WORLD TRADE ORGANIZATION

WT/WGTI/W/141
11 September 2002

(02-4799)

Working Group on the Relationship between Trade and Investment

Original: English

COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

The following communication, dated 10 September 2002, has been received from the Permanent Delegation of the European Commission.

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CONCEPT PAPER ON CONSULTATION AND THE SETTLEMENT OF DISPUTES BETWEEN MEMBERS

This concept paper is intended as a suggestion on the consultation and dispute settlement provisions that could be included in a Multilateral Investment Framework. It should not be read as a text proposal.

1. Paragraph 22 of the Doha Ministerial Declaration mentions "consultation and the settlement of disputes between Members" among the issues to be clarified by the Working Group on the Relationship between Trade and Investment (WGTI), in the period until the Fifth Ministerial Conference.

2. In line with all other WTO agreements, the EC believes that a future Multilateral Investment Framework (MIF) should include the possibility for members to resort to the WTO dispute settlement mechanism where they consider that other members have failed to observe their obligations under the agreement.

3. This paper outlines the dispute settlement mechanisms included in most international investment agreements and in the WTO system.

I. EXISTING DISPUTE SETTLEMENT MECHANISMS IN INTERNATIONAL INVESTMENT AGREEMENTS

4. Foreign investors are subject to the laws of the countries in which they chose to operate, once they have established their activities there. Unless agreed otherwise, local courts are competent to decide on disputes involving the treatment of foreign investors. In addition to this normal domestic jurisdiction, and in order to provide additional legal protection to foreign investors, most countries, parties to bilateral investment treaties (BITs), have agreed to include the possibility for private investors to resort to international arbitration in cases of disputes with a host State.

5. BITs include dispute settlement in order to minimise legal insecurity and political conflicts, with a view to promote a generally favourable climate for investments among the parties. Most BITs include both a dispute settlement mechanism involving investors vis-à-vis States, as well as provisions on disputes between the contracting States. In both cases, BITs provide that the parties to a dispute should first try to solve the matter amicably, through prior consultation and negotiations, before initiating formal proceedings.

6. In the case of investor-to-State dispute settlement provisions, most BITs do not set up new mechanisms but allow private investors to resort, against the host country that violates the agreement, to binding international arbitration under either the ICSID[1] Convention or to *ad hoc* international commercial arbitration set up in accordance with the rules of UNCITRAL[2] or the International Chamber of Commerce.

7. Individual investors are allowed to initiate an international arbitration against a host country for a violation of its international obligations on investment, only when the host country has given its consent. For instance, recourse to ICSID arbitration is only possible when the host government has voluntarily given its written prior consent. This consent may be expressed in the investment law of the host country, in the provisions of a BIT concluded with the State of origin of the foreign investor[3], or in any other written form. Consent may not be unilaterally withdrawn and the decision of the arbitration under ICSID is binding on the parties. It should be noted that the jurisdiction of ICSID covers any legal dispute arising directly out of an investment, between a Contracting State of ICSID and a national of another Contracting State, which the parties to the dispute consent in writing to submit to ICSID[4].

8. State-to-State disputes in BITs are usually subject to binding ad hoc arbitration, in accordance with standard clauses. Either party to the agreement can launch the procedure, if the matter cannot be settled through diplomatic means, in cases of disputes concerning the interpretation and/or application of the treaty. BITs may differ as to the appointment of arbitrators, the procedural rules, the applicable law, the deadlines, the allocation of costs, and the relationship between the State-to-State and investor-to-State arbitration.

II. CONSULTATION AND DISPUTE SETTLEMENT IN THE WTO SYSTEM

9. When a WTO member considers that another member is in breach of multilaterally agreed trade rules, it may resort to the multilateral dispute settlement system instead of taking action unilaterally. The Uruguay Round strengthened the Dispute Settlement mechanism (the Dispute Settlement Understanding, DSU) and introduced clearly defined procedures and deadlines. The system is first of all designed to encourage the resolution of disputes through consultations, which are always possible throughout the proceedings, up to the final award.

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[1] International Centre for Settlement of Investment Disputes, established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, promoted by the World Bank, which came into force on October 14, 1966. Arbitration under the auspices of ICSID is also one of the main mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties (the North American Free Trade Agreement, the Energy Charter Treaty, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur).

[2] United Nations Commission on International Trade Law, established by the UN General Assembly in 1966 (Resolution 2205(XXI) of 17 December 1966.

[3] "Provisions on ICSID arbitration are commonly found in investment contracts between governments of member countries and investors from other member countries. Advance consents by governments to submit investment disputes to ICSID arbitration can also be found in about twenty investment laws and in over 900 bilateral investment treaties". www.worldbank.org/icsid/.

[4] In accordance with Article 25 of the ICSID Convention.

10. It is important to note that this crucial element of the multilateral trading system, which prevents the use of unilateral actions, represents an essential guarantee for the rights of all WTO members, whatever their size or level of development. The DSU contains 11 provisions specifically related to special and differential treatment[5].

11. The DSU fully covers the Multilateral Agreement on Trade in Goods, the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights, as well as, under certain conditions, other plurilateral and multilateral WTO agreements.

12. For instance, GATS Article XXII requires each member to accord sympathetic consideration and to allow other members to consult them, in accordance with the DSU procedures, on any matter affecting the operation of the agreement. Moreover, GATS Article XXIII allows resort to the dispute settlement mechanism where a member considers that any other member fails to carry out its obligations under the agreement or where it considers that possible benefits under the agreement have been nullified or impaired.

III. CONCLUSION

13. The WTO system includes a strong and effective consultation and dispute settlement mechanism which contributes to the fair management of disputes among Members. The GATS, which already addresses around half of world FDI flows (under mode 3) is covered by the WTO DSU. For the sake of consistency, any possible dispute concerning a future multilateral framework on FDI to be negotiated and agreed in the WTO should also be fully covered by the WTO Dispute Settlement mechanism.

14. We believe that the appropriate forum to address possible disputes arising on the interpretation and application of a future multilateral investment framework to be negotiated and agreed in the WTO context should be the existing WTO Dispute Settlement mechanism. The relationship between the DSU and the State-to-State dispute settlement provisions of bilateral or regional investment Treaties may have to be addressed.

15. We look forward to hearing other members' views on these and other possible options available to address the question of consultation and dispute settlement in the context of a multilateral investment framework.

[5] WT/COMTD/W/77 and Rev.1 and Add. 1-4.