

WORLD TRADE ORGANIZATION

RESTRICTED

TN/RL/M/2
11 June 2002

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Negotiating Group on Rules

SUMMARY REPORT OF THE MEETING HELD ON 6 & 8 MAY 2002

Note by the Secretariat

1. The Negotiating Group on Rules held its second formal meeting on 6 and 8 May 2002.
2. The Group adopted the following agenda:
 - A. Adoption of the agenda
 - B. Subsidies and countervailing measures, including fisheries subsidies
 - C. Anti-dumping
 - D. Regional trade agreements
 - E. Other business
 - Request from the African, Caribbean and Pacific Group of States for observer status in the Trade Negotiations Committee and subsidiary bodies
 - Electronic distribution of documents
- B. SUBSIDIES AND COUNTERVAILING MEASURES, INCLUDING FISHERIES SUBSIDIES
3. The Group had before it four submissions relating in whole or in part to this agenda item.
4. The first submission introduced was "Export Credits in the WTO" (TN/RL/W/5). The sponsor noted that an increasing number of developing countries exported higher value-added goods, which required financing, yet these countries faced constraints in competing with exports from developed countries to finance trade. Items (j) and (k) of the Illustrative List of Export Subsidies, the main provisions of the SCM Agreement regarding export credits, had become obsolete in light of the new export credit practices that have developed.
5. A number of delegations shared the concerns expressed in the paper. It was observed that the current rules regarding export credits were negotiated plurilaterally outside the WTO, and needed multilateral control. It was further observed that the current rules involved asymmetries against developing countries. One delegation suggested that the goal should be tougher disciplines on export credit practices, while another suggested that there should be non-actionable status for certain developing country export credit practices. The issue of an "a contrario" reading of items (j) and (k) was discussed.

6. The second submission introduced was Improved Disciplines under the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement (TN/RL/W/1). The sponsor noted that recent dispute settlement decisions regarding export contingency placed certain economies at a disadvantage vis à vis those with large domestic markets. Further, the lack of recourse to the Agreement's serious prejudice provisions, and the lapsing of the deemed serious prejudice provision, suggested a need to consider a more viable and accessible serious prejudice remedy. The lapsing of the non-actionable subsidies category at the end of 1999 negatively affected the so-called traffic light framework of the SCM Agreement; Participants needed to consider whether such a category of subsidies should again be pursued.

7. Regarding non-actionable subsidies, one delegation supported the idea of re-creating such a category, and suggested that the Secretariat might prepare a compilation of the extent and the nature to which Members had availed themselves of the category in the past. Another delegation recalled that the green light provisions were agreed to only in conjunction with the stronger disciplines on dark amber subsidies, and expressed support for a close examination of how the serious prejudice provisions could be strengthened and made more effective.

8. The third submission introduced was Proposals on Implementation Issues and Concerns (TN/RL/W/4). The sponsor considered that the disadvantages faced by developing country industries required the state to assume a more active role in supporting industry. However, special and differential treatment in the SCM Agreement was inadequate. The sponsor proposed amendments to Article 27 of the SCM Agreement to improve special and differential treatment in respect of negligible import volumes and *de minimis* subsidization in the case of countervail investigations regarding imports from developing countries. The sponsor also proposed to amend Article 27 so that the prohibition in Article 3.1(b) of the SCM Agreement would not apply to developing countries. The sponsor reserved the right to table additional implementation-related proposals on the AD and SCM Agreements, including on issues under discussion in the respective Committees.

9. Several delegations expressed support for the paper, with one delegation noting the need for space for development. The question was raised whether the proposed amendments regarding countervail investigations would apply wherever imports from developing countries were involved, or only where a developed country was conducting an investigation? The linkage between the developmental problems identified and the proposed changes to the trade remedy rules was questioned, and it was observed that the proposal that countervailing duties on imports from developing countries be restricted to the amount by which the subsidy exceeds the *de minimis* level was inconsistent with the underlying purpose of the *de minimis* rule, which is to eliminate nuisance cases. Concern was also expressed regarding any weakening of the disciplines of the SCM Agreement, as this would not advance development. One delegation noted that, in addition to problems of developing countries, areas where the Agreement lacked clarity, or where certain provision had not been much used, should be addressed.

10. Turning to a general discussion on the suite of papers relating to subsidies and countervailing measures other than fisheries subsidies, one delegation recalled the mandate provided by the Ministers. This delegation indicated that its core principles for the negotiations involved strengthening the effectiveness of the trade laws, improving disciplines on the underlying distortive trade practices, and ensuring that contingent trade laws operate in a transparent and open manner. Another delegation indicated a need to further address countervail issues, some of which could be addressed in parallel with anti-dumping issues.

11. In respect of fisheries subsidies, two submissions relating in whole or in part to this subject were discussed.

12. Regarding the first submission introduced, Improved Disciplines under the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement (TN/RL/W/1), the sponsor observed that Participants needed to consider whether fisheries subsidy issues would be best addressed on a sectoral basis or under generic disciplines. The sponsor was concerned about the implications of fragmenting subsidies disciplines on a sector by sector basis, and concluded that the logical approach was to examine specific sectoral issues in the light of the existing SCM Agreement framework, and then to address any deficiencies found.

13. The second submission introduced, The Doha Mandate to Address Fisheries Subsidies – Issues (TN/RL/W/3), was sponsored by eight Participants. The sponsors explained the need for dedicated negotiations in the fisheries sector. It was observed that fisheries differed from other sectors in that it was a renewable resource which was vulnerable to depletion if overexploited. Because many fisheries were of interest to more than one country, subsidies in this sector could affect not only markets, but also access to the resource. Yet SCM Agreement rules focused on the impact of subsidies on markets, not on the damage to productive resources. The heterogeneous character of fisheries products and the structure of the industry were additional complicating factors.

14. The two papers attracted substantial discussion. Some delegations contended that there was nothing unique about the fisheries sector, that it was no more heterogeneous than many other sectors, that many fish stocks were within exclusive economic zones, and that in any event the nexus between subsidies and stock depletion was not clearly established. Other delegations supported the view that the fisheries sector was unique and required distinct rules, and that the nexus between subsidies and stock depletion was clear; it was further observed that the Ministerial Declaration provided a sectoral mandate in this area.

15. Some delegations contended that subsidies would not result in overexploitation of fish stocks if there were proper management of fish stocks. Other delegations, while not contesting that fisheries management was an important issue, considered that fisheries subsidies issues should be addressed in parallel to management issues, with one delegation noting that some developing countries lacked the resources for efficient fisheries management.

16. It was observed there was a need to differentiate between those subsidies that had harmful effects and those that did not; in this context, certain delegations noted that subsidies for small scale and artisanal fisheries would not have harmful trade effects and should not be subject to any new disciplines.

17. One delegation noted that the submissions showed the need to address environmental issues in the WTO, while others considered fisheries subsidies to be a trade issue, including in particular distortions caused by fishery subsidies to developing countries' market access. One delegation noted that, by addressing the trade issue, environment and development questions would also be addressed.

18. A number of delegations made reference to work on fisheries subsidies being done in other bodies, including APEC, FAO, OECD and UNEP.

19. Certain delegations disagreed as to whether the joint submission was or was not within the mandate set forth in the Ministerial Declaration.

C. ANTI-DUMPING

20. The Group had before it four submissions relating in whole or in part to this agenda item.

21. The first submission introduced, Anti-Dumping: Illustrative Major Issues (TN/RL/W/6), was sponsored by fourteen Participants. The majority of its sponsors made statements introducing the

paper. It was observed that there was an increasing use of anti-dumping both by developed and developing countries. It was explained that the issues identified in the paper – sales in the ordinary course of trade, constructed value, cyclical markets, prohibition of zeroing, cumulative assessment of injury, causal relationship between dumping and injury, threat of material injury, thresholds under Article 5.8, facts available, lesser duty rule, sunset of anti-dumping orders, and public interest – were just examples of the problems being encountered, and that more issues would likely be identified, either collectively or by individual delegations. It was further observed that outstanding issues regarding implementation complemented this list. One delegation noted that anti-dumping should be used only where competition policy did not work. It was noted that there was a link between progress on anti-dumping and on market access negotiations.

22. A number of delegations indicated support for, or interest in, certain of the proposals in the submission. One delegation observed that the AD Agreement represented a reasonable balance, that the problems related as much to implementation as to the Agreement itself, and that the extent to which textual modifications were required was unclear. It was observed that anti-dumping was a legitimate instrument, although it was sometimes misused. Several Participants referred to the importance of enhancing S&D provisions within the Agreement.

23. The second submission introduced was Improved Disciplines Under the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement (TN/RL/W/1). The sponsor noted that improvements to the rules governing anti-dumping were required in order to achieve greater convergence in interpretation and to prevent unnecessary restrictions on trade. Areas that would benefit from clarification included rules pertaining to the initiation of investigations, transparency and procedural fairness, the calculation of dumping margins and amounts of subsidy, injury determinations, duty enforcement, the consideration of broader public interest and sunset reviews.

24. The third submission introduced was Proposals on Implementation-Related Issues and Concerns (TN/RL/W/4). The sponsor noted an increasing resort to anti-dumping actions, as well as a lack of clarity in certain provisions, including Article 15 which was rendered inoperative. Increasing de minimis dumping margins, enhancing the negligible volume level, removing the requirement of cumulation, and making mandatory application of the lesser duty rule when taking anti-dumping actions against developing countries were some of the ways in which the objectives of the WTO could be achieved.

25. The fourth submission introduced was Negotiating Group on Rules: Implementation-Related Issues (TN/RL/W/7). The sponsor elaborated upon tirets 42 and 44 in the Compilation of Outstanding Implementation Issues Raised by Members (Job (01)152/Rev.1).

26. A general discussion was conducted on the suite of submissions relating to anti-dumping. It was noted that some implementation proposals remained before the Committee on Anti-Dumping Practices. One delegation observed that many of the issues identified as implementation questions affected developed as much as developing countries. The issue of whether sponsors of various proposals sought codification of dispute settlement outcomes or something more was also considered. It was observed that developing countries are now major users of anti-dumping measures, and that new users brought new challenges with respect to transparency.

27. The Chairman thanked Participants for the cooperation they had demonstrated in respect of procedures for the Group's work. He noted the participation of capital-based officials, which he encouraged. He indicated his satisfaction regarding the number of submissions received, and in particular welcomed the submissions from Brazil and India elaborating on implementation proposals; he hoped other Participants advocating implementation proposals would follow the example. He was pleased that additional submissions were to be forthcoming.

D. REGIONAL TRADE AGREEMENTS

28. The Group had before it one submission relating to this agenda item. The Chairman noted that the Compilation of Outstanding Implementation Issues Raised by Members (Job(01)/152/Rev.1) might also be of relevance for the discussion.

29. In introducing its submission on Negotiations on Regional Trade Agreements: Key Issues for Consideration (TN/RL/W/2), the sponsor noted the long-standing concerns about the potentially adverse impact of the proliferation of regional trade agreements (RTAs) on the multilateral trading system, particularly when they did not comply with WTO disciplines; he also recalled that the Committee on Regional Trade Agreements (CRTA) had been unable to carry out effectively its functions of review and oversight of the implementation of RTAs. In order to ensure that RTAs facilitated trade between the parties and did not raise barriers to third parties, a number of issues had to be addressed, including those identified in a Secretariat document prepared for the CRTA in March 2000, Synopsis of "Systemic" Issues Related to Regional Trade Agreements (WT/REG/W/37). The sponsor explained that the issues listed in the submission had been put forward as suggestions for consideration, to be supplemented by other delegations' additions. In the process of moving from the identification of issues to addressing them, it would be helpful if the Secretariat could prepare an updated checklist of systemic issues, based on that earlier document, but more targeted to the work ahead of the Group.

30. Delegations thanked the sponsor for its submission, indicating that it would help to map out the road of the negotiations. A few delegations were of the view that some of the issues listed in the submission went beyond the scope of the negotiations mandate, and one delegation remarked that the mandate did not refer to the elaboration of a WTO Agreement on RTAs. Some other delegations noted that the mandate of the Group was wide-ranging, covering all WTO provisions relevant to RTAs.

31. A number of delegations stressed the need to maintain the primacy of the multilateral trading system *vis-à-vis* RTAs. Some delegations were of the view that the proliferation of RTAs, and the increased overlapping of membership, presented a risk for the multilateral trading system. They noted that over the years RTA trade-diversion aspects have increased, and access to markets under MFN has eroded. One delegation drew a parallel between the resurgence of protectionism and RTA proliferation. In the current situation, where MFN treatment was becoming the exception and not the rule given the very high number of countries recipients of preferential treatment, prospects for success in trade liberalization at the multilateral level could not be but sub-optimal.

32. The fact that the Doha Ministerial Declaration, while noting that the WTO was the unique forum for global trade rule-making and liberalization, also recognized the important role played by RTAs in promoting the liberalization and expansion of trade and in fostering development was highlighted by several delegations. Some delegations noted that RTAs were a reality which found its rationale at the economic, political and legal levels; they were authorized by the WTO and contributed to its objective of trade liberalization. A number of delegations argued that, given the significant role played by RTAs in fostering development, negotiations should take that into account so that any new rules on RTAs protect the interests of developing and least-developed countries. The difficulty recently encountered concerning the granting of the waiver for the Cotonou Agreement between the European Communities and countries of the Africa, Caribbean and Pacific (ACP) were noted in this context; some delegations also expressed the view that the rules would have to be flexibly applied on matters related to the foreseen post-Cotonou Economic Partnership Agreements.

33. One delegation observed that a parallel lowering of MFN tariff rates would significantly reduce the risk of trade diversion brought by the formation of an RTA.

34. The need to clarify WTO rules on RTAs through the consensus-building process of negotiations was supported by all delegations. One delegation noted that the present situation of unclear and disputed rules benefitted none, given that neither the parties to RTAs knew the benchmarks they had to follow nor did third parties know their rights. Another delegation foresaw, in the absence of clearer rules, an increased number of dispute settlement cases relating to RTAs; given the very legal nature of dispute settlement interpretations, these might not always be politically welcome.

35. Several delegations referred to preferential rules of origin as an issue needing to be tackled and disciplined in the negotiations. One delegation noted that unlimited freedom was provided to parties to RTAs to design them. A few delegations suggested that harmonization of RTA rules of origin might be desirable in the long run..

36. One delegation was of the view that all RTAs, i.e. those notified under Article XXIV of the GATT 1994, the Enabling Clause and Article V of the GATS, should be notified to a single body, namely the CRTA, which would adopt the terms of reference for the examination, as appropriate. Some other delegations noted that this would require changes to existing legal provisions.

37. Another delegation suggested that the Enabling Clause should provide legal cover for RTAs among developed and developing countries of a non-reciprocal nature. Acknowledging developing countries' concerns relating to RTAs of a lesser-than-full reciprocal nature, one delegation noted that a number of exceptions were provided for developing countries in the context of the Enabling Clause and other special and differential treatment provisions in various WTO Agreements and Decisions, and that in the negotiations close attention should be given to those instruments. For another delegation, the Enabling Clause could not be seen as presenting a problem.

38. Divergent views were expressed on the "grandfathering" of (or, conversely, the retroactive application of new rules to) existing RTAs. One delegation noted that this question should be looked at once new rules had been developed, and that it would seem possible that some of the new rules might deserve retroactive application while others might benefit from grandfathering.

39. Some delegations noted that issues related to economic integration agreements on trade in services had not deserved the same level of attention neither in the sponsor's submission nor in the Group's discussion.

40. Several delegations also stressed the need to improve the transparency of RTAs and the efficiency of the procedures related to the examination of RTAs, noting that the CRTA had been unable to adequately fulfil its mandate of reviewing RTAs and overseeing their implementation. Some delegations noted that it might be possible to achieve an "early harvest" on procedures for the examination of RTAs. One delegation suggested that the examination of an individual RTA could be carried out on the basis of a prior factual analysis by the Secretariat, which would not only help Members to better understand the functioning of the RTA under examination but would also ensure that all RTAs be treated on an equal footing.

41. A number of delegations indicated that it would seem advisable to organize the negotiations under two topics, namely procedural and systemic issues, though a few saw the division between procedural and systemic issues as an artificial one. One delegation noted that while many of the procedural issues would very quickly translate into systemic ones (e.g., the provision of statistics on a tariff-line basis), a few genuine procedural issues existed (e.g., the timing of notifications).

42. Many delegations stressed the need to setting priorities at an early stage of the Group's work, though a few delegations noted that the issues to be negotiated had first to be identified.

43. The Group widely supported the proposal that the Secretariat prepare an updated and more concise version of a document circulated in 2000, under the form of a checklist of RTA-related issues. Two delegations indicated that they would make submissions in time for the July meeting.

44. In his summing-up, the Chairman underlined that the Group would provide adequate time for negotiations covering the issue of RTAs. He noted that almost all WTO Members were parties to at least one RTA. Further, since all Members were third parties to many RTAs, there was a clear common interest in ensuring that RTAs in which they were not participants did not undermine Members' WTO rights. He highlighted the fact that the present context surrounding RTAs had changed significantly from the time Article XXIV had been drafted, both with respect to the number of existing RTAs, which was very high and yet increasing, and to their scope, which had widened from reductions in frontier protection to cover the granting of preferential treatment on matters covered by other GATT Articles. He noted that the blockage in the CRTA work, which had been mentioned by various delegations, benefitted no-one and that the Negotiating Group had as one of its tasks to find ways to unblock that situation. Regarding organization of work, he indicated his intention to split the RTAs agenda for the next session in two sub-headings, namely procedural issues and systemic issues. He noted that a few delegations had mentioned that progress would require setting priorities, and invited Members to keep that in mind. When time would be right for priority-setting, he would consult so that the Group's priorities adequately reflect those of the Membership. He cautioned the Group in trying to achieve an "early harvest" on procedural aspects of RTAs, as suggested by some delegations; by experience he knew that such an approach might not always prove conclusive. He noted that strong support had been shown in the Group for a note to be prepared by the Secretariat summarizing the systemic issues on RTAs raised in the CRTA, as well as in other WTO Bodies, and he requested the Secretariat to act accordingly. He indicated that the note was expected to be distributed within 10 days, so as to assist delegations in preparing their submissions.¹

E. OTHER BUSINESS

45. The Chairman noted that a request for observer status in the Trade Negotiations Committee and subsidiary bodies had been received from African, Caribbean and Pacific Group of States. As this matter of observers was the subject of horizontal consultations, the Group was not in a position to take a decision on this matter at this meeting.

46. The Chairman recalled that the next formal meeting of the Group would take place on 8-10 July 2002. Proposals and any other documentation for consideration at that meeting should be submitted to the Secretariat by 17 June, in order to insure that they could be circulated and translated in a timely manner.

47. One delegation suggested that Group documents be circulated to Participants via email, a view seconded by another delegation. The Chairman indicated that he would consult with the Secretariat in respect of the request.

¹ This note was later circulated as TN/RL/W/8.