

**Working Group on the Relationship  
between Trade and Investment**

**REPORT ON THE MEETING HELD ON 3-4 DECEMBER 2002**

Note by the Secretariat

1. The Working Group on the Relationship between Trade and Investment met on 3 and 4 December 2002 under the Chairmanship of Ambassador de Seixas Corrêa (Brazil). The Working Group adopted the agenda contained in WTO/AIR/1978.

2. The Chairman said that the purpose of the meeting was three-fold: (i) to continue discussion on Paragraph 22 subjects, especially in light of the new contributions from Members; (ii) to receive an update from the Secretariat on technical assistance; (iii) to consider the Working Group's draft Annual Report; and (iv) to discuss the Working Group's work programme for the coming year – the schedule of meetings, their content, and how the work programme might feed into the General Council's preparations for the 5<sup>th</sup> Ministerial Conference.

A. PARAGRAPH 22 OF THE DOHA MINISTERIAL DECLARATION

3. The Chairman invited delegations to continue discussions on the topics listed for clarification in Paragraph 22 of the Doha Ministerial Declaration and drew attention to recent communications that had been received from India on the subjects of "Development provisions", "Non-discrimination", and "Modalities for pre-establishment commitments based on a GATS-type positive list approach" (WT/WGTI/W/148, 149 and 150, respectively). He also drew attention to a joint communication that had been received from China, Cuba, India, Kenya, Pakistan, and Zimbabwe on "Investors' and home governments' obligations" (WT/WGTI/W/152), and to a communication from the European Communities on "Balance-of-payments safeguards" (WT/WGTI/W/153).

4. The representative of India introduced the three submissions. He noted that India had actively participated in the Working Group's discussions on various subjects in accordance with the mandate outlined in Paragraphs 20-22 of the Doha Ministerial Declaration, read in conjunction with the Chairman's statement at the Ministerial Conference. He recalled that discussions on some of these topics, namely development provisions, non-discrimination and modalities for pre-establishment commitments had been held at the Group's July meeting where his delegation had expressed its views. He considered that the Group had had a useful exchange of views which had enabled Members to better understand each others' perspectives as well as deepen their understanding of the issues at hand.

5. His delegation had submitted its three papers (WT/WGTI/W/148, W/149, and W/150) as its contribution to the learning process without prejudice to India's known position that the need for a multilateral framework on investment within the WTO had not been established. As his delegation had stated at previous meetings of the Working Group, India's knowledge of this complex issue was limited and his delegation therefore reserved its right to revert to these subjects as and when its knowledge increased.

6. He then highlighted some of the points contained in the three papers. First, on development, he noted that the process was complex and that there was no single formula that could fit into every situation in such a manner that it would inevitably lead to economic growth. Developing countries needed policy space so that they could determine for themselves how the process of economic development could be speeded up. This included policy space to determine the manner in which investment should be regulated and channelled. Any multilateral disciplines that sought to limit this policy space, by their very definition, would reduce the policy options available to developing countries to use foreign investment for promoting development and economic growth. Any movement of capital that would cause damage to the domestic industry and have adverse effects on small- and medium-sized enterprises and employment would need to be carefully regulated. Developing countries needed to retain the ability to screen and channel foreign investment in accordance with their domestic interests and priorities. They should be given not only policy flexibility but should also be able to use instruments such as performance requirements in order to achieve their development objectives. Developing countries required development space and it was therefore imperative that the determination of development priorities should be left to the country concerned. The “one-size-fits-all” approach would not work.

7. He suggested that one-sided arguments that focussed on host-country obligations without considering home-country obligations as well as investors’ obligations were not tenable. It was important that the Working Group also discussed a binding code of conduct on investors with a further stipulation that it should be enforced by home countries through a set of precise domestic laws that could be activated by any Member.

8. His delegation also believed that there were severe limitations to the extension of the concept of non-discrimination to capital flows – and that a certain degree of discrimination between different kinds of investments was unavoidable. The principles of free trade in goods and services could not be applied to the movement of capital and investment. When it concerned trade, national treatment had a special relevance and the multilateral trading system was established on the basis of the non-discrimination principle. However, traditionally in international law, control of entry and establishment – including the entry and establishment of foreign investment – had been the prerogative of national governments. International investment agreements (IIAs) in general did not envisage national treatment at the pre-establishment stage. When certain of them did, it had been noted that such instruments were not binding.

9. He noted that there had been some attempt to draw a parallel between Mode 3 of the GATS and investment disciplines, but India did not consider it appropriate to compare investment as defined and dealt with under GATS with investment as proposed for negotiation by some Members under the aegis of the WTO. 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 limitations.

10. Given the complex nature of capital flows, his delegation believed that the application of the non-discrimination principle, as it existed in goods and services, to investment could not be automatic. Developing countries needed to retain the ability to screen and channel FDI in accordance with their domestic interests and priorities. He suggested that bilateral investment treaties (BITs) were preferred the world over for precisely the flexibility they provided to the host country while at the same time extending necessary protection to foreign investors.

11. The point was that financial flows in no way resembled flow of goods and services. Money by its very nature was more fluid and less transparent in its movement; it fell into the category of neither goods nor services. WTO was a trade-negotiating forum and India was not convinced that the issue of investment lay in the domain of the WTO.

12. The representative of Japan recognized the essential point made in India's papers regarding the importance of securing sufficient "policy space" for developing countries to regulate FDI flows and to pursue individual economic and development objectives. At the same time, his delegation felt it was important to recall that at Doha Ministers had clearly recognized the case for a multilateral framework to secure transparent, stable and predictable conditions for FDI flows. Japan believed that many delegations shared its view that creating new multilateral investment rules could go hand-in-hand with pursuing development objectives. While there were clearly issues that needed to be resolved in order to ensure that these objectives were compatible, Japan remained convinced that multilateral investment rules were fundamentally in developing countries' interests. Given that India itself placed the most importance on attracting FDI, Japan urged India to take a more constructive approach to investment discussions in the WTO, rather than placing too much emphasis on the negative aspects of FDI.

13. He noted that the Working Group had already spent considerable time discussing modalities for pre-establishment commitments based on a GATS-type positive list approach. Without repeating the main points raised in previous discussions, he stressed that incorporating the principle of national treatment in the pre-establishment phase was important for investors and had already been accepted in various bilateral agreements – including the Japan-Singapore Economic Partnership Agreement. He also suggested that the positive list approach to scheduling pre-establishment commitments would provide sufficient flexibility for all WTO Members. Developing countries themselves could decide on the sectors in which they wished to make commitments to liberalize FDI in accordance with their national development strategies and priorities. At the same time, the positive list approach would provide greater predictability and certainty for investors. His delegation was convinced that such an approach could provide a solid basis for future discussions in the Working Group.

14. India had argued that it was not appropriate to draw parallels between GATS Mode 3 and a possible investment agreement. While Japan agreed that the purpose of Mode 3 was to ensure the supply of services through the establishment of a commercial presence, once Member countries made commitments in certain services sectors under Mode 3 access for foreign investment in those sectors was ensured. Thus it could safely be said that FDI in services sectors was covered by the GATS.

15. Regarding performance requirements, Japan was of the view that such requirements could be burdensome for investors and that, in any event, many were prohibited under the TRIMs Agreement. Discussion of this subject in the Working Group should keep in mind the need not to undermine the TRIMs Agreement. In Japan's view a more effective way to facilitate the transfer of technology and other development-related goals was to implement policies aimed at enhancing human resource capacity and the competitiveness of supporting industries.

16. Japan also agreed that balance-of-payments issues were important and needed to be further discussed in the Working Group. However, Japan did not share India's view that performance requirements were appropriate to addressing balance-of-payments difficulties.

17. India had pointed to MFN exceptions as an example of how the GATS could be development "unfriendly", but Japan felt that this assessment was not accurate. His delegation pointed out that more than half of the MFN exceptions in GATS schedules were registered by developing countries, and that all exceptions were to be phased out within 10 years of the Agreement coming into effect.

18. Finally, Japan fully agreed with India that the issue of sub-national governments' obligations under any prospective multilateral investment framework was an important one, and it needed to be further discussed by the Working Group.

19. The representative of Korea, in commenting on the papers submitted by India, recalled statements and written contributions his delegation had already made at previous meetings of the

Working Group. His delegation noted that India assumed in its paper on non-discrimination (WT/WGTI/W/149) that “investment” *per se* was distinct from “trade in goods and services” *per se* for the following reasons: first, investments were money flows, which were different in character from flows of services and goods; second, money markets were considerably more opaque, less predictable, and far more subject to purely speculative movements than global markets for goods and services; and third, the concept of “commercial presence” in the GATS was introduced only to facilitate the supply of services, and thus could not be used automatically to justify the inclusion of “investment under goods” in the WTO. Based on this assumption, India concluded that the WTO principles of non-discrimination in trade of goods and services could not be applied to investment.

20. Korea noted that Ministers had recognized the case for a multilateral investment 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. Ministers themselves clearly recognized that investment, especially FDI, contributed to the expansion of trade – and Korea shared this position. The goal was to develop the framework.

21. Korea did not share India’s assumption that investment was exclusively a question of money flows. Investment was also frequently linked to trade flows, through multinational enterprises establishing a commercial presence in host countries. At the same time, trade flows were themselves linked to financial flows. This was why the GATT contained provisions on Restrictions to Safeguard the Balance of Payments in Article XII and Exchange Arrangements in Article XV. The GATS also had numerous provisions relating to the transfer of money in connection with trade in services. Given the dynamic nature of contemporary business practices, money flows from either investment or trade had similar characteristics, though there were certainly differences in degree.

22. Korea also believed that “commercial presence”, as defined in the GATS, should be understood as covering investment provisions in the services sector. He drew attention to the fact that many bilateral and regional investment agreements did not distinguish between services and goods, but dealt with them together as regards their specific provisions on investment.

23. In this respect, Korea believed that the GATS could provide useful guidance as regards the application of the principle of non-discrimination in any prospective WTO investment agreement covering non-services sectors. This was the key argument in Korea’s written contribution (WT/WGTI/W/123). His delegation did not see any reasonable basis for concluding that the five fundamental principles of the WTO outlined in an earlier paper submitted to the Working Group by Korea (WT/WGTI/W/96) could not be applied to a future investment agreement for goods. In Korea’s view, these five principles, including non-discrimination, should be duly incorporated in any prospective multilateral investment agreement.

24. India had cited paragraph 18 of Korea’s paper (WT/WGTI/W/123), suggesting that Korea recognized that commercial presence in the GATS bore no relationship to investment provisions. However, his delegation stressed that this was an incorrect interpretation of this paragraph in particular, and Korea’s position in general. When seen in the context of paragraph 4 of the same paper, Korea clearly stated that investment in the services sector was implicit in Mode 3, which was defined as the supply of a service by a service supplier of one Member through commercial presence in the territory of any other Member. Similar references could be found throughout the paper. Furthermore, unlike India, Korea believed that national treatment at the post-establishment stage would be more appropriate in a multilateral framework, even though national treatment applied to the services sectors committed in a Member’s schedule under GATS. Korea’s understanding was that providing assurances of a stable environment for foreign investors willing to maintain a long-term business relationship with a host country was a minimum requirement.

25. Another mis-contrued interpretation of Korea's position was made in paragraph 6 of India's paper. India correctly quoted one of the questions raised in Korea's paper (WT/WGTI/W/96) – i.e., “How should we bridge the differences in the definition of investment between any multilateral framework on investment and the GATS in which investment is defined as “commercial presence”?” However, this was the second question in Korea's paper and it was in a sequence logically linked to the first question – i.e., “Should we incorporate the services sector in the new investment rules or should we only include the non-services sector”? His delegation wished to be clear that the first question raised by Korea was whether or not a single investment agreement for goods and services was needed. If a single agreement were not thought to be optimal, then another key issue arose - i.e., how to deal with any differences between an investment agreement on goods and the existing provisions of the GATS. India quoted only this second question in Korea's paper, thus leading to a misinterpretation of Korea's position.

26. In conclusion, Korea wished to reiterate its suggestion that the core principles of the WTO should apply to any prospective multilateral investment agreement, in order to enhance both the predictability and transparency of the international investment climate. At the pre-establishment stage, a GATS-type approach could provide a useful model - i.e., providing conditional national treatment to foreign investors according to specific commitments granted by host countries. However, at the post-establishment stage, national treatment should be accepted as a general obligation. Korea firmly believed that this would result in benefits for investors as well as host countries.

27. The representative of Costa Rica in thanking India for its important contributions, made several general comments on the three papers. First, India appeared to start from the principle that a multilateral investment agreement would prevent countries from exercising the right to apply their own regulations. The freedom to apply national regulations was also a subject of great importance to Costa Rica, and, unlike India, his delegation believed that an international agreement in the WTO would strengthen Costa Rica's national capacity to implement domestic regulations. Accordingly, a multilateral investment regime would be of great benefit for small developing countries such as Costa Rica. He also felt that India might speak of its own experience, but that Costa Rica did not share these perspectives and therefore India did not speak on its behalf. Finally, he asked India to explain what had led it to assert, in paragraph 2 of its paper on non-discrimination (WT/WGTI/W/149), that “unlike domestic investment, where funds remain within the country, foreign investment can flow in and out, depending on speculative factors and short-term changes in different investment destinations”. This assertion served as the central premise of India's position on the principle of non-discrimination, and for affirming the validity of discrimination. His delegation's impression was that both domestic and foreign investors tended to react in the same way in the face of a specific risk, and his delegation wished therefore to have more information from India on the particular subject.

28. The representative of Poland suggested that FDI should not be analysed solely in monetary or financial terms. There were in fact many ways in which FDI could make a positive contribution to economic growth. For one thing, much FDI was linked to “greenfield” investment, thus helping to augment a country's productive capacities and employment. Typically foreign investors also had knowledge of opportunities for their products in international markets, which could reduce information costs and risk. Foreign enterprises also often had access to wider distribution channels, meaning that they faced lower barriers to entering new markets. The import of technology and knowledge was also linked to foreign investment, creating spillovers to the economy as a whole. Finally, foreign investment was linked to the import of tacit knowledge and governance that could make foreign owned companies more successful and generate positive spillovers for the economy as a whole.

29. The representative of Brazil noted that Paragraph 22 of the Doha Ministerial Declaration gave the Working Group a clear mandate to clarify a number of topics relevant to the assessment of the

implications of closer multilateral cooperation in the investment for all Members. In that respect, India's contributions were entirely consistent with the spirit and letter of the mandate. His delegation took issue with the assessment of some Members that these contributions were not constructive; quite the contrary, they helped clarify the concerns that India had in the investment area, and that it wanted to explore further as part of the Group's common educative process.

30. Against this background, his delegation wished to highlight several issues that were raised in India's submissions which, in Brazil's view, warranted further consideration. The first was the issue of securing "policy space" for developing countries, so that they could maintain their autonomy and flexibility, especially as regards social and technological development. A second issue – linked to policy space – was pre-establishment rights. As had been pointed out by India and the Secretariat in their papers on modalities for pre-establishment commitments, most IIAs were limited to granting national treatment at the post-establishment phase of investment – and Brazil felt that this would also be an appropriate way to define a prospective WTO agreement in order to strike a balance between the right to regulate (including for development purposes) and predictability and stability for FDI. The third issue which warranted further discussion was the matter of performance requirements. A fourth issue raised by India that required further exploration was the treatment of sub-national measures.

31. The representative of Venezuela considered that India's communications were substantively important and constructive. In particular, his delegation stressed the importance for his country of "policy space". Venezuela had just completed its Trade Policy Review (TPR) – a process which went into issues beyond trade policy. One of the conclusions of the TPR was that Venezuela had an urgent need to find ways to diversify its economy. Venezuela understood that such diversification could not be achieved without active development policies which would remedy market deficiencies. His delegation believed that the trend of the multilateral trading system was to limit the space within which developing countries could apply development policies. His delegation also felt that safeguarding that space was important to ensure that future policy tools and options remained available to developing countries.

32. His delegation also agreed with India's point regarding the difference between financial and trade flows. Identifying these differences was important and relevant to the analysis being carried out by the Working Group.

33. Lastly, his delegation also agreed with India's efforts to draw parallels between investment and labour as factors of production, and the different emphasis placed on each issue in current negotiations. It might be meaningful to ask whether the liberalization of one factor of production should not go hand-in-hand with liberalization of another (as was the case with personal services). He concluded by noting that many of the questions raised in India's papers were highly relevant to reaching an eventual multilateral agreement on investment.

34. The representative of the European Communities agreed with India's emphasis in its submissions on the importance of policy space for developing countries, and maintaining the right to regulate and to pursue development measures. However, his delegation questioned the assumption implicit in these papers that international rules would by definition prevent developing countries from maintaining sufficient policy space. Regardless of the merits of such policies, his delegation had stated many times that policy space was essential – and that a "one-size-fits-all" approach to rule making was not appropriate in the investment context. This was precisely why Paragraph 22 of the Doha Ministerial Declaration set out a number of subjects for clarification that addressed the issue of policy space, in particular modalities for pre-establishment commitments based on a GATS-type positive list approach. India and other developing countries had rightly pointed out that the entry of foreign investors – and particularly the right to screen or channel foreign investment – could be

sensitive for the development policies of any host countries. Recognizing these concerns, his delegation asked how the GATS – whose provisions dealt with the pre-establishment treatment of foreign investment in the services sector – had prevented countries from pursuing such policies?

35. His delegation also wanted to address the point raised by India about the differences between financial and trade flows. While Members might agree or disagree about the causes of the volatility of certain financial flows, he wanted to reiterate that there was now a wide consensus in the Working Group that they were not the kind of financial transaction that Members wished to incorporate in a multilateral investment framework. What Members were discussing was long-term foreign investment, particularly foreign direct investment – and his delegation was at a loss to find a single financial crisis that had been caused by sudden inflows or outflows of FDI. As in the GATS, his delegation felt an agreement should deal with financial flows only to the extent that such flows were necessary to the transactions of a specific investment or enterprise (e.g., banking) – an issue which the EC would return to when it presented its paper on balance-of-payments safeguards.

36. Regarding India's paper on development provisions (WT/WGTI/W/148), the representative of Switzerland said that, while his delegation shared the view that international capital markets were not perfect, it noted that international trade did not take place under perfect market conditions either. This was not an argument for avoiding multilateral liberalization and rule-making in the trading system; on the contrary, this explained on-going efforts to address issues ranging from non-tariff barriers to competition policy in the current negotiations. Regarding the roots of financial instability, he noted that much of this instability flowed from excessive domestic consumption fuelled by unsustainable macroeconomic policies. In a previous submission (WT/WGTI/W134), Switzerland had cited UNCTAD statistics which demonstrated that between 1995 and 1999 FDI flows had remained at \$20 billion for the five Asian countries most affected by the Asian financial crisis while bank loans and debt securities became negative. On the subject of policy space, Switzerland agreed with India, and emphasized in its written contribution that any prospective multilateral framework must contain development provisions, and that developing countries should undertake only those commitments commensurate with their national policy objectives and levels of development. Any agreement should strike a balance between common principles, today's FDI regimes, and the ability of Members to pursue essential national policies. Regarding India's support for BITs, his delegation wished to emphasize that while BITs were important agreements, it would surely be preferable for business to deal with a single set of multilateral investment rules, rather than with over 2000 separate agreements. His delegation believed that performance requirements were subjects already dealt with in the TRIMs Committee. Switzerland did not consider investment an activity reserved to bankers and monetary economists. The linkages between trade flows and financial flows were already well established.

37. The representative of the United States made a number of points on India's submissions. Regarding development provisions (WT/WGTI/W/148), he noted that the United States disagreed with a fundamental premise of the contribution, which was stated in the first tiret: "Any multilateral discipline that seeks to limit this policy space" – referring to the ability of developing countries to regulate investment – "by its very definition, would reduce the policy options available to developing countries to use foreign investment for promoting development."

38. On its face, this was a true statement. As with any discipline agreed in the WTO, multilateral investment disciplines would constrain, to some degree, the capacity of Member countries to impose certain domestic policies. But by now all Members surely recognized and accepted that governments often voluntarily agreed to comply with such disciplines because they had concluded that doing so would be beneficial in ways that more than compensated for any limitations on their freedom of action domestically. Applying this logic to international investment, a persuasive case had been made that countries that choose to adhere to certain multilateral principles relating to the treatment of investment at the domestic level would attract increased private capital flows. Members had not yet agreed, of course, on what those principles should be, but his delegation urged India and other

Members not to dismiss the idea of multilateral investment disciplines, simply because they might involve certain limits on their freedom of action. A perspective such as this would be at odds with the logic of every WTO agreement – indeed, of every international treaty.

39. This same sentence in the Indian communication also talked about the need of developing countries to "use foreign investment" to promote development. The language here appeared to endorse investment screening and other regulatory measures designed to influence the content and destination of incoming investment. The United States did not believe that governments should give up their rights to regulate investment flows for legitimate public welfare purposes and the protection of national security. However, his delegation did believe that screening and other measures that sought to regulate investment flows beyond what was necessary often proved, in practice, to be counterproductive. As a large, dynamic, and growing economy – an economy that had been attracting significant amounts of foreign investment in recent years – India might feel that it was in a position to turn away foreign investment that did not meet certain standards for the promotion of economic development. But for many other developing countries, the fundamental problem with foreign investment was that there was just too little of it. The United States believed that a high-standards multilateral investment agreement would generate increased international flows of investment – and promote economic development in all signatory countries.

40. In the second tiret, India stated that "the basic assumption underlying the proposal for multilateral disciplines on investment is that the principle of free trade, which permeates WTO rules in respect of goods and services, would apply equally to movement of capital". The United States could not speak for other countries, but this was not an accurate characterization of his delegation's own thinking on these issues. The United States' position was not a theoretical one. His delegation did not support investment disciplines merely because it believed the principle of free trade for goods and services somehow automatically or inevitably applied – or should apply – to capital. His delegation supported multilateral investment disciplines on their own merits – because, as already noted, it believed that broad, multilateral adoption of certain standards of treatment for foreign investment would stimulate international investment flows, benefiting all WTO members.

41. His delegation also took issue with India's contention that developing countries could not achieve liberalization of capital movements because of inherent distortions, e.g., continued protection of import-competing industries, inflexible real wages, and asymmetric information in domestic financial markets. These concerns were genuine. But their existence, rather than arguing for abandoning the goal of capital movement liberalization, showed instead the need for developing countries to support financial liberalization with structural reforms – e.g., ending subsidies to import-competing firms, improving bank oversight, and upgrading the flow of information in financial markets.

42. In tiret 4, India's paper stated that "financial flows in no way resemble flows of goods and services. There is no tangible link between buyers and sellers". His delegation agreed that there were differences between international flows of capital, on the one hand, and of goods and services, on the other. But he wanted to make several points in this regard. First, as in markets for goods and services, buyers and sellers of financial instruments were linked in tangible, transparent ways. Governments and firms wishing to sell bonds made offers on the open market, where potential buyers were free to accept the terms offered or invest elsewhere. Banks that lent to private business knew with whom they were doing business, and vice versa. Shareholders in publicly traded corporations were free to glean all kinds of public information about their investments, and the corporations themselves were required to be accountable to the shareholders. Second, while there were also significant differences between international flows of goods and of services, that fact had not prevented the WTO from extending multilateral disciplines to the latter. Third, it was practically impossible to isolate financial investments from direct investment. It was hard to imagine how an investor could manage a direct investment, e.g., in a manufacturing plant, without carrying out local



financial transactions that were necessary for the operation of the business. These, too, could be difficult to monitor, record, and assess, but such difficulties had not prompted governments to stop trying to remove barriers to the free movement of goods and services.

43. In tiret 7, India's paper stated that "empirical studies have shown that affiliates of certain transnational corporations buy the bulk of their inputs from parent companies and other affiliated companies". The paper suggested that this reinforced the case for local content restrictions and other performance requirements. As his delegation had stated recently in several other WTO bodies, the United States believed the existing multilateral prohibitions on performance requirements were sound. These prohibitions had been part of the GATT for more than 50 years, and many current WTO Members had been subject to them for that long. GATT disciplines on performance requirements were reaffirmed by WTO Members just 8 years ago, in the TRIMs Agreement. His delegation believed that restoring performance requirements to the multilateral trading system would have a highly adverse impact on trade and investment flows.

44. Regarding India's paper on non-discrimination (WT/WGTI/W/149), he noted that it made an argument concerning the nature of capital flows that was similar to one made in the Indian paper on development provisions. According to tiret 2 of the paper, there might be many channels of capital flows, and the ultimate investor might not be the original investor or lender. There was no clear buyer-seller linkage, as with goods and services, and no certainty regarding the source of funds. There was also no certainty regarding the manner in which funds would be retained in the host country and when, and in what manner, funds would flow out. In tiret 4, the paper stated that "money flows are essentially different in character from flows of services and goods." According to the paper, all of these characteristics of international capital flows made it difficult to apply the principle of non-discrimination to them. The paper stated, "certain degree of discrimination between different kinds of investment is unavoidable".

45. The United States certainly agreed with the assertion that some discrimination with respect to foreign investment might be appropriate. The United States' BITs contained an exception to treaty obligations where needed to protect national security. His delegation hoped that no country would permit foreign investors to support activities that clearly threatened the public welfare. But his delegation thought India's paper endorsed a much broader and potentially damaging principle of discrimination on the basis of some unfortunate comparisons between capital flows, on the one hand, and trade in goods and services, on the other. In this regard, he reiterated some of the points he had made with respect to India's paper on development provisions. First, the differences between capital flows, on the one hand, and goods and services trade, on the other, could be overstated. The United States believed that trade and investment complemented each other; and for this reason, had included investment chapters in its Free Trade Agreements with Chile and Singapore, in NAFTA, and in the FTAA. Both trade and investment thrived under conditions of openness, transparency, and sound macroeconomic and structural policies. Furthermore, acknowledging that there were differences among international flows of capital, goods, and services did not by itself prove the case that the principle of non-discrimination could not be applied to investment flows. His delegation did not believe that the particular qualities of capital flows made it inherently difficult to apply the principle of non-discrimination to them.

46. In tirets 5 and 6, India suggested that the treatment of commercial presence under the GATS did not offer a model for the treatment of investment in a WTO investment agreement. He pointed out that many international agreements already covered investments that produced goods, and "commercial presence" for service providers, in one investment chapter. For example, the US-Chile and US-Singapore FTA's currently under negotiation covered service providers in the investment chapter. Moreover, the US BIT, like many other countries' bilateral treaties, applied the same obligations to both goods and services providers.

47. In the last tiret of the paper, India stated that "developing countries need to retain the ability to screen and channel foreign direct investment consistent with their domestic interests and priorities". He asked the Indian delegation whether the emphasis in this passage on pre-establishment treatment meant that India would be willing to support the application of the principle of non-discrimination to post-establishment treatment of investment?

48. With regard to India's paper "Views on Modalities for Pre-Establishment Commitments Based on a GATS-Type Positive List Approach" (WT/WGTI/W/150), India made the case in tiret 4 that national treatment should not apply to the pre-establishment phase of investment - and that such commitments were absent from the majority of existing investment agreements. The United States believed the paper mis-characterized the BITs to which the United States was a party. A similar mis-characterization was made in tiret 8 of the Indian paper on non-discrimination.

49. In the present paper, India stated that only two countries, the United States and Canada, were known to insist on pre-establishment national treatment provisions in their BITs. However, together the two countries had negotiated over 60 BITs, many with developing and emerging market economies. He noted that, by concluding a BIT with the United States, each recent treaty partner had also embraced the idea of national treatment with respect to pre-establishment and that most of the United States' treaty partners were developing countries. His delegation therefore saw no reason why, in principle, countries at different levels of development could not commit themselves to guaranteeing national treatment at the pre-establishment as well as the post-establishment phase of an investment.

50. Third, for reasons noted earlier, his delegation did not think it was correct to suggest, as the paper had done in tiret 9, that "binding national treatment and MFN provisions", were only appropriate for "some regional trading arrangements covering advanced stages of integration." The paper cited the NAFTA Agreement as an example of such a regional agreement. NAFTA, of course, included countries at different levels of development. The successful, broad application of national treatment and MFN principles in NAFTA, as well as in US BITs with developing countries, undermined the argument that these principles could not work in the WTO because of the widely varying levels of development of Member countries.

51. Finally, the last tiret asserted that the "complex nature of capital flows and investments" made it neither "feasible nor necessary" to impose binding rules on "pre-establishment commitments". As his delegation had noted with respect to the other Indian papers, it was not clear that any characteristics of capital flows, which included direct investment, required that they be excluded from multilateral disciplines relating to non-discrimination. Here, and in the other papers, India referred to the "complexity" of investment flows, but the United States did not believe they had made a persuasive case that these flows were inherently more complicated or needful of national regulation than goods or services flows. It was important to note that most financial market regulations need not discriminate between foreign and domestic investors, and therefore were consistent with an agreement to provide national treatment. In a United States' BIT, for example, the transfers provision permitted financial market regulators to prevent or delay a transfer if necessary to fulfill a court judgment, and allowed for the mandatory reporting of transactions that might be required by financial regulations, regardless of the source of the money to be transferred.

52. He agreed that multilateral disciplines for investment would not be identical to those for services, just as the disciplines for services were different than those for goods. But the fact that investment flows had certain unique qualities did not mean that multilateral disciplines could not be applied to them effectively and to the advantage of all WTO Members.

53. The representative of Nigeria shared the concerns raised in India's papers and welcomed and supported all the elements contained therein. His delegation also reserved its right to make further comments on the papers at a later stage.

54. The representative of Hong Kong, China noted that India's papers provided the Working Group with an opportunity to review some of the key elements which were the subject of discussion at the Working Group's meeting in July. Thus he first wanted briefly to revisit and identify some of the main points raised at that July meeting. On development provisions, there was general agreement on the need for such provisions in a possible multilateral investment framework. His delegation also saw such provisions as indispensable tools for incorporating policy flexibility, and the Working Group should be guided by three fundamental principles – flexibility, transparency and predictability. The road ahead was to balance policy flexibility in the host countries with the need of predictable, stable and transparent conditions for international investments. The Working Group's previous discussions had generated many possible options that Members might wish to consider further, including: lower level of commitments for developing countries; asymmetrically-phased implementation timetables; exceptions from certain obligations; best-endeavour commitments; a mechanism for scheduling of commitments similar to the GATS approach; technical assistance and capacity building; etc. Some Members, including India, also suggested bringing in other related elements such as performance requirements, technology transfer, investment incentives and home-country obligations.

55. Regarding non-discrimination, Hong Kong, China believed that this principle was an essential precondition for creating a level playing field for FDI worldwide, though Members should also consider possible scope for flexibility. For example, a considerable number of developing-country Members considered there was a need to retain the ability to screen and channel foreign investments in a way consistent with their domestic interests and priorities.

56. On modalities for pre-establishment commitments, there was general recognition of a government's right to suitably regulate the entry of foreign investment at the pre-establishment stage. The challenge was to decide whether – and how – to translate this "right" into multilateral investment disciplines. On this question, views diverged. There was considerable support for using the GATS-type positive list approach as a starting point of discussions. Nevertheless, there were also Members who believed that binding rules on pre-establishment commitments were neither feasible nor necessary. Permanent carve-out for developing-country Members and a negative-list approach to pre-establishment commitments were also raised as possible options.

57. As far as these three elements were concerned, his delegation believed that past discussions had helped to clarify the positions and concerns of different Members, though there had been no substantive breakthrough in achieving consensus. The challenge ahead was to arrive at an integrated set of provisions that could satisfy the needs of all Members and contribute positively to a predictable, stable and transparent environment for cross-border investment. Given the diverse interests of Members, Hong Kong, China was under no illusion that this would be an easy task. In his delegation's view, it was important that any possible multilateral framework should have sufficient built-in flexibility to allow individual Members to pursue national policies that were commensurate with their needs and interests. The gaps among Members remained wide. The collective will of Members was needed to find common ground.

58. The representative of Australia noted that India's opposition to any multilateral framework on investment seemed to be motivated by concerns that such an agreement would reduce its flexibility to regulate foreign investment in accordance with national government priorities. Associated with this was the concern that any multilateral framework would be obliging host countries to accord an unqualified right of establishment to foreign investment. On these concerns, he wanted to reiterate Australia's view that a GATS-type approach to pre-establishment commitments should provide the necessary flexibility – and ability – to host governments to regulate foreign investment. In India's paper on development provisions, foreign investment was characterized as a financial flow with a speculative and volatile nature. As other delegations had pointed out, this was not a complete definition of foreign investment. Direct investment was not as speculate as portfolio investment, and longer lead times were involved with FDI. India had also questioned the value of any multilateral

rules on investment by de-linking flows of goods and services from flows of capital. His delegation believed that given the complementarity between trade and foreign investment the inter-linkages between them were growing rather than diminishing. Investment was now accepted as more important to global growth than trade in goods and services. The latest World Investment Report noted that the sales of foreign subsidiaries and affiliates amounted to almost \$19 trillion in 2001, more than twice the value of world exports. Australia therefore considered the link between investment and trade was too great for the WTO not to address it.

59. Regarding non-discrimination, India's critique of the principle – including national treatment and MFN treatment – appeared to be premised on the view that non-discrimination was an absolute principle incompatible with the sovereign right of Members to control entry and establishment. The paper concluded that BITs were preferred because developing countries could retain the right to screen and channel FDI so that it remained consistent with their development priorities. Prima facie Australia believed that a multilateral framework would not remove this right because the principles of non-discrimination were unlikely to be applied absolutely. Moreover, on the basis of Australia's current and emerging treaty practice, his delegation found it difficult to agree that such a standard could be totally without exception. As his delegation had noted on previous occasions, national treatment was unquestionably a more demanding standard to meet than MFN treatment because its intent was to prevent host countries from discriminating in favour of its own domestic investors. Australia was not aware of any investment agreement where national treatment applied without qualification or exemptions.

60. The representative of Mexico noted that the growth and development dimension of foreign investment was a subject with which all countries were concerned, especially developing countries. The Working Group faced a dilemma. On the one hand, there was widespread understanding that any prospective framework must give flexibility to Members to enable them to undertake obligations and commitments in keeping with their particular needs and circumstances. On the other hand, it needed to be recognized that the sources of growth were no other than domestic or foreign investment, and that to attract and retain investment it was necessary to provide clear, fixed and simple rules for economic operators.

61. With this in mind, the Working Group had received a number of proposals that allowed for the flexibility that developing countries required in order to attain their development objectives. An example was the hybrid GATS approach, which allowed countries to liberalize on a selective basis, undertake commitments in keeping with their circumstances, and maintain the freedom of manoeuvre that they required to adapt their domestic policies accordingly. Clearly it was not possible to make a "mere copy" of the GATS structure in the goods sector. However, that agreement might indeed serve as the inspiration for finalizing investment rules in the goods sector, along the lines of those that investors already had in the service sector. Moreover, to attempt to make a distinction between services and goods would be an artificial distinction, especially when not even the domestic regulations that governed investment regimes distinguished between investment related to services and to manufacturing.

62. On the other hand, his delegation reiterated its view regarding the benefits that foreign investment might have for recipient countries, noting that many studies demonstrated the positive external effects with regard to technology transfer, human capital development, and integration into international trade that it could flow from FDI. In addition, speaking from Mexico's experience, these benefits were not just theoretical, as there were successful cases of developing countries that had used international investment as a tool in their strategies of growth and development.

63. Finally, his delegation noted with concern the attempt to bring into the Working Group a topic which belonged to a separate agreement. Performance requirements was a subject which fell under the rubric of the TRIMs Agreement, and his delegation felt that it should continue to be

analysed within the context of that Agreement. It would be very dangerous to try to move the discussion of an element that not even Paragraph 22 of the Doha Ministerial Declaration considered to be a subject that required clarification.

64. The representative of Argentina noted that some delegations had tried to portray India's papers as ideologically motivated and theoretically based. This was not Argentina's view. On the contrary, his delegation viewed India's papers as important practical contributions to the Working Group's deliberations. Investment was not a new issue. There were many bilateral and regional investment agreements that had been in existence for some time, and which had generated many different effects, both positive and negative. The debate about a prospective multilateral investment agreement was complex and could not be seen in terms of black and white. Any such agreement would necessarily inhibit the regulatory power and discretion of the state. He had never seen an agreement that did not exhibit those characteristics. The debate was not whether an investment agreement would constrain state action in the investment area, but rather would it include a provision which would allow some flexibility for development within these more general constraints. In other words, the debate needed to focus on the nature and substance of "flexibility" – including development policies and the right to regulate in the public interest, which were issues clearly highlighted in the Working Group's Ministerial mandate. The fact that these issues were identified by Ministers demonstrated that any prospective multilateral framework had to represent an improvement on the existing international investment architecture.

65. His delegation also questioned the assumption of some Members that the development dimension was somehow antithetical to the transparency and predictability of investment rules. It was clear that investment rules had to be transparent and predictable; but this same transparency and predictability had to be something which the state could use as a tool in its development. His delegation believed that India conceptually had brought out the development dimension, but that this concept had to be translated into substantive provisions. Whereas the development dimension in most existing IIAs was limited to declaratory or preambular statements, his delegation believed that it should be embedded in every provision of a prospective multilateral investment framework. Furthermore, his delegation believed that any such agreement should not only be limited to negative obligations – i.e., delineating what a state should not do – but should also incorporate positive elements, in areas such as performance requirements and investment incentives, which the state could use in order to promote development. Generally investment agreements were established to help promote and protect investment. Perhaps it would be more appropriate therefore to have an agreement which promoted both development and investment.

66. Finally, his delegation wished to underline the complexity of attempting to transfer automatically the core principles contained in the GATT or the GATS to a multilateral investment framework. Argentina saw non-discrimination as a particularly complex issue – one which underscored the intrinsic differences between goods and investment flows, especially in the pre-establishment phase. Equally complex was the distinction between national treatment and MFN treatment – as well as between the de facto and de jure application of the principle of national treatment. This latter distinction became particularly relevant if a decision was made to extend national treatment to the pre-establishment phase of investment – raising the issue of whether protection should extend to potential investors. A number of World Bank investment arbitration panels had tried to grapple with just this issue. His essential point was that investment could not be looked at in a generic way. The subject needed to be looked at, not only from a theoretical view point, but also from a realistic and results oriented perspective as well.

67. The representative of the Philippines noted that India's three papers largely reflected his delegation's thinking on the relevant subjects. First, the Philippines agreed that policy flexibility was of utmost importance for developing countries – including as regarded the issues of performance

requirements. While he agreed with other delegations that this issue was being addressed in the context of the TRIMs review, he did not believe that this precluded further discussion of performance requirements in the Working Group. Second, his delegation also agreed that pre-establishment commitments were not compatible with the idea of policy space, as envisaged by the majority of Members in the Working Group. Third, like India, the Philippines remained unconvinced that investment rules were needed in the WTO.

68. As regards the possibility of using existing WTO agreements as possible models for an investment agreement, his delegation did not believe that the basic principles or architecture of the GATT or the GATS were automatically adaptable to investment issues as there was an intrinsic difference between trade and capital flows – a point also made by India and other delegations. A case in point was the safeguards issue. There were no rules in GATS for safeguards, while the existing rules in GATT would prove utterly inadequate to address the unique circumstances of investment.

69. Finally, he noted that his delegation regretted very much the statement of Japan to the effect that India should be more constructive. In his delegation's view, India had been very constructive. Japan may not like what India had submitted to the Working Group but this did not mean that India was being unconstructive. The three papers submitted by India were a good illustration of how constructive India had been in the Working Group.

70. The representative of China noted that everything in the world had pros and cons – and this was also the case with FDI. In considering and exploring the possibility of negotiating a multilateral investment framework, the Working Group should certainly take into account all the elements related to FDI, both positive and negative, so as to ensure that such a framework would promote the economic and social development of the host Members, particularly the developing ones, while at the same time helping avoid anything that might have a negative impact on their development policies and objectives. India's submissions were a simple reflection of its own views – views that might be different from those of some Members, and shared by others. Almost all the issues referred to by India in its submissions had been discussed and debated in previous meetings of the Working Group. Regardless of its views and positions on specific issues, India's submissions were enlightening, constructive and beneficial, at least from the perspective of further deepening and developing the Working Group's deliberations.

71. The representative of Cuba considered that India's submission were in keeping with the Working Group's terms of reference, and that they represented a constructive contribution to striking an appropriate balance in the Group's debate. Her delegation supported India's basic approach which underlined the importance of developing countries having margins to pursue development policies, including the manner of channelling and regulating inward investments. Her delegation also concurred with India's concern that any prospective multilateral agreement might find it difficult to guarantee the development objectives of Members would not be adversely affected. For example, the principle of non-discrimination as conceived by certain Members in the course of the debate would undermine these development objectives. In order to strengthen domestic economic security, it was necessary to regulate inward investment. To meet development objectives, it was necessary to stimulate investment in certain sectors, and discourage it in others. Binding, irreversible provisions – together with progressive liberalization along the lines of the GATS – increased the risk of an adverse impact on the lengthy process of development in many countries.

72. The representative of Egypt felt that India's papers represented for the first time a pragmatic and constructive developing-country perspective on the relationship between investment and trade. His delegation concurred with the statement in India's paper that developing countries needed the highest flexibility to screen and channel foreign investment in order to guarantee growth and development goals. Egypt believed that more careful study was needed in order to clarify the links

between the flows of capital, goods and services. It was only reasonable, in light of the recurrence of financial crises in recent years, that developing countries would wish to preserve the right to regulate the entry of foreign investment. In examining the kind of policy space that was needed to regulate against possible adverse effects of capital movements, Members should not exclude from discussion relevant issues such as performance requirements and investment incentives. His delegation was not of the view that the TRIMs Agreement was applicable to all kinds of performance requirements, even within the context of the Article 9 review, and that the subject was a legitimate and important one for the Working Group to discuss.

73. The representative of Djibouti suggested that the issues which India had raised in its submissions and intervention were of great importance to developing countries. What was particularly important to African and least-developed countries was to become familiar with the global environment within which investment flowed, and to use the formulation of international rules to help attract it. His delegation remained hopeful that such a system of multilateral rules would be realized.

74. The representative of Kenya felt that India's contributions were constructive and in keeping with the Doha mandate, and his delegation agreed with most of the issues which they raised. Moreover, his delegation did not believe that being constructive meant looking at issues from a simplistic point of view.

75. The representative of Pakistan suggested that, unlike trade, investment represented a long term relationship between the investor and the host country, and therefore a careful analysis of bilateral or multilateral investment regimes was needed. His delegation agreed with many of the views expressed by India, and considered its papers to be a constructive contribution to the Working Group.

76. The representative of Japan agreed with Brazil, Pakistan and others when they noted that India's submissions had raised critical questions in a legitimate way. His delegation also felt that India had stimulated a constructive exchange in the Working Group. However, there were a number of points raised in India's papers with which Japan disagreed. It was true, as India had argued, that flows of FDI were associated with the movement of capital, but this was also true of flows of goods and services. Japan was not advocating the liberalization of short-term or volatile capital flows, but those flows of FDI related to trade. Regarding the principle of non-discrimination, his delegation reiterated its belief that national treatment and MFN treatment were beneficial, not just for home countries, but for host countries as well. He drew attention to a recent report of the Indian Steering Committee on Foreign Direct Investment which highlighted the importance of investment to India's economic growth, and the impediments which a lack of transparency and unnecessarily complex investment rules posed to the attraction of FDI. He also drew attention to the importance given to principles of non-discrimination in APEC's non-binding investment principles.

77. Japan agreed with India's emphasis on the need to secure policy space – not just for developing countries, but for all countries. That was why his delegation had urged the Working Group to examine ways of striking an appropriate balance between non-discrimination and policy space. One possible answer to this challenge was to adopt a GATS-type positive list approach to pre-establishment commitments. Finally Japan cautioned against accepting a dated model of foreign investment flows which assumed that all host countries were developing economies and all home countries were advanced economies. This was an obsolete model which ignored the extent to which developing countries were increasingly investment exporters and homes to multinationals.

78. Regarding India's paper on non-discrimination, the representative of Switzerland noted that while it was true that many developing countries had been adversely affected by destabilizing outflows of short-term capital, it was also true that during these same periods stocks of FDI had

remained largely unchanged, suggesting that direct investment represented a stable economic influence. This was because foreign direct investors generally had more medium- or long-term objectives. Referring to the distinction between the GATT and the GATS, his delegation felt it was useful to highlight the fact that, in the same way that many services suppliers required a "commercial presence" in order to deliver products to markets, so, too, did many goods manufacturers undertake investments for market access reasons.

79. With regard to India's paper on modalities for pre-establishment commitments, his delegation agreed that substantial investment flows had taken place without multilateral rules, driven by other considerations such as market size and macroeconomic stability. However, it followed that a multilateral agreement on investment might be particularly attractive for all those economies that at present did not attract sizable inward investment. It was also important to remember that it was not only large multinational corporations that conducted foreign investment. There were many small- and medium-sized firms which were also increasingly active investors globally. These firms in particular would benefit from an agreement that aimed to simplify global investment rules. In thanking India for its contribution, he stressed the importance, not just of expressing Members' differences in the Working Group, but also of understanding the nature of these differences – and whether these differences could be overcome in eventual negotiations.

80. The representative of India said that his delegation had benefited from a useful exchange of views on the subjects raised in its papers discussed at previous meetings of the Working Group. It was in this spirit that India expressed its own perspective. In response to comments about the distinction between trade and capital flows, his delegation recognized that money played a central role as a medium of exchange of goods and services. But this was not quite the same as the financial flows involved in investment. As his delegation had suggested many times, it was difficult in practice to differentiate between short-term and long-term capital flows, given that the nature of financial transactions could change between buyers and sellers. India's basic point was that the issues related to investment and money flows were very complex and beyond the understanding of trade negotiators. He also wished to emphasize that the views expressed in the three papers were his delegation's views, and were in no way intended to represent the views of all developing countries. Finally, he noted that while FDI could certainly have positive effects on a host country - just as it could have negative effects - these effects were not automatic. This was why India believed that countries needed policy space in order to regulate and channel FDI in a way that maximized its positive effects while minimizing negative effects.

*(ii) Investors' and Home Countries' Obligations*

81. The representative of India introduced the joint communication circulated in WT/WGTI/W/152. He noted that while the subject of investors' and home governments' obligations was not new, it had not been adequately discussed in the Working Group. At the Working Group's meeting in April, the representative of UNCTAD had raised the issue of the need to discuss home governments' and investors' obligations besides host country obligations. A number of delegations had also expressed interest in the subject of investors' and home governments' obligations.

82. He noted that annual flows of FDI had risen sharply from US\$200 billion in 1990 to \$1271 billion in 2000, and had become an important channel of cross-border business activity. FDI flows could provide supplementary financial resources, technology, managerial skills and employment opportunities and could play a positive role in the economic and social development of many host countries. FDI flows were generally undertaken by multinational enterprises which were characterized by their large scale of operations across many locations worldwide. Given the economic power and global reach of these corporations, countries faced limitations in regulating their conduct. Conflicts of interest could also arise between the development policy objectives of host Members and the objectives of multinational enterprises. Neither inflows of FDI nor the benefits



from such inflows were automatic. While recognizing the positive role of FDI, there was also a need to address its negative effects – such as balance-of-payment problems and the crowding out effects of FDI activities in developing countries.

83. There had been several notable attempts in international fora to develop standards for the conduct of transnational corporations (TNCs). Important attempts included the Draft Code of Conduct on TNCs and the UNCTAD Code of Conduct on Transfer of Technology. These could not be adopted because of differences, among other issues, between developed and developing countries over the legal status of the Codes. In 1980, UNCTAD adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The OECD adopted Guidelines on International Investment and Multinational Enterprises in 1976. Although, a number of steps had been taken by the international community to evolve a code of conduct for multinational enterprises, all existing attempts had been of a voluntary nature.

84. As a result, he observed that the growing internationalization of corporate activities since the 1990s had taken place without an effective global code that regulated the behaviour and operations of multinational enterprises. The absence of an enforceable global code of corporate conduct had been highlighted by the recent spate of cases of fraudulent corporate practices involving some leading multinational enterprises. Legally enforceable norms of investors or corporate conduct were urgently required to prevent such crises from recurring. The need for effective inter-governmental agreements and measures aimed at corporate responsibility and corporate accountability had been most recently recognized by the World Summit on Sustainable Development held in Johannesburg. It was important that the Working Group, as a matter of priority, take on the task of examining legally binding measures aimed at ensuring corporate responsibility and accountability relating to foreign investors, including measures that clearly spelled out investors' and home governments' obligations.

85. He noted that the proponents of a multilateral framework on investment in the WTO had been seeking binding rights for foreign investors that the host country should agree to provide. However, the rights of foreign investors had to be balanced against those of host governments and against the obligations of investors and home governments. In Paragraph 22 of the Doha Ministerial Declaration, it was noted that 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. While recognizing the protection of legitimate rights and interests of the investing multinational enterprises, his delegation believed that the right of host Members to regulate foreign investors and the need for investors to undertake obligations in line with host-countries' interests, development policies and objectives, should be an indispensable part of the Working Group's discussions.

86. He pointed out that the joint submission listed some possible general principles that would need to be kept in mind while drawing up any investors' obligations. The paper also outlined possible obligations of investors in the context of restrictive business practices; technology transfer; balance-of-payments; ownership and control; consumer and environmental protection; disclosure and accounting.

87. In short, the paper had outlined some of the key issues that could be usefully discussed with respect to investors' and home governments' obligations. The recent disclosures of corporate fraud had only underlined the need for greater disciplines on multinational enterprises to bring about greater corporate responsibility and accountability. What was important to many developing countries was to ensure that the operations of foreign investors had positive effects which contributed to the national goals and development objectives of host governments. Home governments' policies could influence the behaviour of their multinational enterprises. It was important, therefore, that home-country governments undertook obligations to ensure responsible behaviour of multinational enterprises.

88. The joint paper was an initial reflection of views of the co-sponsors with regard to the issue of achieving a balance of interests between home- and host-country governments as emphasized in the Doha Ministerial Declaration. The co-sponsors of the paper reserved their right to further elaborate on all the relevant issues in this regard. This subject was of particular interest to the co-sponsors of the paper, and he looked forward to a substantive discussion on this subject in the Working Group.

89. The representative of China observed that his country attached great importance to FDI for its economic development. Since 1979, when China first adopted its policy of economic reform and opening to the outside world, to the end of 2001, China had made use of an accumulated stock of US\$512.3 billion of FDI, and had become the largest absorber of FDI among developing countries for the last nine years. FDI had on the whole played a significant role in China's national economy. It had helped to a great extent to supplement the inadequacy of China's own financial resources for its economic development, introduced some useful technologies, and raised the level of managerial skills. On the other hand, it had also initiated certain negative economic and social effects on China's development process, such as the crowding out of domestic enterprises.

90. He noted that these achievements could be entirely attributed to China's stable political and economic environment, its constantly improved legal framework and physical infrastructure, as well as its network of bilateral investment protection treaties with relevant countries. Its achievements had little to do with any multilateral instrument with regard to investment issues. The Government of China also took some necessary measures to address the negative side effects of the FDI. By co-sponsorship of this submission to the Working Group, his delegation by no means implied that China would change its policies and practices with regard to foreign investment. He hoped that this action taken by China in the Working Group would not be misinterpreted, or send a wrong and unintended signal to the international community.

91. As illustrated in the report to be presented to the General Council, the Working Group had during the last year discussed several issues on the relationship between trade and investment in accordance with the mandate as laid down in the Doha Ministerial Declaration. His delegation believed this process was useful in order to clarify some basic elements that might be incorporated into possible negotiations on a multilateral framework on trade and investment, should an explicit consensus be reached before Cancún. The Doha Ministerial Declaration also provided that "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" and that "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". Politically, economically, commercially and legally speaking, an agreement reflecting a balanced treatment of all relevant elements of interest to all constituencies would represent an important prerequisite for any possible explicit consensus on the modalities for any negotiations that might be launched after Cancún. This submission represented a concrete step to realize such an objective, and that was why China had decided to join it.

92. The representative of Japan noted that as the globalized of economic activities evolved, it was reasonable to expect responsible behaviour from investors and multinational enterprises, as they increasingly operated across borders and jurisdictions. His delegation understood the concerns of developing countries regarding the operations and conduct of multinational enterprises and foreign investors. Having said that, Japan had somewhat different views as to how to ensure their responsible behaviour. His delegation was not in a position to support the idea of binding rules. Rather Japan believed in the freedom of investors and multinationals to operate, but within the domestic laws and regulations of host countries, and in accordance with international guidelines of corporate behaviour as set out in instruments such as the OECD Code. This concept had already been discussed at the Working Group's meeting in September by a number of delegations, including the EC, to which Japan associated itself. In this regard, his delegation wanted to make several points. First, he pointed out

that host countries were free to institute domestic laws and regulations to achieve policy objectives, including rules to control the behaviour of multinational enterprises or foreign investors. There was no reason to discriminate between foreign and domestic firms in terms of the application of domestic laws. Second, even if one assumed there was a case for binding home-country obligations, the issue arose as to whether such obligations would have any meaning in international law. Third, there were also important legal questions raised by the possibility of the extra-territorial application of domestic laws to investors and corporations operating in foreign countries. Fourth, there was the practical matter of whether and how home countries could actually enforce any binding obligations that might be developed. The fact remained that home-country governments were not well placed to monitor or control all the foreign activities of their investors or corporations.

93. Finally, Japan disagreed with some of the points raised in the joint submission about performance requirements. It was clear not only that the imposition of many performance requirements was inconsistent with the TRIMs Agreement, but, as argued by his delegation on previous occasions, such requirements often undermined the very economic and development objectives for which they were designed. A more effective development strategy was to improve the competitiveness of indigenous industries and the quality of domestic products and services, so that investors had an incentive to locate and expand their operations in host countries. His delegation pointed out that China, in its accession to the WTO, had undertaken not to introduce performance requirements, and he believed that this decision would have a positive impact on China's attractiveness to foreign investors.

94. The representative of Canada drew somewhat different conclusions about the UN Centre for Transnational Corporations (UNCTC) Code. Her delegation had no desire to re-kindle the debate, other than to observe that many of the ideas associated with it were fundamentally hostile to benefits that private investors could bring when they invested, and to market-based responses to economic growth and development. Nonetheless, like many Members, Canada shared the concerns about a number of issues raised in the paper. Indeed, whether it was with respect to general principles, restrictive business practices (which, as an aside, her delegation felt fell under the rubric of competition policy), technology transfer, balance-of-payments, consumer and environmental protection, or disclosure and accounting, Canada believed that to varying degrees all governments, not just home governments, had a role to play.

95. Her delegation also noted that some important issues had not been raised in the paper, including bribery and corruption, and employment and labour standards, which were part of a broad package known as the revised OECD guidelines for MNEs which had been issued in 2000. Delegations recalled that these guidelines were the subject of a presentation by the OECD to the Working Group in 2001 (WT/WGTI/W/93). At this stage, it could simply be observed that home countries already encouraged corporate social responsibility, covering a whole host of issues on the part of their investors regardless of where they invested.

96. It should also be recalled that other stakeholders, aside from investors and home and host countries, had been involved in this debate. Shareholders, as well as non-governmental organizations, had performed a valuable function in this regard, and could be expected to do so in the future. For instance, many shareholders and institutional investors had already made a strong case for triple-bottom-line reporting on social and environmental issues, as well as financial issues. There was a realization that this – and other mechanisms to ensure corporate responsibility – was in the long term interest of the firm. And, of course, consumer and environmental NGOs remained vigilant over the trade implications of the Working Group's work.

97. It was also important to recall that the codes – such as the OECD's Guidelines and the UN's Global Compact – were not a substitute for law, nor for weak or unobserved legislation at the domestic level. In the absence of enforceable and enforced domestic frameworks, the political

problems associated with developed countries imposing laws in other jurisdictions on such issues as competition policy, environment policy, bribery and corruption, labour and employment standards, and other issues could prove problematic. Furthermore, the WTO might not be the optimal institution to consider the broader governance questions that such a debate would inevitably entail. Having said that, Canada remained ready and willing to assist any host-country government wishing to enhance domestic frameworks on this issue, as well as to promote the observance of similar norms by host-country firms as they increased investment abroad in their own right.

98. With respect to restrictive business practices, Canada supported the establishment of a WTO agreement on competition policy. Such an agreement could include *inter alia* commitments to the core principles of non-discrimination, transparency, and procedural fairness, to combat hard-core cartels, and a flexible framework for voluntary cooperation. It could also give consideration to many developing and least-developed countries, recognizing that not all WTO Members currently had competition policy regimes. These were many of the same elements that were captured in UNCTAD's set of multilaterally agreed principles on restrictive business practices. Her delegation believed that the work plan currently being undertaken in the WTO Working Group on the Interaction between Trade and Competition Policy could advance many of these goals.

99. With respect to technology transfer, a regulatory approach, which aimed to rectify perceived inequalities between technology owners and recipients through forced technology transfers – e.g., by means of performance requirements – was ineffective. WTO Secretariat analysis had identified the major barriers to technology transfers to developing countries as: lack of access to information about the full range of technological alternatives; inability to identify a technology best suited to needs; limited access to finances; inadequate level and quality of education and skills; insufficient linkages between universities and research institutes on the one hand, and industries on the other; regulatory constraints; market distortions; and weak and insufficient institutions. Submissions to the Working Group on the Relationship Between Trade and Technology Transfer had largely substantiated these messages. Similarly the World Bank had pointed to qualitative gains in terms of technology diffusion and total factor productivity that could result from an open trading environment, particularly between developed and developing countries. Through case studies of its own, UNIDO had further substantiated the Secretariat's work on successful private-sector focussed and market-driven approaches to technology diffusion. It was her delegation's view that technology policy should not be viewed in isolation from other policy goals or tools. National policies did have a role to play in successful technology transfer. However, the price of too heavy a public policy hand could be all too real, whether measured in terms of reduced technology transfers or diminished FDI and other flows. As her delegation had noted in the Working Group on Trade and Technology Transfer, Canada's experience suggested that general business framework policies provided a critically important underpinning to all other efforts to support technology transfer. Such policies included intellectual property protection, competition policy, and regulatory transparency. Many of these policies could be furthered in the context of WTO obligations.

100. Regarding balance-of-payments, it was generally agreed that rights accorded under international trade and investment arrangements should not unduly destabilize a country's balance-of-payment situation. Nor should these rights be inconsistent with obligations under the IMF Articles of Agreement. A balance-of-payments provision was therefore an important component of the Working Group's discussion of possible exceptions in an investment agreement. Exceptions which would facilitate redressing a temporary balance-of-payments problem existed in many trade and investment agreements, including those to which Canada was a party. To be effective a balance-of-payments provision needed to be transparent and predictable, and to be based on procedures of consultation and notification. In this respect, the balance-of-payments provisions of the GATT and the GATS, which were often reproduced or modified in regional and bilateral agreements, could usefully serve as a model in an investment context. In focussing on selected aspects of FDI, however, her delegation felt that the joint paper unfortunately suggested that the overall effect of FDI was negative on the balance-

of-payments, and ignored the significant positive balance-of-payments effects. Canada was of the view that the key issue associated with FDI and balance-of-payments was the effect on current accounts over time, and the contribution that FDI made to possible long-term outcomes and sustainable balance-of-payments positions. The paper proposed a range of solutions to balance-of-payments problems that could well lead to less foreign investment, not more, and exacerbate, rather than improve, the host countries' situation. In this regard, her delegation was very concerned about any government policies that would direct firms to use domestically sourced inputs. Canada believed that this would be inconsistent with existing TRIMs obligations. Canada supported the discussion of a balance-of-payments provision in the investment context, but believed it needed to be based on – and perhaps linked to – existing balance-of-payments provisions. Her delegation had serious doubts about imposing other types of restrictions to deal with balance-of-payments problems because it could have a significant negative effect on foreign investment. Other types of measures, such as GATS treaties, were more appropriate.

101. She concluded by noting that one of the key reasons underlining Canada's support for the launch of negotiations on a multilateral investment framework in Cancún was that the net effect of investment liberalization would be economic growth and development. Indeed, Canadian firms made an important contribution to the development of the economies in which they operated. Many of these firms operating internationally already used codes of conduct or other business ethics in their operations. Canada believed that voluntary initiatives could contribute to and advance public policy objectives in a way that was more easily accommodated to changing circumstances, that encouraged innovation, and that were less costly to administer than regulation. Moreover, they could be used to go beyond the minimum standards set by law. The inclusion of provisions on investors and home governments' obligations in a prospective multilateral framework would be a second best and ineffective policy instrument. Instead of securing transparent, stable, and predictable conditions for long-term cross-border investment, such provisions would deter foreign investment, thereby lowering the prospects for economic growth and development.

102. The representative of Costa Rica noted that his delegation did not yet have a well defined position on the issue of investors' and home countries' obligations. From a first reading of the document, three questions arose in relation to the subject. The first question was the extent to which such obligations would be binding. How might such obligations relate to implementation provisions, in particular the Dispute Settlement Understanding? What type of penalties would be established? Would it be solely a framework for intergovernmental cooperation? If obligations were established for investors, how was this situation to be reconciled with the intergovernmental nature of the WTO?

103. Second, his delegation wished to draw attention to the relationship between these proposed rules and an agreement on competition policy in the WTO. Costa Rica recognized that the proponents had taken this factor into account in paragraph 13 of their communication. However, where would the line be drawn between these provisions and a WTO agreement on competition?

104. Third, on the subject of home country obligations, his delegation would like to know the different proponents' views about the types of provisions and commitments that might be undertaken by developing countries and whether they thought that these should differ from those undertaken by developed countries. His delegation asked this question taking into account the fact that developing countries had, little by little, become a source of FDI and therefore a home country to multinational enterprises.

105. The representative of Kenya noted that his delegation, as co-sponsor of the paper, had attempted to draw up some preliminary thoughts on the question of investors' and home governments' obligations. His delegation wished to make it clear from the outset that this initiative should not be construed as implying that Kenya was enthusiastic about proposals for a multilateral framework on investment. These preliminary thoughts were only triggered by the fact that the proponents of a

multilateral framework on investment had been seeking binding rights for foreign investors that host country governments would agree to provide, while nothing had been proposed in terms of binding obligations of investors or home governments. The joint paper, therefore, was an attempt to inject some balance into the debate on the relationship between trade and investment, in order to enhance Members' understanding of issues.

106. His delegation believed that any multilateral framework on investment had to be balanced one, defining the rights and obligations of all the actors involved – i.e., the host country, the investor and the home country. The importance of this balance had been recognized in Paragraph 22 of the Doha Ministerial Declaration, which stated in part that: "any framework [on investment] should reflect in a balanced manner the interest 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 needs and circumstances."

107. His delegation highlighted the fact that FDI flows were generally undertaken by multinational enterprises and that, given their global operations and massive financial power (some exceeded the GDP of the host countries), developing and least-developed countries faced limitations in regulating their conduct. In this respect, the benefits of FDI could not be taken for granted. The extent to which FDI contributed to development goals depended on many factors including the right of the host governments to regulate and monitor investments in a manner that led to social and economic development and minimized the negative impact.

108. The limitations of national regulations in dealing with the operations of multinational enterprises had been recognized, and a number of steps had been taken by the international community to establish codes of conduct for MNEs. Such steps included the UN code of conduct on TNCs; attempts by the UN to establish international code of conduct on transfer of technology under the auspices of UNCTAD; and the OECD Guidelines on International Investment and Multinational Enterprises. However, almost all the existing attempts by the international community to evolve codes of conduct for MNEs remained voluntary in nature. And yet the growing internationalization of corporate activities since the 1990s had highlighted a number of issues that needed to be addressed through legally binding instruments. These included restrictive business practices; the manipulation of transfer prices; restrictions on transfer of technology; cases of corrupt corporate practices and fraud; financial crises triggered by speculative investments in financial markets; effects of the operations of MNEs on balance-of-payments; consumer protection; ownership and control; and the need to define home governments' obligations that could contribute in a positive way to the development goals of the host country.

109. The joint paper gave the Working Group an important opportunity to reflect carefully on these issues – a process which Kenya believed should not be undertaken in isolation. These issues should be placed squarely in the context of current instruments including existing draft codes. Also, account should be taken of other international and regional organizations that dealt with investment issues in order to ensure coherence among all the international actors.

110. The representative of Mexico suggested that the Working Group needed to be very careful in the way it dealt with the subject of regulating corporate responsibility since, as his delegation had noted on other occasions, this was not an element considered in Paragraph 22 of the Doha Ministerial mandate. It was of fundamental importance that Members read into the content of those paragraphs nothing more than Ministers themselves had stated. It should also be kept in mind that to include a subject of this kind could overload the work agenda, which was already quite complicated.

111. He suggested that it was dangerous to try to use – as has happened in other forums – a possible agreement on investment as a means of trying to overcome concerns that had their proper place either in other international forums or in other working groups of the WTO itself. In addition, as Canada had pointed out, such measures should not be considered substitutes for domestic legislation.

112. As for home countries' obligations, his delegation believed that this could lead to a conflict of interests that would not only affect the MNEs themselves but also the countries receiving investment. The fact that the home countries might impose specific regulations on their enterprises that operated abroad might lead to a conflict over the application of the rules and consequently, might inhibit investment. That would not, under any circumstances, benefit developing countries. Finally, Mexico agreed with Japan's comments with regard to paragraph 17 of the joint document.

113. The representative of Hong Kong, China observed that Paragraph 22 of the Doha Ministerial Declaration had not specifically included investors' and home governments' obligations as elements to be clarified in the Working Group. However, as China had pointed out, Paragraph 22 had provided that "any framework should reflect in a balanced manner the interests of home and host countries". Hong Kong, China had no difficulty with discussing the subject in the Working Group to facilitate Members' consideration of whether – and if so, how – any relevant obligations should feature in a possible multilateral investment framework. His delegation kept an open mind and encouraged Members to exchange their views.

114. Hong Kong, China had some preliminary observations: First, regarding restrictive business practices, as Japan and others had noted, this subject was also being discussed in the Working Group on the Interaction between Trade and Competition Policy. In order to minimize duplication of work and to have a more focussed discussion on the subject, his delegation thought that Members should consider whether the matter would more appropriately be followed up in the other Working Group.

115. Second, on balance of payments, he recalled that Members had had a good exchange of views on the subject at the Working Group's September meeting. One view expressed in Korea's paper (WT/WGTI/W/143) was that provisions on the free transfer of payments were core elements for inclusion in the possible multilateral investment framework given that an investment could hardly be considered protected unless the host country had committed itself to permitting the free transfer of payments related to the investment in question. That view could, to a certain extent, be contrary to the theme of the joint paper – i.e., that foreign investors should be obliged to follow the host government's policies towards a healthy balance-of-payments situation and to contribute to this objective.

116. Hong Kong, China considered that both views had their respective legitimate policy intents. What his delegation wanted to find was an appropriate balance between rules guaranteeing the free transfer of investment on the one hand, and the host country's desire to protect itself from balance-of-payment difficulties, on the other. Further discussion on this issue was essential.

117. Third, on home governments' obligations, paragraph 21 of the joint paper presented the view that home government should also undertake obligations to ensure that investors' behaviour and practices were in line with – and would contribute to – the interests, development policies and objectives of host Members. This implied that the policies of home governments would apply to MNEs that originated in their territories and that were invested in another Members' territory. As a preliminary thought, such application of home government policies to their investors in another country might raise a number of issues, including: the need to define the territorial identity of MNEs under the current highly globalized investment environment where the ownership of MNEs might be widely dispersed among shareholders residing all over the world; the legal and practical difficulties of holding MNEs responsible for their behaviour in other countries through home government policies or

regulations; the operation mechanism for gathering hard evidence of MNEs' investment behaviour by the home governments without unnecessarily intruding into the internal affairs of host countries.

118. As the joint paper had correctly pointed out, all existing attempts to develop codes of conduct for MNEs were voluntary in nature. He noted that it would be breaking new ground if a set of multilateral rules on investors' and home governments' obligations were to be developed in the WTO. Hong Kong, China saw merit in approaching the subject with an open mind and careful assessment on its implications as well as its pros and cons. His delegation looked forward to further exchanges among Members.

119. The representative of the United States noted that his delegation could only offer a preliminary response to the joint paper on "Investors' and Home Countries' Obligations", and he looked forward to discussing this and other contributions during the next meeting of the Working Group. He suggested that the proposals in the paper reflected a perspective on how best to enhance the contribution of MNEs to development with which the United States fundamentally disagreed. His delegation did not object to national regulation of domestic and foreign investment, which the United States itself practiced. His delegation also understood that developing countries would want to do what they could to maximize the benefits of foreign investment. But the proposals in the paper went much too far. In some respects, they sought to turn foreign private corporations into tools of industrial policy. If these proposals were implemented, his delegation believed they would severely chill investment. Private firms would be unwilling to subject themselves to the kinds of requirements envisaged in the paper. They would choose to stay at home or seek opportunities in economies that did not impose equivalent requirements. At a time when the vast majority of developing countries were attracting too little rather than too much investment, these proposals would be highly counter-productive.

120. His delegation wished to comment on several other elements in the joint paper. First, he believed the paper overstated the power of multinational corporations. It recited some familiar claims about the excessive economic power of MNEs relative to developing country governments, but offered little, if any, evidence to support these claims. In tirit 2, the paper referred to "the negative effects of the FDI activities by MNEs", but it did not describe these effects in any detail. In tirit 1 and elsewhere, the paper referred to the global scale of operations of MNEs, their presumed ability to avoid taxes and circumvent financial regulations, their control over technology, their bargaining leverage, and their manipulation of prices and ability to engage in other restrictive business practices. But the paper offered no data or evidence on the frequency of these restrictive business practices, nor did it describe in any detail the consequences of these practices and MNE features for the welfare of developing countries.

121. In tirit 6, and indirectly in tirit 22, the paper cited the recent cases of corporate fraud involving United States-based corporations as evidence of the problems caused by the absence of an enforceable global code of conduct for MNEs. His delegation did not find this argument persuasive. It seemed highly unlikely that even a binding code of corporate conduct would have prevented the alleged abuses of these corporations. Furthermore, these cases actually made a very strong argument for the adequacy of national-level policing of corporate conduct.

122. The paper also cited the late 1990's financial crises in support of its argument for legally enforceable investor and corporate norms of conduct, but here, too, his delegation did not believe the relationship between the problem and the solution was well-established. The fact that private capital was able to flow rapidly both into and out of certain emerging market economies, precipitating financial crises, was foremost an indictment of policies, not of investors and corporations. But concern about volatile capital flows could be met much more effectively through improved bank regulation, prudential standards, and other safeguards. The problem was not short-term capital, but weak oversight and poorly developed bank regulation. The solution was better financial supervision



and surveillance, such as through standards developed by the Financial Stability Forum which was established shortly after the Asian financial crisis to strengthen international financial cooperation.

123. It was not clear to his delegation precisely what was the problem with corporate power that the proposals in this paper were meant to address. The paper made no effort to describe the frequency of the abuses it attributed to MNEs or the consequences either of those abuses or of excessive corporate power more broadly. His delegation would also add that no effort to analyze these matters in greater detail would be credible without some effort to weigh any adverse consequences against the overall benefits of foreign investment, which he believed were significant.

124. This raised the second issue his delegation wished to address, which related to the capacities of developing countries. This paper painted an inaccurately weak portrait of developing countries in their dealings with MNEs. If this were ever the case, it was certainly less so today. As Members were aware, MNEs could only establish themselves in a country, under conditions set by the appropriate regulatory authorities of that country's government. Once established, MNEs were fully subject to the laws and regulations of the host country. If those laws and regulations were transparent and were implemented fairly and with adequate notice, there was very little that most home country governments could or would do to help a home-country corporation that ran afoul of the laws or regulations of their hosts.

125. In this regard, it was critical for Members to note that, outside of the TRIMs Agreement, there existed relatively few multilateral disciplines on the treatment of foreign investors by host country governments. Yet as the paper pointed out, there were in effect today a number of voluntary codes relating to the conduct of corporations in their foreign operations. Furthermore, several Members of the WTO had enacted laws that prohibited domestically-based corporations from engaging in corrupt or abusive practices in their foreign operations. In their dealings with each other, it was arguable that corporate investors, not governments, faced the more substantial set of multilateral constraints.

126. His delegation's third major concern about the paper was its suggestion that the jurisdiction of the WTO should be extended both to the activities of private corporations and to the policies of home governments in relation to the foreign conduct of their corporations. The United States firmly believed that the WTO lacked both the competence and the resources to take on these responsibilities. He reminded Members, in that regard, that any commitments Members were to make with respect to the foreign conduct of home-based corporations would be reciprocal. Corporations based in many developing countries – including several of the countries that submitted this paper – had been rapidly expanding into foreign markets in recent years. These countries needed to reflect on the possibility that their supervision of the foreign conduct of their own MNEs would be under scrutiny, and subject to challenge within the WTO, if the proposals in this paper were adopted.

127. The suggestion that the WTO take on these issues also presupposed that Members could agree on a code of conduct for MNEs. His delegation doubted that this would be possible, in practice and he cited some examples for this reasoning. Tired 17 proposed several binding obligations relating to the balance-of-payments. One suggested that investors should be required to "apply fair pricing policies in intra-corporate trade and curb transfer pricing manipulations". It was difficult to imagine Members of the WTO reaching agreement either on the meaning of these terms or on a methodology for evaluating compliance. Another suggested that investors should be required to "contribute to the promotion and diversification of exports and to increased utilisation of goods, services, and other resources available locally". This was a proposal, of course, for the restoration of trade-related investment measures, which all WTO Members pledged to eliminate under the TRIMs Agreement in 1994.

128. These two examples alone – and his delegation could have cited others – clearly suggested how difficult it would be to conclude an agreement on a code of corporate conduct in this

organization. His delegation also argued that this kind of exercise would require a highly detailed and sophisticated understanding of a wide range of corporate practices, standards, national regulations, and international conventions. WTO delegations and the WTO Secretariat lacked expertise in these areas.

129. He made several other points about specific parts of the paper. Tires 15 and 16 proposed measures relating to the transfer of technology. The United States again stated its unqualified opposition to any proposal to mandate the international transfer of technology under any agreement concluded in the WTO or elsewhere. Commercially applicable technology was almost exclusively in private hands in the United States, as it was in most free-market economies. The United States Government was neither able, under US laws, nor willing to require private actors to hand technology over to other private actors or governments on a non-commercial basis. Technical assistance, other forms of development cooperation, and technology transfer incentives were another matter, and the United States had committed in several WTO and other agreements to support measures in these areas.

130. Tired 20 addressed the issue of the disclosure of corporate finances. Here again his delegation wished to state its strong opposition to any proposal to require broad disclosure of the financial records of private firms or individuals, particularly a requirement that related to transactions, as the paper put it, "not only within the host member but with reference to all other transactions of the MNE which may impact in some way or another on host members' operations". His delegation again urged developing country Members whose corporations were now moving abroad to think about whether they would want to subject their corporations to such a sweeping and open-ended disclosure requirement. It should also be recognized that reasonable reporting requirements could be incorporated into their domestic regulations and that there was no need to have a one-size-fits-all obligation in an international agreement. Each country should decide for itself what type of information it felt was important enough to spend the resources in collecting and reviewing.

131. The representative of the European Communities did not agree with the view that an international investment agreement would only impose obligations on host governments and grant rights to foreign investors. His delegation was not proposing new rights for foreign investors. It was proposing a basic framework to be implemented by all WTO Members on non-discrimination and transparency. Foreign investors were first of all subject to the laws and jurisdiction of the country in which they operated, with or without an investment agreement. An investment framework would simply improve the transparency of conditions for foreign investors and include principles of non-discrimination. It would not prejudice the host country's right to regulate. Thus, any obligation on investors to comply with the laws and policies of the host countries did not need a multilateral agreement since they already applied.

132. As a general point, it was in the interest of every country, developed and developing alike, to open its economy to FDI. Opening up by a host country to FDI in any given sector could not be seen as a concession to be paid by home countries. On the contrary, it was in the interest of the host country to liberalize the entry of FDI. If a host country wished to keep its economy closed to FDI or to impose burdensome conditions on the entry and operation of FDI, it had the right to do so.

133. His delegation wished to clarify another matter. China and India were home countries as well as hosts to FDI. The question arose as to whether the proponents were prepared to accept themselves – and on behalf of their investors – the obligations on home countries and investors that were proposed in their paper (e.g., the draft UN Code and the OECD guidelines)? Would China and India accept that an internationally binding code would impose on them and on their investors certain specific rules of behaviour regarding environmental standards, for instance, or on employment and industrial relations (as included in the OECD guidelines)?

134. Regarding restrictive business practices, the submission stated that "competition policy at the national or international level will take care of the anti-competitive practices". The EC fully agreed with that statement, just as his delegation had argued that a WTO framework agreement on competition could go a long way towards achieving that end. However, he noted that the submission did not answer whether the drafters agreed or not with the role competition policy could play.

135. As regards the UNCTAD set of multilaterally agreed principles, the submission noted that it was not a binding instrument and was thus non-enforceable. It should be noted, however, as UNCTAD had acknowledged, that most developing countries had yet to implement that set of principles. Moreover, Section E of the set of principles essentially spelled out an obligation to have a legal framework which was non-discriminatory, procedurally fair and transparent; that there should be cooperation between competition authorities; and that confidential information should be protected. The submission did not mention this aspect of the UNCTAD principles. He wondered whether the proponents were ready to adhere to – and fully incorporate – all sections of the set of principles?

136. His delegation also noted in paragraph 14 of the joint paper that the predominant anti-competitive practice mentioned was that of hard-core cartels (i.e. price fixing, bid rigging, output restrictions and market allocation schemes). These were exactly the practices which the EC had long been arguing should be prohibited in a WTO agreement as they were the most pernicious violations of competition law. He asked whether this meant that the proponents would agree with what was being proposed in the Working Group on the Interaction between Trade and Competition Policy by the EC and others on hard-core cartels?

137. His delegation noted that the authors of the joint paper seemed well aware of the various international initiatives (including the OECD guidelines for multinational enterprises) intended to regulate the behaviour of MNEs. Their main concerns appeared to be that these instruments were of a non-binding nature.

138. He also noted that all EU-Member states had, as members of the OECD, adhered to the OECD Guidelines for Multinational Enterprises, thereby committing themselves to promote responsible corporate behaviour world-wide, consistent with existing legislation of host countries, and to set up National Contact Points. Furthermore, after the 2000 Review, the OECD Guidelines now contained far-reaching changes that reinforced the economic, social and environmental elements of the sustainable development agenda. Hence, the OECD Guidelines now included all internationally-recognized core labour standards, recommendations on human rights, sections on combating corruption, extended consumer – and environmental protection, and updated chapters on disclosure and transparency. The 2000 Review also improved the implementation mechanism with enhanced guidance to help National Contact Points to carry out their duties, and it had established mechanisms for promoting transparency, accountability and best practice.

139. His delegation fully recognized the need for home and host countries to cooperate and to exchange information. However, it was not realistic to expect home governments to be held legally responsible to ensure the responsible behaviour of their corporations. Such an assurance would require binding laws and regulations, which would have to be monitored in order to be enforceable. He argued that it would be extremely difficult for a home country to enforce and monitor such regulations without interfering with – and limiting – the host country's right to regulate. Moreover, home country measures, as proposed in the paper, seemed to refer to some kind of extraterritorial jurisdiction of domestic laws by home countries, which his delegation believed was unacceptable under international law.

140. It was therefore questionable why such provisions would be desirable from the host country's point of view. The current debate on corporate social responsibility had moved on from a too simple

dichotomy between non-binding versus binding instruments, towards the more challenging objective of achieving the effective implementation of commitments and verification mechanisms in order to ensure compliance with the principles of good behaviour.

141. The representative of Brazil said that since the joint paper was still being examined by capital-based officials, her delegation would comment at a later date.

142. The representative of Korea noted that the joint paper tackled complicated and complex issues which needed to be reviewed carefully from the broadest perspective. In this sense, his delegation's comments were limited to raising questions for further consideration, without prejudging any position. First, his delegation recalled the mandate set out in Paragraph 22 of the Doha Ministerial Declaration instructing that "any framework should reflect in a balanced manner the interests of home and host countries". It was his delegation's view this principle should be at the core of any multilateral investment agreement. Korea also highlighted the importance of the non-discriminatory application of general principles to foreign, as well as to domestic, companies. He understood by this that additional burdens should not be imposed on foreign investors only, and that burdens should be reasonable, feasible, fair and predictable. This would increase the opportunities for higher levels of FDI in host countries.

143. With respect to restrictive business practices, he noted that this matter was closely linked to the work currently being undertaken by the Working Group on the Interaction between Trade and Competition Policy. It was important to identify any common themes and issues in the two Working Groups in the future discussions. Regarding balance-of-payments, Korea wondered whether in a prospective investment agreement further guidelines should be introduced which went beyond the IMF Articles of Agreement, given that most WTO members were also members of the IMF, and they had already agreed to IMF principles. Regarding ownership and control, it was Korea's view that this matter should be discussed in connection with negotiations on market liberalization for investment. As regards consumer and environmental protection, Korea supported the view that MNEs should pay due regard to effective consumer and environmental protection, keeping in mind that unreasonable burdens should not be imposed on the private sector. Regarding home governments' obligations, his question was whether – given the limited role of government in a market economy – this ambitious idea was practical and realistic. In conclusion, Korea welcomed the discussion on this matter, and believed that the OECD Guidelines on International Investment and Multinational Enterprises, as well as other related codes, would provide useful guidance for future consideration.

144. The representative of Australia noted that although many of the views set out in the joint paper were consistent with OECD Guidelines on International Investment and Multinational Enterprises, and that Australia supported the need to consider obligations extending to investors and home countries, his delegation was of the view that any such obligations should be voluntary. Previous experience suggested that it would be difficult to reach a consensus on a binding agreement, and that any binding code of conduct could be used as yet another reason not to invest. His delegation reserved the right to return to this issue at a later date.

145. The representative of Cuba noted that while her delegation co-sponsored the paper, this in no way pre-judged Cuba's position of the work of the Working Group in light of the Doha Development Agenda. Her delegation felt it was important that the debate be broadened to take into account questions which, although not explicitly stated in Paragraph 22 of the Doha Ministerial Declaration, were nonetheless pertinent given the mandate that any framework "should reflect in a balanced way the interests of home and host countries, and take due account of the policies and development objectives of host governments, as well as their right to regulate in the public interest".

146. These were questions and concerns for many developing countries – which were fundamentally host countries for foreign investment, rather than home countries. The Working Group

needed to explore how to ensure or guarantee that multinational enterprises that invested in development countries had a positive impact on their economic development goals. She took note of the comments from delegations which represented home countries. Her delegation's point of view was that there were legitimate questions that required a balanced debate, and for this reason Cuba was in favour of continuing this work.

147. The representative of Switzerland noted that the proposal raised many difficult issues conceptually and methodologically. The extraterritorial implications of home government obligations in particular were viewed by his delegation as problematic. He pointed out that a number of issues raised in the joint paper referred to the policies to be implemented by host countries, while many Members of the Working Group were requesting greater policy flexibility. His delegation believed that the issue of restrictive business practices would be best dealt with by national legislation, as well as internationally in the Working Group on the Interaction between Trade and Competition Policy. He also saw issues of consumer and environmental protection falling within the realm of national legislation, with all the flexibility that was provided for at that level. Regarding disclosure and accounts, his delegation believed that host countries' laws should apply. He also noted that the issues of technology transfer and home country obligations were too complex to be captured in multilateral rules.

148. The representative of Argentina suggested that the joint paper touched on a subject which was of importance to his delegation – namely the search for an appropriate balance between rights and obligations, both for states and investors. It was clear that national governments should have authority and freedom to regulate in the public interest. But it was also clear that international rules and legal regimes could define or influence countries' policy flexibility, sometimes in unforeseen ways. This tension was even more significant in instances where foreign investor had recourse to arbitral bodies or international jurisdiction owing to a lack of guarantees in national jurisdictions.

149. Argentina concurred with those delegations which argued that it should suffice to apply domestic legislation and the guarantees given by national tribunals to rule on abusive practices. However, this right to regulate should be sufficiently guaranteed in any prospective multilateral treaty. His delegation also thought it was important to analyze carefully the feasibility of establishing home country responsibility for private investors in a treaty. However, treaties should not necessarily contain responsibilities to be borne by a foreign investor. Rather they should set out conditions or minimum standards of conduct that must be met by the foreign investor in order to benefit from the treaty. His delegation had listened to arguments which suggested that any additional obligations or conditions imposed on foreign investors would diminish their incentive to invest. Argentina did not understand this argument. Did it imply that in order to maximize foreign investment investors should be allowed to operate in the absence of a legal framework – or that the foreign investor must have the guarantee of impunity? His delegation did not believe that this was the intent of those advancing this line of argument but he wanted to draw out the logical implications of this position in order to make the point. As regards home country obligations, it was asserted by some that this raised intractable legal difficulties, in particular difficulties of identifying corporate nationality. However, he pointed out that any investment treaty would contain criteria for identifying nationality.

150. The representative of Kenya, responding to the point that some of the issues raised in the joint paper were being discussed in other working groups, suggested that he could see no difficulty in analyzing subjects from various perspectives – and in different fora – as long as the appropriate analysis was carried out. Against the argument that the paper's proposals might have a chilling effect on foreign investment, his delegation doubted there was any empirical evidence to support this claim. The basic thrust of the joint paper was the need to achieve a balance of obligations among investors, host countries and home countries – thus maximizing the benefits of FDI and minimizing its negative effects. Nor did his delegation accept the argument that financial instability was the result of weak domestic regulation, institutions, and oversight. There were a number of examples of countries with

perfectly adequate regulatory frameworks which had been struck by financial crises. Regarding concerns that Members should not seek to overextend the resources or jurisdiction of the WTO, he pointed out that this argument had not stopped proponents from urging the negotiation of a new multilateral investment framework in the WTO. If the WTO lacked expertise in certain areas the answer lay in improving staffing decisions, not in resisting new issues or concerns. His delegation could not support the view that the issues raised in the joint paper pitted developing against developed countries – although it was true that the power of multinational enterprises was often felt more strongly by developing countries. The real objective of the joint paper was to achieve a better balance in the obligations of host and home countries. Regarding the argument that the issues raised in the joint paper were too complex and sensitive, his delegation responded that the whole of the investment debate was very sensitive for many delegations.

151. The representative of China offered the following responses and explanations regarding comments on the joint paper. By submitting a joint proposal on investors' and home governments' obligations, and by pointing out the necessity of regulating TNC activities, China in no way wanted to convey a negative sentiment towards TNCs. The paper's objective was to explore an appropriate balance between home- and host-country interests, as mandated in the Doha Ministerial Declaration, and to address any negative effects that TNCs might have on the development policies of the host members, particularly the developing ones. From this perspective, the co-sponsors of the submission could actually be viewed as supportive of TNCs through efforts to provide as favourable an environment for their investment operations as possible.

152. It was true that China had committed itself not to impose TRIMs. This commitment remained unchanged. However, delegations should recognize that the problems noted in the joint submission had nothing to do with China's obligations. The paper did not address the problems faced by China, but those faced by many other developing countries with regard to TRIMs – problems which had already been revisited and reviewed on a case-by-case basis within the framework of the TRIMs Committee. This process demonstrated that many developing countries continued to face serious difficulties implementing aspects of the TRIMs Agreement – and indeed TRIM was highlighted as one of the outstanding "implementation" issues to be resolved by Members. Moreover, there were indications, from discussions of the Committee, that this issue seemed unlikely to be resolved in the near future. It was therefore absolutely necessary for the Working Group to touch upon these issues as they were closely related to investment, and to the creation of a possible multilateral investment framework in the future.

153. Every Member of the WTO was entitled to adopt its own domestic policies and measures unilaterally – or as part of bilateral treaties – with regard to foreign investment in order to realize its own development objectives, as long as these policies were consistent with relevant WTO disciplines. In his earlier supplementary statement on the joint submission, he had listed all of the general reasons for China's success in attracting FDI, as well as some specific policies and measures that China had implemented in order to create an environment favourable to FDI. If the Working Group were going to discuss comprehensively a possible multilateral framework, it was important to bring all of the relevant elements related to investment – including TRIMs, technology transfer, and competition policy – into the picture, regardless of whether these issues were also being addressed in other WTO bodies. These issues had nothing to do with the domestic policies and measures adopted by Members to encourage inward FDI.

154. Several delegations had suggested that the issue of investors' and home governments' obligations was not listed in Paragraph 22 of the Doha Ministerial Declaration, and thus there was no mandate to discuss the issue in the Working Group. On this point China agreed with Switzerland that the list of issues set out for clarification in Paragraph 22 was only an indicative list, not an exhaustive one. Moreover, Paragraph 22 also instructed Members to strike a balance between the interests of

home and host countries – which justified the submission of proposals on investors' and home countries' obligations for discussion by the Working Group.

155. He noted that one delegation had raised the question of whether obligations sketched out in the proposals would apply those activities of TNCs originating in developing countries. China's answer was yes – were such rules to be incorporated in a prospective multilateral framework. Another delegation had suggested that certain TNCs operating in China had incurred losses. While this might be true, his delegation did not believe that this problem was relevant to deliberations on the topic under discussion in the Working Group. As an aside, he noted that making profits or losses were normal in any investment situation, and the reasons varied. Transfer-pricing in order to evade tax, for example, might be one of the reasons for some "losses" incurred. Moreover, regardless of whether losses were being incurred, these TNCs were still operating in China and FDI was still flowing into China on a large scale. He believed there must be some reason behind these inflows – expectations of future profit and the long-term strategic goals might offer some explanation.

156. The representative of India, in responding to comments and questions about the joint paper, noted that his delegation would examine the points raised in greater detail, both in Geneva and in capital, and would respond appropriately at a future meeting. India also looked forward to further debate on the subject and more contributions from Members. At present, he would confine himself to making only broad comments on a few of the issues raised. One set of issues related to investors' obligations and those of home countries. There was a view expressed by some delegations that investors' obligations should be voluntary in nature. There was another question on how binding rules could be enforced for investors, the WTO being a Member-driven organization. There were also several comments on home country obligations, relating to limitation on the role of the home governments in market economies and the implications of extra-territorial application of law.

157. In response, his delegation pointed out that many WTO agreements had a direct impact on private business activity. The TRIPS Agreement, for example, contained a set of provisions enforced through domestic law by countries which impinged on private business. The Anti-Dumping Agreement and the Subsidy and Countervailing Measures Agreement similarly related to multilateral provisions impinging on private business activity in an extra-territorial manner. Even some of the provisions under Article XX of GATT had been imposed in an extra-territorial manner. His delegation thought, therefore, that it would be possible for the Working Group to find solutions that fell within the framework of the WTO's multilateral system of rules.

158. Another set of issues related to the nature of the suggestions made in the joint paper and their relevance in the context of the Doha Ministerial Declaration. He reminded all Members that Paragraph 22 of the Doha Ministerial Declaration very clearly provided that "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 suggestions made in the joint paper were, therefore, well within the mandate of the Doha Ministerial Declaration. As mentioned by China, the list of items in Paragraph 22 of the Doha Ministerial Declaration was only indicative. For India, investor obligations and home country obligations had to permeate all aspects of the discussion in the Working Group, as had been determined by Ministers.

159. Another point raised was that the issues addressed in the paper were complex and sensitive, and that the WTO might not be the right forum for a discussion of such issues. It was his delegation's opinion that the entire subject of trade and investment was complex and sensitive. Taking it up for discussion in the Working Group meant that issues that constituted an intrinsic part of the whole subject could not be excluded. Some delegations expressed concerns regarding performance requirements. It was India's view that performance requirements were of great significance from the

development perspective and that, therefore, they needed to be discussed in the context of development provisions relating to any multilateral framework.

160. A question was raised in the context of companies from developing countries investing abroad, and whether developing countries would also undertake home-country obligations. He pointed out that the co-sponsors of the paper had made no distinction between developing and developed countries in this regard, and the measures proposed would apply to both. Another view expressed was that the joint paper overstated the power of multinational enterprises and that no hard data had been given. There were any number of treaties on the power and functioning of multinational enterprises, and he believed it would not be too difficult to provide a huge mass of data on the subject.

161. There was also a reference to restrictive business practices, which it was pointed out, was being discussed in the Working Group on the Interaction between Trade and Competition Policy. There was a close relationship between trade and investment and trade and competition policy, which was recognized even in the Singapore Ministerial Declaration. The two Working Groups were required under the Singapore Declaration to draw upon each other's work, if necessary. It was his delegation's view that there could be no discussion on a multilateral framework on investment which excluded restrictive business practices.

162. Another point mentioned was that FDI was in the interest of the host country and not a concession that needed to be negotiated. His delegation again needed to reiterate that the current discussion was not about FDI *per se* but about the need for a multilateral framework. FDI had both negative and positive effects, and the objective of host countries was to maximize the positive effects and to eliminate, as far as possible, the negative effects. The joint paper highlighted measures that could be taken to eliminate the negative effects.

*(iii) Exceptions and balance-of-payments safeguards*

163. The representative of the European Communities introduced its submission (WT/WGTI/W/153). He noted that the EC was often asked by developing countries to advise on investment promotion activities, and that the advice it first offered was to negotiate a multilateral investment framework in order to avoid wasteful competition for investors. His delegation noted that the issue of balance-of-payment was not specific to developing countries, but it was one of the issues which was of special interest to them. His delegation considered it as a very useful and central part of a multilateral investment framework aimed at supporting development activities – in other words, an investment for development framework.

164. His delegation believed that a future investment framework should allow the possibility for Members to take safeguard measures in case of balance-of-payments crises. This kind of safeguard clause was particularly important for – but not particular to – developing countries whose financial systems might be more fragile and more exposed to potential instability. The first section of the paper defined the nature of financial crises, and noted that safeguards should only be applicable within well defined and accepted criteria. The second section of the paper explained the relevant provisions in the EC Treaty which pertained to balance-of-payments issues. The third section addressed the issue of freedom of transfers in IIAs. It noted that most BITs did not include binding obligations on the admission of investment; thus the transfer obligations included in these agreements often did not cover those transactions that were necessary to undertake new investments, but only those transactions necessary (i) for the repatriation of profits, (ii) for the development of an existing investment, and (iii) for the liquidation of the capital relating to those investments. Other agreements which included rules on the admission of investments required parties to explicitly or implicitly ensure the capital transfers necessary for the making of new investments. For example, the GATS required Members to guarantee current payments relating to their specific commitments, and provided



that when a Member undertook a market access commitment under Mode 3 that Member would also guarantee the relevant transfer of capital into its territory. The OECD Codes also required Members to allow the free transfer of current payments related to a covered investment as well as to the capital movements needed for the "making, the development, and the liquidation of the investment". Under the IMF Articles of Agreement every IMF Member was required to allow all international current payments and transactions to non-residents. These included the repatriation in convertible currency of all income arising from foreign investment. However, the IMF might allow a Member "to maintain and adapt to changing circumstances restrictions on payments and transfers for current international transactions that were in effect on the date on which it became a Member".

165. The fourth section of the paper referred to existing balance-of-payments safeguards in international agreements. It noted that most BITs did not include specific balance-of-payments safeguards. However, some recent bilateral and regional agreements – such as NAFTA – allowed restrictions on capital movements in cases where a party "experiences serious balance-of-payments difficulties or the threat thereof". Regarding the OECD Codes, it was noted that they provided for Members temporarily suspending their measures of liberalization "if overall balance-of-payments of Members develops adversely at a rate and in circumstances which it considers serious". Turning to the GATS, he noted that Article 12 allowed Members to adopt or maintain restrictions on payments or transfers for transaction related to its commitments in the event of serious balance-of-payments and external financial difficulties or threat thereof. The GATS had a special reference to Members in the process of economic development and economies in transition to maintain a level of financial reserves adequate for the implementation of economic development programmes. Finally under the IMF Articles of Agreement, Members might be allowed to take special exchange measures, including restrictions on current transactions, for balance-of-payments reasons.

166. The fifth section of the EC paper concluded that a future multilateral investment framework should provide as a general rule that Members allow all current and capital transfers related to established investment and, as far as the making of new investment was concerned, to those investment covered by a country in its list of commitments. However, his delegation believed that a safeguard clause should be provided to allow Members to impose temporary restrictions on the outflow of current and capital account transfers related to covered investments in cases of serious balance-of-payment difficulties. Such a safeguard was one example of an escape clause particularly relevant to development countries. However, this safeguard should remain exceptional and its imposition should follow strict criteria. In the EC's view, this meant that any restrictions should be non-discriminatory, should be consistent with other relevant provisions, should be limited in time and phased out progressively, should be applied in a way that did not exceed what was necessary to deal with sudden difficulties, should avoid unnecessary damage to the interests of other Members, and should not be used to justify measures adopted to protect specific industries or sectors.

167. The representative of the United States noted that the issues raised by the EU in its paper were of significance to his delegation, and the United States would be responding in detail at a future meeting.

168. The representative of Japan thought that it was important to agree on the general rule that in any multilateral investment rules the freedom of transfer of all current and capital account transactions should be guaranteed. In its previous submission (WT/WGTI/W/139), he noted that Japan had put forward a similar idea, as had Korea in its submission on the subject. The first step was to address freedom of transfers and only then issues of balance-of-payments safeguards, as an emergency measure, could be discussed. Japan also held that a possible balance-of-payment safeguard should be (i) exceptional, (ii) temporary, (iii) subject to clearly defined conditions for its imposition and operation, (iv) phased out when the balance-of-payments difficulties have improved, and (v) be consistent with IMF Agreements. His delegation concurred in particular with the points outlined in paragraph 18 of the EC paper.

169. The representative of Hong Kong, China noted that the EC paper suggested a number of useful criteria concerning balance-of-payments safeguards provisions in a possible multilateral framework on investment, and he observed that the proposals looked similar to existing related provisions in GATS Articles XI and XII. At the September meeting of the Working Group, the issue of balance-of-payments safeguards had been discussed thoroughly. Though there was no common view on their precise nature and scope, it was generally accepted that balance-of-payments safeguards were useful when a country was facing serious difficulties. It was also emphasized that such safeguards should be in full accordance with the relevant obligations of the IMF.

170. In view of this previous discussion, Hong Kong, China suggested that future deliberations might be based on, among other things, the following two criteria. First, he reiterated that the approach used in the GATS was of particular relevance, as it covered investment in services. Given the close relationship between the GATS Mode 3-type of investment and a possible multilateral investment framework, his delegation saw every reason to make reference to the balance-of-payments provisions in GATS Articles XI and XII. To maintain coherence and consistency, any prospective multilateral investment framework should be complementary to all existing WTO Agreements concerning investment, including the GATS. His delegation therefore agreed in principle with the ideas raised in paragraphs 17–19 of the EC paper, though details would need to be further elaborated.

171. Second, he suggested that any future formulation regarding balance-of-payments safeguards should also be consistent with the IMF Articles of Agreement. He noted that GATS Article XI contained a similar requirement. To facilitate future discussions in this regard, perhaps the Working Group might consider inviting contributions from IMF experts to provide an analysis on the issues relating to balance-of-payments safeguards.

172. The representative of India noted that his delegation had expressed its view on this subject at the September meeting of the Working Group, and as the EC paper was being reviewed currently in his capital, he wished to reserve his right to return with comments at a future meeting.

173. The Working Group took note of the statements.

#### B. PARAGRAPH 21 OF THE DOHA MINISTERIAL DECLARATION

174. The Secretariat noted that an updated report on technical assistance had been distributed in WT/WGTI/W/151, to provide Members with information to enable them to judge the effectiveness and usefulness of the technical assistance activities carried out jointly with UNCTAD. It showed the number of participants who had taken part in technical assistance seminars, costs to the WTO, and the satisfaction of participants. To the extent that the mandate in this field was renewed, the WTO and UNCTAD were committed to continuing to cooperate in providing technical assistance. Costs incurred by the WTO Doha Trust Fund to date had been relatively low, due to the generosity of several Members that had contributed financing directly and to other intergovernmental organizations. However, there could be no guarantee of this being repeated in the future, and the Director-General had noted the importance of providing necessary financing to maintain joint WTO/UNCTAD activities in this area. He referred in this regard to the most recent workshop for English-speaking African countries jointly organized with the International Cooperation Agency of Japan and with UNCTAD, expressed the Secretariat's thanks for the cooperation received from the Government of Japan and the hope that it would be possible to repeat the process for French-speaking African countries in 2003. WT/WGTI/W/151 also provided details of projected technical assistance activities for 2003.

175. The representative of UNCTAD noted that during October and November the technical assistance work on international investment agreements was extended to Latin America. A Regional Seminar for South American countries had been held in Lima, Peru, on 7-8 October 2002 to discuss

"the relationship between trade and investment" and the implications for developing countries of strengthening multilateral cooperation in this area. Ten countries from that region had participated and there had also been a number of observers from the Andean Community. The Seminar had been followed by an intensive training course on "Key issues in international investment agreements" which ran from 9-18 October. The course had been attended by 21 participants from 15 Latin American countries. The Lima events had been implemented in cooperation with the Inter-American Development Bank. In addition, two national seminars had been held in Latin America since last September, one in Venezuela and the second in Guatemala.

176. She noted that technical cooperation had also continued in Asia. A national seminar had been held in Sri Lanka on 20-21 November, to reflect on the implications of international investment agreements for that country. It had been attended by 50 participants from government and the private sector. Shortly after that seminar, on 25 November, a second intensive training course for Asia and the Pacific had started in New Delhi, which was due to last until the 6 of December.

177. In Geneva, joint technical assistance work had continued with the briefing of Geneva-based delegates in Spanish on 29 November. Also in Geneva, a special technical workshop for English-speaking, capital-based African officials had been held on 1-2 December. It was intended to respond to the particular needs of African countries for enhanced support to participate effectively in the WTO Working Group. A second workshop of this kind, for French-speaking African countries, would be organized in 2003. Also, the current programme of regional seminars and training courses would be repeated for African countries in the first half of 2003.

178. Within UNCTAD's Work Programme on International Investment Agreements, she noted that the UNCTAD Secretariat had organized a BITs negotiation facilitation event at the request of several LDCs. This event, which coincided with UNCTAD's Expert Group Meeting on the Development Dimension of Foreign Direct Investment, took place from 4-13 November and brought together 19 countries, including three developed countries. It resulted in the completion of 28 BITs. The event also served as a platform to hold preliminary discussions on a regional investment agreement between France and the Zone Franc countries.

179. She observed that the activities undertaken in 2002 had not covered all UNCTAD members. Activities that responded to the needs of countries in the Caribbean, West Asia, and Central and Eastern Europe were being proposed as a matter of priority in the technical assistance programme for 2003. UNCTAD estimated that by the end of 2002, about 500 officials (and a substantial number of private sector representatives) would have participated in one or more of the technical assistance activities in this field. The UNCTAD and WTO Secretariats had carried out assessments of each technical assistance activity based on written comments by participants, and had adjusted the programme of future events in the light of the comments made. Generally, the activities had been viewed as relevant and useful to the responsibilities of participating officials.

180. Finally, she mentioned with gratitude that since the last briefing on this matter, UNCTAD had received a pledge from the United Kingdom to support this work. In addition, several other governments were considering supporting UNCTAD's activities in the area. As part of the reporting and evaluation procedures of its work programme, UNCTAD had had an informal meeting with donor and beneficiary country representatives on 6 November. The mid-term evaluation of this project had commenced in September.

181. The representative of Peru noted that the regional seminar and the intensive training course were of the highest standard and quality. His delegation believed that the joint efforts of the WTO and UNCTAD Secretariats had facilitated dialogue among countries in the region on this issue, and had involved sectors that would be impacted by any future negotiations. He also highlighted the value

for his country of future plans to initiate a programme of "training for trainers" – as well as follow-up activities.

182. The representative of Sri Lanka noted that the recent national seminar had been very well attended – by both private and public sector participants – and of the highest standard. She added that government officials and business representatives had deepened their understanding of the relevant issues and were now better equipped to evaluate the implications of a possible multilateral investment framework. She noted that Sri Lanka had requested a regional seminar for 2003 in order to build upon this educative process.

183. The representative of Venezuela noted that the national seminar held in his country in October had been timely and effective, in particular with regard to the flexibility of the WTO and UNCTAD secretariats in designing the programme with input from the host government.

184. The representative of the United States noted that the Secretariat's planning on technical assistance appeared to be highly responsive to the Members' needs and requests. He also commended the Secretariat on its successful partnering with other multilateral institutions and national governments which had enabled it to increase the frequency and scope of its training activities.

185. The representative of Japan, in reviewing the Secretariat's report, was encouraged to see so many workshops and seminars being held in various parts of the world. It was commendable that approximately 500 people from developing countries had had the opportunity to learn at these workshops. He also took note of the Secretariat's evaluation that 90 per cent of the participants felt that the workshops and seminars had been carried out competently and effectively by the WTO and UNCTAD Secretariats. Regarding the WTO/UNCTAD Workshop supported by the Japanese International Cooperation Agency, he noted that some 15 English-speaking African nations had been represented and that the major issues had been effectively presented and discussed. Japan planned to support another seminar for French-speaking African countries which would be held at the initiative of Egypt next February in Cairo. Regarding Japan's regional and bilateral technical assistance activities, he noted that Japan was planning a national seminar in Jakarta, Indonesia and in Shanghai, China in January. Under the umbrella of APEC, two regional seminars were planned for Thailand and China in the spring of 2003.

186. The representative of Guatemala wished to note that a successful national investment seminar had been held in his country in October.

187. The representative of Mexico noted that officials from Mexico had attended the two seminars in Peru in October. While the regional seminar was useful in outlining the state of discussions on investment in the WTO, Mexico felt that the seminar could have benefited from a more thorough discussion of the issues highlighted in Paragraph 22, rather than a general stocktaking. Certainly more time to discuss specific initiatives – and the concerns of specific countries – would have been worthwhile in this type of activity. Efforts to bring in regional experts would also have been worthwhile.

188. The representative of Kenya registered on behalf of the African Group appreciation for the Geneva-based Workshop supported by Japan. He also welcomed Japan's offer to host another initiative in Egypt in January 2003.

189. The representative of India noted that a number of workshops and seminars had been held in India jointly by the WTO and UNCTAD Secretariats which had helped improve understanding of the issues at hand. His delegation believed that, as mandated in Paragraph 21 of the Doha Ministerial Declaration, technical assistance should focus on the implications of closer multilateral cooperation in

investment for the development policies and objectives of developing and least-developed countries, as well as on human and institutional development.

190. The representative of Egypt extended his Government's special thanks to Japan for its initiative to hold a workshop in Egypt in February 2003. It was his delegation's view that this seminar would deepen analytical skills and widen perspectives with respect to the different elements of FDI and a possible multilateral framework, and the implications these might have for developing countries.

191. The representative Nigeria informed that his delegation had benefited immensely from current technical assistance, and was gratified to hear that additional events were planned for the African region. In particular, his delegation looked forward to the organization of a national seminar for Nigeria.

### C. ANNUAL REPORT

192. The Chairman informed the Working Group that, as requested at its September meeting, a draft annual report had been prepared by the Secretariat (Job(02)/192) which reported in a factual way on the three formal meetings that the Group had held in 2002. He noted that the discussions undertaken at the present meeting would be the subject of the Annual Report for 2003, in keeping with WTO practice. He explained that the report was intentionally comprehensive and detailed with the objective of offering a precise and accurate summary of Members' views and positions as expressed in the course of the Working Group's deliberations, without undue emphasis on any one point of view or another. This objective was not easy to achieve. He noted that in any document of this nature, there was always room for improvement and it was only natural that delegations might wish to propose some editorial amendments as far as their individual contributions were concerned. He noted that the Secretariat had received several editorial and drafting suggestions in that regard – which in no way altered the substance of the report – and he invited delegations who might wish to make similar suggestions or corrections to convey these to the Secretariat. One proposed amendment in particular he wished to mention involved the final section of the report entitled "conclusion" where he initially felt it might have been useful to highlight some of the issues, and their cross-linkages, that could serve as a basis for further discussion the following year. However, some delegations felt it was premature to include such a reference in the annual report, and he could agree with this deletion should other delegations not object.

193. The representative of Japan believed that the draft annual report served, not only as a summary of the year's work, but as a starting-point for the following year's discussion. However, his delegation felt that there were several places where the report was biased and did not accurately reflect the Working Group's discussion. For example, while the Working Group had discussed the issue of investors' and home countries' obligations, the report gave too much emphasis to arguments that such obligations were needed or required. Likewise, Japan believed that the report did not accurately reflect objections that had been raised to the idea that performance requirements were beneficial to development. Japan also felt that greater emphasis needed to be given in certain parts of the text to the way that a GATS-type positive list approach to pre-establishment commitments could address developing-country concerns about regulating and channelling investment inflows. Regarding technical assistance, he asked that the Secretariat make reference in the report to the activities taking place in APEC as well as to existing bilateral contributions.

194. The representative of Canada viewed the annual report as balanced and objective. While her delegation deferred to the Chairman's judgement, Canada found the section entitled "conclusion" an excellent piece and would prefer to keep it in the report, perhaps re-titling it "key questions". Two alternative suggestions were to keep it as a separate annex, or at the very least to use it as a basis of discussion – perhaps with minor additions – for the following year. Given the importance of

technical assistance, her delegation also wondered whether a list of the year's activities could be attached as an annex to the report.

195. The Chairman suggested that his reasons for agreeing to the removal of the section entitled "conclusion" was that whereas the rest of the report was factual in nature, this section was more of a suggestion. As an alternative he suggested that Members might request that the Secretariat issue a "checklist of issues", under the Working Group's collective responsibility, that might be discussed and analysed the following year.

196. The representative of China did not hesitate to support the adoption of the report, as it represented a factual representation of what had been discussed in the Working Group. At the same time his delegation thought that the present meeting's discussion of investors' and home countries' obligations should also be reflected in the report.

197. The Chairman reiterated that unfortunately the content of the present meeting's discussion could not be reflected in the current report.

198. The representative of Australia agreed with Canada that the report provided a solid basis for discussion next year. He understood the Chairman's rationale for deleting the "conclusion" section, and supported the idea of the Secretariat issuing a checklist early the following year.

199. The representative of Venezuela agreed with other delegations that the draft report represented a factual and balanced summary of the Working Group's discussion. He was surprised that some delegations wanted the "conclusion" section removed, as it represented a useful tool for taking stock of discussions in this and other groups.

200. The representative of India fully subscribed to the view that the report should be balanced and factual. His delegation had also availed itself of the opportunity to make factual or editorial suggestions to the Secretariat. Regarding the "conclusion" section, his delegation felt that the report should focus on past discussions, not future work, and India was in favour of its removal. His delegation was open to the idea of possibly a checklist of issues, based on consultations with Members.

201. The representative of Mexico agreed that the report should be a factual one, and supported the removal of the "conclusion" section. Mexico was not opposed to the idea of a checklist so long as it was made clear that such a list should not prejudge Members' positions on the subjects listed.

202. The representative of Peru found it very useful that the report contain a section entitled "conclusion". His delegation felt that there were key issues noted in this section – along with paragraph 134 – that were worth preserving, noting that it represented by no means a closed or exhaustive list. Peru supported Canada's suggestion that it be removed from the body of the report, but kept as an annex. Or as the Chairman himself had suggested, it could be issued as a separate document with the heading "Checklist" to provide guidance to capitals for discussions the following year. His delegation also agreed with the addition of an annex on technical cooperation.

203. The representative of Switzerland noted that the report's section on "relations with other IIAs" raised a number of important legitimate questions. Switzerland supported the proposal to issue the "conclusion" section as a "checklist of issues", noting that many other subjects could be included as well. This list should be distributed early, to help prepare the Working Group's work, and it should focus on the most important issues – those critical to moving the work forward in the timeframe available.

204. The Chairman noted that paragraph 134 was not entirely factual – and in the same spirit as his earlier suggestion, his inclination was to remove the two bullets contained in paragraph 134 from the text.

205. The representative of the European Communities concurred with the Chairman's proposal to remove the "conclusion" section but perhaps retain it as a kind of exemplary list of issues, if time allowed.

206. The representative of Egypt agreed with the suggestion that the Secretariat issue a checklist to help guide the Working Group's work in 2003. However, his delegation believed that such a checklist should not be exhaustive – and should remain open to any additional subjects or suggestions raised by Members. With respect to proposed changes to paragraph 134, while he agreed that this should remain a factual report, his delegation wanted to retain the two bullets and did not want to see them deleted.

207. The Chairman took note of the comments and agreed to transmit the Report, as amended, to the General Council. He also noted that there seemed to be an emerging consensus that a checklist – including, if Egypt agreed, the bullets in paragraph 134 – should be issued by the Secretariat, to which any delegation could contribute.

#### D. OTHER RELATED ISSUES

208. The representative of UNCTAD informed the Working Group that the UNCTAD Commission on Investment, Technology and Related Financial Issues had convened an Expert Meeting from 6-8 November 2002 to examine the development dimension of FDI and related policy issues in the national and international context. The terms of reference of the Expert Meeting included a number of issues of relevance for the post-Doha discussion on investment. The meeting was structured around a few main themes: host country policy measures and the role of performance requirements, home country policy measures and corporate social responsibility, the right to regulate and safeguards, and she noted that the Chairman's summary had been made available to the Working Group.

209. The Expert Meeting discussed in detail the content and effectiveness of policy measures as well as different concepts and approaches related to the issues of corporate social responsibility and the right to regulate. Host country policy measures, incentives and performance requirements were discussed at some length. Following a long debate, no consensus had been reached as to whether the use of performance requirements should be made more restrictive or less restrictive. On home country measures, experts noted that this was an often overlooked aspect of FDI's relationship which involved TNCs, host countries and home countries. Nonetheless home country measures could play an important role in influencing the direction, magnitude and quality of FDI flowing to developing countries, and the contribution it could make to development. In the context of the balance between investors' rights and obligations in international investment agreements, experts recognized that there were many different ways to address issues related to corporate social responsibility. The issue of linkages between corporate social responsibilities initiatives and trade and investment agreements could be further analyzed. Regarding the right to regulate, the meeting reviewed various approaches in the context of trade and investment agreements. Experts recognized that international agreements might limit the sovereign autonomy of the parties and that some of these limitations might affect the ability of governments to regulate, including economic, social, environmental and administrative regulations. The tension between the need for governments to regulate and international obligations was central to the question of preserving the national policy space for governments to pursue their development objectives.

210. The representative of OECD alerted Members to the fact that the OECD Trade Directorate and the OECD West Africa Club, Saharan West Africa Club were organizing a Conference on Trade and Investment to be held in Dakar, Senegal on 14-16 April 2003 and that the title of the Conference was "Maximizing the Benefits of Globalization for Africa". Further details were available from the OECD Trade Directorate.

E. OTHER BUSINESS

211. The Chairman proposed that the Working Group hold two formal meetings in 2003 in order to complete its mandated work before the 5<sup>th</sup> Ministerial Conference - and he noted that the Secretariat had set aside two available dates, one on 31 March-1 April and a second on 10-12 June. He felt that this would provide ample time to digest all the material produced and to examine the proposed informal checklist. The second formal meeting would obviously be a crucial one because at that time the Working Group would need to report to the General Council, which in turn would have to make whatever political decision was necessary as far as the future work of the Working Group was concerned on the basis of the "clarification" work that had already been undertaken. Given the pressing demands on delegations in the lead up to Cancún, he felt that the five days of discussion spread over two meetings was a realistic and adequate timeframe for the Working Group.

212. As regards the agenda for these meetings, he suggested that the Working Group might continue its consideration of the seven items set out in Paragraph 22, of the WTO's technical assistance activities, and of other topics which had been raised by Members in the course of the Group's discussions. He also thought that the Working Group would have time to consider in greater detail the inter-connection or inter-action among the different issues that might be set out in the Secretariat's informal checklist. Early in the following year, he would hold consultations with delegations about the establishment of the agenda for the two formal meetings.

213. The representative of India said that his delegation could agree with the Chairman's proposal regarding the Group's future work programme. With regard to the proposed checklist of issues, he emphasized that his delegation would like to see the issues that had been discussed at the present meeting also reflected in the proposed list of issues to be discussed. He also took note of the Chairman's suggestion that delegations could provide suggestions in order to enrich the checklist and to help guide the Group's future work.

214. The Chairman suggested that one of the benefits of extruding parts of the draft annual report and incorporating them in a checklist was that it would allow subjects raised at the present meeting to be included in the informal document proposed.

215. The representative of China suggested that any proposed checklist should be indicative.

216. The Chairman concluded by remarking that the Working Group had had a productive year. It had carried out its mandate in an efficient manner, and had succeeded in engaging delegations in the issues at hand.

217. The meeting was adjourned.

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