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COMMENTS BY THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU ON THE SUBMISSION BY THE EUROPEAN COMMUNITIES:

"THE RELATIONSHIP BETWEEN WTO RULES AND MEAS IN THE CONTEXT OF THE GLOBAL GOVERNANCE SYSTEM "(TN/TE/W/39)

Submission by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

Paragraph 31 (i)

The following submission, dated 17 June 2004, is being circulated at the request of the delegation of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

I. INTRODUCTION

1. The submission by the European Communities (TN/TE/W/39, 24 March 2004) introduces the concept of "global governance" and several governance principles in an attempt to clarify the relationship between WTO rules and MEAs. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu appreciates the efforts of the EC in preparing its submission with the aim of helping to clarify certain conceptual issues. In our view, however, some further comment is required on certain aspects, which Members might want to take into account when considering the EC submission.

2. The idea of "global governance", in our view, is an abstract concept that makes it rather difficult to comment on in its entirety. Therefore, we have chosen in this paper to closely examine and offer our comments on each of the five basic principles in turn, and in the order proposed by the EC in its submission.

A. ON "THE IMPORTANCE AND NECESSITY OF MEAS: GLOBAL ENVIRONMENTAL PROBLEMS NEED A MULTILATERAL APPROACH AND SOLUTION; ACCORDINGLY UNILATERAL ACTION SHOULD BE AVOIDED AS FAR AS POSSIBLE"

3. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu would like to make clear, at the outset, that it strongly supports the notion that global and transboundary environmental problems should be negotiated and regulated under the multilateral framework, a point that is well described in the first sentence of Rio Principle 12. At the same time, we believe it is worth emphasizing that, as stated in the latter part of paragraph 31(i) of the Doha Ministerial Declaration, "*The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question*".

4. We also support the view that unilateral action should be avoided as far as possible. Unilateral actions, taken without being supported by multilateral mandates, not only counteract multilateral efforts in dealing with multilateral environmental problems, but also damage the multilateral systems established for the purpose of coping with the environmental problems in a collaborative way.

5. However, the multilateral approach or solution should not be limited to MEAs alone. The WTO, within the boundary of its competence, should also be part of the solution that is of a multilateral nature. It is surely evident that the process of achieving the objectives of MEAs usually requires the involvement of several different government agencies within a country, therefore coordination and cooperation amongst different agencies should be of prime importance. There is also a need for coordination among or between various MEAs and the WTO, in order to reduce the risk of potential conflicts. The key role of the WTO in finding multilateral solutions to environmental problems, therefore, should never be overlooked or undervalued.

B. ON "MULTILATERAL ENVIRONMENTAL POLICY SHOULD BE MADE WITHIN MULTILATERAL ENVIRONMENTAL FORA, AND NOT IN THE WTO, IN ACCORDANCE WITH EACH BODY'S RESPECTIVE EXPERTISE AND MANDATE".

6. On the application of the principle that "multilateral environmental policy should be made within MEAs", the EC suggests that "in case of disputes over trade measures applied pursuant to an MEA, parties of the MEA in question should consider settling their differences in that forum."¹ We are concerned that this suggestion might lead a WTO Member that is a party to a dispute to deviate from the obligations set out in Article 23 of the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU), which requires all WTO Members to resort to, and abide by, the rules and procedures laid down in the DSU. Indeed, we are pleased to note, in the latter part of its submission, the EC's statement that "While MEAs are responsible for environmental policy making, the WTO is competent for ensuring that the national implementing measures are not protectionist,"² which would appear to lend support to the possibility of resorting to WTO dispute settlement procedures when a dispute of an environmental nature arises.

7. Where a trade dispute arises between two WTO Members who are also parties to an MEA, both Members shall have the right to resort to the WTO dispute settlement mechanism where trade measures are involved. WTO panels can therefore look to other rules of international law under the customary international legal rules of interpretation when interpreting the WTO agreements, though they cannot apply other treaties in the determination of a claim.

C. ON "WHEN GOVERNMENTS AROUND THE WORLD DEVELOP POSITIONS FOR MEAS NEGOTIATIONS IT IS DESIRABLE THAT THEY GIVE CONSIDERATION TO RELEVANT WTO RULES SO AS TO ENSURE A MUTUALLY SUPPORTIVE RELATIONSHIP BETWEEN BOTH SETS OF RULES. WHEN THE TRADE AND ENVIRONMENT INTERFACE RAISES NOVEL TRADE-RELATED QUESTIONS, THESE COULD USEFULLY BE A SUBJECT OF INFORMATION EXCHANGE BETWEEN THE MEA SECRETARIAT AND THE RELEVANT WTO COMMITTEES"

8. We fully agree with the view that governments should take account of relevant WTO rules when negotiating and developing rules for MEAs. We do wish to emphasize, however, the particular importance of ensuring that trade policy measures for environmental purposes should never constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and that the WTO rights of any Member should not be prejudiced in any of the MEAs.

¹ TN/TE/W/39, paragraph 17.

² TN/TE/W/39, paragraph 30.

D. ON “MEAS AND WTO ARE EQUAL BODIES OF INTERNATIONAL LAW. THEY SHOULD RECOGNIZE EACH OTHER WITH A VIEW TO BEING MUTUALLY SUPPORTIVE, IN ORDER TO MEET THE COMMON GOAL OF SUSTAINABLE DEVELOPMENT” AND “WTO RULES SHOULD NOT BE INTERPRETED IN ‘CLINICAL ISOLATION’ FROM OTHER BODIES OF INTERNATIONAL LAW AND WITHOUT CONSIDERING OTHER COMPLEMENTARY BODIES OF INTERNATIONAL LAW, INCLUDING MEAS”.

9. The EC relies on the opinion of the Appellate Body (AB) in the *US – Reformulated Gasoline* case as the basis for the principle that “WTO rules should not be interpreted in ‘clinical isolation’ from other bodies of international law and without considering other complementary bodies of international, including MEAs”. Several delegates have already questioned the interpretation of the *Gasoline* case by the EC during the previous CTESS.³ We are also concerned that this interpretation of the *Gasoline* case may be stretching the meaning of the Appellate Body’s opinion beyond its originally intended limits. The whole paragraph from which the EC has drawn its reference⁴ relates to the AB’s determination of whether Article 31 of the Vienna Convention on the Law of the Treaties forms part of the “customary rules of interpretation of public international law” as laid down in Article 3(2) of the DSU. Thus, the term “public international law” used in that paragraph by the AB should refer to public international law in the context of treaty interpretation only and not in terms of a basis for determining the claim.

10. The EC’s approach runs counter to the plain language of Article 3(2) of the DSU which states that Members recognize the dispute settlement system of the WTO as a means “*to clarify the existing provisions of those agreements in accordance with **customary rules of interpretation of public international law***” (emphasis added). In addition, we find no support for the EC’s approach in WTO case law. In the *EC – Hormone* case, for example, the AB noted that: “... *the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement*”.⁵ It clearly indicates that the panel and the AB should apply public international law in the context of treaty interpretation, rather than incorporate the substantive norms and regulations created under MEAs to interpret the provisions of the WTO covered agreement.

11. We also find that the so-called “deference principle”, particularly in its application and implications for WTO dispute settlement procedures, might seriously prejudice the WTO rights of a WTO Member that is not a Party to the MEA in question. Such Members are offered no opportunity to participate in the rule-making process of the MEAs. If the panel and AB, following the “deference principle”, were to apply certain MEA rules or provisions to interpret WTO covered agreements in cases where a trade dispute arises involving a WTO Member that is not a Party to the MEA in question, it would greatly affect both the substantive and the procedural rights of such WTO Members, as well as challenge the principle of fairness. It might also violate the provisions of Article 3(2) of the DSU which states that: “*Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements*” because the rights of the disputing WTO Members might be affected by applying a set of rules not embodied in the WTO covered agreements.

³ TN/TE/R/8, 13 May 2004, paragraph 62, 63.

⁴ “That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law”. WT/DS2/AB/R, page 17.

⁵ WT/DS26/AB/R; WT/DS48/AB/R, paragraph 124.

II. CONCLUSION

12. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu wishes to express once again its appreciation of the contribution of the EC in proposing the challenging concept contained in its submission. We recognize the importance of having due regard for the rules of MEAs when global and transboundary environmental issues are involved. Such rules, however, *“should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade”*, as stated in Rio Principle 12.

13. We note that the EC uses, in its submission, the terms “the relationship between WTO rules and MEAs”, rather than “the relationship between existing WTO rules and STOs set out in MEAs” as mandated by paragraph 31(i) of the Doha Declaration. While we certainly find the EC’s submission helpful in terms of providing a broader perspective on the relationship between two sets of rules provided by equal bodies of international law, i.e. the WTO and the MEAs, as we have attempted to point out in our submission, some of the proposals in the EC’s “global governance” concept would appear to either run counter to the existing rules of the WTO (such as those of the DSU), or to prejudice the rights of a WTO Member that is not a party to the MEA in question.

14. The fact that there has not been any conflict between MEAs and WTO rules does not, in our view, indicate that there is no conflict between STOs set out in MEAs and WTO rules. One of the purposes of our negotiations should be to identify possible and potential conflict, and to provide mechanisms to avoid such conflict. We intend to continue to actively engage in these important negotiations with all WTO Members, in the firm belief that such negotiation *“shall not prejudice the WTO rights of any Member that is not a party to the MEA in question”*.
