WORLD TRADE ORGANIZATION

WT/WGTI/W/127
1 July 2002

(02-3647)

Working Group on the Relationship between Trade and Investment

Original: English

COMMUNICATION FROM THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

The following communication, dated 28 June 2002, has been received from the Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

NON-DISCRIMINATION AND PRE-ESTABLISHMENT COMMITMENT

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that there is a close relationship between the non-discriminatory principle and the pre-establishment commitment. If non-discriminatory treatment is applied to the pre-establishment stage, it will effectively be a method of making pre-establishment commitment. It is for this reason that we submit a single note explaining our views on these two matters.

2. We concur with the view that the standard of non-discrimination, which provides that foreign investors receive in the host country treatment no less favorable than the treatment given to investors of national origin and those from other countries, is an important principle for foreign investors with regard to their business opportunities and rights. It is also of great importance for host countries in ensuring a more transparent, stable and predictable investment environment. This is so irrespective of whether the host country is developed or developing. Thus we consider it to be essential to include broadly covered non-discriminatory treatment in the future investment framework under the WTO.

3. Although there might be different views about the ways of dealing with "fair and equitable treatment", "most-favored-nation treatment", and "national treatment", we consider that there are different dimensions to protecting investments and investors under these three principles. In other words, they are mutually supplementary in their functions. Thus the future rules on investment should preferably adopt all three principles. However, this does not mean that the host country is required to forgo all examination on foreign investment. Indeed pre-establishment examination is inevitably necessary at times to address special circumstances of individual Members. It follows, therefore, that the national treatment principle should preferably be made applicable only to post-establishment commitments.

4. Regarding the adoption of the principle of non-discrimination, the so-called "hybrid" mode under the GATS may well be used as a reference. Indeed, under the Doha Ministerial Declaration, it has been declared that the positive listing mode as well as the GATS model would be used as the basis for future negotiations on the investment rules. It follows that the principle of non-discrimination should also follow the GATS model to ensure consistency. Failing to adopt a consistent approach would overly complicate the management of different sets of similar multilateral framework under a single organization.

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5. Regarding specifically the national treatment principle, we note that positive commitment as well as national treatment principle allowing conditions to be attached under the GATS has effectively rendered the applicability of such principle post-establishment. Since a workable framework in this regard has already been established under the GATS, it is not viable to require a separate framework under the future rules on investment. Indeed, a separate framework may impose additional administrative burden on Members.

6. In relation to the MFN principle, the question of whether similar exemption as that provided under the GATS should also be made available under the future investment rules requires careful consideration. We consider that exemption granted under the future investment rules might reduce, to a certain extent, the positive effect conferred by the non-discrimination principle earlier mentioned and thus should probably not be made available. After all, exemptions under the GATS shall all be phasing out in due course.

7. With regard to exceptions, our view has been that there should be exceptions available for national security with regard to pre-establishment commitment, national treatment and MFN treatment, while public moral exception and other exceptions should only be available with regard to pre-establishment commitments. Exceptions should preferably be well defined so as to avoid impairment of the quality of commitments and non-discriminatory treatments.

8. We consider it to be of great importance to deal with the issue of differential treatments that could arise from bilateral and regional trade agreements. There are numerous bilateral investment treaties granting favors, benefits, or privileges to the investments and investors of the two sides. Regional trade agreements could also have special articles or chapters specifically dealing with investment matters. The way of coping with such bilateral and regional investment provisions under a multilateral investment framework should be given more attention. The existing models under Article XXIV of the GATT and Article V of the GATS, which only allow exception for reason of economic integration, may well be used as a reference on the treatment of this particular issue. If we are of the preference of having multilateral frameworks on investment, perhaps it would not be in line with the need of maintaining the integrity of such framework to admit the many number of bilateral investment treaties as exceptions to the investment rules under the WTO. Our view is that existing bilateral and regional trade agreements should not, in any event, be used as a basis for differential treatment, unless these bilateral or regional investment treaties require full liberalization and full protection for investment flows between or among the constituent territories. In other words, there could be an article under future investment rules allowing higher economic integration on investment to be an exception to the most-favored-nation treatment principle. Other than that, most-favored-nation treatment should still be given priority in its application.

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