

**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.

EXCEPTIONS AND BALANCE-OF-PAYMENTS SAFEGUARDS

1. It is mentioned in paragraph 22 of the Doha Ministerial Declaration that one of the seven issues to be further discussed by the Working Group on the Relationship between Trade and Investment relates to exceptions and balance-of-payments safeguards. We would like to submit our views on this issue for discussion by the Members.

2. We consider that general exceptions, the objective of which is the protection of the public interest (such as protection of human, animal or plant life or health, public morals, or the securing of compliance with laws and regulations which are consistent with the provisions of the WTO Agreement), are reasonable and necessary. However, the conditions mentioned in the Chapeau of GATT 1994 Article XX and that of GATT 1994 Article XV *bis* shall also be the conditions for Members invoking such exceptions to escape from their obligations under the possible future multilateral investment framework. In other words, a host country should not have differential treatment on Members with regard to their investors and investments where like conditions prevail, without proper cause. An equally important aspect is that exceptions should never be used as an invisible barrier for investment entry.

3. Regarding security exceptions, we support such provisions similar to those in Article XXI of the GATT 1994 and Article XIV *bis* of the GATS. When such essential security interest is involved, we cannot just expect related Members to continue strictly following their obligations and commitments under the investment framework. As a matter of legal technicality, however, the last paragraph in the above two security provisions, stating "to prevent any Member from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security" might need to be changed to "to prevent any Member from taking any action pursuant to decisions made under the United Nations Charter for the maintenance of international peace and security", since non-UN Members might not have an obligation arising from the UN decision. Making such change would provide a basis for non-UN Members to apply this provision to help enforce UN decisions.

4. In relation to exceptions for bilateral agreements or regional integration, we previously stated our views in our submission to the Secretariat on non-discrimination and pre-establishment commitment (WT/WGTI/W/127). We consider that this issue merits further exploration. We should make clear our view that we do support the idea of regional or bilateral integration with regard to

investment regimes. But the threshold should be at least as high as, if not higher than, the existing arrangements as provided for in Article XXIV of the GATT 1994 and Article V of the GATS as regards regional trade integration. It should not suffice for Members to establish any kind of bilateral investment agreement and ask for an exception. Otherwise, unlimited possibilities would be created for Members to escape from the most-favoured-nation requirement. Bilateral agreements that do not meet some high-threshold tests should not be used as a basis for differential treatment.

5. On the question of balance-of-payments (BOP) exception, we consider that from the host country's point of view, the need for invoking this exception is less clear by reason that investors may carry their capital inflow with them. Accordingly, there is no concern such as that in international trade, that imports could give rise to losses of foreign exchange. In other words, the issue of BOP will become relevant, in our view, more in terms of trade than in investment. However, the BOP issue could still arise when investors decide to withdraw their investment and remit the funds back to their home countries or other places, or when investors remit profits out. Even in this respect, we consider that the BOP issue in GATT 1994 and GATS, and in the possible future investment framework, are not identical in nature. When importing countries restrict imports for BOP reasons, they only limit the opportunities of importers and exporters to do business for profit-making purposes, but when host countries restrict the remittance of the original funds of investors back to their home countries or the remittance of earned profits out for BOP reasons, they are in fact limiting the use of the investors' own assets. Due to this difference in nature between the two areas, we suggest that there could be different tests set specifically for BOP reasons in relation to investment matters.
