WORLD TRADE ORGANIZATION

WT/WGTI/W/145
16 September 2002

(02-4903)

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 13 September 2002, has been received from the Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

DISPUTE SETTLEMENT MECHANISM

1. One of the issues amongst the terms of the Doha Ministerial Declaration requiring clarification by the WGTI relates to the dispute settlement mechanism between Members as regards investment matters. Prior to the Doha Declaration, there were actually extensive discussions by the WGTI on this issue. One of the main focuses of these discussions was the form of dispute settlement to be adopted in the possible future multilateral framework on investment. As the WTO already has a dispute settlement mechanism in place, which in all fairness has been operating to a very high professional standard in resolving disputes between Members, it will undoubtedly raise the question as to the necessity and appropriateness of building a separate mechanism for investment matters that will co-exist alongside the present DSU. Irrespective of whether the possible future investment framework adopts the existing DSU or builds a separate mechanism, one of the issues of concern will be the position of investors in the dispute settlement process. Should investors be conferred with a status that allows them to participate in the future dispute settlement process? Against this background, we would like to submit our views for Members to consider.

2. In relation to the question of whether the existing DSU should be made applicable for dispute settlement under the possible future multilateral framework on investment: Since investment issues relating to services are already covered under the GATS, which effectively means that any dispute in connection with issues on investment in services will be dealt with under the framework of the DSU, and as the present dispute settlement on investment matters under the GATS poses no particular problem, we do not consider it necessary to have a separate dispute settlement mechanism for the possible future multilateral investment framework. We are of the view that the DSU will suffice for this purpose.

3. We consider that the question of the viability of conferring on the dispute settlement body the authority to award monetary compensation to the home country of investors merits further discussion. Members may agree that losses in trade may be adequately compensated by additional concessions by the host country; however, losses by investors may often be losses of property, especially in the event of expropriation by the host country, compensation in a form similar to trade concessions or investment concessions seems greatly insufficient to redress them.

4. Although the DSU in its present form may be made applicable to the future multilateral framework on investment, we consider it equally appropriate for a special provision to be incorporated into the possible future multilateral framework on investment, the application to dispute settlement of which would take precedence over that of the DSU. This is in line with the current practices of the WTO, under which most of the agreements have their own dispute settlement provisions. If there are such additional dispute settlement provisions in the possible future multilateral investment framework, monetary compensation mentioned in the preceding paragraph may be included therein.

5. Regarding whether the dispute settlement mechanism under the possible future multilateral framework should include a scheme for resolving disputes between Members and private investors: As Members are aware, the existing WTO dispute settlement framework under the DSU does not deal with disputes between Members and private parties. However, it is common to find in many investment agreements provisions providing for a mechanism to settle disputes between the State and private parties. Although the Doha Declaration does not address this issue specifically, we do not see any particular reason to prevent Members from exploring this issue further. We consider that the following suggestions may be a useful reference to Members.

6. The mechanism provided in the Agreement on Preshipment Inspection (PSI Agreement) for resolving disputes between an exporter (a private party) and a preshipment inspection entity (also a private party), i.e. the independent review procedures, is an example which may demonstrate that some form of dispute settlement for private parties is not an absolute impossibility under the existing WTO framework. Paragraph 21 of Article 2 of the Agreement does provide for an appeal procedure against the determination of the preshipment inspection entity; but this is an internal procedure within the inspection entity itself, and may not be wholly impartial in so far as the exporters are concerned. There is, therefore, provided in Article 4 of the Agreement, an independent review procedure which aims to encourage preshipment inspection entities and exporters to resolve their disputes through the help of a third party. Article 4 provides that any aggrieved party may refer a dispute for independent review two working days after submission of its grievance in accordance with paragraph 21 of Article 2. The independent review procedures are established by the Members pursuant to the principle set out in Article 4 of the Agreement. These procedures shall be administered by an independent entity constituted jointly by the preshipment inspection entity and the exporter. The independent entity establishes a list of experts which consists of three sections of experts nominated respectively by the preshipment inspection entity, the exporter, and the independent entity itself. The preshipment inspection entity or the exporter may request the formation of a panel to make the decisions necessary to ensure an expeditious settlement of the dispute. More important is that, according to item (h) of Article 4, the decision by the panel is binding on the preshipment inspection entity and the exporter. It is obvious that although the WTO DSU mechanism does not deal with this type of issue, the PSI Agreement sets up an additional scheme to solve problems that exporters really need to solve. Our observation is that the possible future multilateral investment agreement could also have such an additional scheme so as to provide ways to resolve disputes between investors and host countries; however, this independent procedure should exist in parallel with the existing procedure under the ICSID, and should allow investors to decide the venues they wish to choose.

7. Members may also consider including in the possible future multilateral investment framework a provision to the effect that whenever an investor requests dispute settlement, the host country will be required, at the choice of the investor, to agree with using either the procedure of the ICSID (on the premise that such host country is a member to the ICSID), the Additional Facility

under the ICSID, the UNCITRAL dispute settlement rules, or the ICC Rules, to resolve the dispute in question. This particular form of provision in the possible future multilateral investment framework may obviate the need to establish a separate mechanism under the framework mentioned above, and will be in line with the existing DSU which does not deal with matters involving private parties.

_____