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Bilag	Journalnummer	Kontor	
1	400.C.2-0	EU-sekr.	29. oktober 2002

Til underretning for Folketingets Europaudvalg vedlægges EU's konceptpapirer vedrørende: Konkurrence: 'hard core' karteller – Investering: føretablering – Investering: ikke-diskrimination - Handelslettelse.

Materialet er sendt til WTO.

WORLD TRADE ORGANIZATION

WT/WGTCP/W/193
1 July 2002

(02-3645)

Working Group on the Interaction between Trade and Competition Policy

Original: English

COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

The following communication, dated 24 June 2002, has been received from the Permanent Mission of the European Community and its member States with the request that it be circulated to Members.

International Hardcore Cartels and Cooperation under a WTO Framework Agreement on Competition

Introduction

In its previous submission to the Working Group - WT/WGTCP/W/184 - the European Community and its member States outlined their thinking on the possible modalities for international cooperation under a WTO framework agreement on competition, including the specific assistance to be provided to developing countries both in respect to actual investigations, exchanges of certain information, as well as through targeted and coordinated technical assistance for capacity building purposes. Such assistance would include help in drafting a domestic competition law and accompanying regulations, as well as in the establishment of a domestic competition authority or other enforcement agency.

This submission will address the nature and extent of international hardcore cartels, the added value of establishing multilateral disciplines to restrain such cartels, and will then illustrate in concrete terms how the proposed international cooperation modalities could function with regard to such cartels, including through the exchange of non-confidential information and notice of cartels detected.

1. Nature of international hardcore cartels

1. By "hardcore cartels" we refer to cases where would-be competitors conspire to engage in collusive practices, most notably bid-rigging, price-fixing, market and customer allocation schemes, and output restrictions. These practices can appear in a number of shapes and combinations.

2. In essence, hardcore cartels are characterized by would-be competitors voluntarily and deliberately refraining from competition and rivalry between themselves, all in pursuit of profits and at the expense of consumers and other firms victims of the cartel. The now infamous statement by one of the executives participating in one recently investigated cartel[1] – "Our competitors are our friends, our customers are the enemy" – shows that such cartels are in stark contradiction with the

[1] The so-called lysine cartel.

proper functioning of a competitive market-place, have an adverse impact on international trade and deserve unequivocal international condemnation.[2]

3. The damaging effects of hardcore cartels are widely understood by now and have led to a strengthening of the fight against such cartels in developed economies, including the European Community and its member States. In 1998, on the occasion of the creation of a special unit dedicated to fighting such cartels, then EC Competition Commissioner Karel van Miert stated that:

> *"Time and time again over the last years and yet again on the recent occasion of the pre-insulated pipes cartel (...), again I have emphasised that* ***the Commission shall continue its staunch fight against cartels, which are one of the most harmful restraints of trade****. To this effect, it seemed necessary to me to create a new unit (...) charged exclusively with unveiling, pursuing and eliminating cartels for any product and service related activities. Its creation confirms in concrete terms the Commission's priority to fight such practices."(emphasis added)*[3]

4. The Commission's leniency programme was recently amended in order to create better incentives for parties to cartels to come forward under the leniency measures. Also, a number of EC member States have recently established - or are now in the process of establishing - national leniency programmes. Under such programmes incentives are provided to encourage cartel participants to come forward and provide information regarding the cartel activities. In return, leniency applicants qualify for reduction in the fines and/or are granted immunity from fines or criminal prosecution.[4]

2. Damage caused by international hardcore cartels

5. The 1990s saw a considerable increase in the detection, investigation and punishment of international hardcore cartels in industrialized countries generally. Based on these cartels a number of studies have been made which contain illuminating findings on the economic damage caused by such cartels.

2.1 OECD Hard Core Cartel Report (2000)

6. The Organisation for Economic Cooperation and Development (OECD), the Members of which adopted the so-called "Hard Core Cartel Recommendation" in 1998 [5], notes in its 2000 report on hardcore cartels that in the *citric acid carte:*

- prices increased by as much as 30 per cent; and
- the collected overcharges are estimated at almost US$1.5 billion.

7. In another cartel, the *graphite electrodes cartel:*

- prices rose by 50 per cent; and
- the cartel extracted monopoly profits on an estimated US$7 billion in world-wide sales.[6]

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[2] For a useful description of the actual functioning and methods of international **hardcore** cartels, see OECD document CCNM/GF/COMP/WD(2002)1, *"An inside look at a cartel at work: common characteristics of international cartels"*, by the US Department of Justice.

[3] See press release IP/98/1060 of December 3, 1998. Further press releases on the subsequent cartel investigations of the EC, including the vitamins and graphite electrodes cartels can be found at http://europa.eu.int/comm/competition/press_releases/.

[4] For the text of the revised Commission notice on immunity from fines and reduction of fines in cartel cases, see http://europa.eu.int/eur-lex/en/dat/2002/c_045/c_04520020219en00030005.pdf (visited April 8, 2002)

[5] OECD document C(98)35/FINAL.

8. The OECD report further notes that recently exposed hardcore cartels have:

- cost individuals and businesses many hundreds of millions of US dollars in the United States alone;
- have affected more than US$10 billion of United States commerce; and
- have led to global overcharges in the billions of US dollars.[7]

9. What is clear by now is that hardcore cartels are by no means an evil confined to the developed country economies. Rather, it is a global phenomenon which affects a range of important products used and consumed globally, in developed and developing countries alike. In addition to this, there are strong indications that once detected, investigated and punished, cartels – if not already operating in developing and transitional economies – will then seek to direct their activities at those jurisdictions.[8]

2.2 World Development Report 2001 background paper

10. As regards the damage caused to developing country consumers and producers by international hardcore cartels, research recently undertaken by three economists (which is also the basis for a background paper for the World Bank's World Development Report 2001) provides valuable data and conclusions on this issue.[9] Based on available trade data as well as enforcement agencies' press releases and speeches, court records, general business press and industry publications, that study seeks to quantify "the order of magnitude of the consequences of these cartels on developing countries as consumers".[10]

11. The study looks in considerable detail at five specific cartel cases, namely the cartels operating in the product markets of bromine, citric acid, graphite electrodes, steel tubes, and vitamins respectively. More specifically, the study concludes that in 1997, the last year for which trade data was available:

- developing countries imported US$81.1 billion of goods from industries which had suffered from a price-fixing conspiracy during the 1990s;
- those imports represented as much as 6.7 per cent of imports and 1.2 per cent of GDP of the developing countries;
- the fraction of trade for the poorest developing countries as regards the 16 products in question was even greater, namely 8.8 per cent of imports.[11]

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[6] *"Hard Core Cartels" (2000)*, Organisation for Economic Co-operation and Development, p. 5.

[7] *Ibid.* p. 12.

[8] It should be noted that some argue that the cartels recently detected are only the tip of the iceberg and only represent a small number of the global cartels actually operating. For different views on the incidence of international cartels, see. e.g. the Final Report of the International Competition Policy Advisory Committee (ICPAC), p. 175 ff., available at http://www.usdoj.gov/atr/icpac/icpac.htm (visited April 4, 2002).

[9] See *"Private International Cartels and Their Effect on Developing Countries"* by Margaret Levenstein and Valerie Suslow. The study is available at the following web site address http://www-unix.oit.umass.edu/~maggiel/WDR2001.pdf (visited April 4, 2002).

[10] *Ibid.* p. 2.

[11] The study further notes that certain techniques have been applied in order to block entry into the industries in question, such as attempts to restrict information about technology (steel beam and graphite electrodes) and that such techniques, if successful, may harm developing country producers.

12. Other findings arising from the study presented at the WTO Symposium on 22 April 2002[12] show:

- that the effect of merely 16 cartels on developing country imports was an estimated US$81.1 billion and that this amount was likely to be an underestimate;

- that in terms of overpayment this would amount to 20 to 40 per cent of US$81.1 billion, i.e. between US$16 to 32 billion;

- that once cartels have been broken up price falls of 20-40 per cent were noticed;

- that following enforcement action against cartels, many of the cartel members seek to consolidate themselves through mergers and acquisitions, strategic alliances, or joint ventures and that some degree of post-enforcement monitoring might therefore be needed;

- that in terms of comparison with international aid flows to developing countries, the harm done by cartels to developing economies was three to six times the recent increase in US aid, and that overcharges by cartels were equal to at least one-third of aid received by developing countries.

13. The presentation made at the WTO Symposium further brought to the attention of the participants the fact that international cartels tend to have a diverse international membership. The cartels analysed by the economists Evenett, Levenstein, and Suslow included a total of 31 economies of which eight were developing country economies.

14. Another presentation at the Symposium[13] focused on two international cartels which had been in operation over a considerable time-period. An analysis of the International Heavy Electrical Equipment cartel had found:

- the existence of a near-global coverage of the cartel;

- the leading role of developed country firms;

- that this cartel succeeded in persuading Japanese firms in joining the cartel, after unsuccessfully trying to eliminate them through predatory pricing;

- that most importing countries were developing countries with either little or no domestic manufacturing capacity for heavy electrical equipment;

- that one of the practices applied by the cartel was a limitation on transfer of technology to developing countries;

- that the cartel covered some US$2 billion of sales annually;

- that the cartel directly harmed importing countries due to the mark-up on cartelized sales and the limitation on transfer of technology to non-producing countries;

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[12] Presentation by Simon J. Evenett of the World Trade Institute.
[13] Presentation by Professor Frédéric Jenny.

- that on the basis of one product section, an estimated price increase of 15 to 25 per cent above the competitive rate was the result;

- that given such price increases - if they held for all products covered by the cartel - annual overcharges would range from US$300 to 500 million per year;

- that such overcharges would ultimately be reflected in the cost of electric power and all products dependent on electricity.

2.3. Conclusion

15. In conclusion, developing countries are harmed by these international cartels at least as much if not more than developed countries – moreover developing countries' domestic firms have been found to participate in cartels as active partners, which increases further the damage done to developing country consumers and users of the products involved.

3. How a WTO agreement could address hardcore cartels

16. Given the global nature of hardcore cartels, the EC concurs with the conclusion in the OECD hardcore cartel report that this is "a problem that cannot be addressed effectively without increased cooperation from the over 50 non-Members with competition laws and the many others that are considering them".[14]

3.1 An international ban on hardcore cartels

17. The EC believes that a global competition concern such as the fight against pernicious hardcore cartels is best addressed by a firm response in the form of an international commitment to ban such practices. Such a ban should be included in a WTO competition agreement as nowhere else would it have the backing of a sufficient number of countries. Any alternative would run the risk of cartels seeking to shift the focus of their illegal behaviour to countries not adhering to the ban, in an attempt to escape the jurisdiction of those countries which do prohibit cartels. The main consequence of this "forum shopping" would be greater damage to the countries not adhering to the ban. Furthermore, countries which adhere to the ban will increasingly enforce their domestic rules against cartel members located in territories where the ban is not enforced.

18. The multilateral ban on hardcore cartels would be implemented by means of corresponding domestic legislation and policies. The introduction of clear and predictable leniency programmes to encourage whistle-blowing among cartel participants, thus facilitating the detection of such cartels and leading to successful investigations could also usefully be considered.

19. Consequently, a provision regarding hardcore cartels in a multilateral agreement on competition would need to lay down the essential elements that domestic law provisions on this issue should contain:

- The key element of this provision would be a clear statement that they are prohibited.

- Further, it would be necessary to provide a definition of what types of anti-competitive practices could be qualified as "hard-core cartels" and would be covered by the multilateral ban. Providing a precise definition of "hardcore cartels" for the purposes of a

[14] *Op.cit* footnote 6., pp.5-6.

multilateral WTO agreement on competition is beyond the utility and goal of the present submission to the Working Group. This will be a difficult exercise and, typically, one that will be the object of negotiation. However, the OECD Recommendation of 1998[15] could serve as a starting-point without limiting in any way the discussion that will take place in the Working Group or any options available during negotiations. Article IA2a) defines "hardcore cartels" as "anti-competitive agreements, anti-competitive concerted practices, or anti-competitive arrangements", "by competitors" in order to "fix prices", "make rigged bids (collusive tenders)", "establish output restrictions or quotas", or "share or divide markets by allocating customers, suppliers, territories, or lines of commerce". For WTO purposes this list of elements is necessarily indicative and may be supplemented by further elements or practices. It is also conceivable that some of the elements/practices figuring in the list could be omitted in a definition destined for a multilateral agreement. Beyond this first guidance, the European Community and its member States considers it useful to provide (in Annex to this submission) descriptions of concrete examples of hardcore cartels against which it has taken action in the past. In selecting these examples care has been taken to choose those with particular international relevance as well as examples which give a better idea of the nature of such cartels.

- Equally important would be to describe accurately the limits of the concept of hardcore cartels, in order to be able to decide which practices should not be covered by the multilateral ban. The long debate within the OECD Competition Committee on this particular issue may be of help, again as a starting-point and without prejudging discussions between WTO Members for WTO purposes. According to Article IA2b) of the 1998 OECD Recommendation "the hardcore cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realization of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorized in accordance with those laws". Such exceptions, and further ones that Members may envisage as part of the discussion in the Working Group, are possible elements of the provision on the multilateral ban on condition that they are identified in the domestic competition rules in a transparent and predictable manner.

- The multilateral ban on hardcore cartels would not be effective in the absence of a commitment by WTO Members to provide for deterrent sanctions in their domestic regimes. Domestic rules prohibiting hardcore cartels should aim at dissuading potential offenders and having a strong deterrent function. Therefore it would be of the essence that they include suitably effective sanctions. There is a variety of such sanctions available: some WTO Members have rules that provide for criminal sanctions (prison sentences, fines for both physical and legal persons, etc). Others, such as the EU, sanction hardcore cartels by means of considerable administrative fines imposed upon corporate entities, examples of which are given in the Annex. Other options exist both regarding the type and the severity of the sanction. Without going so far as to prescribe a certain type/severity of sanction, it could be desirable that the multilateral provision on hardcore cartels goes beyond a simple requirement for "effective sanctions" and gives some guidance on which sanctions have proven deterrent and could be available for WTO

[15] Recommendation of the Council concerning Effective Action against Hard Core Cartels, C(98)35/FINAL, 27-28 April 1998.

Members wish to use them in their domestic rules. This could be an issue for further debate within the Working Group.

20. By agreeing on an international ban on hardcore cartels coupled with the necessary flexible modalities for voluntary international cooperation as laid out in the previous EC submission, WTO Members would be taking a major step towards effectively curbing such cartel activity and eliminating their adverse impact.

3.2 Exchange of information and cooperation regarding hardcore cartels

21. In order to be fully effective, the proposed approach should provide for appropriate procedures in the field of voluntary cooperation and exchange of information. Indeed, transparency is an essential element of a framework of competition. Provisions have therefore to be developed on notification, information exchange and cooperation between competition authorities. These would include provisions regarding exchange of information and more generally, cooperation procedures, e.g. when authorities are launching parallel investigations into the same practice. Negative and positive comity instruments could also be addressed.

22. More specifically, meaningful information exchange is the core element of cooperation between competition authorities. However, one should be mindful of the fact that certain business information is subject to strict legal protection in all jurisdictions and it would therefore be difficult to imagine confidential documents being exchanged between competition authorities as a routine matter. At the same time, it is clear that there is a range of non-confidential information, not in the public domain, which could be of great benefit to other competition authorities. Consequently, a WTO agreement should, at least, provide for the exchange of non-confidential business information between countries affected by a given cartel. This would not preclude WTO Members from considering whether exchanging information of a more detailed nature bilaterally on the basis of consent.

23. Exchange of information may take a number of forms, including notifications, by which a Party notifies one or several other Parties, as the case may be, whenever its competition authorities become aware that their enforcement activities may affect important interests of these other Parties. Enforcement activities as to which notification ordinarily will be appropriate include those that:

- are relevant to enforcement activities of the other Party(ies); or
- involve anti-competitive activities carried out in significant part in the other Party's territory.

24. In order to be effective, notification should take place as early as possible within the enforcement process.

25. In those notifiable cases it is in the common interest of all Parties to share information that will facilitate effective application of their respective competition laws. In such cases, each Party will provide either on its own initiative or upon request the other Party(ies) with any significant information that comes to the attention of its competition authorities about anti-competitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

26. The exchange of non-confidential information, i.e. information for which confidentiality and protection has not been or may not be claimed by any of the parties involved in a given anti-competitive practice, allows for a substantial amount of key information to be exchanged such as:

- the nature and scope of the suspected anti-competitive practice;

- the market involved and the key players in that market;

- the procedural steps already undertaken by the informing authority and the subsequent procedural steps foreseen;

- any document related to the case that is public or became available to the public in the course of the procedure.

ANNEX

Selected International Hard Core Cartel Cases

investigated by the EC Commission

Case No. 1: Vitamins Cartel

Product market :

The cartels concerned bulk synthetic substances which belong to the following groups of vitamins and closely related products: A, E, B1, B2, B5, B6, C, D3, Biotin (H), Folic Acid (M), Beta Carotene and carotinoids.

Geographic coverage :

The European Economic Area (EEA = the fifteen EU Member States plus Norway, Iceland and Liechtenstein) and elsewhere. The market for the products covered in the EC Decision was worth around € 800 million in 1998.

Type of illegal activities :

The participants in each of the cartels fixed prices for the different vitamin products, allocated sales quotas, agreed on and implemented price increases and issued price announcements in accordance with their agreements. They also set up a machinery to monitor and enforce their agreements and participated in regular meetings to implement their plans.

Duration of cartel :

September 1989 till February 1999.

Date of EC Decision and Press Release Reference :

21 November 2001, IP/01/1625

Companies fined a total <u>€ 855.22 million</u> (The Commission fined 8 out of the 12 cartel agreements as 4 were time-barred) :

- Hoffmann-La Roche AG (Switzerland): € 462 million
- BASF AG (Germany): € 296.16 million
- Aventis SA (France): € 5.04 million (for 1 of the 8 cartels)
- Solvay Pharmaceuticals BV (Netherlands): € 9.10 million
- Merck KgaA (Germany): € 9.24 million
- Daiichi Pharmaceutical Co Ltd (Japan): € 23.4 million
- Eisai Co Ltd (Japan): € 13.23 million
- Takeda Chemical Industries Ltd (Japan): € 37.05 million

Leniency grants :

Aventis (formerly Rhône-Poulenc): 100% for 7 of the 8 cartels; Hoffmann La Roche: 50%; BASF : 50%; all other participants: smaller reductions in view of various degrees of cooperation

Case No. 2: Carbonless Paper Cartel

Product market :

Carbonless paper - also known as self-copying paper -, intended for the multiple duplication of documents and made from a paper base to which layers of chemical products are applied.

Geographic coverage :

The European Economic Area (EEA). Between 1992 and 1995, the market for the products covered in the EC Decision was worth around € 850 million a year.

Type of illegal activities :

Cartel members (carbonless paper producers or distributors) agreed collective price increases and set the timetable for implementing them.

Duration of cartel :

January 1992 till February 1995.

Date of EC Decision and Press Release Reference :

20 December 2001, IP/01/1892

Companies fined a total € 313,7 million :

- Arjo Wiggins Appleton Plc – "AWA" (United Kingdom): € 184,27 million
- Papierfabrik August Koehler AG (Germany): € 33,07 million
- Zanders Feinpapiere AG (Germany): € 29,76 million
- Bolloré SA (France): € 22,68 million
- Mitsubishi HiTech Paper Bielefeld GmbH (Germany/Japan): € 21,24 million
- Torraspapel SA (Spain): € 14,17 million
- Papeteries Mougeot SA (France): € 3,64
- Distribuidora Vizcaina de Papeles S.L. (Spain): € 1,75 million
- Carrs Paper Ltd (United Kingdom): € 1,57 million
- Papelera Guipuzcoana de Zicuñaga SA (Spain): € 1,54 million

Leniency grants :

Sappi Limited (South Africa): 100%; Mougeot: 50%; AWA: 35%; Bolloré: 20%; Carrs, MHTP and Zanders: 10% each.

Case No. 3 : Graphite Electrode Cartel

Product market:

Graphite electrodes are ceramic-moulded columns of graphite used primarily in the recycling of scrap steel into new steel in electric arc furnaces, also referred to as 'mini-mills'. The electric arc process accounts for some 35 percent of steel production in the European Union.

Geographic coverage:

The European Economic Area (EEA) and elsewhere. The market at stake in 1998 was worth € 420 million in the EEA.

Type of illegal activities:

The participants held regular meetings to agree concerted price increases usually triggered by the "home producer" or market leader and then followed in other parts of the world. In the period in which the cartel operated, prices of graphite electrodes increased by as much as 50 percent.

Duration of cartel :

From 1992 till 1998.

Date of EC Decision and Press Release Reference :

18 July 2001, IP/01/1010

Companies fined a total <u>€ 218.8 million</u> :

- SGL Carbon AG (Germany): € 80.2 million
- UCAR International Inc. (United States): € 50.4 million
- Tokai Carbon Co. Ltd (Japan): € 24.5 million
- Showa Denko K.K. (Japan): € 17.4 million
- VAW Aluminium AG (Germany): € 11.6 million
- SEC Corp. (Japan): € 12.2 million
- Nippon Carbon Co. Ltd (Japan): € 12.2 million
- Carbide Graphite Group Inc. (United States): € 10.3 million

Leniency grants :

Showa Denko : 70%; UCAR: 40%.

Case No. 4 : Citric Acid Cartel

Product market :

Citric acid is one of the most widely used additives in the food and beverage industry both as an acidulent and preservative. It is found in non-alcoholic beverages as well as in jams, gelatine-based deserts and tinned vegetables and fruit. Citric acid is also used in household detergent products especially as a substitute for phosphates considered harmful for the environment.

Geographic coverage :

The European Economic Area (EEA) and elsewhere. During the infringement period, the annual market was worth around € 320 million in the EEA.

Type of illegal activities :

The cartel pursued four main objectives: i) allocation of specific sales quotas for each member and adherence to these quotas; ii) fixing 'target' and 'floor prices' for citric acid; iii) exchanging specific customer information, and iv) eliminating price discounts.

Duration of cartel :

March 1991 till May 1995.

Date of EC Decision and Press Release Reference :

5 December 2001, IP/01/1743

Companies fined a total <u>€ 135.22 million</u> :

- F. Hoffmann-La Roche AG (Switzerland): € 63.5 million
- Archer Daniels Midland Company Inc – "ADM" (United States): € 39.69 million
- Jungbunzlauer AG –"JBL" (Switzerland): € 17.64 million
- Haarmann & Reimer Corp. – "H&R" (Bayer AG) (United States/Germany): €14.22 million
- Cerestar Bioproducts B.V. (Netherlands): € 0.17 million

Leniency grants :

Cerestar Bioproducts: 90%; ADM: 50%; JBL: 40%; H&R: 30%; Hoffmann-La Roche: 20%.

Case No. 5 : Sodium Gluconate Cartel

Product market :

Sodium gluconate is a chemical mainly used to clean metal and glass, with applications such as bottle washing, utensil cleaning and surface treatment.

Geographic coverage :

The European Economic Area (EEA) and elsewhere. During the infringement period, the market was worth €18 million annually in the EEA.

Type of illegal activities :

The participants held regular meetings, where they agreed on individual sales quotas, fixed "minimum" and "target" prices and shared out specific customers.

Duration of cartel :

From 1987 till June 1995.

Date of EC Decision and Press Release Reference :

2 October 2001, IP/01/1355

Companies fined a total <u>€ 57.53 million</u> :

- Archer Daniels Midland Company Inc. – "ADM" (United States): € 10.13 million
- Akzo Nobel N.V (Netherlands): € 9 million
- Avebe B.A (Netherlands): € 3.6 million
- Fujisawa Pharmaceutical Company Ltd. (Japan): € 3.6 million
- Jungbunzlauer AG –"JBL" (Switzerland): € 20.4 million
- Roquette Frères S.A. (France): € 10.8 million

Leniency grants :

ADM: 40%; Roquette: 40%; Akzo: 20%; Avebe: 20%; Jungbunzlauer: 20%.

WORLD TRADE ORGANIZATION

WT/WGTI/W/121
27 June 2002

(02-3584)

Working Group on the Relationship between Trade and Investment

Original: English

COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

The following communication, dated 26 June 2002, has been received from the Permanent Delegation of the European Commission.

CONCEPT PAPER ON MODALITIES OF PRE-ESTABLISHMENT

This concept paper is intended as a suggestion on the pre-establishment provisions that could be included in a Multilateral Investment Framework. It should not be read as a text proposal.

WTO Ministers have recognised at the Doha Ministerial Conference the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade. Paragraph 22 of the Doha Ministerial Declaration mentions, inter alia, "modalities for pre-establishment commitments based on a GATS-type, positive list approach" as one of the issues to be clarified in the Working Group on the Relationship between Trade and Investment, in the period until the Fifth Ministerial Conference.

Among the issues listed in the Ministerial Declaration, this is probably the one on which Ministers have given the clearest indications about the possible way forward. The issue of the admission of investment has already been addressed in papers presented in this Working Group since 1997.[1] In this context, this submission aims at outlining the EC view on how the admission of investment could be addressed in a multilateral framework on FDI.

Since 1999 the EC and its Member States have made clear their position according to which, in the context of a multilateral framework on investment, the question of admission should be addressed following a GATS-type approach based on positive commitments.

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[1] See, for instance WT/WGTI/W/22, W/23, W/28, W/29, W/30, W/33, W/42, W/47, W/51, W/54, W/71, W/79, W/84, W/96, and W/104.

We believe that this approach would allow enough flexibility for all WTO members. Each WTO member would be able to decide to open up (i.e. to commit) the sectors in which it wished to attract foreign investors in accordance to its needs and to its level of development. This would guarantee legal certainty and policy stability for potential investors. But no member would be forced to take commitments in any given sector. This was the suggestion given by Ministers of WTO Members at Doha.

I. CLEAR RULES ON THE ADMISSION OF FOREIGN INVESTORS ARE IMPORTANT

In order to analyse modalities of pre-establishment commitments based on a GATS-type positive list, the starting point for admission of investment has to be defined. Subject to admission rules in any international agreements, governments have the right to control entry and establishment of foreign companies within their territory. They can restrict the admission of investment in a two-fold way:

They prohibit or restrict the entry of FDI, or discriminate among investors on the basis of their nationality or other elements.

They impose entry conditions[2] to permitted FDI.

1. Firstly, when such restrictions are in place foreign investors either have no rights or only conditional rights to enter the market. Secondly, when their possibilities to launch an undertaking are conditional, this by definition entails that foreign direct investors are not treated under the same conditions as domestic investors, and in some cases as other third country investors. They might be excluded to invest in certain sectors which are only open to domestic investors or other foreign investors, and/or they might be subject to additional conditions.

2. During the last decade several host countries have unilaterally liberalised their investment climate and increased the opportunities for foreign companies to invest in their territory. However, a host of barriers world-wide still prevent foreign investors from entering markets in many countries. The rules that regulate the entry of foreign investors as provided for both in the domestic legislation and in the admission rules included in international agreements concluded by a potential host country are important factors when investors consider entering new markets. The admission rules may increase the legal certainty for companies that plan to set up an undertaking in a new host country by confining the wide area of discretion of host countries into a more predictable pattern.

3. Generally speaking, open and transparent admission rules for foreign investment can significantly contribute to a better allocation of capital by creating a level playing field among potential host countries and among investors. At the same time, host-country governments usually keep a certain control on the entry of foreign investors in order to preserve national development goals, security, public health, the protection of the environment, safety and public morals. These two objectives are not incompatible and can co-exist in a multilateral investment framework, as they do already in most international investment agreements.

DIFFERENT WAYS TO REGULATE THE ENTRY OF FOREIGN INVESTMENTS

4. Host countries can regulate the admission and/or market access, of foreign investors in many different ways and for a number of reasons. Some sectors of the economy might be closed to any private investment either domestic or foreign. In other cases host countries might wish to restrict specifically foreign investment in certain areas, to screen the entry of foreign capital or to impose

[2] Provided they comply with existing international obligations such as for instance, the TRIMs provisions.

certain conditions on foreign enterprises who wish to establish their activities in the host-country's territory.

UNCTAD[3] has classified the different host-country measures affecting the entry of FDI in two groups: (a) measures relating to the admission and establishment, and (b) measures relating to ownership and control. Within these two broad categories, the different categories of measures can be classified under the following headings (see Annex): (a) Controls over access to the host-country economy; Conditional entry into the host-country economy; (b) Controls over ownership; Controls based on limitation of shareholder powers; Controls based on governmental intervention in the running of the investment; Other types of restrictions.

HOW INTERNATIONAL AGREEMENTS DEAL WITH THE ENTRY OF FOREIGN INVESTMENT

While on the one hand most host countries wishing to attract FDI have liberalised unilaterally the entry conditions for foreign investors, on the other hand, it is only through international investment agreements that host governments are bound to provide the entry conditions that give investors the predictability and security they seek. As already discussed in a number of meetings of this working group, there are two basic approaches to address the pre-establishment phase of FDI in international investment agreements: non-discrimination (NT and MFN) and market access.

1. Non-discrimination: Most-Favoured-Nation (MFN) and National Treatment (NT)

MFN treatment for the entry of FDI ensures a level-playing field among foreign investors. This ensures that any more favourable treatment on the entry of investors from one country are automatically extended to all other foreign investors. This does not affect the internal economic policy of the host country, for instance, whether it liberalises or not certain economic sectors.

NT at the pre-establishment stage prevents discrimination between foreign and domestic investors. However, this does not affect the right of the host country to completely exclude private investments in certain sectors of its economy.

Both, the MFN and NT may be subject to exemptions, conditions and qualifications.

Market access

Unlike MFN and NT, which are relative standards of treatment, market access provisions address the host country's regulations on the entry and establishment of investment in absolute terms. In other words, in addition to the principles of non-discrimination, a host country may commit to refrain from applying certain specific restrictive measures to the entry of foreign investment, regardless of whether they are discriminatory or not.

THE GATS MODEL

The GATS includes both the non-discrimination and the market access principles. It is the prime example of a multilateral agreement that provides for pre-establishment rules on FDI in the services sectors based on a positive-commitments (or positive list) approach. While the MFN principle applies across the board, the NT principle and market access rules apply only in those sectors in which WTO members have taken specific commitments in their schedule.

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[3] UNCTAD Series on issues in international investment agreements, "Admission and Establishment", 1999.

1. Most-Favoured-Nation

According to GATS Article II, the MFN obligation applies across the board (pre- and post-establishment) to all services sectors unless an exception is contained in the country list of MFN exemptions.

National Treatment

5. In addition to MFN, the GATS includes a mixed approach for pre-establishment obligations: national treatment combined with market access. There is no general obligation to remove all barriers concerning the entry and establishment of foreign service providers. According to Art. XVII NT only applies in the sectors where commitments have been made. The NT obligation refers to treatment, in respect of measures affecting the supply of services, which should be "no less favourable" than that of like national services and service suppliers. This does not always mean formally identical treatment, as long as it is ensured that the treatment applicable which covers both pre- and post-establishment measures does not result in less competitive market conditions for the foreign services or service suppliers. Any treatment will be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the member (host country) compared to like services or service suppliers of any other member. This means that the NT principle covers both *de facto* and *de jure* discrimination. Thus, while the NT principle in the GATT only applies to the products in question, the GATS NT provision applies to the competitive conditions imposed on the service supplier. WTO members, through their schedule of commitments, set out any limitations to NT in each sector listed.

Market Access

6. Market access for services in the sectors in which a Member has undertaken commitments provides that these service suppliers will be treated no less favourably than as specified in the Member's schedule. Article XVI (2) gives a list of market access barriers, such as for instance, limitations on the participation of foreign capital, limitations on the number of service suppliers or measures which restrict or require specific types of legal entity or joint venture. Members shall not maintain or introduce those limitations listed in Article XVI (2) in sectors where they have undertaken market access commitments, unless if specified in their schedule of commitments. In any case these limitations cannot violate the MFN principle.

The NT and market access provisions in the GATS cover "measures affecting the supply of services", which includes all measures affecting, directly or not, the conditions under which the service provider operates.

CONCLUSION

The EC and its Member States believe that the GATS approach provides a useful model for addressing pre-establishment rules in a multilateral investment framework. On the one hand, governments can keep full control of the sectors in which they wish to commit market access and NT to foreign operators and of the sectors in which they do not feel ready to do so. On the other hand, it provides a transparent and predictable picture of the rules affecting the admission and establishment of investors in each host country. This approach has the merit of incorporating enough flexibility to allow a gradual and progressive liberalisation of FDI, fully compatible with any development strategy adopted by WTO members.

As in the GATS, a multilateral investment framework in the primary (i.e. agriculture, fisheries and mining) and secondary (i.e. manufacturing) sectors could incorporate a general MFN obligation (including exceptions), as well as market access and NT obligations in accordance with a

schedule of commitments, sector-by-sector. The schedule of commitments would enumerate each member's limitations to market access and NT.

Since FDI in services sectors, according to UNCTAD calculations, accounts for approximately half of world FDI stocks and flows[4], the GATS approach for pre-establishment commitments already applies to a large chunk of FDI and could therefore serve as a useful model for multilateral pre-establishment commitments in the primary and secondary sectors. Moreover, since WTO members have far fewer market access and discriminatory restrictions in the manufacturing sector than in the services sectors, the adoption of the GATS model to the manufacturing sector with respect to the pre-establishment phase would not seem to represent a major difficulty for host countries. Even for the primary sectors such as agriculture, fisheries and mining, which are usually more regulated and politically sensitive, the "positive list" approach used in GATS would allow for sufficient flexibility to take into account and accommodate each specific domestic situation. It is understood, however, that the relationship between pre-establishment rules in a multilateral framework on investment in the WTO and the GATS mode 3 provisions as well as those in other international agreements covering investment will need to be carefully assessed.

[4] UNCTAD World Investment Report, 2001.

Annex

Examples of host-country measures affecting the entry of FDI (as identified by UNCTAD[5]):

A. MEASURES RELATING TO THE ADMISSION AND ESTABLISHMENT

Controls over access to the host-country economy

- Absolute ban on all forms of FDI.
- Closing certain sectors, industries or activities to FDI for economic, strategic or other public policy reasons.
- Quantitative restrictions on the number of foreign companies admitted in specific sectors, industries or activities for economic, strategic or other public policy reasons.
- Investment must take a certain legal form.
- Compulsory joint ventures either with State participation or with local private investors.
- General screening/authorisation of all investment proposals; screening of designated industries or activities; screening based on foreign ownership and control limits in local companies.
- Restrictions on certain forms of entry (e.g. mergers and acquisitions).
- Investment not allowed in certain zones or regions within a country.
- Admission to privatisation bids restricted, or conditional on additional guarantees, for foreign investors.
- Exchange control requirements.

Conditional entry into the host-country economy

General conditions:

- Conditional entry upon investment meeting certain development or other criteria based on outcome of screening evaluation procedures.
- Investors required to comply with requirements related to national security, policy, customs, public morals as conditions of entry.

Conditions based on capital requirements:

- Minimum capital requirements.
- Subsequent additional investment or reinvestment requirements.
- Restrictions on import of capital goods needed to set up investment possibly combined with local souring requirements.
- Investors required to deposit certain guarantees.

Other conditions:

- Special requirements for non-equity forms of investment (e.g. build-operate-transfer agreements, licensing of foreign technology).
- Investors to obtain licenses required by activity or industry specific
- regulations.
- Admission fees (taxes) and incorporation fees (taxes).

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[5] UNCTAD Series on issues in international investment agreements, "Admission and Establishment", 1999.

- Other performance requirements (e.g. local content rules, employment quotas, export requirements).

MEASURES RELATING TO OWNERSHIP AND CONTROL

Controls over ownership

- Restrictions on foreign ownership (e.g. no more than 50 per cent
- foreign-owned capital allowed).
- Mandatory transfers of ownership to local firms usually over a period of time (fade-out requirements).
- Nationality restrictions on the ownership of the company or shares thereof.

Controls based on limitation of shareholder powers

- Restrictions on the type of shares or bonds held by foreign investors (e.g. shares with non-voting rights).
- Restrictions on the free transfer of shares or other proprietary rights over the company held by foreign investors (e.g. shares cannot be transferred without permission).
- Restrictions on foreign shareholders rights (e.g. on payment of dividends, reimbursement of capital upon liquidation, on voting rights, denial of information disclosure on certain aspects of the running of the investment).

Controls based on governmental intervention in the running of the investment

- Government reserves the right to appoint one or more members of the board of directors.
- Restrictions on the nationality of directors, or limitations on the number of expatriates in top Managerial positions.
- Government reserves the right to veto certain decisions, or requires that important board decisions be unanimous.
- "Golden" shares to be held by the host Government allowing it, for example, to intervene if the foreign investor captures more than a certain percentage of the investment.
- Government must be consulted before adopting certain decisions.

Other types of restriction

- Management restrictions on foreign-controlled monopolies or upon privatization of public companies.
- Restrictions on land or immovable property ownership and transfers thereof.
- Restrictions on industrial or intellectual property ownership or insufficient ownership protection.
- Restrictions on the use of long-term (five years or more) foreign loans (e.g. bonds).

WORLD TRADE ORGANIZATION

WT/WGTI/W/122
27 June 2002

(02-3585)

Working Group on the Relationship between Trade and Investment

Original: English

COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

The following communication, dated 26 June 2002, has been received from the Permanent Delegation of the European Commission.

CONCEPT PAPER ON NON-DISCRIMINATION

This concept paper is intended as a suggestion on the non-discrimination provisions that could be included in a Multilateral Investment Framework. It should not be read as a text proposal.

WTO Ministers have recognized at the Doha Ministerial Conference the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade. Paragraph 22 of the Doha Ministerial Declaration mentions, inter alia, "non-discrimination" as one of the issues to be clarified in the Working Group on the Relationship between Trade and Investment, in the period until the Fifth Ministerial Conference.

Non-discrimination is one of the basic principles of the WTO system and has been addressed in relation to investment during several meetings of this working group since 1997.[1] This submission aims at outlining the EC and its Member States view on how the principle of non-discrimination could be addressed in a multilateral framework on FDI.

In this paper we will focus on the 2 principles of MFN and NT treatment, without addressing other standards included in international investment agreements such as "fair and equitable treatment". The concept paper on modalities for pre-establishment already presented by the EC to this working group addresses the principle of non-discrimination in the pre-establishment stage of investment.

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[1] See, for instance WT/WGTI/W/19, W/22, W/23, W/28, W/29, W/30, W/33, W/34, W/36, W/37, W/42, W/51, W/54, W/68, W/71, W/75, W/79, W/84, W/89, and W/104.

I. WHY NON-DISCRIMINATION?

Host countries may wish to treat different investors in different ways, for legitimate reasons. Customary international law does not require any host country to guarantee a non-discriminatory treatment to foreign investors wishing to establish their activities in its territory or even to those already established. Nevertheless, host countries are consistently removing discriminatory barriers to the entry and operation of foreign investors in their territory. Given the fierce international competition to attract FDI, some countries have even decided to provide specific incentives for foreign investments creating a sort of reverse discrimination against their own local companies, although most countries make the incentives available to both domestic and foreign investors on a non-discriminatory basis.

The non-discriminatory treatment of international investment is a necessary condition for the development of a level playing field for FDI worldwide which would improve the allocation of capital and minimize distortions, releasing additional resources. Discrimination on the basis of the nationality of the (ownership, control, or place of residence) investor does not make much sense given the complex organizational structure of today's multinational companies. Moreover, all countries have realized that in order to attract foreign investors they need to provide, as a pre-condition, a predictable, transparent and non-discriminatory regulatory framework, beyond macroeconomic and political stability, infrastructure, labour skills, etc. This is why more than 2000 bilateral investment treaties and a number of other regional and multilateral investment agreements, all including non-discrimination standards to a certain extent, have been concluded. This is also why the EC and its Member States believe that the time is ripe for the consolidation of basic non-discriminatory provisions in a truly multilateral investment framework.

MOST-FAVOURED-NATION PRINCIPLE (MFN)

The MFN principle is one of the fundamental elements of international investment agreements and of the WTO system. Under the MFN rule host countries must extend to investors from one foreign country treatment no less favourable than they accord to investors from any other foreign country.

The stocktaking exercise of existing agreements involving investment has shown that the MFN principle has been widely included in most bilateral, regional and multilateral agreements.

Since Bilateral Investment Treaties (BITs) typically cover investments established in accordance with the laws of the host country, the MFN clause applies, as a general standard, to post-establishment treatment of foreign investments. Some other BITs, for instance those concluded by the US and Canada, as well as the NAFTA, also include the MFN principle with respect to the establishment (or admission) of foreign investments.

The MFN provision is often included in combination with the national treatment principle. The combined national treatment/MFN obligation usually accords to investors and their investments the better of national treatment or MFN in order to allow them, for instance, to benefit from incentives for FDI.

In the GATS, the MFN obligation applies across the board (pre- and post-establishment) to all services sectors unless an exception is contained in the country list of MFN exemptions.

NATIONAL TREATMENT (NT)

According to the NT principle, the host country is required to treat the foreign investor and his investment operating in its territory in the same or comparable way as a domestic investor or investment.

As for the MFN principle, most of the 2000+ existing BITs require host countries to apply the NT standard for the treatment of foreign investments, once these foreign investments have been admitted. The NT principle is regularly included in BITs involving both developed and developing countries, in general without sectoral exceptions, since it only covers foreign investments established in accordance with the host country's laws and regulations.[2]

In the US and Canadian BITs, the NAFTA, the MERCOSUR Colonia protocol, and other recent agreements, the NT (and MFN) standard applies to the establishment of foreign investors in addition to post-establishment treatment. In these agreement the parties usually include their sectoral exceptions to NT (and or MFN) in an annex.

In the GATS the NT principle is a specific commitment which only applies to the sectors listed in each member's schedule. The NT obligation refers to treatment, in respect of measures affecting the supply of services, which should be "no less favourable" than that of like national services and service suppliers. The schedule of commitments also enumerates the possible limitations to NT that each Member maintains on each sector. Thus, in the case of "commercial presence" (i.e. mode 3), the NT principle applies to both the pre-establishment and post-establishment stage of investments in the sectors included in each country's schedule.

EXCEPTIONS TO MFN AND NT

The coverage of the MFN and NT provisions in any international agreement depends on the extent of the exceptions attached to them. These exceptions can be divided in 3 categories: general exceptions; sector-specific exceptions, and; country-specific exceptions.

General Exceptions

General exceptions do not usually apply only to MFN/NT provisions but to the whole agreement. The most common exceptions of this type allow the parties to the agreement to derogate from the provisions of the agreement on grounds of public health, order and morals, national security and protection of the environment.

Subject-Specific Exceptions

Many investment agreements exclude the application of NT/MFN standards on taxation. Some agreements exclude intellectual property or public procurement from their coverage, taking into account that MFN and/or NT obligations already exist in these areas. Moreover, all agreements involving parties which are members of regional integration organizations exclude the application of the MFN principle to measures taken in the framework of regional integration.

Country and Sector-Specific Exceptions

Some investment agreements include in an annex the sectors with respect to which each party reserves the right to deny NT/MFN (eg. NAFTA, OECD codes of liberalization, etc.).

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[2] As stated, for instance, in India's written submission WT/WGTI/W/71, para. 6.

The GATS allows one-off exceptions to the general obligation of MFN by members, which are notified in their country-specific annex. As for NT, members only apply the principle in the sectors included in their scheduled commitments, where they can also specify the conditions and qualifications to NT.

CONCLUSION

The EC and its Member States support the inclusion of the MFN and NT principles in a multilateral investment framework. The stocktaking of existing provisions in international investment agreements and the discussions in this working group lead us to believe that multilateral investment rules in the primary (i.e. agriculture, fisheries and mining) and secondary (i.e. manufacturing) sectors, which should not stay behind the level of treatment granted to investments in the services sectors by the GATS, could incorporate:

- a general MFN obligation (including possible exceptions) for foreign investments across the board and on all sectors;

- a general NT obligation (including possible exceptions) for all foreign investments established in accordance with the laws and regulations of the host country (as provided for in most existing BITs);

- specific NT obligations for the establishment (i.e. admission) of foreign investments in those sectors listed in each country's schedule of commitments. The schedule of commitments would also enumerate each member's limitations to NT.

As in other international investment agreements, especially those covering the pre-establishment stage, general exceptions to MFN/NT, as well as subject- and country-specific exceptions could also be envisaged.

It is understood that the relationship with existing non-discrimination provisions covering FDI in the services sectors (i.e. GATS mode 3) as well as with non-discrimination provisions included in bilateral and regional agreements will need to be carefully assessed.

The discussions and analyses carried out in this working group seem to confirm that while on the one side the above provisions would go a long way towards improving the legal security and coherence of international investment rules on the other side they would not prevent host countries and in particular developing countries from pursuing their domestic policies.

We look forward to hearing other members' views on these and other possible options available to address the question of non-discrimination in the context of a multilateral investment framework.

WORLD TRADE ORGANIZATION

G/C/W/394
12 July 2002
(02-3900)

Council for Trade in Goods

Original: English

WTO TRADE FACILITATION - IMPROVEMENTS TO GATT ARTICLE VIII ON FEES AND FORMALITIES CONNECTED WITH IMPORTATION AND EXPORTATION

Submission from the European Communities

The following communication, dated 11 July 2002, has been received from the Permanent Mission of the European Communities.

Introduction

The WTO's work on Trade Facilitation in the last three years has led to agreement on the benefits of measures to simplify import and export procedures. Members have stressed the importance of trade facilitation in enhancing developing countries' capacity to trade and better integrate into the international economy, and agreed on the complementary nature of facilitation measures and the improvement of border controls and revenue collection. The business community – both large companies and SMEs, and traders in both developed and developing regions - has emphasised the need to simplify trade procedures so as to reduce costs and delays for legitimate business, as well as to improve the climate for investment, and urged WTO Members to seize the opportunity before them to establish trade facilitation measures in the WTO.

While the natural focus of simplification is on customs procedures, some WTO members have also argued that measures should extend beyond customs to include the procedures and formalities imposed by other public agencies, and to transit requirements. A number of Members, while open to WTO commitments to simplify trade procedures, have said that any such commitments should operate hand in hand with meaningful technical assistance, since it would be inadvisable to assume commitments in WTO in cases where Members simply do not have the capacity to implement measures, however necessary and beneficial those measures might be. The EC agrees that measures to deliver technical assistance should be an integral part of any WTO exercise.

At Doha, Members agreed to future negotiations on trade facilitation, subject to agreement on modalities for such negotiations at the fifth ministerial conference, and identified the three key GATT articles on which preparatory work should concentrate: Articles V, VIII and X. The EC has already made a submission on ways to make Article X more operational, and is also preparing a paper on improvements to GATT Article V, freedom of transit, although it would point out that several of the proposals in this paper, if implemented, will also have a positive effect on freedom of transit. The present submission suggests how GATT Article VIII – the core GATT Article on trade facilitation – could be improved and made fully operational in order to simplify international trade procedures in a way that will benefit all WTO Members.

Article VIII of the GATT

Article VIII is quite broad in scope, extending "to fees, charges, formalities and requirements imposed by governments in relation to importation and exportation". Of note is that it is not limited simply to procedures but also to requirements applied by governments to trade transactions, and it deals equally with exports and imports. However, not all parts of GATT Article VIII are fully operational. In particular, Article VIII merely "recognises the **need for** reducing the incidence and complexity of import and export formalities to the minimum" but neither **requires** any such reduction nor indicates how to achieve it. Similarly, it also "recognises the **need** for reducing the number and diversity of fees and charges" but again does **not create any commitment** actually to do so. The absence of any operational WTO requirements to simplify or reduce fees and formalities - notably unduly cumbersome border formalities - remains a significant weakness in the WTO rule book which, as tariffs are progressively reduced, has become more and more in need of attention.

The EC believes there is scope to make Article VIII fully operational in the same way that, in recent years, Members have made more specific and operational GATT Articles and provisions relating to eg anti dumping, subsidies, safeguards, customs valuation, import licensing and technical barriers to trade. The trading community and many Members are keen to see the establishment of a set of WTO commitments, perhaps in the form of an agreement or understanding on the Application of GATT Articles V, VIII and X, that would set all WTO members on an agreed path of modern and simplified procedures, based on international standards, and taking in account work done in other international organisations. In respect of GATT Article VIII, we seek to clarify and improve its provisions in a way that would, indeed, reduce the incidence and complexity of import and export procedures and formalities, and fees and charges.

The proposals below take in account the views of Members expressed in the course of the WTO's work programme and other international fora, and the views of the business community. The "model" for the EC's overall approach to trade facilitation is

the WTO TBT Agreement which, for its own particular subject area, has struck a pragmatic balance between general and specific commitments tied to core GATT principles, ensures the right to take measures to achieve legitimate objectives, while ensuring that those measures are as little trade restrictive as possible, incorporates into its commitments the work carried out by other international organisations, without duplication, and includes measures of special and differential treatment and technical assistance. All of these elements – core GATT principles, the avoidance of unnecessary obstacles when applying legitimate measures, the use of international standards, and special and differential treatment - are equally relevant to efforts in WTO to simplify international trade procedures.

In addition, many of the specific proposals set out below implement the recommendations made in the UNCTAD Columbus declaration of 1994. They also reflect concepts and ideas that several Members have since begun to develop in bilateral or regional agreements. Embedding these initiatives in a set of WTO commitments would ensure that all Members work to the same agreed benchmarks, therefore reducing the risk of differing standards and practices.

Proposals to Clarify and Improve GATT Article VIII to Make it More Operational

The EC suggests that it would be useful to clarify and improve Article VIII through a number of general commitments reflecting WTO principles, as well as more specific provisions relating to fees and charges, document and data formalities, customs and other import/export procedures, and special and differential treatment measures. The rest of this submission is structured accordingly.

A. General Commitments

1. **Scope and Coverage.** Pursuant to GATT Article VIII, the provisions would apply to all procedures, formalities and requirements, and fees and charges applied to products by customs authorities or by any other government body in connnection with importation and exportation, to the extent not already covered by other WTO articles and agreements (including procedures and formalities applied by customs on behalf of other agencies).

Comments: it is essential that the scope of any commitments in WTO apply beyond customs to other agency interventions, as otherwise any efficiency gained via simple customs procedures could be diminished by unnecessary procedures applied by other agencies.Our understanding of Article VIII is that its scope does extend to any government agency imposing formalities and requirements in connection with importation or exportation (VIII.4).

2. **Geographical coverage.** Any provisions agreed should also obviously apply to sub Federal authorities where appropriate, as well as to procedures and requirements applied by customs unions.

Comments: it is assumed that Members would, as in the case of existing WTO agreements, assume responsibility for measures applied at the sub-national level. Inclusion of customs unions in the scope of any future disciplines needs little explanation. It is essential that customs and other procedures are applied in a uniform and simple way by customs unions as much as by individual countries, particularly given the increasing number of customs unions being developed.

3. **Non discrimination** in the design, application and effect of export and import procedures and formalities imposed on the goods of all Members.

Comments: GATT Article I applies to some import and export formalities but its applicability needs to be made explicit, as is the case in for example the TBT Agreement, the Agreement on Import Licensing Procedures and other similar sets of WTO rules. Non-discrimination in the treatment of exporters should also be covered by this commitment. The principle of non-discrimination should not of course interfere with Members' rights to treat consignments differently according to objective risk assessment criterias.

4. **Transparency and predictability** in the design, application and effect of procedures and formalities.

Comments: the EC recently submitted a proposed set of measures to implement GATT Article X, notably to ensure transparency and predictability in the promulgation and application of trade regulation, as well as consultation with affected traders (doc GC/W/363 of 12 April 2002). .

5. A commitment to avoid **unnecessary procedural barriers** to trade in the design, application and effect of import and export procedures, and in particular to ensure that such procedures do not unduly slow down the movement or release of goods. This should also include a commitment not to design or apply procedures and formalities with a view to or with the effect of giving additional protection to domestic products. This would be done by ensuring that import and export procedures **shall not be more trade restrictive than necessary to fulfil legitimate objectives (**which we suggest should be specified or given in an illustrative list).

Comments: a basic discipline to ensure that regulatory authorities - customs etc - consciously make efforts to design and implement procedures that take account of the needs of traders, that facilitate trade as far as possible, and that prohibit the use of import and export procedures for protectionist or harassment purposes.

6. A provision whereby Members should no longer maintain a procedure or requirement **if the circumstances giving rise to its introduction no longer exist** or if the changed circumstances or objectives can be addressed in a **less trade restrictive** manner.

Comments: a commitment modelled on already existing provisions of Articles 2.2 and 2.3 of the TBT Agreement, that requires public authorities regularly to review their regulations and working procedures with a view to introducing better and less burdensome practice.

7. **International Standards and Instruments**. Members should base their import and export procedures on agreed international standards and instruments, except where such international standards would be an ineffective or inappropriate means to fulfil the legitimate objectives sought.

Comments: again, a provision inspired by several existing WTO Agreements, giving priority to the use of international standards. Use of international standards ensures a common basis for the measures applied by different WTO members, which in turn improves transparency and predictability, and lowers costs for traders for example in preparation of trade documents and data. The standards and instruments developed by the WCO should be promoted, as well as those of UNCTAD, the UN regional economic commissions, the IMO, and ICAO relevant to trade facilitation.Local variations of such standards should be avoided as far as possible. It will be desirable to identify and agree which international standards and instruments should be referred to, and to decide how to take account of subsequent amendment or updating of such standards and instruments .

8. A commitment to the principle and application of **Special and Differential Treatment** for developing countries, in particular the least developed countries.

Comments: Special and Differential Treatment is referred to in the Doha declaration, para 27. Specific measures are suggested in Section E below. The possible options, for least developed countries and possibly other poorer developing countries, would include waiving those commitments that imply significant financial commitments or infrastructural assistance, until such time as these Members are in a position to apply them, or an approach whereby the Member in question assumes commitments according to an agreed timetable, coupled with measures to provide assistance necessary to aid implementation of trade facilitation measures. The EC also suggests in section E below a specific mechanism for future coordination of such assistance.

B. Specific Provisions on Fees and Charges

Article VIII paragraph 1 a) establishes certain obligations regarding fees and charges. Notably, it authorises only those fees and charges that are limited to the approximate cost of services rendered, and prohibits fees and charges aimed indirectly at protecting domestic products or having an effect equivalent to an import or export tax for fiscal purposes.

Past dispute settlement cases have partially clarified the scope of this provision, notably the definition of a fee or charge limited to the approximate cost of the service rendered, and the kinds of services permitted. There is still however a lot of uncertainty over what may or may not be allowed under this provision, leading to

introduction of widely varying practices around the world, and resulting in uncertainty and unwarranted costs to traders.

Predictability for traders could therefore be increased if Members, based on past panel conclusions, were to agree on an interpretation of VIII 1 a) on the following lines:

- the service provided must be related to the products in question
- fees levied must refer to the approximate cost of the service rendered.
- the fees or charges in question may not therefore be calculated on an ad valorem basis.
- administrative or operational costs not associated with treatment of imports or exports respectively may not be imposed on such imports or exports.

The second weakness in Article VIII regarding fees and charges concerns the provisions of Article VIII 1b). This "recognises the need for reducing the number and diversity of fees and charges", but does not require their reduction. Given this, it would be useful to establish a commitment by Members to review, and if necessary, consolidate or reduce the number and diversity of their fees and charges, and to notify remaining fees and charges together with the justification for them in terms of the provisions of Article II and Article VIII of the GATT. Consideration could be given to establishing a list of types of permissible fee eg an illustrative list, or an exclusive list etc.

Comments: the above proposals confirm the findings of several panels on the definition of permissible fees, and create a new discipline to make VIII 1 b) operational. The proposals if implemented will give important guidance to administrations when introducing fees or setting fee levels, and ensure greater transparency and predictability of such fees. Provisions on the lines proposed would enable us to avoid situations where unwarranted or disproportionate fees, unrelated to the specific services rendered, are imposed on either importers or exporters, and would ensure transparency..

C. Specific Provisions on Data and Documentary Requirements and Procedures

Excessive and non-standardised documentation and data requirements for border crossing trade are, according to representatives of the trade community, a significant obstacle to trade. Smaller traders, typically in developing countries and Small and Medium Sized Enterprises (SMEs) may be particularly affected by unduly burdensome procedures, since they both drain manpower and resources which SMEs can ill afford, and they also act as a fixed cost regardless of the size of the consignment. Evidence suggests that excessive export procedures are as troublesome and costly as excessive import bureaucracy. Many such requirements – which have accreted over time - are unnecessary and can be simplified and reduced. One could therefore consider a number of ways to make these requirements more focussed and simple and in so doing create a more hospitable climate for international trade. One could for example consider improving GATT Article VIII by commitments such as the following:

- Commitment by Members to **simplify and reduce documentation and data requirements to the absolute minimum,** consistent with the need to enforce legitimate policies, including the use of agreed international standards as a basis for documentation and data requirements (both for format and content of documents and data). The WCO's simplified data set could be developed further as the basic reference point/standard, while the UN layout key is also relevant here. Members could agree to abolish excessive documentation requirements such as demands for consular invoices and the like and, in cases where physical documentation is required, routinely accept copies and not originals of documents, except in narrowly defined and clearly identified circumstances.

- Introduction by each WTO Member, or customs union between two or more Members, of a **uniform domestic customs code** or similar legislation, as well as single import and export declarations, administrative message or data set.

- Acceptance of relevant **commercially available information** and documents as the norm, as well as regular review of documentation and data requirements in liaison with representatives of the trading community with a view to continued simplification.

- Introduction of the principle of a **single, one -time presentation to one agency, normally the customs,** of all documentation and data requirements for export or import, subject to any exceptions to be identified. For developing countries, the commitment should be to implement this provision in a progressive manner.

Comments on the above proposals: it is essential for transparency, and for efficient administration of customs to have a coherent body of legislation, regulations etc, and traders are keen to have simple, standardised documents or data sets, as this reduces errors and processing times. Regarding the proposals to reduce data and documents to a minimum, the approach should not be too prescriptive but rather set the basic direction for introducing improvements and continuously reviewing the changes made. Reference to "presentation" of data or documents is taken to include procedures whereby customs obtain data or documentation via traders' systems.

D. Customs and Related Import and Export Procedures

There is overwhelming evidence that cumbersome border crossing procedures act as a brake on trade and investment, and hamper exports as much as imports, in particular for small and medium sized companies. Simplification of trade formalities and requirements is an important and low-cost way to improve trade and investment flows. It has also been shown to result in higher revenue collection rates, better enforcement of justifiable border controls, and greater efficiency and morale of customs administrations. The EC proposes therefore the establishment of a number of commitments to simplify import and export procedures, which would be applicable to all Members. These commitments would make GATT Article VIII 1 c) – which calls for the simplification of procedures – more operational. The provisions proposed below would

steer WTO members in a common direction through the progressive adoption of simpler and more internationally standardised procedures drawing on good administrative practices gaining currency worldwide.

- **Progressive introduction of simplified and standardised import and export procedures,** based on on international standards and instruments (eg the WCO's Kyoto Convention). This could include a commitment to the **progressive modernisation** of customs administrations (e.g. through implementing the WCO's Customs Modernisation Programme and the Arusha Declaration), and agreement by each Member to establish, notify and, within realisable targets, progressively reduce, its domestic **standard processing times** for goods release.

- **Non-discrimination** in terms of requirements and procedures applicable to like products irrespective of their **mode of transportation** (procedures are unlikely to be identical – but they should not give rise to discriminatory treatment). Non – discriminatory criteria should also apply in respect of licensing of **customs brokers**, together with an undertaking to phase out, over time, any requirements for their mandatory use.

- Introduction of **simplified release and clearance procedures** (eg. Presentation of simplified data sufficient for rapid release, followed by submission of more detailed data later; or/and periodical submission of data and company auditing). Members could consider drawing up a list of agreed types of simplified procedures for adoption.

- Use of **risk assessment** methods based on international standards and practices, and the introduction by each Member of a system of **authorised traders**, using transparent, objective and non-discriminatory criteria. Such systems would grant to compliant traders willing to support the customs' regulatory work with simplified or other premium procedures for their import and export activities. Such systems should not exclude the participation of small and medium sized enterprises. Members could consider developing in WTO or under WCO auspices a coherent international standard or model for authorised trader status.

- **Convergence of official controls.** Where documentary or physical verification of consignments by more than one agency is necessary this should be carried out at a single place and time, to the extent possible, and at hours that meet traders' needs.

- **Automation of customs** and other agency procedures for import and export, including the possibility to present electronically the customs' and other declarations, and for the payment of duties or other fees and charges.

Comments: through the above proposals Members would make a commitment to begin to simplify procedures, basing their domestic efforts on international instruments. The EC does not think that

Members should be required formally to adhere to instruments (such as the revised Kyoto Convention) negotiated elsewhere but suggests that they be applied in substance or be given a privileged status, just as, for example, FAO or ISO standards are the benchmark standard in the SPS and TBT Agreements respectively. Publication of standard processing times would ensure that such times are in the first place established, and then efforts made to reduce them. Regarding licensing of customs brokers, this should be carried out transparently and fairly, so as to enable competition, and companies should have the choice of managing the transaction themselves.

Regarding simplified release and clearance procedures, many WTO members are now starting to operate different forms of simplified procedure. Given the economic importance of such procedures, it seems essential that they be reflected in terms of WTO commitments so as to reduce costs and delays and bring greater predictability to traders. The same is true of risk assessment. In practice no WTO Member can inspect 100% of all consignments and should not. Risk assessment procedures allow customs etc to concentrate their limited resources on targeting the most suspect shipments while facilitating trade for compliant traders. As trade flows expand but customs' resources shrink or remain static, such selectivity becomes even more essential. Exchange of experience on risk assessment practices and tools and their further development in the WCO could complement this proposed WTO provision. The proposal on authorised traders would encourage all Members to implement procedures that identify and reward efficient and compliant traders with additional facilitation measures, and through which the traders themselves support the regulatory goals of the customs. Such systems are a major benefit for hard pressed customs administrations, allowing them then to target their limited resources on areas of risk.

A concern of traders relates to excessive delays in getting goods released due to the absence of coordinated border controls between different agencies. Developing countries have drawn attention to the incidence of multiple inspections for different control purposes in their major export markets. The EC believes that Members should make a commitment, towards greater coordination of controls, recognising that developed countries must lead the way here, and that for developing countries this may take some time to accomplish.

Finally, customs automation is a key facilitation tool, aiding in particular higher rates of tariff collection and enforcement, the implementation of simplified release procedures delinked from the payment of duties, the speed of clearance and the movement of goods, and the coordination of official controls.. Many developing countries have in the past few years introduced automation (eg via Unctad programmes), increasing efficiency and trade flows, and rapidly recouping investments. Since however automation implies start up costs and maintenance, flexibility will be needed for developing countries. This is taken up in Section E below.

E. Special and Differential Treatment

The biggest long term beneficiaries of simplified procedures should be developing countries, whose future trading performance and attractiveness to foreign investment will improve if they can provide and maintain a simple, transparent trading environment. Currently it is their typically small and medium sized enterprises which may suffer most from burdensome export and import procedures, non-transparent and

excessive charges, and costs and delays. Simplified trade procedures should also enable these Members to increase their rate of duty collection, which remains an important part of government revenue, and improve controls on illicit goods, fraudulent activities etc. Many of the proposals to improve customs procedures will also lead to savings in terms of human and other resources in the medium term.

However, simplification cannot be achieved overnight and any agreement or understanding on GATT Articles V, VIII and X should recognise the needs and difficulties faced by developing countries, especially the least developed, and provide practical means to assist their development.

Taking in account the views expressed on this issue over the last three years, the EC suggests that any future WTO provisions should therefore include a range of special and differential treatment provisions, including less onerous initial commitments for poorer developing countries, transitional periods for the assumption of commitments, and more stable provisions regarding the supply of technical assistance.

1. Differentiation in Commitments

As noted throughout this proposal, a number of commitments may require resources or capacity building measures to implement, and may thus at the moment be beyond the means of, in particular, least developed countries. This may be the case of the proposals on a single one time presentation to one agency of data and documentation, automation of customs processes, and introduction of certain kinds of simplified release procedure, but there may be other specific procedures which pose difficulties in the short term for particular Members.

In these cases, two options could be considered and merit further discussion. The first option is that the commitment in question should not apply until such time as the Member in question is in a position to implement them, and in the meantime developed country Members and intergovernmental organisations should continue as far as possible to provide technical assistance to help implementation. The drawback however with this option is that it risks creating a semi permanent "two tier" Membership and may contain insufficient incentives for the Member in question to implement what are at the end of the day valuable improvements to its trading potential. The EU is therefore not convinced that this would be the best option, but would like to know the views of LDC members.

The other option would be that all LDC Members do enter into commitments to implement all the provisions established in the WTO but that, in doing so, individual transitional periods would be established for each Member seeking time, in conjunction with a specific technical assistance programme that would be worked out and agreed with the country in question. The advantage of this approach is that it would increase the prospect of LDCs actually to join and implement the commitments while maintaining considerable flexibility and giving specific consideration to their individual

development constraints. Further details of how such technical assistance programmes could be carried out is found in paragraph 3 below.

2. Transitional periods

Transitional periods should also be considered to enable developing countries other than the least developed to implement commitments in a progressive or staged manner, in particular where commitments have appreciable resource implications. However, commitments relating to transparency and non-discrimination could be implemented immediately.

3. Technical Assistance and Capacity Building Measures

The EC already dedicates considerable development assistance to trade facilitation and intends to continue to do so, particularly if a set of WTO provisions, setting common standards to which assistance can in future be mobilised, can be established. The definition of trade facilitation, in technical assistance programmes, is of course traditionally wider than customs and border crossing measures, and broader than the subject matter of GATT Articles V, VIII and X. Assistance for trade facilitation often covers also measures relating to, for example, the improvement of port infrastructure, cargo logistics, or services to exporters.

Recognising the importance given to technical assistance in para 27 of the Doha Declaration, the EC proposes the following arrangements for the improved provision and coordination of assistance in the field of trade facilitation:

a) Members should signal readiness to increase the level and quality of technical assistance for trade facilitation. Where competing requests for assistance are made, priority should be given to those countries whose needs are clearly identifiable and which have demonstrated clear political commitment to carrying out simplification measures.

b) where a Member, as part of its development aid, is providing trade related technical assistance to another Member it should, if requested by that other Member, include in such assistance trade facilitation measures and support. This would help ensure that where a recipient Member does seek support on trade facilitation, it can be provided as part of any TRTA programme – the concept of "demand-driven" aid.

c) consideration should be given to setting up an international mechanism for the future organisation of technical assistance in the field of trade facilitation, bringing together donor Members and recipient Members and regional groupings, along with the WTO, UNCTAD, WCO, World Bank, IMF, UN regional economic commissions, and

as necessary other intergovernmental bodies such as the ICAO, IMO and UPU. This international mechanism would be charged with ensuring that recipient needs are matched with donors, that potential gaps are filled, that transparency, coherence and where necessary coordination takes place between donors and recipients, and that assistance is directed, among other things, to implementing WTO commitments in this field. This kind of coordinated approach simply does not exist today and is needed.

d) In the case of a Least Developed Country Member seeking to implement specific commitments only after a transitional period (see paragraph 1 above), the Member in question could develop and agree with other donor Members and institutions a specific action plan, whose implementation could be reviewed and monitored through the joint mechanism described above. Such action plans should define the activities, funding and timing for implementation, the commitments to be made by the donors and the recipient, and where appropriate the regional dimension of implementation.

e) The EC has received indications of interest from a number of trade federations in contributing to assistance to implement trade facilitation measures, notably if some basic rules have been agreed in the WTO to which that assistance could be targeted. The EC believes this interest should be encouraged. The business community will be a major beneficiary of simplified procedures and at the same time many of the improvements proposed need the active collaboration of traders. The EC suggests therefore that national and international trade federations or interested companies be invited to participate in capacity building/technical assistance programmes – either in respect of specific country programmes, or specific areas of expertise - via the proposed international framework.