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Note for the attention of the 133 Committee

SUBJECT: *Issues paper: Upgrading the EU Investment Policy*

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OBJECTIVE: For discussion

REMARKS:

133 COMMITTEE
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Issues paper:

Upgrading the EU investment policy

- 1- Foreign Direct Investment (FDI) is recognised as a key factor in generating international trade and fostering economic growth. Virtually all countries in the world are striving to attract FDI since they recognise that it plays a crucial role in economic growth and development, for both capital-exporting and importing countries. But such investments need a predictable, transparent, non-discriminatory and secure business climate.

At present, there is no overall multilateral framework specifically dedicated to foreign investment, after the failure of WTO Members during the Cancun conference to agree to basic multilateral rules in this area. An attempt to set up disciplines at the OECD level had also previously failed¹. However, it is worth recalling that mode 3 of the GATS, which relates to the provision of services via a commercial presence (i.e. establishment), regulates foreign investment in the services sector. Moreover, certain plurilateral disciplines do exist, such as the OECD Codes of Liberalisation of Capital Movements and Invisible Transactions. But their coverage is limited in terms of geographical scope and substance.

- 2- Against that background, the rise of regionalism in the last few years has been impressive. This is true both in terms of the number of preferential agreements concluded or under negotiation and in terms of the depth of integration thus provided. North American countries in particular have contributed to this trend with the inclusion of far reaching investment provisions in their recent trade agreements (e.g. the US with GCC countries, Morocco, Australia, Singapore), or through their stand-alone investment liberalisation agreements. These agreements cover elements pertaining both to market access and to the extensive protection of established investments.

In Europe, two layers of investment rules coexist:

- i) The numerous bilateral investment treaties (BITs) concluded at national level by EU Member States. These treaties traditionally deal with the protection of established investments against expropriation and discrimination, with enforcement mechanisms through State-to-State and Investor-to-State arbitration, but do not contain provisions on market access (unlike the BITs of NAFTA countries);
- ii) EU agreements with third countries, that focus on market access and non-discrimination for committed investments, with enforcement mechanisms through a State-to-State dispute settlement mechanism that applies to the whole agreement.

In comparison to NAFTA countries' agreements, EU agreements and achievements in the area of investment lag behind because of their narrow content. As a result, European investors are discriminated vis-à-vis their foreign competitors and the EU is losing market shares.

All these elements require an appropriate and timely answer from the EU.

¹ Multilateral Investment Agreement - « MAI » - in 2001.

3- The only way to redress that situation is to rapidly upgrade the EC investment approach. Far from wishing to create radical changes, the Commission proposes a reasonable but substantial policy to be developed along two principles: first, the consolidation of the current *acquis*; and second its complement with a few improved or new elements.

a) Consolidation of the *acquis*: to provide for comprehensive market access and non-discrimination in third countries.

The principle of non-discrimination (national treatment) at pre- and post-establishment is already present in all EU existing agreements concluded with third countries.

The principle of market access for direct investment is also part of most EU agreements (ex: Stabilisation and Association Agreements², draft EU-Mercosur Agreement, etc...).

The consolidation of this approach is fully consistent with WTO commitments of the EU, in particular under the General Agreement on Trade in Services (GATS). GATS provisions -by which all Member States are already abiding- include market access and national treatment at pre- and post-establishment.

Other important elements of the current *acquis* are the free flow of payments and investment-related capital movements, while preserving the possibility to take safeguard measures in exceptional circumstances; and the facilitation of the movement of investment-related natural persons ('key personnel').

b) Improvement of the *acquis*: with an improved most-favoured-nation provision relating to establishment; and hortatory provisions on the non-lowering of standards.

i) The purpose of the improved most-favoured-nation (MFN) provision relating to establishment is to avoid the EU being discriminated against by virtue of other preferential agreements to which one of the EU's contracting parties would also be a Party. For instance, the EC should at least obtain the treatment granted by US FTAs.

The scope of application of the MFN clause is focused and limited to establishment, thus clearly signalling that it could not extend to BIT provisions on expropriation and dispute settlement.

It appears necessary to exclude from the benefit of this clause the most deep-integration agreements the EU concludes (i.e. to exclude granting to third countries the advantages resulting from - for instance - the EU/Balkans Stabilisation and Association Agreements that could lead at a later stage to EU accession). To that aim, the classical regional economic integration organisation (REIO) clause needs to be adjusted to avoid a carve-out from the scope of MFN treatment of any FTA, which would be counter-productive.

Here again, this approach is fully consistent with WTO commitments of the EU under the GATS, since the latter contains an MFN provision of general application³. It is also consistent with existing EU agreements with third countries that already contain an MFN provision (ex: Article 30 of the EU-Jordan Association Agreement; Article 48 of the Agreement EU-FYROM).

² Cf. for instance Article 48 of the Agreement EU-FYROM.

³ GATS Article II.

ii) The hortatory provision on the non-lowering of standards aims at implementing at operational level EU political priorities⁴, to foster sustainable development in all its dimensions. Sustainable development is enshrined in the EU and EC Treaties⁵ as an overarching objective, and is also mentioned in the EU Charter of Fundamental Rights⁶.

4- The Commission considers that the above-mentioned elements constitute a minimum platform. It will reflect on how further build on them and is open and willing to consider any suggestions from Member States to further develop the scope and depth of these proposals.

In that perspective, do Members States confirm their call, made during the 133 informal Full Members meeting in Vienna earlier this year, for an ambitious EU investment policy with third countries?

Do Members States agree to the objective that the EU should avoid its investors being discriminated against by virtue of other preferential agreements to which one of its contracting parties would also be a Party?

Do Members States agree to implement EC and EU Treaty provisions and European Council Decisions regarding the promotion of sustainable development?

Further to the above-mentioned improvements, what types of investment protection provisions could be envisaged? What could be their scope?

This issues paper should serve as a basis for a discussion with Member States. At a later stage, the Commission intends to reflect the outcome of this discussion in a draft proposal for a text on establishment.

⁴ Cf. inter alia the European Council decision to approve the "Declaration on guiding principles for Sustainable Development" at its meeting on 16 and 17 June 2005.

⁵ Inter alia Articles 2, 136, 151, 174 EC.

⁶ Article 22.