



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 6 March 2009

7242/09

LIMITE

**WTO 48
SERVICES 13**

NOTE

from : General Secretariat of the Council
to : Article 133 Committee

Subject : Minimum Platform for Investment for the EU FTAs

Delegations will find attached the revised version of the Minimum Platform for Investment Chapter for the EU FTAs, as agreed within the framework of the Article 133 Committee. The new model Most Favoured Nation clause, which was the main subject of the revision, will be used as a model also in the Chapter on Cross Border Supply of Services in the FTAs.

TITLE [...]

ESTABLISHMENT, TRADE IN SERVICES AND E-COMMERCE

CHAPTER I

GENERAL PROVISIONS

Article [...]

Objective, scope and coverage

1. The Parties, reaffirming their respective commitments under the WTO Agreement [and with a view to facilitate the increasing participation of [COUNTRY] [REGION] in the world economy], hereby lay down the necessary arrangements for the progressive reciprocal liberalisation of establishment and trade in services and cooperation on e-commerce
2. Nothing in this Title shall be construed to impose any obligation with respect to government procurement.
3. The provisions of this Title shall not apply to subsidies granted by the Parties.
4. Consistent with the provisions of this Title, each Party retains the right to regulate and to introduce new regulations to meet legitimate policy objectives.
5. This Title shall not apply to measures affecting natural person seeking access to the employment market of a Party, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

Nothing in this Title shall prevent a Party from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific commitment.

Article [...]

Definitions

For the purposes of this Title:

- (a) 'measure' means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form
- (b) 'measures' adopted or maintained by a Party means measures taken by:
 - (i) central, regional or local governments and authorities; and
 - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;
- (c) 'natural person' means a national of one of the Member States of the Community or of [COUNTRY][A "REGION" COUNTRY] according to their respective legislation;
- (d) a 'Community juridical person' or a '[COUNTRY] [REGION] juridical person' means a juridical person set up in accordance with the laws of a Member State of the Community or of [COUNTRY] [A "REGION" COUNTRY] respectively, and having its registered office, central administration, or principal place of business in the territory of the Community or of [COUNTRY] [A "REGION" COUNTRY], respectively;

Should the juridical person have only its registered office or central administration in the territory of the Community or [COUNTRY] [A "REGION" COUNTRY] respectively, it shall not be considered as a Community or [COUNTRY][REGION] juridical person respectively, unless its operations possess a real and continuous link with the economy of the Community or [COUNTRY] [A "REGION" COUNTRY], respectively;

- (e) Notwithstanding the preceding paragraph, shipping companies established outside the Community or [COUNTRY] [REGION] and controlled by nationals of a Member State of the Community or of [COUNTRY] [[A "REGION" COUNTRY], respectively, shall also be beneficiaries of the provisions of this Agreement, if their vessels are registered in accordance with their respective legislation, in that Member State or in [COUNTRY] [A "REGION" COUNTRY]and carry the flag of a Member State or [COUNTRY] [A "REGION" COUNTRY].

CHAPTER II
ESTABLISHMENT

Article [...]
Definitions

For purposes of this Chapter

- (a) ‘establishment’ means any type of business or professional establishment through:
- (i) the constitution, acquisition or maintenance of a juridical person, or
 - (ii) the creation or maintenance of a branch or representative office
- within the territory of a Party for the purpose of performing an economic activity;
- (b) ‘investor’ of a Party means any natural or juridical person that seeks to perform or performs an economic activity through setting up an establishment;
- (c) ‘economic activity’ does not include activities carried out in the exercise of governmental authority, i.e. activities carried out neither on a commercial basis nor in competition with one or more economic operators.
- (d) ‘subsidiary’ of a juridical person of a Party means a juridical person which is effectively controlled by another juridical person of that Party¹;
- (e) ‘branch’ of a juridical person means a place of business not having legal personality which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension

¹ A juridical person is controlled by another juridical person if the latter has the power to name a majority of its directors or otherwise to legally direct its actions.

Article [...]

Coverage

This Chapter applies to measures by the Parties affecting establishment² in all economic activities with the exception of:

- (a) mining, manufacturing and processing of nuclear materials;
- (b) production of or trade in arms, munitions and war material;
- (c) audio-visual services³;
- (d) national maritime cabotage, and;
- (e) air transport services, including domestic and international air transportation services, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights⁴, other than:
 - (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service;
 - (ii) the selling and marketing of air transport services;
 - (iii) computer reservation system (CRS) services;
 - (iv) other ancillary services that facilitate the operation of air carriers, such as groundhandling services, rental services of aircraft with crew, and airport management services.

² Investment protection, other than the treatment deriving from Article X (National Treatment), including investor-state dispute settlement procedures, is not covered by this chapter.

³ [Audiovisual services are the subject of [Title ...] [Chapter ...]

⁴ [These services are/may be the subject of an open skies agreement between the Parties]

Article [...]

Market Access

1. With respect to market access through establishment, each Party shall accord to establishments and investors of the other Party a treatment no less favourable than that provided for in the specific commitments contained in Annex [...] (lists of commitments on establishment).
2. In sectors where market access commitments are undertaken, the measures which a Party shall not maintain or adopt, unless otherwise specified in Annex [...] (lists of commitments on establishment), are defined as:
 - (a) limitations on the number of establishments whether in the form of numerical quotas, monopolies, exclusive rights or other establishment requirements such as economic needs tests⁵;
 - (b) limitations on the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test⁶;
 - (c) limitations on the total number of operations or on the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test⁷.
 - (d) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; and
 - (e) measures which restrict or require specific types of establishment (subsidiary, branch, representative office)⁸ or joint ventures through which an investor of the other Party may perform an economic activity.

⁵ Subparagraph 2(a) does not cover measures taken in order to limit the production of an agricultural product.

⁶ Subparagraph 2(b) does not cover measures taken in order to limit the production of an agricultural product.

⁷ Subparagraph 2(c) does not cover measures taken in order to limit the production of an agricultural product.

⁸ Each Party may require that in the case of incorporation under its own law, investors must adopt a specific legal form. To the extent that such requirement is applied in a non-discriminatory manner, it does not need to be specified in Annex [...] (lists of commitments on establishment) in order to be maintained or adopted by the Parties.

Article [...]

National Treatment

1. In the sectors inscribed in Annex [] (lists of commitments on establishment), and subject to any conditions and qualifications set out therein, with respect to all measures affecting establishment, each Party shall grant to establishments and investors of the other Party treatment no less favourable than that it accords to its own like establishments and investors.
2. A Party may meet the requirement of paragraph 1 by according to establishments and investors of the other Party, either formally identical treatment or formally different treatment to that it accords to its own like establishments and investors.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of establishments and investors of the Party compared to like establishments and investors of the other Party.

Article [...]

Lists of commitments

The sectors liberalised by each of the Parties pursuant to this Chapter and, by means of reservations, the market access and national treatment limitations applicable to establishments and investors of the other Party in those sectors are set out in lists of commitments included in Annex [...] (lists of commitments on establishment).

Article [...]

Most-favoured-nation treatment

Symmetric MFN clause	Asymmetric MFN clause <i>(asymmetric elements are in italic and are optional)</i>
<p>1. With respect to any measures affecting establishment covered by this Chapter, unless otherwise provided for in paragraphs 2 and 3, each Party shall accord to establishments and investors of the other Party a treatment no less favourable than that it accords to like establishments and investors of a major trading economy in the context of an economic integration agreement.⁹</p>	<p>1. With respect to any measures affecting establishment covered by this Chapter, unless otherwise provided for in this article, each Party shall accord to establishments and investors of the other Party a treatment no less favourable than that it accords to like establishments and investors of a major trading economy in the context of an economic integration agreement.¹⁰</p>
	<p>2. <i>The EC Party shall accord to establishments and investors of (ONE ACP REGION) a treatment no less favourable than it accords to like establishments and investors of (ANOTHER ACP REGION).</i></p>
<p>2. Paragraph 1 shall not apply to economic integration agreements that create an internal market in services and establishment, and to which a Party is a signatory.</p>	<p>3. Paragraph 1 shall not apply to economic integration agreements that create an internal market in services and establishment, and to which a Party is a signatory.</p>
<p>3. The obligations set by paragraph 1 of this provision shall not apply to treatment granted:</p> <p>a) under measures providing for recognition of qualifications, licences or prudential</p>	<p>4. The obligations set by paragraph 1 of this provision shall not apply to treatment granted:</p> <p>a) under measures providing for recognition of qualifications, licences or prudential</p>

⁹ The term economic integration agreement is to be understood in the sense of Article V.1 and V.3 of the General Agreement on Trade in Services (GATS). The obligation contained in paragraph 1 does not extend to the investment protection provisions not covered by this chapter, including provisions relating to investor-state dispute settlement procedures.

¹⁰ The term economic integration agreement is to be understood in the sense of Article V.1 and V.3 of the General Agreement on Trade in Services (GATS). The obligation contained in paragraph 1 does not extend to the investment protection provisions not covered by this chapter, including provisions relating to investor-state dispute settlement procedures.

<p>measures in accordance with Article VII of the General Agreement on Trade in services or its Annex on Financial Services,</p> <p>b) under any international agreement or arrangement relating wholly or mainly to taxation, or</p> <p>c) under measures benefiting from the coverage of an MFN exemption listed in accordance with Article II.2 of the General Agreement on Trade in Services</p>	<p>measures in accordance with Article VII of the General Agreement on Trade in services or its Annex on Financial Services,</p> <p>b) under any international agreement or arrangement relating wholly or mainly to taxation, or</p> <p>c) under measures benefiting from the coverage of an MFN exemption listed in accordance with Article II.2 of the General Agreement on Trade in Services</p>
	<p>5. <i>Where a Party becomes a Signatory to an economic integration agreement with a third party referred to in paragraph 1 which is not an agreement referred to in paragraph 3, and that agreement provides for more favourable treatment to such third party than that granted by the Party to the EC Party pursuant to this Agreement, a Party shall have the right to request consultations with the EC Party with a view to deciding whether the concerned Party may deny the more favourable treatment contained in the economic integration agreement to the EC Party. The (Joint Council) may adopt any necessary measures to adjust the provisions of this Agreement.</i></p>

<p>4. For the purpose of this provision, a "major trading economy" means any country accounting for a share of world merchandise exports above 1 percent in the year before the entry into force of the economic integration agreement referred to in paragraph 1, or any group of countries acting individually, collectively or through an economic integration agreement accounting collectively for a share of world merchandise exports above 1.5 percent in the year before the entry into force of the economic integration agreement referred to in paragraph 1.¹¹</p>	<p>6. For the purpose of this provision, a "major trading economy" means any country accounting for a share of world merchandise exports above 1 percent in the year before the entry into force of the economic integration agreement referred to in paragraph 1, or any group of countries acting individually, collectively or through an economic integration agreement accounting collectively for a share of world merchandise exports above 1.5 percent in the year before the entry into force of the economic integration agreement referred to in paragraph 1.¹²</p>
---	---

¹¹ For this calculation official data by the WTO on leading exporters in world merchandise trade (excluding intra-EU trade) shall be used.

¹² For this calculation official data by the WTO on leading exporters in world merchandise trade (excluding intra-EU trade) shall be used.

Article [...]

Other agreements

Nothing in this Title shall be taken to limit the rights of investors of the Parties to benefit from any more favourable treatment provided for in any existing or future international agreement relating to investment to which a Member State of the Community and [COUNTRY] [A "REGION" COUNTRY] are Parties.

Article [...]

Review

With a view to the progressive liberalisation of investments, the Parties shall review the investment legal framework, the investment environment, and the flow of investment between them consistent with their commitments in international agreements no later than [...] years after the entry into force of this chapter and at regular intervals thereafter

CHAPTER III

CROSS BORDER SUPPLY OF SERVICES

[...]

CHAPTER IV

TEMPORARY PRESENCE OF NATURAL PERSONS FOR BUSINESS PURPOSE

Article [...]

Coverage

1. This Chapter applies to measures of the Parties concerning the entry and temporary stay into their territories of key personnel, graduate trainees, [...] in accordance with Article [...], paragraph 5, of this Agreement.

2. For the purpose of this Chapter:

(a) 'Key personnel' means natural persons employed within a juridical person other than a non-profit organisation responsible for the setting-up or the proper control, administration and operation of an establishment. 'Key personnel' comprises 'business visitors' responsible for setting up an establishment and 'intra-corporate transfers'.

(i) 'Business visitors' means natural persons working in a senior position who are responsible for setting up an establishment. They do not engage in direct transactions with the general public and do not receive remuneration from a source located within the host Party.

(ii) 'Intra-corporate transfers' means natural persons who have been employed by a juridical person or have been partners in it (other than as majority shareholders) for at least one year and who are temporarily transferred to an establishment in the territory of the other Party. The natural person concerned must belong to one of the following categories:

1. Managers:

Persons working in a senior position within a juridical person, who primarily direct the management of the establishment, receiving general supervision or direction principally from the board of directors of stockholders of the business or their equivalent, including:

- directing the establishment or a department or sub-division thereof;
- supervising and controlling the work of other supervisory, professional or managerial employees;
- having the authority personally to recruit and dismiss or recommend recruiting, dismissing or other personnel actions.

2. Specialists:

Persons working within a juridical person who possess uncommon knowledge essential to the establishment's production, research equipment, techniques or management. In assessing such knowledge, account will be taken not only of knowledge specific to the establishment, but also of whether the person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge, including membership of an accredited profession.

- (b) ‘Graduate trainees’ means natural persons working within a juridical person who possess a university degree and who are temporarily transferred to an establishment in the territory of the other Party for career development purposes or to obtain training in business techniques or methods¹³.

[...]

Article [...]

Key personnel and graduate trainees

1. For every sector liberalised in accordance with Chapter II of this Title and subject to any reservations listed in Annex [...] (list of commitments on establishment) or in Annex [...] (reservations on key personnel and graduate trainees), each Party shall allow investors of the other Party to employ in their establishment natural persons of that other Party provided that such employees are key personnel or graduate trainees as defined in Article [...]. The temporary entry and stay of key personnel and graduate trainees shall be for a period of up to [...]
2. For every sector liberalised in accordance with Chapter II of this Title, the measures which a Party shall not maintain or adopt, unless otherwise specified in Annex [] (reservations on key personnel and graduate trainees), are defined as limitations on the total number of natural persons that an investor may employ as key personnel or graduate trainees in a specific sector in the form of numerical quotas or a requirement of an economic needs test.

[...]

CHAPTER V

REGULATORY FRAMEWORK

[...]

¹³ The recipient establishment may be required to submit a training programme covering the duration of stay for prior approval, demonstrating that the purpose of the stay is for training.

CHAPTER VI

ELECTRONIC COMMERCE

[...]

CHAPTER VII

FINAL PROVISIONS

[...]

Article [...]

General exceptions

- 1 Without prejudice to general exceptions set in Articles [...] of this Agreement the provisions of this Title and of Annexes [...] (lists of commitments on establishment and [...]) are subject to the exceptions contained in this Article.

2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on establishment [...], nothing in this Title shall be construed to prevent the adoption or enforcement by any Party of measures:
 - (a) necessary to protect public morals or to maintain public order and public security;
 - (b) necessary to protect human, animal or plant life or health;
 - (c) relating to the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on domestic investors;
 - (d) necessary for the protection of national treasures of artistic, historic or archaeological value;
 - (e) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Title including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;

- (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
 - (f) inconsistent with Articles [...] on National Treatment, provided that the difference in treatment is aimed at ensuring the effective or equitable imposition or collection of direct taxes in respect of economic activities or investors of the other Party¹⁴.
3. The provisions of this Title and of Annexes [] (lists of commitments on establishment, [...]) shall not apply to the Parties' respective social security systems or to activities in the territory of each Party, which are connected, even occasionally, with the exercise of official authority

Article [...]
Security Exceptions

1. Nothing in this Agreement shall be construed:
- (a) to require any Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

¹⁴ Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Party under its taxation system which:

- (i) apply to non-resident investors and services suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Party's territory; or
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Party's territory; or
- (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or
- (iv) apply to consumers of services supplied in or from the territory of another Party in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Party's territory; or
- (v) distinguish investors and service suppliers subject to tax on worldwide taxable items from other investors and service suppliers, in recognition of the difference in the nature of the tax base between them; or
- (vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Party's tax base.

Tax terms or concepts in paragraph (f) of this provision and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Party taking the measure.

- (b) to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests:
 - (i) relating to economic activities carried out directly or indirectly for the purpose of provisioning a military establishment;
 - (ii) relating to fissionable and fusionable materials or the materials from which they are derived;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

ANNEX [...]

LISTS OF COMMITMENTS ON ESTABLISHMENT

(referred to in Article [...])

PART A

COMMUNITY AND ITS MEMBER STATES

[...]

Sector or Subsector	Reservations
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]

PART B

[COUNTRY] [“REGION” AND “REGION” COUNTRIES]

[...]

Sector or Subsector	Reservations
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]

ANNEX [...]

RESERVATIONS ON KEY PERSONNEL AND GRADUATE TRAINEES

(referred to in Article [...])

PART A

COMMUNITY AND ITS MEMBER STATES

[...]

Sector or Subsector	Reservations
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]

PART B

[COUNTRY] [“REGION” AND “REGION” COUNTRIES]

[...]

Sector or Subsector	Reservations
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]

NON-LOWERING OF STANDARDS CLAUSE

(to be inserted in the preamble of the Agreement)

Whereas

1. The Parties shall not encourage foreign direct investment by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from such legislation and standards as an encouragement for the establishment, acquisition, expansion or retention of an investment or an investor in its territory. Where a Party considers that an actual or proposed measure of another Party is or would be inconsistent with these principles, it may request consultations with that Party. The Parties shall consult in an effort to avoid any such encouragement

***RECITAL TO BE INSERTED IN COUNCIL DECISIONS CONCLUDING AN AGREEMENT
ON BEHALF OF THE EC***

Whereas this Agreement shall not seek to affect the rights of European investors to benefit from any more favourable treatment provided for in any agreement related to investment to which a Member State and [COUNTRY][A "REGION" COUNTRY] are Parties; whereas Member States may maintain and conclude such agreements in so far as they comply with Community law