Bilateral Investment Treaties
and a possible basic Multilateral framework on Investment

Two independent stories or a mutually reinforcing process?

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The EU, as well as several partners in the WTO, supports the objective of negotiating a basic multilateral framework on investment.

Let me explain the reasons and content of such proposal (I), before going to the relationship between this possible future framework and the already existing and future BITs (II), and, last but not least, addressing the issue of Investor’s responsibilities (III).

I – A possible multilateral framework for investment

Its key objectives would be as follows:

*Improve the legal framework for Foreign Direct Investment worldwide, by establishing a level-playing field among host countries and among investors*

*Reduce the risk faced when investing abroad, thus enhancing investment flows*

*Respect the interests of home and host countries, in particular developing countries*

*Drafting rules on FDI in order that they benefit Developing Countries*

No need to say that Foreign direct investment (FDI) is now recognised as one of the key factors in economic growth and wealth, since it does not create debt obligations and represents long-term commitment and lasting assets. Investment flows benefit everyone, creating opportunities for investors and helping countries to achieve sustainable development; but FDI needs the stable, transparent, predictable and non-discriminatory business climate that multilateral rules - which do not yet exist in this area-, would provide.

The EU supports the launch of negotiations, aimed at the establishment of a coherent basic framework of multilateral rules on Foreign Direct Investment, as part of the next round of WTO multilateral trade negotiations. We believe that it is in the interest of all countries,
developed and developing, to create a more stable and transparent climate for FDI worldwide. Non-discrimination, transparency and predictability of domestic laws applicable to FDI should be the guiding principles for the investment framework that we would support.

- **Improve the legal framework for Foreign Direct Investment worldwide, by establishing a level-playing field among host countries and among investors**

WTO rules on investment will help create an investment-friendly legal and administrative environment for all investors. In order to do this, WTO investment rules must secure stability and predictability for foreign and domestic investors.

Treatment of foreign investors should be based on WTO principles of non-discrimination (MFN and National Treatment), if necessary subject to limited, negotiated exceptions. These principles would preserve the right of host countries to regulate investors’ activities in their territory in a non-discriminatory manner.

Transparency of domestic investment regimes is also a key to their predictability, and would help to improve investment promotion.

- **Reduce the risk faced when investing abroad, thus enhancing investment flows**

Foreign investors are much more prone to uncertainty and more concerned by risk – whether real or merely perceived – when investing abroad. This uncertainty and risk perception is a particularly acute problem for developing countries, also because it can undercut their domestic policies to attract FDI.

Reduced uncertainty may not guarantee increased FDI flows to any particular host country, but multilateral investment rules would increase overall FDI flows by reducing the marginal risk associated with each new venture abroad and help developing countries to attract a fairer share of it, by reducing the perception that they are risky locations and by strengthening the effectiveness of their own investment policies.

- **Respect the interests of home and host countries**

Each government should also preserve the right to regulate economic activity within its territory, including in the fields of development, environment and social conditions. Countries need assurances that they would not lose policy control over investment decisions and that they will be able to pursue their development or social objectives.

The scope of the rules must reflect a manageable level of ambition. Negotiations should focus only on FDI, not on short-term capital movements. Each government should maintain its ability to regulate the short-term capital movements, whose sudden outflows (or inflows) can be harmful in countries that do not possess a sufficient regulatory and financial infrastructure.

Moreover, WTO Members must preserve their flexibility in deciding which sectors can be open to foreign investors or not. In other words, no multilateral rule should force any country to liberalise any given sector. The question of market access should be addressed in a way to allow each country to absorb FDI in a manner and at a rhythm compatible with its domestic policies (i.e. “bottom-up” approach). Developing countries would be free to decide which sectors of their economy they wish to open up to FDI.

- **Drafting rules on FDI in order that they benefit Developing Countries**

The EU includes development at the heart of its agenda. This agenda, as regards FDI, would increase transparency and stability of the conditions governing investment worldwide, and hence lead to an improved allocation of capital. In thus lowering the risk-premium attached to
investments to many developing countries, a number of developing countries will find it easier to attract FDI, and the capital and technology it brings. A multilateral framework on investment would help to redress the current situation in which many Least Developed countries are at the margins of world FDI flows.

These rules need to be shaped in such a way as to allow developing countries sufficient policy-flexibility to further their developmental aims. An approach to multilateral rules based on non-discrimination would allow ample policy-flexibility, and indeed, most bilateral treaties between developing and developed countries or between developing countries themselves already include the principle of non-discrimination.

The Dispute Settlement mechanism should be that of the WTO. Investor-to-State arbitration does not fit in the WTO framework, and should be left, if need be, to bilateral agreements.

II - Why should we establish multilateral rules on FDI, and how would such rules fit in with Bilateral investment treaties?

1- Consistency and Transparency

a) Existing BITs (more than 1,800) and Regional agreements have different geographic scope and present significant differences as to their substantive coverage, specific content and legal nature. Although this multiplication of international instruments covers a broad set of issues, even taken together, they do not create a totally coherent and complete international framework for FDI. Around 7,500 BITs would be necessary to link all WTO member countries. Besides, the production and distribution processes of companies today tend to involve more and more countries at the same time.

BITs concluded by Member States of the EU for instance differ in several aspects from the ones of the United States. European BITs do not include the principle of National Treatment at the pre-establishment phase, and contain some reservations to the non-discrimination principle (MFN) in areas like audio-visual services (European preference granted under the framework of the “Television sans frontières” directive), air and road transport services, and marketing of such services.

Whereas US BITs usually provide for National Treatment since the pre-establishment period - while at the sale time they contain many exceptions to this principle-, and for high protection clauses against expropriation. They may also foresee an investor-to-state dispute settlement mechanism.

A basic set of investment principles, agreed at multilateral level, would consolidate in a transparent and consistent way the principles already enshrined in BITs and build up on the basic non-discriminatory WTO principles on trade.

b) Should a multilateral framework for FDI be created, it would not prevent States from going on with concluding BITs. A multilateral framework could constitute a sort of floor of FDI principles, allowing for countries that want to go further to do it through BITs. In that sense, BITs would be the locomotive, as a driving force, which lead the whole train of multilateral principles.

In the same way, Dispute Settlement mechanism could be fitted according to each BIT. The one of the WTO (State-to-State), could be complemented upon wish of Contracting States in the BIT.
2- Complementing trade rules

Trade and investment are inextricably linked and should therefore be dealt with in a more integrated way. FDI is a major vehicle for international trade, accounting, according to UNCTAD data, for at least one third of world trade flows. From a policy perspective, open trade regimes favour FDI inflows with the highest level of technology, while open investment policies in a country are usually a positive factor to keep markets competitive.

As the process towards worldwide trade liberalisation and rule-making trade has moved significantly forward, therefore, so should multilateral liberalisation and protection of investment. The GATS, TRIMs and TRIPs agreements partially cover certain investment issues, but there is growing need for comprehensive rules on investment in all sectors. A basic framework of rules based on non-discrimination, transparency and an open policy environment for FDI would be beneficial for the world economy as trade rules have been for most countries in the past 50 years.

The relationship with TRIMs rules

The WTO Agreement on trade-Related Investment Measures, one of the multilateral agreements on trade in goods, prohibits trade-related investment measures, such as for instance local content requirements, that are inconsistent with basic provisions of GATT 1994.

In that sense, the Trims agreement’s scope is limited to investment-related measures which relate to exchange of goods, and cannot deal with investment-related measures that would stem from trade of services.

The TRIMs agreement thus does not address directly investment policies and preserves country’s ability to regulate the admission and treatment of foreign investors.

Recognising that certain investment measures can have trade-restrictive and distorting effects, it states that no Member shall apply a measure that is prohibited by the provisions of GATT Article III (national treatment) or Article XI (quantitative restrictions). Examples of inconsistent measures, as spelled out in the Annex Illustrative List, include local content or trade balancing requirements.

For instance, investor’s right to use imported goods as inputs should not depend upon some performance requirements.

Therefore, BITs have to comply to GATT and TRIMs rules in so far as the latter prohibit any trade distorting measures.

The TRIMs Agreement contains transitional arrangements allowing Members to maintain notified TRIMs for a limited time following the entry into force of the WTO (two years in the case of developed country Members, five years for developing country Members, and seven years for least-developed country Members).

As regards the relationship between BITs and GATS, the GATS agreement contain provisions which are linked to investment. Its mode 3 for supply of services foresee a commercial presence in a third country, presence that will include an investment. Therefore, non-discrimination between foreign investors is ensured (MFN applies whether there are commitments or not for a sector, except if an MFN exemption was duly scheduled in 1994, and there were few MFN exemptions related to investment). Also, for sectors inscribed in a GATS member schedule, by which the latter make positive commitments for liberalisation, restrictions on the turnover, the type of legal entity, or the number of persons to be employed can be suppressed and national treatment can be ensured.
However, one should notice like an incoherence in the framework of rules depending whether an investment is related to a provision of services—in which case it could be liberalised if foreseen in GATS member schedules— or not, therefore only dependent upon a possible existence of BITs. There is no reason to justify the discrimination of FDI between services providers, which benefit from GATS rules, and goods manufacturers, who do not.

III - What about investors’ obligations?

WTO rules deal with the behaviour of governments only, and should remain as they stand, including in presence of a multilateral framework for FDI. Governments regulate their internal economic activity, including investment in a non-discriminatory manner. Foreign investors must comply with the law of the country in which they are established.

In order to maximise the benefits of FDI and minimise possible costs, the EU is actively engaged in developing a citizen corporate behaviour approach. We support voluntary principles and standards that would exhort companies to follow a responsible behaviour in fields as diverse as Human Rights, environmental protection, labour relations, consumer protection, development concerns, transparency and fight against corruption.

We have actively participated in the revision of the OECD Guidelines on multinational enterprises, adopted on 27 June 2000 in Paris, by Governments of 29 OECD Members and the ones of Argentina, Brazil, Chile, and of the Slovak Republic, which became since then the 30th Member of the OECD.

At a two-day conference held in Brussels on May 10 and 11th, the European Commission launched a dialogue on implementing voluntary commitments of good corporate behaviour. The conference entitled “Best business practices for corporate social responsibility: Management tools for implementing the OECD Guidelines for Multinational Enterprises” enabled European firms to exchange experiences on their practices at EU level. Pascal Lamy, European Commissioner for Trade, has stressed that we have to work together towards corporate citizenship, because we all share the issues and societal objectives at stake.

European Member States National Contact Points (NCP) are also active in the field, and we are confident that this kind of responsible behaviour can help sustainable development.
CONCLUSION

A “Harnesssed Globalisation”

The establishment of multilateral rules on investment, complemented by BITs, is an opportunity to move FDI flows from a purely power-based dynamic into a rule-based system. This should be done in the interest of all governments (developed and developing), all kinds of companies (MNEs and SMEs), but not at the expense of other concerns such as the environment, consumers, and labour conditions.

That is why international investment should be dealt with in parallel with other policies, such as competition, to which the behaviour of investors is closely linked. It would be an opportunity to develop, in a credible way, an agenda for a "harnessed globalisation".

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