

COMMUNICATION FROM KOREA

The following communication, dated 12 April 2002, has been received from the Permanent Mission of the Republic of Korea.

SCOPE AND DEFINITIONS OF "INVESTMENT"

I. INTRODUCTION

1. Defining "investment" and clarifying its scope is the primary task in building a multilateral framework, for the definition of "investment" determines the limits of our future work.
2. Contributions to this Working Group by Members, inter-governmental organizations, and the WTO Secretariat in the past have helped Members understand the current practice of defining investment by each Member in the domestic laws and in the regional or bilateral agreements to which each Member is a party. Based on this understanding, we now need to identify how the current practices can be transformed at the multilateral level.
3. The purpose of this paper is to provide Korea's thoughts on the issue. Our main aim is to generate further discussion.

II. THE CURRENT PRACTICE

4. The Note by the Secretariat (WT/WGTI/W/108) has examined how investment and investor are defined today, and noted that there are in general two ways to define investment: an asset-based definition and an enterprise-based definition (both, of course, allow for a variation in scope through specific provisions in individual investment agreements).
5. These two ways of defining investment are not mutually exclusive. Rather, they coexist under the same system, but are simply used for different objectives. In order to incorporate different objectives, sometimes it may be necessary to combine the above two approaches, to limit their scope, to provide exceptions, or even sometimes to apply different definitions for different situations.

III. THE PURPOSE OF THE MULTILATERAL INVESTMENT FRAMEWORK

6. The definition of investment is not fixed, but something that varies and evolves, reflecting the specific purposes of the investment agreements and investment practices of the time. Some focus on the liberalization of investment. Some others focus on investment protection. Yet others focus on both. Their purposes define the scope of the definition of investment.

7. However, such examples, even though they are a good guide and a starting-point for developing a definition, should be differentiated from what we are trying to develop in the Working Party.

8. According to Paragraph 20 of the Doha Ministerial Declaration, Ministers recognized:

"a 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 ..."

9. First, we are here to build a multilateral investment framework under the WTO that is binding in nature.

10. Second, we are here to develop a framework on "long-term, cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade". This limits our scope of investment. The investment should have a long duration. A short-term financial transaction with a speculative nature should definitely be excluded in this sense. While the mandate would not exclude the review of portfolio investment, we should focus "primarily" on "foreign direct investment".

11. Third, this framework is to serve the purposes of securing transparency, stability and predictability of international investment activities. This may include all kinds of activities, whether it is an entry into or operation within a country. Therefore, we need to take into consideration how we should define "investment" for ensuring transparency, stability and predictability in all aspects of investment.

12. Finally, we also need to take into consideration two all-encompassing objectives of the Doha Declaration. First, we should be able to meet the development needs of developing countries. Second, we need to be able to effectively produce a framework that is achievable and deliverable within three years.

IV. AREAS FOR FURTHER REVIEW

13. With such broad objectives as provided by the Ministers, we still have many questions to answer. The foremost concern, before giving specific answers to the outstanding issues prepared by the Secretariat, is how we can fully incorporate the two all-encompassing objectives in our definition of investment. We may additionally need to consider the possibility of setting a priority between the various objectives.

14. First, a multilateral framework demands flexibility in order to incorporate the interests of all the Members, developed or developing, home and host countries, while at the same time incorporating the development of various bilateral and regional agreements and giving room for future development of the rules. How can we ensure such "flexibility" with the definition? Can we achieve this goal by using either one of the two – asset-based and enterprise-based – definitions? Can they be combined? How can substantial provisions be used? Or, is it appropriate to use the asset-based approach, and narrow down in order to represent only the foreign direct investment for the purpose of liberalization?

15. Second, how can we develop a definition that primarily defines foreign direct investment, while still preserving a place for considering portfolio investment that contributes to trade expansion? Given the sophisticated, complex and developed skills of providing capital for investment, it is becoming difficult to draw a fine line between FDI and FPI. How can the two be distinguished? The short-term financial transaction with a speculative nature must be excluded, but how can we achieve this through the definition?

- Under Korean law, investment is defined both in the form of equity investment, and in the form of long-term loans. But can we pick a certain benchmark equity ratio or a certain benchmark loan period to define investment? In short, we need to think about an appropriate qualitative criteria as well as a more delicate quantitative criteria.
16. Third, how should we incorporate the protection aspect? Even when we are primarily focusing on liberalizing foreign direct investment, we need to address from the outset how we will incorporate the current practices of investment protection provided by the Members. In this sense, how should the current practice of defining investment differently under the bilateral and regional agreements be incorporated?
17. Concerning the treatment of protection, there may be at least three different approaches:
- Exclude it from the multilateral agreement.
 - Introduce a basic framework incorporating the current bilateral agreements and the level of protection based on the least common denominator, and allow an MFN exception list for a higher level of protection provided bilaterally.
 - Introduce a general obligation of protection.
18. Fourth, is it necessary to define "investor"? If it is necessary, what would be the difference with the definition of investor in bilateral agreements? Can it be solved by simply replacing the "Party" or the "other Party" to the "Member".

V. CONCLUDING REMARKS

19. The scope and definition of investment is the element that will determine the coverage of the multilateral framework on investment, and thus determines the scope of our future negotiations. However, the scope and definition are also determined by the objectives we are pursuing for creating a multilateral framework. Therefore, we must first clarify what our specific objectives should be. This we should bear in mind when we go through every element that is mandated in the Working Group.
20. Finally, this exploration leads us to suggest that we try to achieve as much common understanding on the definition of investment as possible at this early phase and that we revisit the issue of definition at a latter phase of our work to reflect what would have by then been discussed.
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