

**Dispute Settlement Body
Special Session**

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**CONTRIBUTION BY THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU,
KINMEN AND MATSU TO THE DOHA MANDATED REVIEW OF THE DISPUTE
SETTLEMENT UNDERSTANDING (DSU)**

Communication from the Separate Customs Territory of Taiwan,
Penghu, Kinmen and Matsu

The following communication, dated 12 November 2002, has been received from the Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agrees that the dispute settlement mechanism is essential to the effective functioning of the multilateral trading system. All WTO Members want to see this system survive and flourish in order that they may adequately protect their WTO rights. Further improvement and clarification of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) should therefore result in wider and more effective participation by all Members, and in particular by developing-country Members.

We wish to comment on certain aspects of proposals made by the United States, the European Union, Costa Rica and Jamaica, in particular those concerning transparency and those concerning the rights of Members with substantial trade interests that are not party to a dispute (i.e. third parties).

I. TRANSPARENCY

The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu strongly favours greater transparency in the DSU process, which would set up a powerful dynamic for compliance with the covered agreements by WTO Members. This would give them greater confidence to participate in the mechanism. We also fully support the US proposal on timely circulation of the final report¹, which is designed to ensure that parties to the dispute will faithfully implement the time-frame stated in Article 20. However, in the interests of maintaining the efficiency and the integrity of the system itself, we either oppose, or have reservations about, some of the other proposals as follows:

1. Opening of meetings to the public, and public access to submissions

The United States proposes that certain meetings in the dispute settlement process be opened to the public, and that submissions and documentation be made publicly available.² Our fear in this regard is that taking the dispute process into the public domain could lead to complications that get in the way of an efficient settlement.

¹ United States TN/DS/W/13.

² United States TN/DS/W/13.

We should not lose sight of the fact that the dispute settlement mechanism was originally designed as a "government-to-government" process. In other words, it was never conceived as a public process.

2. *Amicus curiae* submissions

(a) The proposal from the EU is that the panel or the Appellate Body may permit unsolicited *amicus curiae* submissions. Our concern here is that only those Members that have well developed social resources such as think tanks, academic institutions and non-governmental agencies are likely to be called upon for information and technical advice. DSU Article 12 details the rules governing WTO panel proceedings, and DSU Article 13 empowers panels to "seek information" during those proceedings. The panel therefore currently has the flexibility and the discretionary authority "to seek information and technical advice from any individual or body it deems appropriate". To allow unsolicited *amicus curiae* submissions, and to systematize this in a new Article as proposed by the EU³, would create a situation where those Members with the least social resources could be put at a disadvantage.

A further reason why we consider that the EU's proposal would make the mechanism run contrary to the purpose of the system is that although the DSB may be commonly referred to as a "world court" for trade, it does not actually function in the same way as a normal court of law. In the WTO system, interpretation of the rules of agreements is the responsibility of the panel and the Appellate Body in the context of adjudicating disputes, acting fully in accordance with their terms of reference and to which Members have explicitly delegated their authority. Thus, compared with a national judicial system, the terms of reference for the panel and Appellate Body are of relatively limited scope. The underlying purpose of the dispute settlement system is (i) to assist WTO member governments in understanding their rights and obligations under the WTO with reference to specific actual situations, and (ii) to instruct them on the implementation of those rights and obligations in such cases.

(b) The US proposes the creation of some guideline procedures for the handling of *amicus curiae* submissions to address Members' concerns.⁴ We question the need for this because we believe it is already adequately covered by precedents from past cases for the panel and the Appellate Body to follow.

II. THIRD-PARTY RIGHTS

The issue of enhancement of third-party rights in dispute settlement procedures deserves further exploration. Fears are often expressed that any extension of third-party rights might make the procedures more complex and might result in a third party having undue influence on panel or Appellate Body decisions.

We submit, however, that:

1. The implications of international trade disputes, just like some disputes in other international fora, are not always exclusively bilateral and indeed the interests of a third party are often involved.
2. The current DSU regime only allows the third party to join in at the first substantive review stage. Given that resource and monetary constraints often preclude small and developing Member countries from making full use of the system, we support a

³ European Communities TN/DS/W/1.

⁴ United States TN/DS/W/13.

number of the amendments proposed by Costa Rica⁵, the EU⁶ and Jamaica⁷ to enhance third parties' accessibility to information and knowledge of the dispute settlement system. At the same time, however, we do have certain reservations about other proposals, all of which are elaborated upon below:

(a) Request to be joined in consultations:

We are not in favour of the proposal from Costa Rica to modify the "substantial trade interests" provision. Our view is that, at the consultation stage, when the DSB has not yet been formally involved in its adjudication function, "substantial trade interests" should continue to be a requirement for third-party participation. This is to ensure that the necessary space and simplicity for the disputing parties is retained in the consultation stage, and that consultation is preserved as an important method of settling trade disputes. We do agree fully, however, with Jamaica's proposal that guidelines be developed in order to prevent the arbitrary refusal of third party requests for consultations.

(b) The expression of third-party interest:

We support the Costa Rica and EU proposals to set a deadline of 10 days after the date of the establishment of the panel for the third party to express its interest to the DSB.

(c) Enhanced third-party rights:

We agree with proposals that third-party rights should be enhanced by the addition of the following:

- entitlement to receive all information and documents, except certain confidential business information designated as such by the disputing parties;
- presence at all meetings; and
- entitlement to receive the final report at the same time as the parties to the dispute.

(d) We do have some reservations, however, on the proposals seeking to introduce amendments requiring that third-party arguments be reflected in panel reports, and that third parties should have the right to comment on the descriptive part and the interim report. Here, our concerns are twofold:

- The primary aim of the WTO dispute settlement mechanism is to secure a "positive solution to a dispute" for the parties to the dispute, at all stages. The participation of the third party should not be allowed to increase the complexity of the dispute process.

⁵ Costa Rica TN/DS/W/12.

⁶ European Communities TN/DS/W/1.

⁷ Jamaica TN/DS/W/21.

- In the interests of judicial economy, the panel and the Appellate Body should not be bound to take into consideration the views and arguments presented by the third party, but should need only to address those claims relevant to resolving the matter at issue in the dispute.
