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REPORT (1999) OF THE WORKING GROUP ON THE RELATIONSHIP BETWEEN TRADE AND INVESTMENT TO THE GENERAL COUNCIL

TABLE OF CONTENTS

Paragraph

A. INTRODUCTION

1. At its meeting held on 9-11 and 18 December 1998, the General Council had before it in document WT/WGTI/2 the Report (1998) of the Working Group on the Relationship between Trade and Investment and took the following decision with respect to the continuation of the work of this Working Group:

"The General Council decides that the Working Group on the Relationship between Trade and Investment shall continue the educational work that it has been undertaking on the basis of the mandate contained in paragraph 20 of the Singapore Ministerial Declaration. The work of the Working Group, which shall be reviewed by the General Council, shall continue to be based on issues raised by Members with respect to the subjects identified in the Checklist of Issues Suggested for Study. It is understood that this decision is without prejudice to any future decision that might be taken by the General Council, including in the context of its existing work programme."(1)

This report provides an overview of the work done by the Working Group in 1999 pursuant to the General Council's decision.

B. PROCEDURAL INFORMATION ON THE GROUP'S ACTIVITIES

(a) Sources and materials used in the Group's work

2. As was the case in 1997 and 1998, the work of the Working Group in 1999 has been based on written contributions by Members and on oral statements, questions and answers by Members in the Group. This material has been supplemented by information received from observer intergovernmental organizations and notes prepared by the Secretariat. A tabular summary of written contributions provided to the Group in 1999 is attached as Annex 3.

(b) Meetings held in 1999

3. The Working Group has held three formal meetings in 1999, on 22-23 March, 3 June and 24 September. The dates of these meetings were determined in the light of the instruction in paragraph 22 of the Singapore Ministerial Declaration that careful attention be given to coordinating meetings of the Working Groups established under paragraphs 20 and 21 with those of relevant UNCTAD bodies. At both meetings, consideration was given to all Items of the Checklist of Issues Suggested for Study. Reports on these meetings have been circulated in documents WT/WGTI/M/8, 9 and 10.

(c) Cooperation with other intergovernmental organizations

4. The Singapore Ministerial Declaration (paragraph 20) encouraged the Working Group to undertake its work in cooperation with UNCTAD and other appropriate intergovernmental fora in order to make the best use of available resources and to ensure that the development dimension is taken fully into account. In this regard, the IMF and the World Bank attended the Working Group's meetings in an observer capacity, pursuant to the cooperation agreements concluded between the WTO and these organizations. UNCTAD, OECD and UNIDO also attended the meetings as observers, on the basis of an invitation from the Working Group. In the course of the Group's meetings, these organizations have kept the Group updated on their relevant activities and contributed to the debate. The Working Group is highly appreciative of the valuable contributions to its work made by the observers.

C. SUBSTANTIVE WORK DONE IN THE GROUP IN 1999

5. This part of the report provides an overview of the substantive work done in the Working Group, pursuant to the mandate given in paragraph 20 of the Singapore Ministerial Declaration and to the General Council's decision adopted in December 1998. By its very nature, such an overview cannot reflect everything that was said and capture all nuances, such as can be found in the detailed records of the two meetings of the Working Group (WT/WGTI/M/8 and 9) and in the written contributions of Members (see Annex 3).

6. As provided for in the General Council's decision, the work undertaken in 1999 was structured on the basis of the Checklist of Issues Suggested for Study which the Group took note of at its meeting on 2 and 3 June 1997. This summary uses the same structure.

I. IMPLICATIONS OF THE RELATIONSHIP BETWEEN TRADE AND INVESTMENT FOR DEVELOPMENT AND ECONOIMIC GROWTH

7. Written contributions on this Item of the Checklist were provided by Korea (W/69)[(2)] and India (W/73). Oral statements were made by Korea, Australia, the European Communities, India, Japan, the United States, Canada, Pakistan, Venezuela, Malaysia, Costa Rica, Switzerland, Mexico, the Philippines on behalf of ASEAN WTO Members, Chile, Argentina, Brazil, and the observer for the World Bank.

8. With reference to the experience of one Member regarding the role of foreign direct investment ("FDI") in the context of the Asian financial crisis, attention was drawn to recent empirical studies which had found a positive correlation between a low level of net FDI and the occurrence of a currency crisis. This was due, *inter alia*, to the fact that FDI flows were more stable than portfolio investment flows. The point was also made that FDI had played a stabilizing role in the current financial crisis, as evidenced by the significant increases of FDI inflows experienced by this Member in recent years. Information was provided on recent changes in this Member's policy towards inward FDI which were part of a more general process of structural policy reforms adopted after the onset of the Asian financial crisis.[(3)]

9. Comments made on this Member's experience highlighted the positive, stabilizing role played by FDI in the context of the Asian financial crisis and the relationship between, on the one hand, the weakness of a country's financial infrastructure and its vulnerability to financial instability in international markets and, on the other, a low level of FDI. Interest was expressed in the experiences of other Members with respect to the role of FDI in the context of the Asian financial crisis.[(4)]

10. With respect to the observations made by this Member on the difference between FDI and portfolio investment, the question was raised how as an operational matter a distinction could be made between FDI and portfolio investment.[(5)] Related to this, the observation was made that, while FDI was more stable than portfolio investment because it involved assets which were not easily transferred abroad, it was not easy to attract one type of investor while discouraging the other, and that FDI and portfolio investment tended to take place together. It was stated, in this regard, that portfolio investment made an important economic contribution to host economies by adding to national savings, by broadening the array of lending terms available to domestic businesses and by stabilizing the local economy by spreading credit risk.[(6)] It was also stated that the distinction between long- and short-term investment was more relevant than the distinction between FDI and portfolio investment, and that portfolio investment was not by definition short-term and speculative.[(7)]

11. In response to the comment on the difficulty of distinguishing between FDI and portfolio investment, it was said that many countries made this distinction in practice.[(8)] It was also argued that important differences existed not only between FDI and portfolio investment, but also between various kinds of FDI. In particular, FDI in the form of acquisitions of existing domestic enterprises was clearly less beneficial in terms of its impact on development than

FDI in the form of greenfield investment.[9] This view was questioned on the grounds that FDI in the form of acquisitions entailed benefits deriving from greater access to capital, managerial skills, technology, and international markets.[10]

12. The negative effects of volatile capital movements were mentioned as an issue which required further study in the Working Group.[11]

13. As an example of the stabilising role of FDI in the Asian financial crisis, mention was made of data on the overseas activities of firms of one Member which showed that, while the sales of the subsidiaries of these firms in four Asian countries had declined, the level of employment at these subsidiaries had remained stable.[12]

14. A number of issues raised at the WTO High-Level Symposium on Trade and Development which had taken place in March 1999 were identified as relevant to the work of the Working Group.

15. With reference to the point made at that Symposium that trade liberalization could not take place in a vacuum, it was observed that an increase in FDI did not automatically lead to economic growth, and that the Working Group needed to consider a range of factors impacting on the contribution of FDI to economic growth.[13] In response to this comment, it was stated that the work in this Working Group was valuable precisely because it had allowed for a consideration of the relationship between investment and development from a wider perspective.[14]

16. It was noted that, while in the debate at the Symposium on the relationship between development and trade openness views had differed on the desirable pace of trade liberalization, no support had been expressed for closed markets, and that investment had often been included in references to the value of openness for development. The importance of capacity building, which had been stressed at the Symposium, should also be looked at from the perspective of investment. With reference to the argument advanced at the Symposium that bound, duty-free treatment of imports from least-developed countries was important *inter alia* because uncertainty regarding the tariff treatment of their exports hampered FDI in these countries, it was stated that the conditions for FDI in these countries obviously could be even more directly affected by a lack of predictability of the regulatory framework for foreign investment.[15] Enhancing the transparency of the regulatory framework was important not only to attract foreign investment but also to foster domestic investment.[16]

17. It was noted that a number of speakers at the Symposium had pointed to the need for government intervention. Bearing in mind that the contribution of FDI to development differed, depending on the kind of economic activity concerned, the need for an active government role appeared to be incompatible with the notion of a multilateral framework on investment which would inevitably reduce the policy discretion of governments.[17] In response to this comment, it was stated that the appropriate extent of government intervention was for each individual country to decide, but that this issue had little bearing on the shape of the investment regime for all investors, whether they were government-owned or privately-owned, and thus did not detract from the importance of a transparent and non-discriminatory investment regime.[18] Reference was made to the experiences of several Members with negative effects of excessive government intervention[19] and to academic studies which indicated that over time countries were departing from government intervention. Thus, empirical studies showed a trend toward the reduction of the use of performance requirements, reflecting the experience of countries that these requirements, once seen as essential, in the end had proved detrimental.[20] However, another view expressed was that, in light of the present financial crisis, there was a growing opinion among scholars and practitioners in favour of government intervention, and that performance requirements and incentives were used extensively by many developing countries and were useful given their present stage of development.[21] Finally, the observation was made that the discussions at the Symposium had shown that in recent years there had been an important evolution in the debate on the role of governments in the process of economic development in that it was now increasingly recognized that an active government role to pursue specific development objectives was not incompatible with strategies based on openness to international integration and adherence to a framework of international, market-oriented rules.[22]

18. Reference was made to the view expressed at the Symposium by some academic experts that the linkages between trade and investment did not merit a consideration of rules on investment in the WTO.[(23)]

19. The relationship of FDI to technology development of host economies was another prominent theme of debate under this Item of the Checklist. In this respect, the Working Group had before it a Note by the Secretariat on "The Effects of Foreign Direct Investment on Development: Technology and other Know-How Transfers and Spillovers" (WT/WGTI/W/65).

20. Support was expressed for the analysis contained in this Note of the contribution of FDI to economic development which resulted from the diffusion of technology and other know-how arising from various kinds of spillover effects.[(24)] Reference was made in this connection to empirical studies which provided evidence of the contribution of FDI to technological development of one Member through the transfer of technology from parent companies to their foreign affiliates, the diffusion of technology arising from linkages between foreign affiliates and local firms, and through research and development projects initiated by foreign affiliates.[(25)]

21. The point in the Secretariat Note that the most significant channels for the dissemination of modern, advanced technology were the spillover effects of FDI, rather than formal technology transfer agreements, was endorsed[(26)], but it was also stated that on this issue the Note did not adequately take into consideration other views.[(27)]

22. The importance was emphasized of the conclusions drawn in the Secretariat Note that the positive effects of FDI through technology and other know-how spillovers depended upon the characteristics and policies of host economies, and that the existence of a competitive environment and local technological capabilities were especially important in this regard. It was argued that optimal policies to enhance the contribution of FDI to technological development of host countries should aim at improving local technology capabilities, education and infrastructure and at ensuring an adequate regulatory framework in areas such as competition policy and the protection of intellectual property. By contrast, policies involving government intervention in investors' decisions, such as performance requirements and transfer of technology requirements had been demonstrated to be often counterproductive. The point was also made that, in order for FDI liberalization to produce the expected outcome, including technological advance, strong economic fundamentals and sound management of macro-economic policies were essential.[(28)]

23. The view was also expressed that, while the main message of the Secretariat Note seemed to be that technology transfer might occur automatically as a result of FDI, and that where this was not the case a range of policy measures were available to host countries to stimulate and secure such transfers and spillovers, the Note did not adequately analyze the need and scope for specific policies to enhance the contribution of FDI to technological development of host countries. Thus, the Note failed to give due attention to the role of performance requirements, except that paragraph 71 pointed to the costs of such requirements. The observations made in paragraph 72 clearly had important implications regarding the need for a certain role of governments, but the Note failed to discuss these implications. A more general point made in this connection was that the discussion so far in the Working Group on FDI and technology transfers and spillovers was somewhat inconclusive and unsatisfactory because it was not informed by a sufficiently detailed analysis of the nature and effectiveness of specific policies used by governments to promote the transfer of technology. In this regard, it was suggested that the Secretariat undertake an analysis of the relationship of performance requirements and investment incentives to the transfer of technology.[(29)]

24. The point was made that in discussions on the transfer of technology there was a tendency to view technology flows through the prism of competitive markets, while in reality international investment and technology flows were determined by decisions of multinational enterprises taken in a context of oligopolistic equilibrium in which such enterprises sustained their strategic market dominance through the systematic application of various policies, such as localization of individual stages of production, the use of internal transfer prices and technological innovation. These strategies could not be adequately understood within a model of perfectly competitive markets in which any active development policy was seen as *per se* distorting investment, trade and technology flows. The strategic

considerations underlying the investment decisions of multinational enterprises explained the fact that such firms preferred to buy from their affiliates to protect their dominant market positions even where efficient local suppliers existed. This strategically-motivated conduct necessitated policy responses on the part of host countries, for example through measures to encourage multinational enterprises to conduct research and development in host countries with a view to enhancing productive capabilities of local suppliers. [30]

25. It was stated that the conclusions drawn in the Secretariat Note were perhaps valid for some countries in some circumstances, but that there were also other views. Since multinational enterprises accounted for almost two-thirds of world trade and had a virtual monopoly on the transfer of technology, there was a basic asymmetry between the buyers and the sellers of technology, which was a fundamental factor in regard to the type of technology available to host countries. A number of studies had shown that there were indirect costs associated with the transfer of technology, such as confidentiality requirements and export restrictions. In addition, the transfer of technology was not facilitated by the fact that international agreements, such as the TRIPS Agreement, reflected the view that technology was of a proprietary nature. In view of these considerations, it was naïve to believe that FDI would automatically lead to the transfer of technology.[31]

26. In response to this observation, it was stated that, in the context of investment, the issue was not the relations between buyers and sellers of technology but the inflow of technology into an economy through investment. Mention was made in this connection of the experience of one Member regarding the tangible benefits from technology flows associated with FDI. This Member had made a commitment in a number of investment agreements not to impose transfer of technology requirements as a condition for an investment because it believed that the imposition of such requirements had negative consequences, in particular in the context of intense international competition for investment and technology.[32]

27. With regard to observations made in contributions by one Member regarding the importance of policy intervention to enhance the contribution of FDI to the transfer of technology and intangible assets, mention was made of studies which had found examples of negative effects of such policy intervention. While these studies did not necessarily indicate that policy intervention always resulted in negative effects on the transfer of technology, they provided some empirical evidence that technology transfer through nonmarket mechanisms could cause unexpected negative effects, and that local conditions in host countries, such as a high level of technical skills, infrastructure and a competitive environment, were more important determinants of technology transfer and spillovers.[33] With respect to the same contributions, it was stated that they seemed to suggest that governments should step in and force technology transfer and it was argued that, given that the WTO rules placed restraints on governmental intervention, this suggestion was contrary to the disciplines and motivations underlying the WTO.[34]

28. In response to these comments, it was stated that, while in some circumstances policy intervention with respect to the transfer of technology might have adverse consequences, the fundamental point made in these contributions was that it was for each country to decide what were the appropriate policies to adopt in light of its own circumstances. The contributions did not suggest that governments should intervene to ensure that transfer of technology took place at any cost. Rather, the point was that, if one left it completely to market forces, transfer of technology might not happen at all. A number of African countries had completely liberal investment regimes but had not experienced any technology transfer. Thus, to say that a liberal FDI regime would automatically give rise to FDI and associated transfer of technology seemed a very simplistic approach. Equally simplistic would be to draw the conclusion from these contributions that there was only a role for governmental intervention. While attracting FDI was important, the space for policy intervention should not be severely restricted. In light of the existence of provisions on the transfer of technology in several WTO agreements, for example in the TRIPS Agreement, it could not be said that the WTO had nothing to do with the subject of technology transfer. These existing WTO provisions on technology transfer needed to be strengthened to encourage the transfer of technology on reasonable terms.[35]

29. In response to the point that an open investment regime did not automatically lead to transfer of technology, it was stated that one should distinguish between the issue of the factors which determined a country's capacity to attract FDI, on the one hand, and the issue of appropriate policies regarding the transfer of technology, on the other. The capacity of a country to attract FDI depended in the first place upon the existence of profitable investment opportunities. While the existence of an open investment regime did not mean that a country would automatically be able to attract FDI, instability and lack of transparency of the investment regime could increase the perceived risk of the investment and thus deter investment decisions. Policies involving the compulsory transfer of technology which did not give sufficient guarantees to the investor that it would reap a legitimate profit from using that technology could deter investment decisions.(36) However, the view was also expressed that, while it could be argued that, if a country forced a company to transfer technology, this would diminish a country's attractiveness for FDI, what was involved was a bilateral contract between an enterprise and a government. Since a company would not engage in transfer of technology if it felt that the conditions imposed were too strict, host-country governments knew exactly the risk of applying such conditions. The point was also made that a distinction should be made between the use of a particular technology in a country and the transfer of that technology. Especially in regard to high technology, transfer of technology often did not occur even though the technology was actually being used in the country by a particular company.(37)

30. Reference was made to the experience of some Members which had benefitted substantially from the transfer of technology associated with FDI, notwithstanding the absence of legislative provisions requiring transfer of technology. The positive impact of such transfer of technology was evident in the growth and diversification of exports and the improvement in the quality of the domestic infrastructure. Thus, the benefits of FDI that arose from its contribution to the transfer of technology could be achieved through the operation of market forces.(38) It was also argued that the process of globalization augmented the contribution of FDI to the transfer of technology in that the competitive pressures facing multinational enterprises in international markets compelled such enterprises to enhance the efficiency of their operations. An important example of this phenomenon was the transfer of technology in the context of sub-contracting arrangements with local suppliers of parts and components.(39)

31. The view was expressed that the concept of government intervention with regard to the transfer of technology was not necessarily incompatible with WTO rules and principles.(40) It was stated that while active policies to promote the transfer of technology were justified because of the fact that markets for technology were not perfectly competitive, experience also demonstrated that policies involving the compulsory transfer of technology did not achieve the intended results because the technology transferred was often limited to process technology instead of core technology. It was therefore necessary for governments to be able to implement active policies which were not compulsory but which tended to promote the transfer of technology on reasonable commercial terms, including promotion of research and development activities and the formation of productive clusters. Mention was made of one Member's positive experience with this kind of policy in the petroleum sector. Rather than focusing on the question of whether or not countries should oblige multinational enterprises to transfer technology, the Working Group should concentrate its study on the identification of market-friendly and WTO-consistent policy instruments to promote the transfer of technology.(41)

32. It was stated that there appeared to be two grounds on which there was opposition to government policies aimed at encouraging the transfer of technology. The first was that such policies were not effective; the second was that such policies might deter FDI. Whether such policies were effective was essentially an empirical question on which evidence appeared to be mixed and for which further study was required. There was no conclusive evidence to justify a sweeping assertion that technology transfer measures taken by governments had in all cases been counterproductive. As to the argument that technology transfer policies would deter FDI, this was essentially a matter for governments to consider in light of their experience. The experience of some developing countries was that in certain cases it might be useful to institute policies which might encourage transfer of technology. If a country found that this had a negative impact on FDI inflows, it would obviously reconsider its policies and seek to restore the balance between attracting investment and regulating investment to promote development.(42)

33. The Working Group was informed of studies prepared by the Foreign Investment Advisory Service, a joint service of the World Bank and the International Finance Corporation, on criteria and procedures for the screening of FDI and on backward linkages between multinational enterprises and suppliers in host countries.(43)

II. THE ECONOMIC RELATIONSHIP BETWEEN TRADE AND INVESTMENT

34. A written contribution was provided by India (W/72). Oral statements were made by Costa Rica, the European Communities, Switzerland, Korea, Mexico, the United States, the Dominican Republic, Singapore, India, Canada, Venezuela, Egypt, Argentina, Malaysia on behalf of ASEAN WTO Members, Brazil and Hong Kong, China.

35. The discussions under this Item of the Checklist centred on the issue of investment incentives.

36. The view was expressed that fiscal incentives to attract investment were a second-best solution, and that a more efficient approach was to directly address the causes of market failures. The costs of fiscal incentives often exceeded their benefits, especially in the case of competition between countries or regions to attract investment through the granting of incentives. The effects of such incentives were mainly negative as they reduced global welfare, distorted investment flows and related trade flows and delayed the necessary structural reform. Moreover, most decisions of investors appeared not to be affected by incentives. While the legitimate concerns of countries which needed to provide incentives to attract investment should be recognized, the firstbest policy for countries wishing to attract FDI was to commit to long-term reform of the regulatory and economic environment. (44)

37. It was stated that there appeared to be a view that, since investment incentives were second-best solutions, they should either be eliminated or be disciplined. However, the granting of incentives did not mean that there was no recognition of the need to address underlying distortions through the adoption of other policies. Rather, incentives were an important additional tool, together with other polices aimed at addressing distortions, and they played an essential role in economic development.(45)

38. The point was made that the divergent views of Members on investment incentives illustrated why Members were not yet ready to initiate negotiations on multilateral investment rules in the WTO. If investment incentives were as distortive as had been argued by some Members, it was difficult to understand that their use was widespread among developed countries. Mention was made of the positive experience of one Member with the use of investment incentives, for example to promote export diversification.(46)

39. In response to this observation, it was stated that the widespread use of investment incentives, including by developed countries, did not mean that there was no need to consider possible disciplines. A key argument which had motivated the creation of multilateral rules on subsidies in the area of trade in goods was that developed countries with deep pockets had a greater capacity to grant subsidies than developing countries. The same argument was valid with respect to investment incentives.(47) It was also stated that the granting of investment incentives amounted to a transfer of money from the domestic tax payers to a foreign investor, which was especially unfair from the perspective of developing countries in which the tax base was often quite limited. It was likely that in many cases decisions were made to invest in developed countries because investors received more generous incentives than in developing countries. It was suggested that the Secretariat attempt to make a comparison between OECD and non-OECD countries with respect to their aggregate expenditures on incentives.(48)

40. The view was expressed that, instead of focusing on whether incentives were good or bad, the first question to be asked was why both developing and developed countries granted investment incentives. While it was understandable that developing countries sometimes needed to use investment incentives, it was more difficult to understand why developed countries used incentives, in particular in light of the fact that these countries generally took the view that market forces should determine the allocation of resources.(49)

41. The need for further work aimed at distinguishing between various kinds of investment incentives was emphasized. A specific proposal was made that the Secretariat undertake a study which would differentiate between various kinds of investment incentives, their effects, and the possible disciplines that could apply to specific kinds of incentives.[(50)] It was suggested that a possible classification of investment incentives might contain four categories: (1) financial incentives; (2) fiscal incentives; (3) subsidized services; and (4) market privileges.[(51)] The need to take into account incentives granted at different levels of government was also mentioned.[(52)]

42. Regarding the proposal for a study of different types of investment incentives, the comment was made that the Working Group also needed to pay more attention to the distorting impact of various kinds of trade policy measures on investment flows, such as rules of origin in regional trade agreements. The question of investment incentives should be considered within a broader conceptual framework which encompassed a range of factors affecting locational decisions. In this respect, reference was made to the concept of "investment-related trade measures," which was the subject of a recent UNCTAD publication.[(53)]

43. The view was expressed that there was a need to explore the possibility of multilateral disciplines with respect to investment incentives. Such disciplines should not provide for a prohibition of incentives but strike a balance between the recognition of important policy objectives served by incentives and the need to minimize their distorting effects on investment flows. In this respect, the proposal was made that the Working Group explore the possibility of classifying incentives into allowable and prohibited incentives. In regard to the notion that different disciplines for different kinds of incentives might be warranted, depending upon their distorting effects, the Agreement on Subsidies and Countervailing Measures was mentioned as an example. It was also argued that consideration of possible multilateral disciplines on incentives should be inspired by the fundamental WTO principles of non-discrimination and transparency.[(54)]

44. The suggestion that the Working Group attempt to distinguish between allowable and prohibited incentives was opposed on the grounds that it would create difficulties in regard to the distinction already contained in the SCM Agreement between allowable and prohibited subsidies, that it was incompatible with the educational nature of the mandate of the Working Group, and that it was inappropriate in light of the sensitivity of the subject. A further observation made in this connection was that, while the developed countries provided very substantial up-front grants to firms, developing countries, which did not have the financial resources to provide such grants, usually granted performance-based incentives. A comprehensive consideration of this subject should therefore include the grants offered by developed countries.[(55)]

45. In reaction to these objections, it was stated that the proposal to attempt to distinguish between allowable and prohibited incentives was not limited in scope to certain kinds of incentives but was intended to address all forms of incentives comprehensively. The point was made that the term incentives should be understood to cover any actions by governments which provided a financial advantage to a recipient. In this sense, the concept of incentives was similar to the notion of subsidy as defined in the SCM Agreement. If the term incentives was interpreted in this manner, it was self-evident that grants were included and that there was no basis for distinguishing between fiscal incentives and other kinds of incentives. It was also observed that an attempt to distinguish at a conceptual level between desirable and undesirable incentives could further the Group's understanding of this subject and was therefore not incompatible with the educational character of the Group's work.[(56)]

46. The point was made that the Working Group should adopt a more differentiated approach not only with respect to incentives but also with respect to performance requirements.[(57)]

47. With respect to the indent of this Item of the Checklist concerning the degree of correlation between trade and investment flows, attention was drawn to a recent OECD study on the relationship between trade and investment which had found, on the basis of an examination of data on 14 OECD member countries, overwhelming evidence that FDI tended to be complementary to trade. Intra-firm trade was a central element of this complementary

relationship. For host countries, the immediate result of FDI was an increase in imports but in the medium-term their export capacity increased due to the inflow of capital and productive assets and the positive spillovers with respect to technology and management. The study therefore found that countries which were both substantial outward and inward investors stood to gain in trade terms from both outward and inward FDI.(58)

48. The comment was made that the findings in this OECD study appeared to differ somewhat from the conclusions drawn in the Note by the Secretariat on the relationship between trade and FDI (W/7), which had found that in some instances there was substitution between trade and investment.(59)

49. Regarding the indent of this Item of the Checklist concerning the relationship between investment and competition policy, the view was expressed that a competition-oriented reform of WTO rules with a view to increasing the synergies between trade, competition and investment policies was essential to ensure that WTO rules remained valid and credible in a technology-driven globalized economy. In this connection it was proposed that , in order to ensure that trade policy and investment policy were mutually reinforcing, these policies should be reviewed in light of the competition policy concept of market contestability. Examples of measures which required attention from this perspective were performance requirements, investment incentives, the abuse of anti-duping practices and the use of restrictive rules of origin.(60)

III. EXISTING INTERNATIONAL INSTRUMENTS AND ACTIVITIES REGARDING TRADE AND INVESTMENT

50. A written contribution was provided by India (W/71). Oral statements were made by India, the European Communities, the United States, Egypt, Japan, Pakistan, Korea, Venezuela, Brazil, Hong Kong, China, and the observers for UNCTAD and the OECD.

(a) WTO provisions on matters related to investment

51. The view was expressed that existing WTO provisions relevant to investment, as contained in the TRIMs Agreement, the GATS and the SCM Agreement, were limited in scope and lacked coherence.(61) The different treatment of investment in services and in manufacturing was highlighted in this respect. It was suggested that, in considering possible future WTO rules on investment, account should be taken of approaches reflected in existing WTO rules, such as the "positive list" approach and the concept of a progressive development of rules under the GATS.(62)

52. Specific suggestions were made regarding themes meriting consideration in the Working Group with respect to the TRIMs Agreement and the GATS.

53. With regard to the TRIMs Agreement, it was proposed that the Working Group study whether and how the review of this Agreement provided for in Article 9 thereof might contribute to achieving investment liberalization in a multilateral context. In this connection, it was proposed that the Working Group consider proposals which had been made to prohibit certain performance requirements, such as joint venture, local ownership and technology transfer requirements, and that the Working Group examine possible improvements to the TRIMs Agreement with respect to investment incentives. The point was made that, while it was unrealistic to call for the prohibition of all investment incentives in the WTO at this stage, there was merit in exploring ways to discourage Members from engaging in unhealthy competition for investment and to minimize the distortive effects of investment incentives.(63)

54. With regard to the GATS, it was proposed that the Working Group consider the feasibility of expanding the scope of the GATS to encompass provisions on investment protection and to cover all forms of FDI. Reference was made in this regard to the negotiations foreseen in Article XIX of the GATS.(64)

55. With respect to the suggestion that the Working Group consider proposals to proscribe certain performance requirements, including transfer of technology requirements, the observation was made that there was an inconsistency between the view that an investment agreement should be promoted on the grounds that FDI brought in technology to the host country, and the view that host countries should be denied the ability to require investors to transfer technology.(65) While FDI might entail a transfer of technology from a parent to its foreign affiliate, this did not necessarily lead to diffusion of such technology to the host economy more generally.(66)

56. A different view was that there was no inconsistency between the view that FDI brought technology to a host country and the view that foreign investors should not be forced to transfer technology. Rather, the real inconsistency was between the claim that forced technology transfer helped the development process and the evidence which showed that, when forced to bring in a particular type of technology, investors would either not enter a market at all or bring in less advanced technology.(67)

57. However, the view that firms would react to transfer of technology requirements by not entering the market at all or by bringing in a lower level of technology was said to be contradicted by one Member's experience which showed that firms used a certain level of technology in their global operations and found it costly to use an inferior type of technology for the purpose of investing in a particular country. The concept of a "forced" transfer of technology was questioned on the grounds that in practice host countries encouraged the transfer of technology through a variety of incentives rather than through compulsory measures.(68)

58. It was stated that, if the effect of performance requirements was that investors would bring in less advanced technology, this would be a compelling argument against the use of such requirements. However, if, as had been argued, firms would bring in the most advanced technology anyway, the question arose as to why performance requirements were necessary.(69) The observation was also made that the effect of a technology transfer requirement on the level of technology used by a foreign investor depended on many circumstances, including the nature of the industry.(70)

59. The suggestion that the Working Group study the issue of the review of the TRIMs Agreement under Article 9 attracted some support,(71) but it was also observed that, though the Working Group could discuss substantive issues which might also be raised in the context of the review under Article 9, the formal competence to conduct this review rested with the Council for Trade in Goods.(72) The point was made that the express reference made to the review of the TRIMs Agreement in the decision establishing this Working Group served to highlight the interface between the work of the Working Group and the review of the TRIMs Agreement and underlined the need for consistency in this regard.(73)

60. Scepticism was expressed as to the possibility of extending the GATS to all forms of FDI in view of the fact that the structure and obligations of the GATS specifically related to services.(74)

(b) Bilateral, regional, plurilateral and multilateral agreements and initiatives; implications for trade and investment flows of existing international instruments

61. In a statement on one Member's experience with bilateral investment treaties the main features of such treaties were described, including provisions on the definition of investment, the scope of the agreements, Most-Favoured-Nation treatment and national treatment, expropriation, compensation and repatriation, dispute settlement and the duration and termination of the agreements. The point was made that bilateral investment treaties had found favour with developing countries because they did not restrict the ability of host countries to follow their own FDI policies in light of their unique needs and circumstances. Under these treaties, developing countries had the freedom to grant national treatment only in the post-establishment phase, subject to such qualifications as they deemed necessary.(75)

62. In respect of the latter observation, the question was raised as to what kind of qualifications to national treatment this Member considered useful, and what was the relationship between this Member's bilateral investment treaties and the Most-Favoured-Nation principle.[(76)] In response, it was stated that the Member in question had consistently taken the position that it was not possible for developing countries to accord a right of establishment or national treatment in the pre-establishment phase and that the entry of foreign investment needed to be regulated. The bilateral investment treaties concluded by this Member accorded national treatment and MFN treatment once investments had been admitted in accordance with the applicable policy framework. Bilateral investment treaties provided protection of foreign investment and did not deal with market access issues. By contrast, the current discussion in this Working Group centred on the need and desirability of a possible multilateral framework, the main focus of which was market access. Because of this qualitative difference between bilateral investment treaties and the proposed multilateral rules on investment, the argument that multilateral rules were more efficient because they would obviate the need for concluding a large number of bilateral treaties was without merit.[(77)]

63. In a comment on these observations, it was stated that market access was only one of a number of issues that had been discussed in the Working Group, along with investment protection and development.[(78)]

64. It was noted that in the description of this Member's bilateral investment treaties it was stated that foreign investments were accorded the same treatment as domestic investments in the post-establishment phase, but that such national treatment was not accorded to foreign investors. An explanation was requested of the rationale for this distinction between foreign *investments* and foreign *investors* and of how this distinction operated in practice. The question was also raised as to whether the provisions in these bilateral investment treaties on repatriation facilities also covered payments, such as interest payments and payments for goods, and whether these treaties contained a structure for exceptions.[(79)]

65. The view was expressed that not enough attention had been paid so far to the concrete implications of principles such as national treatment and MFN treatment.[(80)]

66. The Working Group was informed of relevant recent activities of UNCTAD and the OECD.

67. With respect to UNCTAD, information was provided on meetings organized by UNCTAD with representatives of civil society which were aimed at providing a forum for public-private sector dialogue on issues related to international investment agreements; a seminar organized at the request of the Group of 15 at which a number of bilateral investment treaties had been concluded between G-15 countries; regional symposia in Egypt, Argentina and the People's Republic of China on key concepts and issues relevant to international investment agreements; a joint WTO-UNCTAD seminar on trade, investment and development for Geneva-based delegates; an Expert Meeting on the question of how international investment agreements could provide for flexibility in the interest of promoting growth and development; and the publication of a new series of Issues Papers on concepts and issues relevant to international investment agreements.[(81)]

68. With respect to the OECD, the Working Group was informed that negotiations on a Multilateral Agreement on Investment ("MAI") were no longer taking place and that further work in the OECD on investment rules would be of an analytical nature. To this end, the OECD Committee on International Investment and Multinational Enterprises had recently adopted a new work programme on international investment which envisaged analytical work on five specific issues: (1) analysis of OECD member countries' investment rules, including the definition of investment in relation to issues raised by financial crises; (2) non-discrimination and social policies; (3) non-discrimination and environmental policies; (4) non-discrimination, investment protection and national sovereignty; and (5) investment incentives and investment promotion. The aim was to complete this work programme by Spring 2000. OECD member countries were also undertaking the first review of the OECD Guidelines for Multinational Enterprises since 1991 as part of the normal follow-up process to ensure that the Guidelines were effective and that necessary changes were made to ensure their continued relevance. The current review would address both the implementation procedures and the

substantive provisions of the Guidelines. The main issues in the review were the territorial scope of the Guidelines, i.e. the question as to whether the Guidelines should apply to the global operations of OECD-based multinational enterprises or only to their operations in OECD countries; the possible need to update the Guidelines in certain areas, notably labour and the environment; and ways and means to strengthen the procedures for implementation of the Guidelines, especially with regard to the role of national contact points. A special working group had been established for the purpose of considering the suggestions that had been made concerning possible changes to the scope of application, substantive provisions and implementation procedures of the Guidelines. In connection with this review, there had also been a meeting with representatives of civil society.[82]

69. It was observed that the fact that the further work envisaged in the OECD on international investment rules was of an exploratory and analytical nature underlined the need to proceed with caution in this area. It was proposed that, in order that the Working Group might benefit from the experience gained by OECD member countries in the MAI negotiations, the Secretariat prepare a factual account of the difficulties that had been encountered in these negotiations and of the positions that had been taken on these issues.[83]

IV. ITEM IV OF THE CHECKLIST OF ISSUES SUGGESTED FOR STUDY

70. Written contributions were provided by India (W/74), Japan (W/75), Korea (W/70 and 79), Australia (W/80), and the European Community and member States (W/81). Oral statements were made by India, Japan, Korea, Costa Rica, the European Communities, Egypt, Argentina, Canada, Chile, the Philippines on behalf of ASEAN WTO Members, the United States, Brazil, Venezuela, Malaysia, India, Mexico, Singapore, Australia, Hong Kong, China, and the observer for UNCTAD. A note was submitted by the Secretariat on issues raised and views expressed in the discussions in the Working Group on the definition of the term investment in international investment agreements (W/76). Written contributions were provided by UNCTAD on the issue of how international investment agreements can provide for flexibility in the interest of promoting growth and development (W/77 and 78).

71. Referring to a contribution made by a Member, a statement was made which identified certain themes which needed to be taken into account by the Working Group in its consideration of this Item. First, the fundamental factors explaining decisions of multinational enterprises to invest in developing countries were availability of natural resources, market size, and the existence of a suitable platform for exports. The strength of local institutions, the quality of local infrastructure and of the work force and the degree of macro-economic stability also played a role. Second, certain possible negative effects of FDI needed to be addressed, including restrictions on the transfer of technology, the negative impact of FDI on the balance of payments and exchange rates, and the crowding out of domestic entrepreneurial activity. A number of studies had pointed out that countries at low levels of development were likely to be able to induce FDI only to low technology activities. Third, the situation of developing countries as net importers of capital and technology and the competitive gap which existed between their enterprises and multinational enterprises should be acknowledged. The experience of developing countries showed that the building-up of domestic entrepreneurial, industrial and technological capabilities was essential not only to cope with, but also to realize the full benefits from FDI and foreign technology. Fourth, capital and labour were complementary factors of production which needed to be studied together. Fifth, the issue of obligations of foreign investors should be dealt with, in which connection account should be taken of relevant OECD and UN instruments. Finally, the development dimension should be placed at the centre of the work of the Group.[84]

72. In regard to a contribution on the role of international investment rules in ensuring stability and transparency of the legal systems and policies of host countries, the point was made that lack of such stability and transparency reduced the ability of foreign investors to develop their business operations based on long-term plans, increased the costs of their investments, and distorted the conditions of competition in favour of domestic firms. Enhancing stability and transparency would not only remove these problems faced by foreign investors, but would also benefit local firms and would contribute overall to the development of host countries. Based on existing international agreements, certain provisions which were essential to enhancing transparency and stability of investment laws and regulations

could be identified, including rules on the publication of laws and regulations and on the availability of enquiry points, due process requirements with regard to authorization and licensing procedures, non-discrimination requirements, standstill requirements, and dispute settlement procedures. Since rules designed to enhance transparency and stability could entail administrative costs for host countries and might deprive them of some of their policy tools which provided necessary protection to their domestic industries, developing countries needed to be given sufficient time for the implementation of such rules.(85)

73. The view was expressed that it was doubtful that the alleged problems of lack of stability and transparency described in the above-mentioned contribution warranted the creation of multilateral rules on investment. In this respect, it was argued that in an era of globalization it was in each country's self interest to improve its domestic regulatory framework in order to compete successfully for FDI. The point was also made that the contribution did not offer a sufficiently detailed description of these problems to make it possible to determine how prevalent they were in practice. It was possible that these problems were due to practices of the enterprises concerned, and that they might be addressed more effectively through appropriate representation with individual governments of host countries, including in the context of bilateral investment treaties. A further observation made in this connection was that multilateral rules might compound problems arising in connection with FDI by overly emphasizing the protection of foreign investment, and that such rules, if necessary, should address in a balanced manner the diverse and evolving interests of all countries. Any consideration of benefits of multilateral investment rules could not be confined to the benefits of such rules for home countries and foreign investors, but should also address the question of whether multilateral rules would translate into more investment flows and consequent net benefits for host countries. Related to this, it was stated that the multilateral rules on investment advocated in this contribution lacked a development dimension. This development dimension should find concrete expression in specific substantive aspects of investment rules, notably with respect to the discretion of host-country governments with regard to the establishment of foreign investment, their ability to use policy instruments to pursue legitimate sectoral, locational and development objectives, and provisions on the transfer of technology. Consequently, an approach to the development dimension which only centred on extended timeframes for implementation was inadequate.(86)

74. With respect to another contribution on the role multilateral rules on investment in enhancing transparency and stability of the legal environment for FDI, the point was made that, unlike bilateral investment treaties, which had not been effective in addressing the issue of transparency, multilateral rules could establish a set of common standards regarding the transparency of foreign investment regimes. The very process of participating in the negotiation of such rules could improve the transparency of a country's regulatory framework for foreign investment in that it necessitated a comprehensive review of a country's laws and regulations affecting foreign investment. Multilateral investment rules should provide for technical assistance to aid developing countries to establish a comprehensive, yet focused list of all regulations and rules governing foreign investment. Transparency provisions as a core component of a multilateral investment treaty would serve as a valuable reference for countries desiring to enhance the overall level of transparency of their investment regime.(87)

75. With respect to concerns which had been raised on previous occasions about the possible negative effects of FDI, the implications of multilateral rules on investment for policy autonomy and the uncertainty as to whether such rules on investment would actually lead to increased investment flows which would benefit host countries, the view was expressed that these concerns were legitimate, but that they did not provide a compelling argument against the benefits of multilateral rules on investment. It was stated in this connection that no convincing arguments had been presented so far regarding any real costs of a multilateral framework on investment and that it was important to make a distinction between the issue of possible negative effects of FDI, on the one hand, and the issue of possible costs of multilateral rules on investment, on the other. However, the issues raised in the Working Group regarding the need to view the implications of foreign investment in light of the particular development needs and polices of individual countries merited further consideration. A basic consideration regarding the desirability of multilateral rules on investment was that, by enhancing transparency and predictability, such rules would contribute to creating increased opportunities for foreign investment and thus contribute to economic growth and development. In order to strike a balance between the interests of capital exporting and capital importing countries, multilateral investment rules

should be investor-friendly, provide a sufficient degree of freedom and flexibility for host countries, and should address the issue of obligations of investors.(88)

76. In other comments on the advantages of multilateral rules on investment, it was stated that, in comparison with existing international arrangements on investment, multilateral rules would be more efficient, stable and predictable and easier to comply with for investors; they would ensure greater consistency between trade and investment disciplines and would enshrine the principle of non-discrimination in international investment relations. The point was also made that multilateral rules on investment negotiated among countries at different levels of development would necessarily take into account developmental aspects, and that such rules would entail a limitation of regulatory sovereignty of countries only to the extent that this was acceptable to all participants in such a negotiation. It was observed that, while multilateral rules on investment were necessary to address certain deficiencies in the existing framework of bilateral and regional investment arrangements, multilateral rules would not supplant bilateral and regional arrangements but would be complementary to such arrangements.(89)

77. The view was also expressed that the arguments advanced in favour of multilateral rules on investment did not contribute anything new to the debate and were too general in nature to be convincing. A more concrete identification of costs and benefits of such rules was necessary by focusing upon the precise contents of such rules. In this respect, it was argued that, in view of the nature of the rules being proposed the benefits seemed to be outweighed by the costs. A first category of costs pertained to the loss of policy autonomy of developing countries to pursue their development policies as a result of, for example, obligations with respect to incentives and performance requirements. A second category pertained to the possibility that such rules would unduly favour multinational enterprises in their relationship with host countries.(90)

78. In respect of the point made regarding the general character of arguments in favour of multilateral investment rules, it was suggested that it would be useful for the Working Group to examine how existing investment agreements addressed certain matters.(91)

79. Views were expressed on the implications of the failure of the MAI negotiations for the consideration of the possible creation of multilateral rules on investment in the WTO. It was argued that the Working Group should devote more time to a concrete examination of advantages and disadvantages of multilateral rules on investment in the WTO, and that a useful starting point in this respect might be to ask the question of what lessons could be learnt from the failure of the MAI negotiations.(92) It was also observed, however, that investment negotiations in the WTO should be guided by the WTO's own principles, philosophy and practice, and there was therefore no need to seek guidance from the experience of OECD member countries with the MAI negotiations.(93) The view was expressed that, in light of the recent experience with the MAI negotiations, work in the WTO should take a more incremental approach. In this regard, certain issues were identified which merited further attention, namely, whether the core obligations of a multilateral framework on investment would include only MFN and national treatment or whether it should also include standards for the protection of investment; whether provisions should be included on incentives and performance requirements; whether the existing dispute settlement mechanism of the WTO could apply to disputes arising under a multilateral investment framework; whether private investors should have standing under the dispute settlement procedures in a multilateral framework; and how exceptions should be treated, in particular whether a "positive list" or "negative list" approach should be followed.(94) In connection with a proposal regarding key elements of a multilateral framework of rules on investment in the WTO, the point was made that, since the overall balance of interests among Members was at the heart of all negotiations in the WTO, the feasibility of a multilateral framework on investment in the WTO would largely depend on whether and how the different realities faced by each Member could be reflected in an overall balance of concessions. A multilateral framework on investment in the WTO should therefore be different from the MAI, the standards of which were unrealistically high and had failed to secure broad-based participation.(95)

80. It was observed that, while the possibility of multilateral negotiations on investment should be considered, there were other possible avenues to promote investment liberalization and protection in a multilateral setting, for example in the context of the TRIMs Agreement and the GATS.(96)

81. In regard to a contribution which contained a proposal on the main elements of a possible multilateral framework on investment in the WTO, the point was made that the differing views expressed in the Working Group on the desirability of multilateral rules on investment could be seen as representing two different schools of thought on FDI: a "globalization" school and an "internalisation", school and that in order to reach agreement on multilateral rules on investment in the WTO, the objectives of these different schools of thought needed to be reconciled. This meant that an equilibrium had to be reached between, on the one hand, the objective of enhancing global welfare through freer flows of investment and, on the other, the need to respect the right of sovereign countries to formulate their own policies, in particular with respect to economic development. In relation to investment protection, the level of protection in a multilateral framework should be set at the medium rather than the highest level and should be aimed at achieving an optimal standard of protection that was reasonably high, based on a consensus among all participants. With respect to investment liberalization, the "bottom-up" approach adopted by the GATS, as opposed to the "top-down" approach envisaged in the MAI negotiations, should be favoured. While these two basic concepts might need to be developed further, they could offer ways to devise a multilateral framework on investment which reconciled the need for policy flexibility with the need to enhance transparency and predictability.(97)

82. The discussion of this proposal can be briefly summarized by the following key points. First, the comment was made that the proposal was an important contribution which helped focus the work of the Working Group by offering concrete suggestions with regard to specific elements of a possible multilateral framework of rules on investment in the WTO.(98) However, it was also argued that the proposal did not address the key question of why multilateral rules on investment were necessary and why the WTO was seen as the forum for the negotiation of such rules.(99) Second, it was argued that the categorization of countries with differing positions on the desirability of multilateral investment rules into a globalization school and an internalisation school was too simplistic, and that the pursuit of policies aimed at benefiting from closer integration into the global economy was not incompatible with a belief in the need for government intervention and with a sceptical attitude toward the need for multilateral investment rules.(100) With respect to this point, it was also stated that, since most countries were somewhere in between the extremes of the globalization school and the internalisation school, it was possible to envisage a reconciliation of these different perspectives through a cautious approach to the negotiation of multilateral rules on investment.(101) Third, differing views were expressed on the merits of the proposed method of achieving investment liberalization in a progressive manner through a "positive list" approach.(102) Fourth, it was pointed out that greater precision was necessary with respect to the meaning of certain concepts used in this proposal, for example the concept of "a reasonably high standard of protection."(103) Fifth, the point was made that further consideration was necessary of developmental aspects and of investment promotion.(104) Finally, concern was expressed regarding the suggestion made in this proposal that account should be taken of industries with special characteristics.(105)

83. In connection with the discussion on this proposal, the point was also made that, if some countries belonged to a special multilateral agreement on investment and others did not, countries which were parties to that particular agreement were in a better position to attract FDI. However, if all countries were parties to a multilateral agreement on investment, it was difficult to see how adherence to such rules ensured that individual countries had a better chance of attracting FDI.(106)

84. In response to this observation, it was argued that multilateral rules on investment would contribute to an efficient allocation of resources by enhancing transparency and predictability for FDI; that such rules would prevent a country's ability to attract FDI from being negated by distorting practices of other countries, such as incentives and performance requirements; and that the alternative to a common set of multilateral rules was the current patchwork of separate arrangements which created confusion and lack of transparency. The point was made that there could be no guarantee that common investment rules would by themselves result in increased investment flows, but that the

experience with the multilateral trading system suggested that by improving investment opportunities such rules would impact positively on the level of international investment. It was also observed that the existence of a set of common, multilateral rules would not necessarily mean that countries would behave identically as there would be ample room for individual countries to enhance their attractiveness to FDI, for example by improving the quality of their infrastructure and human resources.(107)

85. However, scepticism was voiced with regard to these arguments in favour of multilateral investment rules. It was argued that the need to address distorting practices, such as performance requirements and incentives, did not constitute a convincing reason for the negotiation of multilateral investment rules. Thus, it was stated that one Member's experience demonstrated that its difficulties in attracting FDI were due to internal factors rather than to distorting practices of other countries and could be resolved only through domestic policy measures. Likewise, the idea that the existence of a multitude of investment agreement resulted in confusion and lack of transparency and thus warranted the establishment of a multilateral framework of rules on investment was contested. Attention was also drawn to the limited relevance of investment agreements as a determinant of investment decisions. Finally, it was argued that in reality the main objective of proposals for the creation of multilateral investment rules was to secure market access for foreign investment, and that in this regard such rules would entail significant costs for host countries in terms of reduced policy flexibility.(108)

86. A proposal was made on the use of the WTO dispute settlement mechanism in a possible multilateral framework on investment in the WTO. The point was made that, since the essential function of dispute settlement was to eliminate or modify measures found to be inconsistent with an agreed set of rules, the WTO dispute settlement system could be applied to investment disputes without the need to make major adjustments. An important question was whether the WTO provisions on compensation and suspension of concessions should be applied to investment disputes. In this regard, it was notable that these provisions were already applicable to investment-related disputes that might arise under the GATS and the TRIMs Agreement. Another question requiring attention was the relationship between the application of WTO dispute settlement procedures to investment and the application of dispute settlement provisions contained in the numerous existing bilateral and regional investment agreements. Since the WTO mechanism was more efficient, it appeared preferable to use the WTO procedures, but this should not preclude recourse to provisions of bilateral or regional investment agreements if the parties to a dispute so decided. In any case, the coexistence of various dispute settlement procedures was not unique to investment but also occurred in the field of trade. For example, regional trade agreements often contained their own dispute settlement procedures. The availability of various dispute settlement mechanisms in the area of trade did not appear to have caused serious problems. Indeed, the coexistence of dispute settlement procedures in different agreements could enhance the complementarity of such procedures. However, it might be necessary to design specific rules to avoid inefficiency and duplication.(109)

87. The Working Group continued its discussion on the definition of the term "investment" in international investment agreements. In this connection, differing views continued to be expressed on the merits of a definition confined to foreign *direct* investment as compared with a broader, asset-based definition.

88. One view was that the Working Group should limit its work to FDI and should use the IMF's definition of FDI, as described in document W/61. Mention was made of the possible negative consequences of the volatility of portfolio investment. It was suggested in this regard that the precise coverage of different components of the IMF definition needed to be better understood, and that the benefits of FDI in relation to each of these components required further study.(110)

89. The desirability and feasibility of limiting the definition of investment to FDI was questioned. First, a definition of investment only in terms of direct investment would be incompatible with the basic objective of international investment rules to provide protection of investment. In this regard, it was stated that an investment usually consisted of a complex of different properties that were difficult to separate; that bilateral investment treaties for the protection

of foreign investment typically adopted broad definitions of investment; that, in view of the economic benefits deriving from both direct and indirect investment, a distinction in the treatment of foreign investors depending upon whether their shareholdings constituted direct or indirect investment was difficult to justify; that, as a practical matter, any attempt to draw a clear line between direct and indirect investment would raise very complex issues because of the difficulty of defining when a particular investor held a controlling interest in an enterprise; and that the distinction between investment and speculative capital movements was more pertinent than the distinction between FDI and portfolio investment. Second, it was argued that concerns regarding the implications of including non-FDI forms of investment and speculative capital movements should be dealt with through appropriate qualifications to substantive obligations rather than through limitations of the definition of investment. Specifically, the definition of investment should be considered in conjunction with provisions on the movement of capital. Reference was made in this respect to provisions in most investment agreements on transfers of funds, which could be formulated to allow for a certain policy flexibility by permitting certain restrictions on transfers, for example for macro-economic reasons or for the stability of the financial system.(111)

90. The need to view the definition of investment in relation to the scope and objectives of an agreement was stressed by some of the Members. In this connection, interest was expressed in exploring the possibility of applying different definitions for purposes of different obligations. In particular, it was suggested that a distinction might be warranted between a broad, asset-based definition for purposes of obligations relating to the treatment of investment in the post-establishment phase and a narrow definition, limited to FDI, for purposes of the treatment of investment in the pre-establishment phase.(112)

91. The point was made that a broad definition of investment raised several questions that required careful consideration: first, whether it was feasible and practical to apply the same set of international investment rules to different categories of investment, for example, direct investment, portfolio investment and intangible assets; second, whether the use of a broad definition might have unintended consequences in terms of the scope of application of substantive rules; third, whether it was fair and desirable to give the same level of protection to short-term and long-term investors; and, fourth, whether a broad definition could adequately take care of the development needs of all Members.(113)

92. It was suggested that the Working Group study the implications of electronic commerce for the treatment of commercial presence in the context of investment agreements.(114)

93. The Working Group considered the development dimension of international investment agreements. It had before it communications from UNCTAD on the question of how international investment agreements could provide for flexibility in the interest of promoting growth and development.

94. The point was made by the observer for UNCTAD that the ultimate objective of international investment agreements was to promote growth and development, and that a stable, transparent and predictable framework for investment could help attract foreign investment by providing security for such investment. A basic challenge in the design of international investment agreements was how to find a proper balance between the need to provide security for foreign investment and the need to provide for the flexibility necessary for developing countries to pursue development policies in light of their specific circumstances. This flexibility should not be used as a justification for unnecessarily restrictive policies. Recent work in UNCTAD was aimed at identifying the means by which international investment agreements could provide for such flexibility. A background Note by the UNCTAD Secretariat, which had been made available to the Working Group, contained a detailed analysis of how flexibility for development purposes was reflected in the objectives, substantive provisions, implementation and structure of existing international investment agreements. The Agreed Conclusions adopted at the UNCTAD Expert Meeting at which this Note had been discussed provided that UNCTAD would continue its work on this matter.(115)

95. The view was expressed that by providing for security for foreign investment, international investment promoted investment and thus contributed to economic growth and development, but that such agreements should also contain flexibility to reflect the differing levels of development of countries.[116] The need for a proper balance between such flexibility for development purposes and the role of investment agreements in securing stability and predictability of the conditions for foreign investment was emphasized.[117] The point was made that the development dimension should be taken into account as an integral part of the design and structure of investment agreements, in which connection the example was mentioned of the structure of the GATS which allowed Members to make commitments commensurate with their levels of development.[118]

96. It was stated that, while countries wished to retain a large degree of flexibility with respect to the issue of the entry of foreign investment, at the post-establishment stage bilateral investment treaties usually provided for national treatment for foreign investment. This suggested that most countries did not consider that discriminatory treatment of foreign investment in the post-establishment stage was necessary for development purposes.[119] In this connection, the point was made that existing international investment agreements showed that there were various possible approaches to provide a degree of flexibility in relation to obligations with respect to the entry of foreign investment.[120] Attention was also drawn to other aspects of the development dimension which needed to be addressed in investment agreements, such as the problem of lack of human resources necessary to implement an agreement.[121]

97. It was argued that the issue of flexibility for development purposes should not only be considered in relation to the objectives, substantive provisions, implementation and structure of an agreement, but also in respect of the particular institutional framework in which an agreement was concluded. In this respect, the question was raised whether, in view of the nature of obligations undertaken in the WTO, an optimal balance between flexibility for development purposes and predictability for investment could be achieved in a negotiation of investment rules in the WTO.[122]

98. The point was made that a careful definition of the notion of flexibility was necessary not only to avoid the risk that this concept would undermine the fundamental objective of an investment agreement but also to ensure that it would not be used to justify policies which were inefficient and which, in a context of competition between countries to attract foreign investment, could have adverse consequences for other countries. The example of fiscal incentives was mentioned in this respect.[123]

99. It was stated by some Members that it would appear that a common assumption in recent UNCTAD papers was that government intervention in investment would assist or enhance the development process. They pointed out that this assumption was in contradiction with empirical evidence which showed that development was sometimes better promoted by deregulation than by regulation.[124]

100. The Working Group received a contribution by one Member on the issue of investors' responsibilities. This contribution contained an overview of relevant international instruments containing norms for the conduct of foreign investors and of corporate codes of conduct. It identified certain questions for further consideration regarding the impact of these international instruments and corporate codes, the relative merits of guidelines adopted in the framework of international organizations, as compared with corporate codes of conduct, the role of governments in the further development of norms for corporate conduct, and the relationship between instruments dealing with corporate responsibility and existing or future rules on investment. In the latter regard, it was emphasized that this contribution was not intended to suggest that the issue of investors' responsibilities should necessarily be dealt with in the WTO.[125] Related to this, the point was made that foreign investment was a complex, multifaceted matter which needed to be addressed in different fora and through different instruments.[126]

101. It was stated that the need to strike a balance between rights and responsibilities of foreign investors had been recognized in the OECD Guidelines for Multinational Enterprises, the negotiations on a draft United Nations Code of Conduct for Transnational Corporations and in the linkage established in the TRIMs Agreement between investment policy and competition policy as subjects for future consideration in the WTO.[127] Recent investment negotiations

had given rise to renewed interest in this matter among OECD member countries.[(128)] In this regard, the point was made that the Working Group could benefit from the work under way in the OECD in the context of the review of the OECD Guidelines for Multinational Enterprises.[(129)]

102. The view was expressed that, while in the context of investment the obligations of foreign investors were commonly understood to relate to issues such as restrictive business practices, transfer pricing and the transfer of technology, the international instruments and corporate codes of conduct discussed in this contribution also dealt with social and human rights issues that were not within the mandate of the Working Group and were not relevant to the WTO.[(130)] In response to this observation, it was stated that the aim of this contribution was to provide factual information on the wide range of aspects of corporate behaviour covered by existing instruments without implying that these matters should be taken up in the WTO. It was also observed that the instruments described in the contribution contained norms for the conduct of enterprises, not governments.[(131)]

103. The point was made that international agreements should strike a balance rights and obligations of foreign investors and that the statement made in this contribution that international agreements cannot impose direct obligations on citizens or companies was too sweeping.[(132)] In response to these comments, it was stated that the contribution focused on the balance between the rights of investors and the right of host countries to regulate economic activities in their territories because the responsibilities of investors were primarily, if not exclusively a mater for domestic law and the role of international instruments and guidelines on corporate responsibility was to facilitate the implementation of domestic laws. In addition, it was difficult to see how the concept of a balance between rights and obligations of foreign investors could in practice be translated into international rules. Thus, the approach that had evolved over the years was to rely on instruments of a voluntary nature which were complementary to the basic obligation of firms to respect the rules and regulations of host countries.[(133)]

104. The question was raised whether the voluntary character of the international instruments and guidelines discussed in this contribution had affected their implementation.[(134)] It was stated that a key question was whether existing instruments and guidelines had actually resulted in changes in the behaviour of multinational enterprises in areas of interest to developing countries, such as competition and the transfer of technology.[(135)] The point was also made that there did not appear to be an effective mechanism for the monitoring of the implementation of these instruments and guidelines.[(136)] It was observed that because of the lack of objective and verifiable data and of effective monitoring mechanisms it was difficult to determine whether or not the behaviour of multinational enterprises had improved as a result of guidelines for corporate conduct.[(137)]

105. It was argued that the issue of investors' responsibilities was an important theme for consideration with respect to a possible multilateral framework on investment, particularly as regards the development dimension of such a framework. Provisions contained in the OECD Guidelines for Multinational Enterprises on competition and on the role of foreign investors in the technological development of host countries were particularly relevant in this regard.[(138)]

106. Interest was expressed in more detailed information and further discussion on certain instruments and initiatives mentioned in the contribution.[(139)] In particular, it was proposed that there be a discussion of the reasons of the failure of certain attempts to establish international norms for corporate conduct, notably the draft United Nations Code of Conduct for Transnational Corporations.[(140)]

107. The view was expressed that the existing approach to corporate responsibility based on voluntary commitments by investors had worked well and that there was therefore no need for a different approach.[(141)] It was argued that the further development of corporate codes of conduct should be left to the private sector but that there might be a role for governments in developing guidelines and recommendations.[(142)] Doubts were voiced as to whether this should be done in the WTO.[(143)]

ANNEX 1

TEXT OF THE SINGAPORE MINISTERIAL DECLARATION, PARAGRAPH 20

"20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to:

- establish a working group to examine the relationship between trade and investment; and

- establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.

These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage cooperation with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations."

ANNEX 2

CHECKLIST OF ISSUES SUGGESTED FOR STUDY

Non-Paper by the Chair

Revision

It was widely recognized that the Working Group's work programme should be open, non-prejudicial and capable of evolution as the work proceeds. It was also emphasized that all elements, not only category I, should be permeated by the development dimension. Particular attention should be paid to the situation of least-developed countries. In pursuing the items of its work programme, the Working Group should avoid unnecessary duplication of work done in UNCTAD and other organizations.

I. Implications of the relationship between trade and investment for development and economic growth, including:

- economic parameters relating to macroeconomic stability, such as domestic savings, fiscal position and the balance of payments;

- industrialization, privatization, employment, income and wealth distribution, competitiveness, transfer of technology and managerial skills;

- domestic conditions of competition and market structures.

In this work, the Working Group should seek to benefit from the experience of Members at different stages of development and take account of recent trends in foreign investment flows and of the relationship between different kinds of foreign investment.

II. The economic relationship between trade and investment:

- the degree of correlation between trade and investment flows;

- the determinants of the relationship between trade and investment;

- the impact of business strategies, practices and decision-making on trade and investment, including through case studies;

- the relationship between the mobility of capital and the mobility of labour;

- the impact of trade policies and measures on investment flows, including the effect of the growing number of bilateral and regional arrangements;

- the impact of investment policies and measures on trade;

- country experiences regarding national investment policies, including investment incentives and disincentives;

- the relationship between foreign investment and competition policy.

III. Stocktaking and analysis of existing international instruments and activities regarding trade and investment:

- existing WTO provisions;

- bilateral, regional, plurilateral and multilateral agreements and initiatives;

- implications for trade and investment flows of existing international instruments.

IV. On the basis of the work above:[(144)]

- identification of common features and differences, including overlaps and possible conflicts, as well as possible gaps in existing international instruments;

- advantages and disadvantages of entering into bilateral, regional and multilateral rules on investment, including from a development perspective;

- the rights and obligations of home and host countries and of investors and host countries;

- the relationship between existing and possible future international cooperation on investment policy and existing and possible future international cooperation on competition policy.