject to specific conditions. In addition to national security matters, these exceptions typically covered areas such as the protection of public safety and health and certain environmental and cultural policy objectives. Conditions were often set out for applying measures in these areas, notably that the measures must not involve arbitrary or unjustifiable discrimination or create disguised restrictions. Many felt that such general exceptions should also be incorporated in any prospective investment framework, although some suggested that their scope or parameters should not extend beyond what already existed in the WTO.

126. It was suggested that general exceptions should also be available for development purposes – a point which had been raised previously in the context of development provisions.

(ii) Exceptions for regional integration arrangements

127. It was noted that exceptions for regional integration purposes were contained in the WTO and were also a feature of many IIAs, particularly bilateral investment treaties, where typically the aim was to prevent the MFN rule from disallowing IIA parties from conferring preferential benefits on one another.

128. One view was that the Group needed to look more closely at the relationship between bilateral and regional agreements and a possible multilateral framework in order to identify the scope for potential overlaps and conflicts, particularly as regards the issue of MFN obligations. The models of the GATT and the GATS were thought to provide a valuable reference point for that. One suggestion was that an article could be included in a prospective WTO investment framework allowing an MFN exception for agreements that achieved higher integration in terms of investment, so as to avoid the problem of free riders. Another view was that the Working Group needed to proceed cautiously with regard to treating bilateral and regional investment agreements as exceptions.

(iii) Balance-of-payments safeguards

129. Balance-of-payments safeguards were widely considered to be a particularly important element in any discussion of a possible investment framework, as they touched directly on concerns about short-term capital flows and exposure to financial volatility. It was commonly understood that rights and obligations accorded under both trade and investment agreements should not serve to undermine or destabilise a country's balance of payments nor interfere with its obligations to the IMF. At the same time, the point was made that an appropriate balance needed to be struck between the rules guaranteeing the free transfer of investment and related payments, and governments' desire to protect themselves from balance-of-payment difficulties. While no common view on the precise nature and scope of balance-of-payments safeguards emerged from the discussions, it was widely accepted that the subject warranted further examination, perhaps including contributions from relevant agencies such as the IMF. Some felt that the issue of balance-of-payments safeguards needed to be viewed in the wider context of international financial flows and concerns about the effects of such flows on countries' macroeconomic stability. Several emphasised the need for compatibility between a possible investment agreement in the WTO and the Articles of Agreement of the IMF.

130. The point was made that balance-of-payments issues in IIAs related to cross-border capital transactions whereas balance-of-payments issues in the WTO relate to trade flows. This explained the prevalence of provisions in IIAs regarding the imposition of exchange controls and other instruments of monetary policy that aimed at restricting capital account transactions and related current payments. In contrast, the WTO balance-of-payments provisions set out the conditions under which Members could restrict imports.

131. It was noted that there was considerable divergence among IIAs in the way balance-of-payments issues were addressed. Most IIAs contained provisions guaranteeing that a host country would permit current payments and transfers related to foreign investment. Only a few contained balance-of-payments safeguards *per se*, in part because most did not contain substantive provisions on the admission of cross-border capital flows, leaving participating governments free to apply restrictions as they saw fit, including for balance-of-payments purposes.

132. One view was that defining precisely the conditions under which balance-of-payments safeguard measures could be invoked was a major concern, and needed to be examined further. Particular attention needed to be paid to the precise formulation, procedures, conditions and application of any safeguard provisions. Inasmuch as such provisions identified precise conditions that needed to be met before a safeguard clause could be invoked, for example by stipulating prior notification and/or approval from the competent organ or setting time limits, they defined the scope for flexibility in dealing with economic emergency situations. This related especially to the issue of transfer of funds, and whether the provisions allowed for greater flexibility for developing countries.

133. The point was also made that among the provisions most directly affected by capital restrictions imposed for balance-of-payments reasons were investment protection provisions broadly defined, and especially those related to the free transfer of payments and expropriation. It was felt that the subject of balance-of-payments safeguards further highlighted the need to address related issues such as expropriation and transfer pricing.

134. It was noted that an important factor influencing the need for – and role of – a balance-of-payments safeguard provision in an IIA was the type of foreign investment covered by the agreement. It was noted that most IIAs took as their starting-point a comprehensive, asset-based definition of investment. Balance-of-payments safeguard provisions in such agreements allowed a host country to react where a need arose to control inflows and outflows of investment, particularly short-term, speculative capital flows, and to control outflows of transfers and payments associated with established investment.

135. Many felt that any prospective WTO investment framework should exclude from its coverage those categories of foreign investment – notably short-term, speculative capital flows – that could be most problematic from a balance-of-payments point of view, thus reducing the need for safeguards. As noted in previous discussions, the difficulty then lay in defining which these were.

136. It was noted that one approach to dealing with concerns about the effects on the balance-of-payments of short-term, speculative capital flows was illustrated by Chile's bilateral investment treaties as well as its Free Trade Agreement with Canada.

137. One view was that serious balance-of-payments crises could not be resolved simply through provisions related to the suspension of transfers. There needed to be a balance-of-payments impact analysis of foreign investment more generally, and the effects of large-scale capital inflows and outflows on countries' economic stability.

138. It was also noted that the issue of potential balance of payments crises in the case of liberalizing host countries was not very straightforward. It was more a question of preventing such crises rather than damage control after they had taken place. Impending crises had their toll in the form of general slack in economic activity and left a chilling effect on the overall economic outlook. In case the concerned country was not adequately equipped with the necessary policy tools to prevent such impending balance-of-payment crises, there would be loss of confidence in its ability to survive and it would inevitably slip into financial crisis.

(iv) Broader safeguards

139. While the Working Group's discussion focused on safeguards related to balance-of-payments emergencies or crises, the question arose whether consideration should be given to other emergency situations, beyond balance-of-payments, that might require safeguards – such as the equivalent of an import surge in the investment area and concerns about the crowding out of domestic investors.

(v) Safeguards on developmental grounds

140. One view was that safeguards should be available to developing countries to address their trade, financial and developmental needs. Such safeguards should be objective and operationable.

8. Consultation and the settlement of disputes between members

141. A Secretariat Note on the subject was circulated in WT/WGTI/W/138. Written contributions were received from Japan, the European Communities, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Canada (WT/WGTI/W/139, W/141, W/145, and W/147).

142. One view was that at this stage it was difficult to determine the kind of provisions on dispute settlement that could be applied to a prospective investment agreement since they would depend on its substantive provisions.

143. One view was that any prospective investment agreement should be anchored firmly in the procedures, rules and structures of the WTO dispute settlement system. It was noted that there was no

precedent in existing WTO agreements for conducting dispute settlement outside of the DSU. If the objective was to secure a "transparent, stable and predictable framework" for investment, it would be counterproductive - and unnecessarily confusing - to establish a separate system for settling disputes among parties to a prospective multilateral investment framework. Also, to the extent that existing WTO agreements such as the GATS and the TRIMS Agreement included investment-related provisions, the WTO provisions on dispute settlement were already applicable to investment. Integrating a prospective investment framework into the existing dispute settlement system of the WTO would help to ensure greater coherence in the treatment of investment-related policies, and avoid the need to draw arbitrary and artificial distinctions between services and manufacturing-related investments.

144. The view was also expressed that the possibility of employing the existing WTO dispute settlement mechanism was one of the main reasons for adopting a multilateral approach to investment rules. Compared with bilateral treaties, where the dispute settlement process was based on *ad hoc* arbitration and could be easily influenced by the nature of the dispute or the relationship between the two countries, supervision through a multilateral system, based on binding commitments and with detailed procedural rules for the different phases of the settlement process, would help to ensure the fairness and transparency of a dispute settlement process. It was pointed out that the DSU included a number of provisions on special and differential treatment for developing and least-developed countries, although views differed as to whether these measures had proven to be effective.

145. It was suggested that an important task would be to explore how to strengthen consultation mechanisms in the context of dispute resolution in the investment area so that it could serve home- and host country interests. Settlement through consultation was preferable to the formal adjudication of disputes, which could entail high costs of litigation. The WTO provided a good model in the form of good offices, conciliation, and mediation.

146. Concerns were raised by some about the scope for non-violation cases were an investment framework to be brought under the DSU. Also, an important question was felt to be how provisions on compensation and suspension of concessions should apply to investment disputes. The difficulty of determining levels of compensation, particularly as regards non-violation complaints, was noted by some. For example, if an investor was denied admission and establishment in a sector where a Member had undertaken pre-establishment commitments, assessing the level of compensation could prove complex and difficult. Others suggested that similar issues were being adequately dealt with in the context of the GATS.

147. The view was also expressed that the implications of any binding multilateral framework on investment on the fast moving ‘autonomous’ liberalization drive by developing countries and LDCs had to be taken into account. It was pointed out that international law on foreign investment contracts did not exist at present because such contracts did not fall under the purview of international law. The determination of the nationality of firms was another important issue. Even though regional and bilateral treaties provided for international arbitration of foreign investment disputes, two points needed to be noted in this regard. First, a number of sectors were exempted from the provisions of the agreements at regional levels, making such agreements partial. Second, and more importantly, such agreements were applicable only to investment duly approved by the host country, and in most cases were subject to domestic laws and regulations, thus indicating in unequivocal terms that the control rested with the host country as far as foreign investment was concerned. The investing firm was aware, at the time of investment, of the level and extent of protection available to investment and to the investor, as the case may be, and this was all the more reason why investment should be subject to a mechanism that was controlled by the host state which determined whether or not the investment was to be protected. It was also suggested that the Working Group should deliberate on issues like the incompatibility between possible international investment rules and the multilateral trade rules and the unfeasibility and undesirability of aiming to work international investment rules on the platform of the

multilateral trading system, as well as the need for control over entry, establishment, promotion and protection of foreign investment resting within the domain of host country jurisdiction.

148. Some expressed concern about the scope for cross-retaliation and cross-compensation in the trade area in the case of investment related disputes. Some others noted that this was already applicable to investment-related disputes under the GATS and the TRIMs Agreement.

149. One issue raised was how compensation would be awarded if a prospective multilateral framework included obligations related to investment protection and expropriation. It was noted that in the case of IIAs which included investor-to-State arbitration, if a host State was found to be in breach of the agreement the tribunal was typically empowered to order that the investor be awarded monetary damages and/or restitution of property with applicable interest. The arbitral tribunal could not, however, order a host State to revoke or modify an inconsistent measure or policy. This situation differed fundamentally from the WTO dispute settlement system, where it was understood that neither panels nor the Appellate Body could recommend the payment of monetary damages.

150. A related question was whether a prospective WTO investment framework should recognize the right of individual investors to pursue claims against host States by incorporating investor-to-State dispute settlement. One view was that consideration should be given to provisions for investor-to-State disputes, as well as for State-to-State disputes, as this was the model adopted in most IIAs; the Preshipment Inspection (PSI) Agreement was a WTO precedent for the settlement of disputes between private parties and governments. Another view was that, given the inter-governmental nature of the WTO, the introduction of investor-State dispute settlement provisions in a prospective investment framework would require a fundamental change to the DSU that was unwarranted and probably not feasible. It was also felt that the case for changing the DSU was unconvincing as the system had proven itself capable of accommodating existing WTO investment-related agreements, such as the TRIMs Agreement and the GATS. More generally, some stated that providing for a right of individual investors to pursue claims against host States would represent an unjustified intrusion into national sovereignty. In this regard, it was noted that the Doha Ministerial Declaration had explicitly referred to disputes "between Members" as a subject for clarification.

151. The relationship between the application of WTO dispute settlement procedures in the context of a multilateral investment framework, on the one hand, and the application of dispute settlement provisions contained in existing bilateral and regional investment agreements on the other, was viewed as a significant issue that warranted further discussion. Some pointed out that the use of WTO procedures should not preclude recourse to provisions of bilateral or regional investment agreements if the parties to a dispute so decided. In this respect, it was suggested that there might be a need to design specific rules to avoid inefficiency and duplication. Others raised concerns about the difficulties that could arise from "forum shopping", especially in cases where rules overlapped and memberships differed. Some noted that similar issues arose in the trading system without posing insurmountable difficulties.

152. It was felt important to ensure not only that effective consultation and dispute settlement mechanisms were provided for any prospective multilateral framework, but also that Members could make effective use of these means. An important consideration in this respect was the difficulty that many Members expressed in participating fully and effectively in existing WTO arrangements owing to lack of adequately skilled personnel and resources. To address such difficulties, it was felt that special provisions should be made for technical and financial assistance. In the same vein, it was important to ensure full participation of developing-country experts in consultative and decision-making panels.

9. Relationship with other WTO agreements and IIAs

153. There was discussion of the relationship between a prospective WTO investment framework and existing IIAs. The observation was made that any eventual investment framework would need to co-exist and interact with a number of other investment-related agreements, both within the WTO system and outside it. Relevant WTO agreements the Agreements on Trade-Related Investment Measures, Trade-Related Aspects of Intellectual Property Rights, Subsidies and Countervailing Measures, Government Procurement, and especially the GATS, all of which contained provisions that to a greater or lesser extent also pertained to investment policy insofar as it was trade-related.

154. The point was made that while the WTO already contained important trade-related investment provisions, the coverage was partial and incomplete. In particular, the anomaly of having WTO rules related to foreign investment in the services sector – as embodied in the GATS – but not the non-services sector was emphasised. Some saw inconsistency in the TRIMs agreement addressing trade-related investment measures for trade in goods, but not for trade in services. Similar points were made about the coverage of subsidies, safeguards, and other rules in the WTO system and their relationship to investment issues.

155. It was felt by some that the existence of investment-related provisions in WTO agreements raised important systemic questions about the purpose and scope of an investment framework – as well as broader questions about how investment rules should be treated overall in the WTO system. Would a WTO framework aim for common standards of treatment for investment across all sectors? Or would certain sectors (i.e., services) and assets (i.e., intellectual property) be excluded from its coverage? And if these sectors were excluded, how to distinguish clearly whether an investment was in one sector or another, given different standards of treatment that might apply? A related question was whether WTO rules in areas such as TRIMs and subsidies would apply to a framework agreement on investment.

156. Although the Working Group did not address these wider systemic questions in any detail, some suggested that the scope of any framework could be limited to foreign investment in the primary and secondary sectors, leaving investment in the services sector to be covered by the existing provisions of the GATS. Some others considered that a possible framework could seek to provide an integrated approach to foreign investment rules across all WTO agreements and sectors.

157. It was felt by the Working Group that the relationship between a possible WTO investment framework and the existing network of bilateral and regional investment agreements needed to be examined and clarified. These existing agreements would, by necessity, shape and circumscribe the architecture of a possible multilateral investment framework. One issue in particular was the inter-relationship between non-discrimination commitments – particularly MFN treatment – in IIAs and a possible multilateral framework.

10. FDI and the transfer of technology

158. In response to a request from the Group, the Secretariat circulated a Note on "Foreign Direct Investment and the Transfer of Technology" (WT/WGTI/W/136). The Note provided a synthesis of the main themes arising from previous discussions of this subject in the Working Group and other relevant studies, and reviewed the treatment of technology-related policies in current investment agreements (namely provisions on performance requirements related to the transfer of technology and the conduct of research, and intellectual property rights).

159. Discussion focused on the different ways that technology was transferred by multinational firms: through internal transfers between a parent company and its foreign affiliate, external transfers from a multinational enterprise to a firm that it does not own or control, through licensing, minority joint ventures or technical co-operation. It was noted that the impact of FDI on technological

development depended not only upon the formal transfer of technology by multinational firms to its affiliates or partners, but also upon the ability of economies to absorb technology as a result of various types of knowledge "spillover effects". In other words, the capacity of an economy to utilise technology was critical to its transfer.

160. There was discussion of whether technology transfer requirements – and performance requirements more generally – were a valid subject of discussion in the Working Group, in light of the mandate set out in paragraphs 20-22 of the Doha Ministerial Declaration as well as the parallel discussion in the context of the Article 9 Review of the TRIMs Agreement.

Annex 1

TEXT OF THE DOHA MINISTERIAL DECLARATION[3]

RELATIONSHIP BETWEEN TRADE AND INVESTMENT

20. Recognizing 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, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

21. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members. 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. 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. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

[3] WT/MIN(01)/DEC/1.

Annex 2

Summary of contributions received in the Working Group on the Relationship between Trade and Investment in 2002

Symbol (WT/WGTI/W/-)	***Member / Other source***	***Title or Topic***
W/108	Secretariat	Scope and Definitions: "Investment" and "Investor"
W/109	Secretariat	Transparency
W/110	European Community and member States	Concept Paper on Transparency
W/111	Japan	Scope and Definition
W/112	Japan	Transparency
W/113	Canada	Scope and Definition
W/114	Korea	Scope and Definitions of "Investment"
W/115	European Community and member States	Concept Paper on the Definition of Investment
W/116	OECD	OECD Activities in the Field of Investment Capacity Building
W/117	Mexico	Communication regarding APEC Seminar on Bilateral and Regional Investment Rules and Agreements – Mérida, Mexico, 17-18 June 2002
W/118	Secretariat	Non-Discrimination – Most-Favoured-Nation Treatment and National Treatment
W/119	Secretariat	Development Provisions
W/120	Secretariat	Modalities for Pre-Establishment Commitments based on a GATS-Type, Positive List Approach
W/121	European Community and member States	Concept Paper on Modalities of Pre-Establishment
W/122	European Community and member States	Concept Paper on Non-Discrimination
W/123	Korea	Non-Discrimination and GATS-Type Approach for Investment
W/124	Japan	Non-Discrimination
W/125	Japan	Modalities for Pre-Establishment Commitments
W/126	Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Development Provisions
W/127	Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Non-Discrimination and Pre-Establishment Commitment

Symbol (WT/WGTI/W/-)	*Member / Other source*	*Title or Topic*
W/128	Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Scope and Definition of "Investment"
W/129	Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Ensuring Transparency
W/130	Canada	Modalities for Pre-Establishment Commitments Based on a GATS-Type, Positive List Approach
W/131	Canada	Development Provisions
W/132	Mexico	Non-Discrimination
W/133	Switzerland	Multilateral Framework for Investment: An Approach to Development Provisions
W/134	Secretariat	Consultation and the Settlement of Disputes between Members
W/135	Secretariat	Technical Assistance Activities Pursuant to Paragraph 21 of the Doha Ministerial Declaration
W/136	Secretariat	Key Issues Concerning Foreign Direct Investment and the Transfer and Diffusion of Technology to Developing Countries
W/137	Secretariat	Exceptions and Balance-of-Payments Safeguards
W/138	Japan	Exceptions and Balance-of-Payments Safeguards
W/139	Japan	Consultation and the Settlement of Disputes between Members
W/140	European Community and member States	Concept Paper on Development Provisions
W/141	European Community and member States	Concept Paper on Consultation and the Settlement of Disputes between Members
W/142	United States	Covering FDI and Portfolio Investment in a WTO Investment Agreement
W/143	Korea	Balance-of-payment Safeguard Provisions in Investment Agreements
W/144	Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Exceptions and Balance-of-Payments Safeguards
W/145	Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Dispute Settlement Mechanism
W/146	Canada	Exceptions and Balance-of-Payments Safeguards
W/147	Canada	Consultation and Dispute Settlement
W/148	India	Development Provisions
W/149	India	Non-Discrimination

Symbol (WT/WGTI/W/-)	*Member / Other source*	*Title or Topic*
W/150	India	Views on Modalities for Pre-establishment Commitments based on a GATS-type, Positive List Approach
W/151	Secretariat	Technical Assistance Activities in 2002 Pursuant to Paragraph 21 of the Doha Ministerial Declaration
W/152	China, Cuba, India, Kenya, Pakistan and Zimbabwe	Investors' and Home Governments' Obligations
W/153	European Community and member States	Concept Paper on Balance-of-Payments Safeguards

Annex 3

Technical Assistance and Capacity-Building Activities held in 2002

Topics	Doha TC/CB Mandate	Activity	Cooperation with	Dates	Venue
Intensive Training Course for English-speaking Africa	21, 22	Training Course	UNCTAD	18-29 March 2002	South Africa (Pretoria)
Regional Seminar for Asia	21, 22	Regional Seminar	UNCTAD/Singapore	6-8 May 2002	Singapore
Trade and Investment	21, 22	National Workshop	UNCTAD	13-14 May 2002	China (Beijing)
OECD Technical Workshop	21, 22	Technical Workshop	OECD	15-20 May 2002	Hong Kong, China
Trade and Investment	21, 22	National Seminar	UNCTAD	16 May 2002	Indonesia (Jakarta)
APEC Workshop on Regional and Bilateral Investment Rules/Agreements	21, 22	Technical Workshop	APEC	17-18 May 2002	Mexico (Mérida)
Intensive Training Course for French-speaking Africa	21, 22	Training Course	UNCTAD/Agence de la Francophonie	27 May-6 June 2002	Egypt (Alexandria)
Regional Seminar for French-speaking Africa	21, 22	Regional Seminar	UNCTAD	19-21 June 2002	Gabon (Libreville)
Regional Policy Seminar	21, 22	Regional Seminar	Thailand	27 June 2002	Thailand (Bangkok)
Trade and Investment	21, 22	National Seminar	Thailand	28 June 2002	Thailand (Bangkok)
Training for Geneva Delegations/Officials visiting from capitals, coinciding with WGTI meeting	21, 22	Technical Workshop (English)	UNCTAD	2 July 2002	Switzerland (Geneva)
Regional Seminar for Central America	21, 22	Regional Seminar	UNCTAD / IDB	12-13 August 2002	Costa Rica (San José)

Topics	Doha TC/CB Mandate	Activity	Cooperation with	Dates	Venue
Training for Geneva Delegations/Officials visiting from capitals, coinciding with WGTI meeting	21, 22	Technical Workshop (French)	UNCTAD	13 September 2002	Switzerland (Geneva)
Regional seminar for South America and Intensive Training Course for Latin America	21, 22	Regional Seminar and Training Course	UNCTAD / IDB	7-8 October 2002 and 9-18 October 2002	Peru (Lima)
Trade and Investment	21, 22	National Seminar	UNCTAD	24-25 October 2002	Venezuela (Caracas)
Trade and Investment	21, 22	National Seminar	UNCTAD	28-29 October 2002	Guatemala (Ciudad de Guatemala)
Trade and Investment	21, 22	National Seminar	UNCTAD	21-22 November 2002	Sri Lanka (Colombo)
Intensive Training Course for Asia and the Pacific	21, 22	Training Course	UNCTAD	23 November – 4 December 2002	India (New Delhi)
Training for Geneva Delegations/Officials visiting from capitals, coinciding with WGTI meeting	21, 22	Technical Workshop (Spanish)	UNCTAD	29 November 2002	Switzerland (Geneva)
Workshop on the Relationship between Trade and Investment for English-speaking African countries	21, 22	Technical Workshop	UNCTAD / JICA	1-2 December 2002	Switzerland (Geneva)
Trade and Investment	21, 22	National Seminar	UNCTAD	19-20 December	Tunisia (Tunis)