WORLD TRADE ORGANIZATION

RESTRICTED

TN/RL/M/26
11 May 2005

(05-1927)

Negotiating Group on Rules

SUMMARY REPORT OF THE MEETING HELD ON 11, 13 & 15 APRIL 2005

Note by the Secretariat

1. The Negotiating Group on Rules ("the Group") held a formal meeting on 11, 13 and 15 April 2005.

A. ADOPTION OF THE AGENDA

2. The Group adopted the following agenda:

B. ANTI-DUMPING ("AD")

3. The Group first discussed a paper entitled **"Proposal on Material Retardation"** (TN/RL/W/175). The sponsor explained that, as the AD Agreement ("ADA") neither defined material retardation, nor gave any indication of how its existence should be established, it was necessary to clarify the concept, taking into account problems faced by investigating authorities, particularly in developing countries. The proposal identified difficulties encountered by the sponsor in determining injury in specific circumstances, specifically those relating to a new company in a developing domestic market, to the upgrading of production facilities, and to privatization. The sponsor proposed to clarify that the concept of material retardation included not only industries established from zero, but also domestic industries characterised by a limited level of development and/or new organization, including embryonic, restructured and newly privatised industries. The sponsor further proposed to specify criteria for determining when material retardation occurs.

4. A number of Participants agreed that the provisions regarding material retardation would benefit from clarification. Concern was however expressed regarding a perceived desire to expand the concept beyond establishment of a new industry to other situations. This could deprive Members of market access rights and have a particularly severe impact on developing countries. Regarding the concept of an "embryonic industry", one Participant asked whether the sponsor was suggesting that AD measures be used as industrial policy to promote infant industries. Regarding new companies, one Participant queried why an existing company would not seek relief if there were injurious dumping. Regarding privatization, it was queried when a newly privatized firm could be considered materially retarded and how causation should be established in such cases. The sponsor was asked whether its proposal was for special and differential treatment (S&D) that would be applied only to developing and least-developed countries.

5. The sponsor stated that the main theme of its proposal was to try to find a proper definition for the concept of material retardation. Participants should not focus on the examples as these were simply illustrations from the sponsor's own experience which could provide a basis to discuss a definition of this concept and the factors needed for its assessment. The proposal did not address S&D.

6. The Group then turned to the paper entitled **"Public Interest"** (TN/RL/W/174) and sponsored by 10 Participants. The paper proposed that an importing Member be required to analyse the effects of an AD measure on the various sectors of its economy before imposing an AD measure, and not to impose the measure if it was not in its overall economic interest. The proponents believed that such a provision would enable an importing Member to better assess the potential effects of an AD measure and to ensure that imposition was consistent with its overall economic interest, which in turn would have a positive effect on global trade and the multilateral trading system. The proposal encompassed four main elements that could provide the public interest framework.

7. Some Participants welcomed the paper and viewed a public interest test to be in the self-interest of every Member. These Participants emphasised the importance of a mechanism allowing users, competition authorities and consumer associations to present their views regarding the imposition of an AD measure. Other Participants however expressed concerns. Some Participants considered that public interest was hard to define and subjective, and that criteria should be left to individual Members. One Participant noted that the proposal allowed Members to take non-economic considerations into account, and asked how this would relate to Members' non-discrimination obligations. Some Participants expressed concern that application of the test could prove time-consuming, costly and burdensome for interested parties and investigating authorities. Questions were posed about the relationship between the proposed test and the lesser duty rule, and about a possible overlap with the work of competition authorities. It was also inquired whether the proposal envisioned a mandatory test as opposed to guidelines, and whether the dispute settlement system would be authorized to determine whether Members had appropriately judged their own public interest. It was inquired how injurious dumping could be in a Member's overall economic interest.

8. The sponsors indicated that the test proposed was primarily economic. The application of such a test was in the overall economic interest of Members who therefore should not have any difficulties applying it on mandatory basis. With respect to dispute settlement, this primarily economic assessment did not differ much from what was already contained in the ADA or put forward in the AD negotiations. The issue of public interest was distinct from the lesser duty rule, as the latter adjusted a duty to a level adequate to remove the injury to the domestic industry, while the former assessed the effect of a duty on other sectors of the economy.

C. SUBSIDIES AND COUNTERVAILING MEASURES ("SCM"), INCLUDING FISHERIES SUBSIDIES

9. The first paper discussed was entitled **"Contribution to the Discussion on the Framework for Disciplines on Fisheries Subsidies"** (TN/Rl/W/176). The sponsor stated that the aim of its proposal was to address S&D, but in order to do so it had first to address the general rules. The proposed disciplines involved two basic categories of subsidies, a green box and a red box. The proposal identified four categories of programmes that could be deemed non-actionable. Subsidies not falling within the green box would be prohibited. The sponsor explained that the S&D it proposed aimed at defining a very specific limited set of conditions under which developing countries would need flexibility to address their special situations and concerns. Those situations would be captured in an amber box, providing developing countries with the possibility to grant actionable subsidies. The proposal envisaged also a dark amber box within which the burden of proof regarding serious prejudice would be shifted in case the granting developing countries surpass a certain threshold. The proposal also dealt with the concerns of least-developed countries.

10. Several Participants emphasized the need for S&D for developing and least-developed countries. One Participant stated that such S&D should supplement that already existing under Article 27 of the ASCM. Another Participant explained that many developing countries had not yet developed their fisheries industries and should be allowed to take advantage of underexploited fisheries. Other Participants considered that the S&D proposed was too extensive. It was observed that developed countries represented only three of the ten most important fishing countries, and that the level of S&D proposed by the sponsor would render any new disciplines ineffective. Several Participants indicated that linking S&D to such concepts as "patently at risk" fisheries was complex and queried who could make such judgements. While one Participant questioned whether all developing countries should be treated similarly, another indicated that S&D should be available to all developing countries regardless of the scale of their fisheries.

11. Regarding the general framework for disciplines, certain Participants considered the proposal to adopt a top-down approach, which they considered to be inconsistent with the current ASCM and contrary to the Doha mandate, while others welcomed the positive-list approach. One Participant agreed with the sponsor that fisheries management and general infrastructure should be excluded from the definition of fisheries subsidies. Several Participants asked for further explanations regarding the exclusion of inland fisheries and aquaculture from the proposed disciplines, while others asked for clarifications regarding the issue of specificity.

12. Regarding the issue of top-down versus bottom-up approaches, the sponsor explained that its intention was to have a detailed discussion regarding programmes that it considered should be actionable for developing countries and programmes that should be green. Regarding the depletion of fisheries resources, the proposal did not aim to define what is a sustainable level as WTO negotiators had neither the competence nor the mandate to do so. On the exclusion of inland fisheries, the proposal was meant to tackle the issue of open and high seas fisheries, not inland fisheries. With respect to specificity, this term was used to capture the nature of the discussions which focus specifically on fisheries subsidies, not on subsidies in general. Regarding fisheries management, the sponsor confirmed that these services are on the border between being green subsidies or not being subsidies at all.

13. The second paper discussed was entitled **"Fisheries Subsidies"** (TN/RL/W/178). The sponsor explained that its paper focused on transparency and enforcement through the adoption by Members of one of two alternative approaches, a WTO control system and a domestic-based system. The WTO control system would not only require prior notification, but would consider any subsidies programmes not notified in sufficient time for Members to examine them to be prohibited. With respect to the domestic control approach, it would require the introduction of a provision in the domestic law of the Member concerned making full transparency a mandatory legal requirement. These legal provisions would be notified to the WTO and be subject to scrutiny and if the system proved to be inadequate or subject to abuse, such subsidies could also be deemed to be prohibited. It was thus essentially an *ex-post* surveillance mechanism ensuring transparency. On S&D, the paper acknowledged the need for a certain phase-in period for developing countries during which they should be given special help via an intensive programme on how to set up a comprehensive system for transparency and enforcement.

14. Some Participants considered that an effective enforcement system should form an integral part of any new disciplines on fisheries subsidies, and welcomed the two-track approach to transparency and enforcement suggested in the paper. Other Participants however queried whether the two alternatives would be equally effective. One Participant considered the proposed pre-notification and pre-authorization obligations to be an intrusion into the domestic affairs of WTO Members which would not be acceptable to lawmakers. Such obligations would depart from the basic structure of the ASCM and be at odds with paragraph 28 of the Doha Declaration, while a presumed prohibition as the consequence of non-performance of a pre-notification obligation would reverse the

burden of proof, thus violating a fundamental principle of the dispute settlement system. On S&D, some Participants viewed it necessary to allow developing countries certain exceptions from the pre-notification system in the case of subsidies for emergency relief and unforeseeable national disasters where immediate help from the government is needed urgently.

15. A number of questions were posed regarding the proposal. Was the WTO control system simply an analogue to the regular treatment of Members' subsidy notifications that currently takes place in the SCM Committee? What was envisaged by the sponsor to be an appropriate de minimis level of any specific subsidy? Should this level be the same for developed and developing countries including LDCs? what should be done if the cumulative effect of such programmes is substantial? Why shouldn't Members be required to notify all types of subsidies whether prohibited or not? If a Member was found to be in breach of its notification obligation, would it have to terminate the subsidy immediately or just submit a notification? Would a developing country Member be subject to a transitional enforcement mechanism? What type of assistance programmes were envisaged in order to assist developing countries to set-up an enforcement system?

16. The sponsor explained that it intended to submit this paper for further discussion in the informal session of the Group.

17. The third paper discussed was entitled **"Treatment of Government Support for Export Credits and Guarantees under the Agreement on Subsidies and Countervailing Measures"** (TN/RL/W/177). The sponsor explained that the paper sought to clarify items (j) and (k) of the Illustrative List of Export Subsidies relating to export credit guarantee and insurance programmes. The paper was motivated by the desire to ensure a level playing field for all WTO Members in the field of export credits and the concern that WTO rights and obligations should be based on the decision of all WTO Members. The idea underlying the latter point arose from the second paragraph of Item (k) which creates a safe harbour for export credit practices that are in conformity with the interest rates provisions of the OECD Arrangement on Export Credits. It would be in contradiction with basic principles of public international law to allow a small number of Members to decide on rules which automatically determine the rights and obligations of all WTO Members.

18. With respect to the second paragraph of item (k), several Participants considered that the OECD Arrangement was a tested and workable set of rules which should be taken into account. These Participants considered that WTO Members as a whole benefit from rules that are kept current and reflective of evolving market development and conditions, and that it would not be prudent to freeze the relevant text of the OECD Arrangement referred to in that paragraph. One Participant queried in this regard how the proposed amendment would impact recent amendments to the OECD Arrangement that provided greater transparency *vis-à-vis* non-Participants. It was further observed that the safe harbour was available to OECD and non-OECD countries alike, so OECD countries could not vote themselves a better deal to the exclusion of non-OECD WTO Members. Moreover, the Participants to the OECD Arrangement had invited non-Participants to participate in negotiations to revise the Arrangement where those non-Participants are net providers of export credits, and the WTO Secretariat had also been invited to comment.

19. Several Participants queried whether item (j) in fact creates any form of "safe harbour" and asked whether the sponsor was advocating an *a contrario* reading of item (j). In this vein, one Participant inquired about the relationship between 14(c) of the ASCM and item (j) as amended by the proposal, and why item (j) did not fully reflect Article 14(c). It was also suggested that the sponsor's draft language regarding item (j) was unclear, in that it seemed to offer a Member providing export credit guarantees the choice between the two benchmarks identified in the proposal. One Participant warned that the proposal would drive up premium rates for transactions involving exports to developing countries and reduce the flow of capital to such countries.

20. With respect to the first paragraph of item (k), several Participants noted that the difference between the current text and the proposal appeared to be that the language "borrowed by governments" in the current text is replaced by "funds available" in the proposed text and it was inquired to whom those funds would have to be made available.

21. In response, the sponsor reiterated its concern that a small number of Members should not be allowed to decide on certain disciplines on behalf of the WTO Membership. It emphasised that item (k) should reflect that the 1992 Arrangement, and not any subsequent version, is the "international undertaking" used to determine whether export credits fall within the safe harbour, unless WTO Members, by consensus, agree otherwise. Since 1992, the Arrangement had been significantly modified to the benefit of OECD Members by allowing Participants to match offers which did not comply with the Arrangement. This change undermined the special and differential treatment given to developing Members by Article 27 of the ASCM. With respect to item (j), the sponsor clarified that it rejects the "a contrario" interpretation of item (j), and its proposal seeks to reconcile the Illustrative List with the normal tests found in Articles 1 and 3 of the ASM.

D. OTHER BUSINESS

22. The next meeting of the Group will be held on 30 May–3 June 2005. The deadline for any informal elaborated proposals for consideration in informal mode at that meeting is Thursday, 12 May 2005, close of business.