

**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.

SCOPE AND DEFINITION OF "INVESTMENT"

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu would like to follow up the issues discussed in the Working Group meeting on April 18 and 19, 2002 on the scope and definition of investment.
2. We are of the general view that the definition of "Investment" in the future WTO rules on investment should be broad in scope so as to afford adequate protection for investors. Indeed, the adoption of an asset-based definition of "Investment" will be consistent with various bilateral investment agreements already in existence among Members of the WTO.
3. While we do not envisage that our existing laws and policies will pose any particular obstacles to the implementation of future WTO rules on investment that adopt a broader definition of "Investment", and will thus effectively provide foreign direct investment a higher degree of protection, we are however of the view that if portfolio investment would be included in such definition, movements of capital that are mere financial transactions, in nature for speculative purposes and which might have adverse impact on the financial system of a jurisdiction, should preferably be excluded from the obligations.
4. In adopting an asset-based definition, there may be significant overlapping problems with other existing WTO agreements. If, for example, intellectual property is embraced in the definition of "Investment" of the future rules of investment, such rules will inevitably overlap with various protection afforded in the TRIPS Agreement. The TRIPS Agreement not only requires Members to ensure that relevant intellectual works will be provided with exclusive rights in their respective jurisdictions, it also imposes obligations on Members to provide protections for intellectual properties as well as the right-holders from other Members. Including intellectual property rights into the future investment rules may give rise to issues concerning the proper application of different rules with jurisdiction on the protection of existing intellectual properties and their right-holders.
5. Likewise, the question of overlapping with the provisions in the GATS and the Government Procurement Agreement (GPA) would have to be resolved as well. It is apparent that without properly limiting the scope of the definition on investment, the third mode of trade in services (i.e. commercial presence) under the GATS would be fully covered by the future investment rules. With regard to the government procurement matters, suppose a supplier from a signatory to the GPA argues that it should have been awarded the government project and suppose the country or area

which awards the project is also a signatory to the GPA, in this case, it is possible that the supplier's country or area could argue that the GPA has been violated due to the fact that the provisions governing the awards of contracts under Article XIII of the GPA had not been observed. It is also possible for the Member to argue that the rights under contract of its nationals or companies have not been protected under the investment rules, if there will be any, under the WTO.

6. In any event, we consider that the definition issues should be dealt with in conjunction with the discussions of possible overlapping questions.

7. With respect to the issue of definition of investment, it should be noted that the GATS practices and the structures embodied therein are of significant importance for reference purposes in the drafting of future rules on investment. Under the GATS, services have been defined to include any service in any sector except services supplied in the exercise of governmental authority. However, a number of ways have been designed to limit the scope or effect of such broad definition, some of which are: to allow MFN exemptions by individual Members, to adopt annexes so as to limit the practical scope of the application of the GATS (for instance, to exclude exchange of traffic rights from the GATS in the Annex on Air Transport Services), and to apply a positive list approach with regard to the sectors needed to be opened up for foreign competitors based on negotiations. In the Doha Ministerial Declaration, it has been decided that "modalities for pre-establishment commitments" should be based on a GATS-type and positive list approach. We consider it appropriate to apply the GATS approach with respect to the "definition of investment" as well.

8. In other words, we suggest to have a broad definition based on property in the first place and to apply restricting schemes through the schedules of commitment and possible annexes so as to deal with issues arising from the special nature of relevant sectors. The suggestion is not only to ensure consistency with existing WTO agreements, but also to avoid structural differences on similar matters that could give rise to unnecessary administrative costs.

9. We consider that any future rules on investment should preferably provide a certain degree of flexibility. This is of particular importance if developing Members would be to benefit fully from these rules. However, the flexibility should be reflected only in proposed deviations from the obligation. Examples of such deviations are those listed in the preceding paragraph. Our view is that the need for flexibility should not in any way affect the adoption of a broad definition of investment.

10. It seems that the discussions of the scope of investment focus exclusively on inward investment. Perhaps Members would like to exchange views on whether and how to deal with outward investment. Although it has been the arrangement under the GATS that Members are required to open up their service markets according to their commitments; it is not within the scope of jurisdiction under the GATS to regulate or restrict the export of services. Studies and views in this regard on investment should provide a valuable reference for Members in deciding whether it would also be in their interest in discussing or even in negotiating issues pertaining to the restriction or regulation of outward investments by a Member.
