WORLD TRADE ORGANIZATION

RESTRICTED

TN/RL/M/9
10 July 2003

(03-3726)

Negotiating Group on Rules

SUMMARY REPORT OF THE MEETING HELD ON 11 JUNE 2003

Note by the Secretariat

1. The Negotiating Group on Rules ("the Group") held a formal meeting on 11 June 2003.

A. ADOPTION OF THE AGENDA

2. The Group adopted the following agenda:

A. ADOPTION OF THE AGENDA
B. REGIONAL TRADE AGREEMENTS
C. OTHER BUSINESS

B. REGIONAL TRADE AGREEMENTS

3. The Chairman noted that he would start the meeting in formal mode, before moving to an informal debate on "Regional Trade Agreements (RTAs) Transparency Issues". The formal debate would focus on S & D proposals, and the three submissions received very recently.

S & D proposals

4. The Chairman informed the Group that the Chairman of the General Council had referred to the Group a number of specific S & D proposals, of which three were RTA-related. He had requested the Group's consideration of the proposals "as soon as possible" and on the basis of a "specifically drawn up schedule of work". Further, the Group was requested to report on progress made to the last meeting of the General Council before the Cancún Ministerial Conference.

5. The Chairman read the three RTA-related S & D proposals submitted by the African Group (document TN/CTD/W/3/Rev.2) and by the LDCs (document TN/CTD/W/4/Add.1). He noted that two of them were identical and that they all referred to the *Understanding on the Interpretation of Article XXIV of the GATT 1994*. He regretted that the late announcement that this question would be addressed at that meeting had not made it possible for the proponents to be present. His intention, at that meeting, was to invite the Group to start the process. Under "Other Business", he would propose future steps to fulfill the request made by the Chairman of the General Council, in particular the possibility to hold an additional meeting in July.

6. Expressing their understanding for the proponents' absence, participants noted that their reactions to the proposals made would be of a very preliminary nature. The legitimacy of the proponents' concerns was generally recognized. Some participants considered that finding solutions to these S & D proposals merited high priority, as they believed that the current structure of the multilateral trading system contained some imbalances and lacked sufficient flexibility to take into account different levels of development. In their view, a positive response to the proposals would renew the confidence of developing countries and LDCs in the multilateral trading system.

7. Though participants noted that the two identical proposals (by the African Group and the LDCs) did not appear to add substance to the existing legal situation, most of them recognized that a reaffirmation of existing rights could be of value to some Members; one participant was however of the view that a proposal without value added should not be accepted. The Group requested proponents to provide the concrete background of these proposals. It was also noted that any S & D proposal intending to clarify the relationship between the Enabling Clause and Article XXIV of the GATT 1994 should be dealt with in the context of the Group's discussion on legal issues and after the Cancún Ministerial Meeting.

8. As to the proposal related to special treatment for LDCs in arrangements with developed or developing countries, participants were unanimous in requesting proponents to clarify the nature of the flexibility they were seeking. The point was made that while the Enabling Clause did not apply to RTAs between developed and developing countries, preferential treatment for LDCs was already provided for in paragraph 2(d) of the Enabling Clause. It was also noted that some RTAs among developed and developing countries had been dealt with under the waiver provisions in Article IX:4 of the WTO Agreement; in that context, proponents were requested to explain whether any linkage existed between that proposal and another proposal made regarding waiver application by LDCs.

9. The Chairman highlighted the need for the proponents' presence for the debate to progress, while noting the Group's understanding for their absence in light of the clash of meetings; he would be conveying this message to the proponents. In summing up the preliminary debate, he noted that the two identical proposals did not appear to pose a problem to participants, as they seemed to re-state the already existing law, while, at the same time, providing a reassurance *vis-à-vis* existing rights, and he urged participants to consider that point in a positive light. As to the third proposal, the issue was more complicated but there was a readiness to consider ways to operationalize the proposal. He would report informally to the Chairman of the General Council that the Group had started discharging its mandate in a good atmosphere and that he was optimistic that in due course he would be able to report back in a constructive way. He finally noted that the Group would revert back to these issues at its next meeting.

Other issues

10. The Group moved on to have a preliminary exchange of views on three recently submitted proposals, which due to their late arrival were only available in English. Participants noted that the submissions distributed as documents TN/RL/W/114 and TN/RL/W/117 addressed *inter alia* a number of issues raised in the various Chairman's informal papers on RTAs transparency.

11. The proponent of the submission contained in document TN/RL/W/114 observed that the submission mainly dealt with systemic issues, which had not been substantially visited so far in the Group. The proposal built upon GATT Article XXIV:4 and the review mechanism under the Committee on Regional Trade Agreements (CRTA). Though RTAs were an alternative window of trade liberalisation, it was important that they complemented multilateral trade liberalisation; they should not make the achievement of that goal more difficult, nor occur at the cost of the trade or development of countries not parties to particular RTAs. It was thus important to emphasize the basic principle of RTAs, as enshrined in Article XXIV:4 of GATT 1994, that they were meant to facilitate trade between the constituent territories and not to raise barriers to trade of other Members. Formation of RTAs should indeed lead to meaningful welfare gains for the parties; since this required closer integration between their economies, RTAs should extend to as large a proportion of trade as possible. Keeping this in mind, it might be useful to define "substantially all the trade" (SAT) for the purpose of GATT Article XXIV, in terms of both threshold limits of HS tariff lines and trade flows, at various stages of implementation of the RTA.

12. Commenting on certain proposals made to bring the RTAs notified under the Enabling Clause within the ambit of GATT Article XXIV transparency mechanism, i.e. to subject the agreements to review under the CRTA, the proponent stated that this was an issue of some concern to his delegation. Any attempt to dilute the provisions of the Enabling Clause would be contrary to the spirit of the WTO framework and of the Doha Ministerial Declaration. It was his delegation's belief that it was not advisable to change the notification requirement of RTAs under the Enabling Clause and the existing system of notifying such RTAs to the Committee on Trade and Development (CTD) should continue.

13. On the issue of transparency of RTAs formed under GATT Article XXIV, the proponent said that his delegation actively participated in the informal discussions, on the basis of the *aide-mémoire* prepared by the Chairman, and felt that a two-step process of notification would be appropriate. He added that, in view of the increasingly comprehensive and complex character of RTAs, a prior factual analysis of the RTA by the WTO Secretariat would be helpful in making Members more familiar with the various RTA provisions and provide them with an analysis of their impact on the multilateral trading system. He suggested that, after the initial review, there could be a fixed periodicity for review of existing RTAs, depending upon the share of their trade.

14. The proponent continued his presentation of document TN/RL/W/114 highlighting that some of the existing provisions of preferential rules of origin (PROO) had a negative impact on non-RTA members, by leading to significant trade diversion and creating barriers to trade. It would be useful to arrive at an understanding whereby RTA origin rules would be considered "other regulations of commerce" and, as such, subject to the criteria set forth in GATT Article XXIV:4 and XXIV:5 (namely, not to raise barriers to trade for non-parties). He added that certain tests could allow Member to assess compliance with those criteria. He also pointed at issues relating to fast track procedures in RTA provisions on sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT) as requiring examination with respect to their impact on exports of non-RTA members. The question of mutual recognition agreements (MRAs) in the context of RTAs equally deserved careful consideration. With respect to trade defence measures, he stressed that the primacy of WTO rules should be maintained and, in particular, the MFN character of safeguard duties as provided in Article 2 of the Agreement on Safeguards; in his delegation's view, the provisions of GATT Article XXIV did not permit any derogation from MFN treatment for safeguard measures. Another issue that could be addressed was the possibility of derogation from the standards of safeguard investigations in actions taken only against RTA members.

15. Finally, the proponent said that the proposition of grandfathering existing RTAs was not in accord with the overall purpose of the negotiations. Since the number of RTAs had strongly increased during the 1990s and this trend continued, an analysis of the impact of these RTAs on the multilateral trading system was still needed, by applying to them any improved and clarified RTA provisions.

16. Participants generally shared the proponent's views on the relationship between RTA and multilateral trade liberalisation, and recognized RTAs' role in assisting developing countries to integrate into the multilateral trading system. Various participants also joined the proponent in supporting the two-stage notification proposal, although some questioned whether it fully addressed the problem of timely notification, in particular for developing countries and other Members that had particular constitutional constraints. One participant welcomed the timeframe proposed for notifying changes and the reference made to the WTO Agreement on Import Licensing, but others were of the view that timeframes remained to be carefully considered. Clarification was also sought on whether such a two-step process would apply to all RTAs.

17. The idea of requesting a factual analysis of notified RTAs to the Secretariat, as advocated in the paper; met with strong support. A few participants, however, requested that the role of the Secretariat be further clarified, and one participant reiterated reservations regarding that proposal.

Participants found references made to the Trade-Policy Review Mechanism (TPRM) as meriting further consideration. The idea for a periodical summary review of existing RTAs was also welcomed, but it was noted that this might require modulation on the basis of the type of RTA and on its country composition.

18. Several participants disagreed with the proponent's view that the fact of directly notifying an RTA among developing countries to the CRTA would alter parties' rights under the Enabling Clause, and that changes in the CTD review procedures would entail additional burden for the parties. In their opinion, a single-window approach would ensure administrative efficiency and a better understanding of RTAs by Members, without prejudicing the nature of the Enabling Clause or the rights and obligations of Members under that Clause. Also, noting the inadequacy of CTD reviews, they stressed that, if carried out in the CRTA, the review would be done on the basis of terms of reference and procedures adopted by the CTD and could therefore be made less burdensome than those carried out under Article XXIV. Further, it was noted that, while any dilution of the provisions of the Enabling Clause would be contrary to the spirit of the Doha Ministerial Declaration, this Declaration should not be subject to an over-restrictive interpretation; in that sense, increased transparency should apply to all RTAs, including those notified under the Enabling Clause.

19. Other participants shared the proponent’s views regarding RTAs under the Enabling Clause. One participant said that the interest raised by arrangements notified under paragraph 2(c) of the Enabling Clause was puzzling, given their generally low significance in terms of trade flows and potential for trade diversion when compared with the Generalized System of Preferences (GSP) regimes, also under the Enabling Clause. Reacting to that, a participant, noting that the great majority of high tariffs faced by developing countries were imposed by other developing countries, said that the economic importance of an RTA was not the relevant issue in this context. Another participant, stressing that RTAs under the Enabling Clause should not face stricter disciplines nor be scrutinized in the CRTA, proposed that procedures in the CTD be improved, if the Group felt it necessary to increase transparency. A number of participants referred to a Secretariat's note entitled *Legal Note on Regional Trade Arrangements under the Enabling Clause*, distributed on 13 May 2003 to the CTD as document WT/COMTD/W/114 as being of relevance to the debate.

20. Concerning the definition of SAT proposed in the submission, some participants inquired how it could ensure that a sector of the economy was not excluded from the RTA. Other participants noted that while this concept referred to trade as a whole and did not provide for a sectoral approach, SAT could not be simplified into a mathematical formula only, as it contained both quantitative and qualitative aspects – for example, interlinkages existed between SAT and PROO. On a more general note, one participant highlighted the point made in the submission that welfare gains generated by an RTA tended to increase when its coverage was greater.

21. Various delegations welcomed the prominence given to RTA regulatory frameworks in the submission and agreed that these should not work as barriers to trade for third parties. One participant wondered whether the proponent’s principles on some types of "other regulations of commerce" (ORCs) should also be applied to other ORCs. It was noted that while trade patterns changed after the formation of an RTA, negative effects on third parties need not be accepted. However, various participants expressed caution with regard to the concrete suggestions on how to address the negative effects that these measures might have. The proponent's comments on PROO prompted calls for further consideration of that issue by the Group. The point was made that PROO also posed problems for GSP-related trade and that any possible solution would have broader applicability than simply RTAs' trade. It was also noted that PROO were problematic not only in RTAs between developed countries, but also in RTAs between developing countries. One participant disagreed that systems of diagonal cumulation were not in conformity with GATT Article XXIV; rather, in his view, these systems contributed to increase trade. Various participants noted that while harmonisation and recognition procedures of TBT and SPS measures might appear to work as trade restrictions, they

generally aimed at facilitating trade. One participant expressed disagreement with the proponent's analysis on MRAs and stated that these were justified under the WTO Agreement on TBT and should not be discussed in the Group. Regarding trade defence measures, divergent views were expressed on the extent to which parties to an RTA might apply ORRCs in their intra-trade, and how these should relate to WTO rules. It was noted however that this issue, in particular as it referred to anti-dumping and safeguard measures, also merited further consideration.

22. On the question of whether or not existing RTAs should be exempted from compliance with any future new rules, it was generally felt that the question of grandfathering of existing RTAs should be addressed once the Group had a more concrete outline of possible improvement of the rules. Referring to the informal paper circulated by the Secretariat on this question, one participant highlighted the importance of clarifying the temporal application of various WTO rules on RTAs.

23. The proponent reiterated that the proposal aimed at reaffirming the importance of systemic issues, despite the intensive work being pursued on transparency. Reacting to some of the comments made, he noted that, if a significantly high threshold was agreed to define SAT, there might not be a need for dealing with any possible sectoral exclusion. On the proposal for a two-step notification process, he clarified that it aimed at taking into account domestic legislative constraints, and that information provided at that stage should not surpass the level of detail contained in press announcements made at the time of signing RTAs. As to the TPRM-type periodicity mechanism, an idea could be to link it to trade flows. On grandfathering, he cautioned against any exemption being provided to existing RTAs, since these represented at least 50 per cent of world trade. Regarding RTAs under the Enabling Clause, he observed that, because of their relatively small number, a review in the CRTA would not add any value to the situation prevailing at that date; rather, it would be more advisable to review the CTD procedures. The question remained whether a notification of RTAs under the Enabling Clause to the CRTA would be the first step for a more rigorous test of these agreements. He finally reiterated that RTAs under the Enabling Clause, which basically consisted of an exchange of tariff preferences, had a different meaning than those under GATT Article XXIV, and that their review should take place in the CTD.

24. The second submission introduced was contained in document TN/RL/W/116. The proponent explained that the submission focused on issues relating to ORCs and ORRCs, as provided for in GATT Articles XXIV:5 and XXIV:8. As an overarching principle for RTAs, Article XXIV:4 provided that RTAs should not be used as a means to raise barriers to trade for non-parties. Articles XXIV:5 and XXIV:8 were central to the assessment of the compatibility of individual RTAs with this overarching principle. However, neither of the two provisions contained a definition of what constituted an ORC or an ORRC, nor of how these terms should be interpreted in the examination of RTAs. Since these lacunae had created a great deal of difficulties in past examinations, clarification and improvement of those GATT Articles should be an important part of the negotiations on rules relating to RTAs. The main purpose of the submission was to elaborate on some key questions relating to ORC and ORRC, most of which had already been raised not only in individual RTA examinations but also in discussions on "systemic issues" in the CRTA. The intention was not to propose solutions to these questions, but to present them in a way that could stimulate further debate. The first part of the submission contained more general questions on the definition and scope of ORC and ORRC, and the second part set forth more specific issues relating to individual measures that might constitute ORC or ORRC. On the definition and scope of ORC and ORRC, it raised three questions that might lead the Group to a better understanding of the terms: (i) what was the relationship between ORC and the more traditional and widely-used term of non-tariff measures; (ii) how could the scope of the term ORC be defined and could the list of measures contained in the Standard Format be any reference to such scope; and (iii) whether the use of the different terms of ORC and ORRC, i.e. the insertion of the word "restrictive" in ORRC, affected their meaning and scope in any significant way. In the part dealing with specific issues, questions had been presented relating to PROO, standards, safeguard measures and anti-dumping measures. The central question

was whether these measures fell within the scope of ORC or ORRC and how to address the negative effects of these measures on the trade of non-members of RTAs. The questions contained in the submission were not intended to be exhaustive, and the proponent was fully aware that there might be other important questions that had bearings on ORC and ORRC.

25. Participants noted that the submission related to major issues and that it should serve as a basis for further consideration once the Group moved into deliberations of a substantive and legal nature. The Chairman proposed, and the Group so agreed, to defer the consideration of this submission to a later date. The proponent noted his delegation's understanding with respect to the Group's time pressure in light of the Cancún Ministerial Meeting; the main objective of paper was to revive discussions after a period that lacked activity.

26. Five participants had sponsored the third submission (document TN/RL/W/117). One sponsor, speaking on behalf of all the proponents, stated that the purpose of the submission was to set out concrete practical views on how to achieve greater transparency in relation to RTAs, in line with the format used in the informal papers by the Chairman. In relation to when to notify, the submission advocated a two-stage notification process, and the need for a more prescriptive approach for customs unions in order to allow time for negotiations provided in GATT Article XXIV. As to what to notify, the submission set out specific items of information that should be notified at both of the notification stages and highlighted the need for tariff and trade data, in particular the identification of which tariff lines were granted MFN, preferential or zero tariff rates. These minimal items of information were not unduly onerous for RTA parties, as this kind of information should be available to negotiators before they engaged in RTA discussions; at the same time, their provision would greatly enhance the ability of WTO Members to discharge the systemic obligation to ensure the complementarity of RTAs with the multilateral trading system and would also be of interest to the private sector. As to where to notify, the proponents had set out their views in concrete terms in the submission, in particular that for consistency reasons all RTAs should be notified to the CRTA given its expertise, institutional memory and continuity. The co-sponsors were fully committed to the mandate to clarify and improve disciplines and procedures under existing WTO provisions applying to RTAs; the views contained in the submission were moderate and balanced and they hoped that it would contribute to taking the discussion forward towards an outcome of transparency.

27. Another co-sponsor stressed the importance of putting down some ideas on various key transparency questions, not because the co-sponsors believed they had the complete answers but rather because they attached fundamental importance to the question of transparency. It would be inconceivable that the Group deliver its mandate without significant improvements to the current situation on the "fog" of RTAs. Lifting this fog would be a significant outcome of the negotiations. He highlighted three features of the submission, which were not fully dealt with in the informal paper by the Chair, namely the two-stage process for notification; the need to make the factual report by the Secretariat as comprehensive as possible and include detailed information on the scope and depth of liberalization; and the benefits to be gained in terms of transparency from developing a more consistent practice with respect to where RTAs were notified. While views differed on that, the co-sponsor was of the view that a distinction existed between procedures relating to transparency and the legal standard for WTO consistency. The submission dealt only with the former; and the benefits flowing from transparency existed whether or not an RTA had been notified pursuant to he Enabling Clause. It was with that distinction between transparency and legal rules in mind that the proponents hoped that some common ground could be found in that issue in the future. By addressing the three elements contained in the submission, the Group would go a considerable way towards lifting the fog of RTAs. Another co-sponsor reiterated that the objective of the submission was to facilitate the process to achieve an early agreement on one procedural issue, namely transparency of RTAs. In light of that, the proposals contained therein aimed at being moderate and practical.

28. The two-stage notification process suggested in the submission prompted comments from participants similar to those reflected in paragraph 16 上の. One of the co-sponsors noted that the two-stage notification process would aim at allowing basic information on an RTA to be provided early in the process; such basic information need not be extremely complete and could be similar to what had been proposed by the proponent of TN/RL/W/114.

29. While a number of participants welcomed the timeframe proposed for full notification of an RTA, some indicated that they could not possibly commit to a deadline expressed in terms of "[X] days prior to entry into force". The reference made to notification being made prior to the application of the preferential treatment was welcomed by some participants; an alternative way was also suggested to link the timing of notification to the completion of ratification procedures in all RTA's parties.

30. Divergent views were expressed on the proposed stricter notification deadlines for customs unions than for free-trade areas (FTAs). Some participants failed to see why more stringent transparency requirements should be required from customs unions than from FTAs or any other type of RTA. In their understanding, while the formation of a customs union might lead to a modification of bound rates, GATT Article XXIV:6 and the Understanding referred to GATT Article XXVIII procedures and defined precisely the timeframes applicable; it was stated there that procedures had to be commenced before bindings were broken, but not when they were to be completed. They also remarked that the formation of FTAs might also imply a modification of applied rates. Other participants observed that while FTAs might result in third parties' exports facing a relative comparative disadvantage, the tariff applicable to them would normally not go up. It was argued that there was a distinction between providing relative advantage and actually raising barriers, not only reflected in GATT Article XXIV but also in standard WTO language for waivers. Further, in the view of some participants, while modification of applied rates by parties to an FTA might have the same effect as the break of bindings following the formation of a customs union, the legal nature of the requirements of GATT Article XXIV was fundamentally different. It was stressed that differentiated treatment of customs unions and FTAs was both embodied in GATT Article XXIV and reflected in the standard terms of reference adopted by the Council for Trade in Goods for the examinations.

31. Participants welcomed the proposals made regarding improvements on the notification of changes made to RTAs, as well as the detailed suggestions regarding what to notify at both stages of the proposed notification process. Regarding the first stage, the point was made that a combination of information provided by governments to the public in general and of a contact points could represent a real added value to the existing situation. Regarding the second stage, some participants noted that the precise nature of information on the depth of intra-trade liberalization had to be defined. Concerns were expressed regarding the risk that this information might result in a value judgement being made by the Secretariat; in that context, the distribution by the Secretariat of a mock factual analysis of two RTAs, as agreed informally by the Group, would help to clarify that question. One participant requested that data be provided to allow the Secretariat to calculate the percentage of duty-free trade against the overall trade. The proposal to request the Secretariat to prepare a draft outline for a factual presentation on individual RTAs for the services sector, similar to the goods draft outline on goods it had prepared and distributed informally in February, was generally supported. The point was made that divergent views remained on whether discussions relating to the possible submission by Members, in electronic format, of a consolidated tariff schedule including all applied tariffs (MFN and preferential) were directly relevant to the work of this Group or the work of the Negotiating Group on Market Access.

32. Commenting on the proposal that all RTAs, including those under the Enabling Clause, be notified to the CRTA, participants referred to the views they had expressed earlier on another submission TN/RL/W/114, as reflected in paragraphs 18-19 上の.

33. Reacting to the comments made on the distinction between customs unions and FTAs, one of the co-sponsors noted that it aimed at allowing for the compensation requirements provided for in GATT Article XXIV:6 and in GATS Article V:5, which foresaw an advance notice of 90 days.

C. OTHER BUSINESS

34. Referring to the relevant Airgram, the Chairman noted that S & D proposals relating to elements in the Group's mandate, other than RTA rules, had been proposed for the agenda of the Group's formal meeting on 18-19 June. That would permit at least a preliminary discussion of the proposals, and he urged participants to inform the pertinent members of their delegation. He also proposed to hold formal meetings of the Group on 21-23 July, to enable the Group to report to the General Council by the time of its 24 July meeting, which at that moment was the last General Council meeting scheduled before the Cancún Ministerial. While an important focus of those meetings would be the S & D proposals transmitted by the Chairman of the General Council, they would also provide an additional opportunity for pursuing work on other issues, as and if desired. Finally, he noted that in order for a submission to be reflected on the Airgram of the July meetings, it should be placed in the hands of the Secretariat by noon of 10 July.