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SUBMISSION ON REGIONAL TRADE AGREEMENTS BY THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

Paper by the Separate Custom Territory of Taiwan,
Penghu, Kinmen and Matsu

The following submission, dated 27 July 2005, is being circulated at the request of the Delegation of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

RESPONSES FROM THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU TO QUESTIONS RAISED ON PAPER TN/RL/W/182 STRENGTHENING THE MULTILATERAL TRADING SYSTEM VIA OPEN REGIONALISM: PROPOSAL FOR REGIONAL TRADE AGREEMENTS TO CONTAIN AN ACCESSION CLAUSE FOR NON-PARTIES

We are responding hereby to Members' questions concerning our paper TN/RL/W/182 of 9 June 2005, which were raised at the Rules Negotiations Meeting on RTA of 14 June 2005. We are also taking this opportunity to elaborate further on the main ideas contained in the paper, in the hope that Members will then be in a better position to give favourable consideration to our proposal.

A. QUESTIONS AND RESPONSES:

1. Does the proposal to include an accession clause in RTAs exceed the Doha mandate?

Paragraph 29 of the Doha Declaration states in part that ministers "agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements." One of the disciplines applying to RTAs is that they should be made under the GATT/WTO and thus should not impair the integrity and nature of the multilateral trading system. A concern for Members is that there have been so many RTAs, which have created so many exceptions to the cornerstone of the WTO, the most-favoured-nation principle. We believe that the inclusion of an accession clause to allow a third party to negotiate accession to the relevant RTA is an important way to improve the disciplines and procedures so as to maintain and enhance the multilateral framework of the WTO.

2. Would it be necessary to amend the text of Article XXIV of GATT 1994?

We think it is too early to discuss the legal form of amendment. Members should focus on how to find consensus on the solutions before jumping into the technical work of legal drafting. In our opinion, the previous WTO Understandings not only interpret provisions of certain articles of GATT 1994, but also introduce some new elements into the operation of relevant articles. Thus, although currently there is no provision in Article XXIV concerning the accession clause as we suggested, it may still be possible that such a requirement being incorporated in an understanding on the interpretation of Article XXIV is in line with WTO practice.

3. Some Members expressed concerns about the feasibility and acceptability of the requirement of parties to the RTA to allow third countries to join their RTAs, as well as possible political and other non-trade implications or considerations.

We certainly understand these concerns. We also understand that different RTAs have different historical, economic and other backgrounds with their own specific preferential arrangements in their respective RTAs. Recognizing these concerns and different backgrounds, we agree that RTA members should be allowed to decide the terms and conditions for third parties to negotiate accessions to the respective RTAs. The minimum requirement is that RTA members should provide the opportunity for third countries to negotiate accession to the RTAs. Again, this is not a drastic proposal. Whether or not a third party would be able to accede to an RTA depends mainly on whether they would be able to meet the terms and conditions set forth.

4. Concern was expressed about the possibility of too many countries asking for the accession to relevant RTAs creating too many burdens and costing too much in terms of resources for the RTA members.

In our opinion, this mandatory requirement of accession provision would not generate too many accession negotiations. As explained in our proposal, there have been many RTAs with such provisions incorporated in them. The fact is that there have not been many accession applications made by third countries under these accession clauses. We believe that the concern about limited resources to deal with too many accession applications is often hypothetical.

5. Some Members requested clarification of the mandatory or non-mandatory nature of the proposed provisions.

As a matter of fact, the WTO does not have many non-binding or non-mandatory trade rules. We suggest following WTO practice in this regard and making the accession provision a mandatory one. In our opinion, the mandatory requirement allowing third countries to negotiate accession to existing RTAs would be an effective way to bridge the difference between multilateralism and regionalism and to maintain the multilateral system.

6. A question was raised about the meanings of “respond sympathetically” and “accord in good faith adequate opportunities”.

We must point out that the terms “sympathetically” and “good faith” were not created by us. They have been used in some international agreements. Article XXIII of GATT 1994 requires Members being approached under this article shall give sympathetic consideration to the representations or proposals made to it. There have not been many disputes about the meaning of the term “sympathetic”. Also, Article 31 of the Vienna Convention on the Law of Treaty provides in part that “a treaty shall be interpreted in good faith...” Thus the “good faith” requirement is a fundamental principle of treaty law, therefore the requirement of good faith regarding accession applications does not impose much additional obligation on RTA members. The basic idea of the requirement in our proposal is that the RTA members should not bluntly reject an accession application without any consideration of the merit of such application.

7. One Member raised an issue concerning implications in dispute settlement procedures.

If we are to have mandatory provisions, certainly they will give rise to possible dispute settlement procedures if the provisions are not followed. However, this concern could be reduced to a very low level simply because, under our proposal, RTA members are only required to provide opportunities allowing third parties to negotiate an accession to the RTA; there is no guarantee that they will succeed. Furthermore, since RTA members are allowed to design the accession terms and conditions, it is very unlikely that third countries will be able to bring a complaint under the Dispute Settlement Understanding only on the basis that they are not able to meet the terms and conditions to successfully join the RTAs.

8. Concern was expressed about whether the accession provision is applicable to both a customs union (CU) and a free trade area (FTA).

It could be that there are more historical and other ties between CU members, and it is also true that the formation of a CU needs greater integration. However, our view is that although the CU and the FTA are by nature not exactly the same, we still cannot find a proper basis to distinguish between a CU and an FTA with regard to the need to make them more compatible with the multilateral system. Both of them are exceptions to the most-favoured-nation provision of Article I of GATT 1994 and they need to be arranged so as not to get further and further away from the multilateral trading system under the WTO. Also, as suggested previously in our explanation, members of the RTAs will be able to design their own respective accession provisions in their RTAs. This will allow CU members to take into account the particular historical and other backgrounds of their CUs and to hammer out the most suitable accession clauses.

B. FURTHER COMMENT:

We must re-emphasize the fact that there have been so many RTAs established under the WTO with a wide diversity of content. Much of the content is designed specifically to protect members' domestic industries. This has created difficulties for the traders of other Members, and the trend has been worsening in this respect. Therefore, although it is possible for third countries to negotiate new RTAs with the original RTA members, we do not believe that this is the best way to solve the problem of the diversity that exists, or the trend of departing further and further from the multilateral system. Allowing third parties to negotiate possible accession could have the effect of reducing the need for creating new RTAs, thus reversing the trend towards regionalization of the trading system. In our view, RTAs that are by nature open to others to join could help the original RTA members to enhance the benefits arising from market opening under their RTAs, without the need to create new RTAs.

In summary, we appreciate Members' valuable comments on our proposal and the positive discussions on relevant issues that have arisen. We hope our responses have reduced the concerns of Members, and we look forward to our proposal becoming part of the WTO framework dealing with RTAs, so that they may be brought fully into line with the multilateral system under the WTO.
