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CONSULTATION AND THE SETTLEMENT OF DISPUTES BETWEEN MEMBERS

I. INTRODUCTION

1. This paper is not intended to propose any particular mechanism of dispute settlement in relation to a possible future WTO agreement on investment. Rather, the purpose is to raise certain number of points which could merit special consideration in relation to a set of rules on investment.

2. Most international agreements have mechanisms to deal with disputes arising from differing interpretations of the provisions or violation of obligations set out in the agreements. The WTO has developed a detailed mechanism under the DSU (Understanding on Rules and Procedures Governing the Settlement of Disputes) which covers all the WTO agreements, and bilateral investment treaties(BITs) and regional trade agreements(RTAs) have also introduced certain mechanisms to deal with disputes relating to the agreements.

3. Disputes arising from the interpretation or application of a possible future WTO agreement on investment should also be covered by the existing WTO dispute settlement mechanism. This is important for securing effectiveness of the future agreement, increasing objectivity and fairness, ensuring legal stability, improving predictability, among others. Application of the existing dispute settlement mechanism will provide all WTO Members with an opportunity to seek an objective and fair judgement on issues related to the interpretation or application of the future investment agreement.

II. EXISTING DISPUTE SETTLEMENT MECHANISMS

A. WTO

4. Based on the recognition that a well-designed dispute settlement mechanism is indispensable for maintaining the security and predictability of the multilateral trading system, the current dispute settlement mechanism under the DSU has on the whole, served its initial purpose to establish a system of prompt settlement of disputes.

5. The basic mechanisms set out by the DSU are as follows. First, consultations among concerned Members will take place. Good offices, conciliation and mediation are available as voluntary procedures. If not resolved amicably, a panel will be established. After the panel issues a report indicating whether the measure in question nullifies or impairs a Member's benefit accruing from the WTO agreements, the Dispute Settlement Body (DSB) will adopt the panel report by a

"negative consensus." Issues of laws covered in the panel report and legal interpretations developed by the panel could be appealed.

6. The DSB may recommend the Member concerned to bring the measure in question into conformity with the agreement. When the compliance panel (§21.5) finds that the recommendations are not complied by that Member, the DSB may authorize the suspension of concessions or other obligations by the complaining Member(s). As a general principle, suspension of concessions or other obligations should be carried out in the same sector where the violation or other nullification or impairment was found. However, when that is not practicable or effective, suspension of concessions or other obligations under another WTO agreement may be authorized.

7. Several characteristics deserve special mentioning. First, the dispute settlement mechanism covers all provisions in the WTO agreements. Second, any matter affecting the operation of the agreements, or leading to nullification or impairment of a Member's benefits may be settled through the dispute settlement mechanism. Third, only disputes which could not be resolved through consultations can be brought to the panel. Fourth, the DSB can issue recommendations, which are legally binding, to bring the measure into conformity but has no measures to enforce them. Fifth, the primary goal of the current dispute settlement is not to seek compensation of damages but is to remove measures inconsistent with the agreement.

B. BITS AND RTAS

8. Most BITs and RTAs also have provisions on dispute settlement although often they do not set out the procedures in detail. In many cases, BITs and RTAs rely on arbitral tribunal for the resolution of disputes, instead of a panel as in the WTO, and the rules and procedures of the arbitral tribunal are not predetermined in detail. The arbitral tribunals are conducted, for instance, in accordance with the UNCITRAL Arbitration Rules[1] or any other agreed rules and procedures between the contracting parties. In some of the recent agreements such as the Japan-Singapore Economic Partnership Agreement, the rules and procedures for arbitration are set out in detail. Usually, all provisions of the agreement are subject to arbitral tribunal.

9. Some BITs and RTAs such as Japan-Korea Investment Treaty or NAFTA have introduced an investor-to-state dispute settlement mechanism. This is a mechanism that allows investors of a Party to submit a claim to an arbitral tribunal that another Party has breached an obligation and caused losses to them. It is a major departure from the intergovernmental mechanism under the WTO where only Members are qualified to resort to the dispute settlement mechanism.

III. POSSIBLE MECHANISMS IN THE FUTURE WTO AGREEMENT ON INVESTMENT

10. The existing WTO dispute settlement mechanism in principle should be applied to disputes relating to the possible future WTO agreement on investment. If disputes relating to commercial presence in the services sector and those relating to foreign direct investment in the manufacturing sector were to go through different mechanisms, it would be hard to justify. If the investment agreement adopted a new mechanism, it would be more costly, and, moreover, it would raise some concerns that reaching rational solutions would be difficult with regard to disputes related to the investment agreement and other WTO agreements. Therefore, it makes most sense to apply the existing WTO mechanism to disputes in investment. Also, the intergovernmental nature of the WTO system should be preserved.

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[1] UNCITRAL Arbitration rules were adopted in the United Nations Commission on International Trade Law in 1976. They were drawn up wit the intention to be used in international commercial arbitrations which deals with international transaction disputes.

11. The existing dispute settlement mechanism covers all agreements of the WTO, and there seems to be no reason to exclude specific provisions of the future agreement on investment since disputes can arise from any agreement. Theoretically, all provisions of the future investment agreement should be subject to the dispute settlement mechanism. It also needs to be stressed that the role of consultation under the WTO dispute settlement mechanism needs to be maintained and if possible strengthened. As in all other fields, an amicable solution is desirable for disputes on investment.

12. The current dispute settlement mechanism stipulates special procedures for disputes involving least-developed country Members. Members are required to "exercise due restraint" in raising matters or asking for compensation or measures of retaliation when disputes involve least-developed country Members. Moreover, good offices, conciliation and mediation are to be offered, by the Director-General or the Chairman of the Dispute Settlement Body, to least-developed country Members, under certain conditions and upon requests. These special procedures are important in assisting the least-developed country Members and would play an important role for disputes in the future WTO agreement on investment.

13. Some issues, however, need to be given careful consideration due to the special nature of investment. When investment disputes are undertaken by the panel, the issue of how to ensure compliance with the recommendations or rulings needs to be further explored. Suspension of concessions by the complaining Member is a very important element of the dispute settlement mechanism to force the Members concerned to bring the measure into conformity with the agreement, and it can be justified as long as the level of the suspension does not exceed the level of nullification or impairment. The difficulty we face in the field of investment is how to determine the level of nullification or impairment, especially if pre-establishment phase is to be included in the future agreement on investment. For example, if the future rule on investment includes provisions for pre-establishment commitments, and if an investor was denied admission/establishment in a certain sector where a Member had committed to liberalize, the determination of the level of nullification or impairment of benefits caused by the denial will be a complex task.

14. However, under the current WTO dispute settlement mechanism, the level of damages caused by disputes on establishing commercial presence in the services sector (under mode 3 of GATS) are to be determined by the arbitrators(DSU §22-7), and there is no reason to believe that the arbitrators will be required to do a more difficult task under the future agreement on investment. Suspension of concessions will continue to play an important role as the last resort in the dispute settlement mechanism to exert pressure on the concerned Member to bring the measure into conformity.

15. The second issue is on the protection of investments and adequate compensation for expropriation. These issues are important elements for developing a favorable environment for investment, and are stipulated in many BITs and RTAs. If these elements are included in the scope of a future WTO investment agreement, it would pose the question of how the WTO dispute settlement mechanism should deal with disputes in those fields. The existing dispute settlement mechanism does not have any mechanisms to provide compensation directly to the investor who have losses incurred from the expropriation. This is because WTO agreements stipulates trade rules between countries, and the purpose of the WTO dispute settlement mechanism is not to provide remedies for losses but to bring the WTO inconsistent measures into conformity with the WTO agreements. Therefore, foreign investors should seek resolution through the domestic judicial procedures. When sufficient settlement is not provided through the domestic judicial procedures, Members may seek correction through the WTO dispute settlement mechanism in order to bring the measure into conformity but not for the purpose of obtaining compensation to the investors.

16. Some BITs and RTAs contain investor-to-state dispute settlement mechanisms to protect investors. However, given the inter-governmental nature of the WTO, the WTO dispute settlement mechanism should only deal with disputes between Members.

17. Lastly, Members may wish to consider the issue of "forum-shopping." Depending on the scope of the future WTO investment agreement, certain disputing measures may be covered by both the investment agreement and other BITs or RTAs. Whether "forum-shopping" between WTO and BITs/RTAs should be allowed or not needs to be further considered.

IV. CONCLUSIONS

18. The existing WTO dispute settlement mechanism should be applied to the future WTO investment agreement. The special character of investment may require some further consideration for some issues, although it needs to be stressed that the difference between dispute settlement mechanism for investment and that of other WTO agreements (notably the GATS), should be as little as possible. All provisions of the investment agreement should be subject to the dispute settlement mechanism and special treatment of least-developed countries under the current system needs to be applied as well, in order to introduce flexibility. These should serve all Members benefit.