

Doha Mandates

"We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements."
(Paragraph 29 of the Doha Ministerial Declaration)

"In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 [i.e. the Anti-dumping Agreement] and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries."

(Paragraph 28 of the Doha Ministerial Declaration)

Negotiations on WTO Rules

Background

The inclusion of trade remedy and subsidy rules in the Doha Round was a victory for developing countries. As frequent targets of anti-dumping and countervailing investigations — and subsequent import duties — on industrial goods, they had pushed for tightening disciplines on the use of remedies since before the WTO's failed Seattle Ministerial Conference. To secure a negotiating mandate in Doha, the 'Friends of Anti-dumping Negotiations' — a group comprising 14 developing and developed WTO Members — had to overcome stiff resistance from the United States, which views trade remedies (i.e. anti-dumping and countervailing duties) as an essential tool of its trade policy. While not a 'Friend', the EU conceded pre-Doha that in order to achieve a negotiating mandate acceptable to all Members, concerns on trade remedy agreements would have to be addressed despite the issue's political sensitivity. This view finally prevailed in Doha, albeit with the potentially significant proviso that the negotiations must "preserve the basic concepts, principles and effectiveness of these Agreements."

The explicit mention of fisheries subsidies in the Doha mandate for the rules negotiations was due to the concerted efforts of Iceland, the Philippines, the US and five other 'Friends of Fish'. The main obstacle was Japan's and Korea's longstanding resistance to developing WTO disciplines for fisheries beyond those that generally apply under the GATT and the Agreement on Subsidies and Countervailing Measures.

Regional trade agreements (RTAs) have been under scrutiny in the WTO since its creation, but Members have thus far failed to come to any conclusions with regard to any particular agreement's WTO compatibility, or to arrive at a common understanding of key definitions. At Doha, Members acknowledged for the first time the need for co-existence between regionalism and

multilateralism. The challenge of the Doha Round negotiations is to devise an approach that balances the proliferation of RTAs with efforts under the WTO. Talks could have far-reaching effects on future agreements, particularly those under negotiation between the European Union and (still undefined) groupings of developing countries in Africa, the Caribbean and the Pacific; the conclusion of the Western Hemisphere's Free Trade Area of the Americas; and the projected ASEAN Free Trade Area.

Mandated Deadlines

- Fifth WTO Ministerial Conference (10-14 September 2003 in Cancun, Mexico) will take stock of progress in the negotiations, provide any necessary political guidance, and take decisions as necessary.
- 1 January 2005, conclusion of the negotiations as part of the single undertaking agreed in Doha.

Current State of Play

The Negotiating Group on Rules is currently nearing the end of the first phase of its work programme, i.e. identification of issues to be addressed. In 2002, Members made 42 submissions, including proposals, comments and questions, as well as papers outlining their general approaches to the issues. Mirroring most other post-Doha negotiations, the submissions and initial debates have faithfully reflected the divisions that existed before the Round was launched.

With a January 2005 deadline, Members may not yet feel under pressure. In his progress report to the Trade Negotiations Committee in early December 2002, Chair Timothy Groser (New Zealand) nevertheless reminded participants that time was limited, urging them to "shift from conceptual submissions to a new progressive phase where more precise proposals are formulated and discussed" (TN/RL/3).

Anti-dumping

More proposals and questions/comments (16) have been tabled on anti-dumping than on any other issue under consideration in the Negotiating Group. The process has mainly been driven by the Friends of Anti-dumping Negotiations,¹ who have made four joint submissions (TN/RL/W/6, W/10, W/28 and W/29).

Among issues identified by the Friends for 'clarification and improvement of the disciplines' is agreement on definitions for several key concepts of the Anti-dumping Agreement. Such definitions include, *inter alia*: 'product under investigation/consideration' and 'like product', domestic injury, dumped imports, standing rules, determination of 'normal value', constructed export price, conditions to disregard the export price practised, cumulative assessment of imports, price undertaking/lesser-price rule, public notice, period of data collection for AD investigations and treatment in case of a large number of exporters, producers, importers or types of products. Australia, the EU and the US have requested numerous clarifications of these and other proposals.

Unlike the Friends of Anti-dumping Negotiations, who are pushing for rule changes that would restrict recourse to or application of trade remedies (i.e. anti-dumping/countervailing investigations and duties), the US Administration is under pressure to ensure that the examination of trade remedy rules results in a regime under which the US loses fewer anti-dumping, countervailing and subsidy disputes at the WTO. The US has thus proposed to focus the talks firmly on 'procedural fairness', i.e. the transparency of trade remedy investigations (TN/RL/W/35). While agreeing on the importance of procedural fairness, some trading partners have noted that the proposed procedures merely reflect current US practice, and pointed out that the more complex and detailed the procedures are, the greater the administrative costs.

The US approach reflects an earlier concept paper, which outlines four 'core principles' to guide the Rules Negotiating Group: (1) the strength and effectiveness of trade remedy laws must be maintained; (2) trade remedy laws must operate in an "open and transparent manner"; (3) the focus of negotiations should be on the "underlying trade-distorting practices"; and (4) that dispute settlement panels and the Appellate Body should not "impose on national authorities obligations that are not in the Agreements." In a 6 December paper, Australia queried, *inter alia*, whether the United States considered that addressing trade-distorting practices should exclude

consideration of improving and clarifying trade remedy rules (TN/RL/W/38). The US has not yet replied to Australia's questions.

In a paper described as 'inspired' by implementation topics proposed by developing countries, the EU agreed that Article 9.1 of the Anti-dumping Agreement, which pertains to the decision of whether or not to impose an anti-dumping duty and the determination of the level of the duty imposed, should be amended so it would oblige WTO Members to apply the so-called 'lesser-duty' rule, i.e. levy an anti-dumping duty below the margin if that were sufficient to remove the injury to domestic industry (TN/RL/W/13). The EU proposed that a "special and clearly-defined developing country package should be prepared once clear, effective and updated rules for all WTO Members have been agreed." It also raised the need to reduce the cost of anti-dumping and countervailing investigations and called for consideration of a "swift dispute settlement mechanism for initiation of investigations."

Implementation issues: India, Brazil and Morocco are the only developing countries to have made individual submissions. India has brought to the table a number of longstanding demands found in the Compilation of Outstanding Implementation Issues including, *inter alia*, raising the *de minimis* margin (under which dumping is not considered to have occurred) from 2 percent of export price to 5 percent for imports from developing countries, as well as raising the threshold volume of dumped imports which shall normally be regarded as negligible (Article 5.8) from the existing 3 percent to 5 percent for imports from developing countries (TN/RL/W/4). India and Brazil have also stressed that the lesser-duty rule should be made mandatory. In addition, India has proposed amending SCM Article 5.4 so as to prohibit the initiation of an anti-dumping investigation if a negative finding involving the same good has been made within the previous 365 days (TN/RL/W/26).

See also the anti-dumping section of the Doha Round Briefing No. 1 on Implementation-related Issues and Concerns.

Subsidies and Countervailing Measures

Of the 13 proposals/comments submitted on the Agreement on Subsidies and Countervailing Measures (SCM), about half focus on the improvement and clarification of the Agreement's trade remedy (i.e. countervailing) provisions, while the other half centre on subsidies.

Too many issues have been proposed for consideration in the Negotiating Group

for all to be covered in this paper. However, those with the greatest sustainable development implications are highlighted below.

See also the subsidies section of the Doha Round Briefing No. 1 on Implementation-related Issues and Concerns.

Special and differential treatment: Arguing that the disadvantages faced by developing countries warrant modifications to the SCM Agreement's Article 27 (Special and Differential Treatment for Developing Countries), India has proposed adding a new provision that would "provide for countervailing duties on imports from developing countries being restricted only to that amount by which the subsidy exceeds the *de minimis* level." It has also suggested amendments that would: prohibit the imposition of countervailing duties when the volume of imports of a good from a developing country is under 7 percent of total imports; exempt certain export subsidies granted by developing countries from WTO disciplines; raise the level of non-countervailable subsidies above 3 percent for imports from developing countries; and exempt developing countries from the prohibition to grant subsidies contingent on the use of domestic over imported goods (TN/RL/W/4).

The US has questioned the basis of these proposals (TN/RL/25), and offered its own concept of special and differential treatment with regard to subsidies (TN/RL/33). The latter submission notes that "the Article 27 provisions of the Subsidy Agreement have been commended as a rational approach to the issue of special and differential treatment for developing and lesser-developed countries in the rules-based trading system of the WTO." The paper states that the US does not believe that it is "necessary to expand the special and differential treatment provisions of the Subsidies Agreement to allow greater undisciplined subsidisation on the part of developing and lesser-developed countries in order to stimulate these Members' industries, to promote economic growth and development, or to increase their share of world trade." Instead, "the substance of the WTO prohibition on export subsidies and import substitution subsidies, and the general obligation of all Members to eliminate such subsidies — an obligation at the heart of the Subsidies Agreement — must be preserved." Members have not yet discussed this submission.

Export subsidies: Brazil has raised the issue of using an OECD standard as the basis for determining which export credits are considered compatible with SCM rules (TN/RL/W/5). At issue are items (j) and (k) of the SCM Agreement's

Annex 1,2 which — according to Brazil — refer to export credit disciplines “mostly negotiated by a few countries outside the GATT/WTO system [i.e. the OECD], do not take into account the contrasts among WTO Members and, in so doing, introduce asymmetries in the capacity of Members to compete on equal footing in the field of export credits. These asymmetries weaken the credibility of the multilateral trading system, which hinges on equitable conditions of competition for all Members.” Another question that needs addressing in Brazil’s view is “the interpretation by panels that the reference to the OECD Consensus gives a permanent ‘carte blanche’ to the participants of that Arrangement to alter WTO rules.” Brazil’s position is supported by many developing countries.

Brazil’s interest in this issue stems from adverse dispute settlement rulings on its export credit scheme for aircraft manufacturer Embraer — partly based on the fact that the credits did not fall within the scope of the OECD Arrangement.

The EU has expressed an opposing view, calling the detailed rules on official support for export credits elaborated in the OECD Arrangement an “effective ‘safe harbour’ for this type of export financing, i.e. that the export credit support can in no case be considered a prohibited export subsidy in the meaning of Article 3.1(a) ASCM as long as the OECD interest rate provisions on export credits are complied with” (TN/RL/30). With regard to the need to establish “clear and consistent rules for all types of export financing” — except those “existing or to be established under the Agreement on Agriculture” — the EU noted that the OECD Arrangement offered a “tested and workable set of rules.” It added, however, that it was “prepared to address the legitimate concerns of developing countries in this regard.”

India reacted sharply to the EU’s seeking to “expand the scope of the so-called safe harbour”, saying it would clearly benefit the countries that participate in the OECD Arrangement but that developing countries “would not stand to gain from any enhanced flexibility that may result from establishing consistent rules for all types of export financing. There cannot be a better example, than this, of an inverse S&D provision designed to benefit the developed countries” (TN/RL/W/40).

Non-actionable subsidies: Until 1 January 2000, Article 8 of the SCM Agreement on non-actionable subsidies³ allowed governments — on certain conditions — to support (i.e. subsidise) such activities as research conducted by firms or research establishments; assistance to disadvantaged regions; or assistance to

firms needing to adapt existing facilities to new environmental requirements imposed by law and/or regulations.

According to SCM Article 31, Members were to decide five years after the WTO’s entry into force whether to extend the application of Article 8 provisions, either as presently drafted or in a modified form. However, in the run-up to the Seattle Ministerial Conference, WTO Members could not agree on a recommendation, and the provisions consequently expired on 1 January 2000.

Underlining its importance to the “development dimension within the multilateral trading system”, Venezuela has proposed that Members consider reintroducing the concept of ‘non-actionability’ to the SCM Agreement during the rules negotiations, adding that the categories specified in Article 8 could provide a ‘relevant basis’ for deciding on the types of subsidy that could be included in the category of non-actionable subsidies (TN/RL/W/41). This proposal refers to para. 10.2 of the Doha Decision on Implementation-related Issues and Concerns, which states that ministers “take note of the proposal to treat measures implemented by developing countries with a view to achieving legitimate development goals [...] as non-actionable subsidies [...]. During the course of the negotiations, Members are urged to exercise due restraint with respect to challenging such measures.” Venezuela’s proposal has not yet been discussed.

The EU and Canada have also highlighted the need to address non-actionable subsidies (TN/RL/W/30 and TN/RL/W/1, respectively). The EU submission points out that certain subsidies “can have a positive effect, by for instance encouraging reductions in pollution or furthering research into cleaner environment. In view of this it may be necessary to address the environmental dimension of subsidies and, in particular, to consider further how to approach subsidies aimed at the protection of the environment, following the expiry of the ‘green box’ (i.e. Article 8 provisions, [ed.]).”

Fisheries subsidies: Since the establishment of the WTO’s Committee on Trade and Environment, a number of Members have focused on the elimination of fisheries subsidies as possibly the greatest contribution the multilateral trading system could make to sustainable development. In particular, the ‘Friends of Fish’⁴ have pointed to the ‘win-win-win’ nature of such action: good for the environment, good for development and good for trade. Their major argument is that subsidies are at least partly responsible for the alarming depletion of many fish stocks, as much of the money is spent in commissioning new vessels or in

enhancing the efficiency of older boats. However, in the Negotiating Group on Rules, Japan and Korea continue to strongly insist that poor fisheries management, rather than subsidies, is the root cause of stock depletion.

Six proposals/position papers — reinforcing the arguments of either side — have been submitted so far. For instance, Japan has underlined that the SCM Agreement “should be reviewed, if necessary, from the viewpoint of trade distortion”, pointing out that “international bodies report that many of fisheries subsidies are spent on resource management and do not distort trade. In order for the WTO to appropriately deal with the complex nature of the fisheries subsidies issue, it should fully consider the results of studies conducted by international bodies with fisheries expertise such as the FAO and OECD, taking into account sustainable use of fisheries resources” (TN/RL/W/11).

New Zealand, on the other hand, has concluded that the “characteristics of fisheries products are the source of specific technical obstacles to the use of the ‘serious prejudice’ and ‘determination of injury’ provisions of the SCM Agreement. These impediments to the application of existing rules underline the need for specific measures to improve WTO disciplines on fisheries subsidies” (TN/RL/W/12).

China has suggested that subsidies granted for infrastructure construction, prevention and control of disease, scientific research and training, and support for fishermen leaving the sector should be defined as ‘non-actionable’. Such subsidies, China argues, do not distort trade and “contribute to the protection of environment and sustainable development of fishery resources.” In addition, China has highlighted the need for special and differential treatment for developing countries (TN/RL/W/9).

Among other top subsidisers of fisheries operations, the EU kept a low profile during the first year of the talks. More engagement is expected in the future, as in late 2002 — after months of bitter divisions — EU ministers adopted reforms to the Union’s Common Fisheries Policy including, *inter alia*, a phase-out of subsidies for fleet renewal.

At the Group’s late November meeting, New Zealand called for developing a platform for negotiations, starting with the identification and categorisation of different types of subsidies. While other ‘Friends’ agreed, Japan called the idea ‘premature’. It again noted that no reasoned determination had been made on the causality between fisheries subsidies and stock depletion, and that

discussion on the clarification and improvement of the SCM Agreement should focus solely on trade distortions caused by subsidies.

In short, nothing so far points to a meeting of the minds on how to address fisheries subsidies in the context of the WTO.

Regional Trade Agreements

According to the latest Chairman's report to the Trade Negotiations Committee (2 December 2002), the issue-identification phase concerning regional trade agreements (RTAs) is nearly complete in formal meetings. Parallel open-ended informal consultations are currently focusing on questions related to the 'transparency' of RTAs (TM/RL/3).

Initial positions have revealed a faultline between WTO Members heavily involved in regional trading arrangements (such as the EU, Norway, Brazil and Hungary) and those that mainly rely on the WTO as the basis for their international trade relations (such as Australia, India and Pakistan). Curiously, despite the vital interest of this issue to African countries in particular, Chile and Turkey are the only developing country Members to have made submissions so far.

On procedural issues, Australia and Chile have highlighted the importance of notifications of RTAs to the WTO, with Chile proposing some starting criteria on when, where and what to notify (TN/RL/W/16).

Development dimension: The EU's submission focuses largely on the 'development dimension' of some regional trade agreements, urging the Negotiating Group to be 'alert' to the work in the Committee on Trade and Development, particularly with regard to the identification of the developmental aspects of the overall negotiations, and the work programme established in Doha on small economies (TN/RL/W/14). It clearly states that the negotiations on RTAs "should aim to clarify the flexibilities

already provided for within the existing framework of WTO rules. This is likely to involve further consideration of the relationship between GATT Article XXIV [on the territorial application of GATT rules in RTAs] and the Enabling Clause [regarding 'differential and more favourable treatment' for developing countries], as well as an examination of the extent to which WTO rules already take into account discrepancies in development levels between RTA parties." The proposal also calls for improving the procedural aspects of reviewing RTAs in relevant WTO bodies.

Key definitions: The EU has also emphasised the need to define key concepts and to clarify the WTO's legal framework applicable to RTAs, i.e. Article XXIV of the GATT (TN/RL/W/14).

Australia has identified several key terms that would benefit from a clear common understanding, including that of 'substantially all the trade' and 'other restrictive regulations of commerce' (TN/RL/W/2). These concepts are important, as GATT Article XXIV.8 requires WTO-compatible free trade areas to eliminate "duties and *other restrictive regulations of commerce* [...] with respect to *substantially all the trade* between the constituent territories." Australia has proposed defining 'substantially all the trade' in terms of "coverage by a free trade agreement, or an agreement establishing a customs union, of a defined percentage of all the six-digit tariff lines listed in the Harmonized System. This approach would ensure that there is sufficient flexibility to set aside product areas that for one reason or another cannot yet be traded between the partners free of restrictions" (TN/RL/W/15).

Although the RTA discussions have so far been relatively free of controversy, more heat can be expected as negotiations start in earnest on such questions as whether developing countries may offer 'less than full reciprocity' in market opening to developed countries with

which they form a free trade area — a key concept of the Economic Partnership Agreements currently being negotiated between the EU and ACP countries.

Endnotes

- 1 Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland and Thailand.
- 2 Annex I is an Illustrative List of Export Subsidies. Item (j) refers to exchange risk programmes and export credit guarantees against increases in the cost of exported products; (k) to the granting of export credits at rates below those obtainable on international capital markets. However, item (k) specifies that Members who are "party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are party as of 1 January 1979" will not be considered in violation of the Agreement if their export credits are in line with the conditions of the international undertaking.
- 3 'Non-actionable subsidies' (also referred to as 'greenlighted' subsidies) cannot be challenged multilaterally or be subject to countervailing action. They are thought to either be of particular value and/or to be highly unlikely to have trade-distortive effects.
- 4 Australia, Chile, Ecuador, Iceland, New Zealand, Peru, the Philippines and the US.

Proposals submitted to the Rules Negotiating Group are available at <http://docsonline.wto.org/> under the code TN/RL/W*.

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