

### Doha Mandates

*"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 Antidumping 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)

*"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)

## Negotiations on WTO Rules

### Prospects for Cancun

At Cancun, ministers will take stock of progress in the area of rules (i.e. anti-dumping, subsidies and regional trade agreements). As they agree on the programme of work, they are likely to conclude that the first phase, consisting of identification of issues, has been completed, and move to seeking solutions. The Negotiating Group Chair, on his own responsibility, is preparing a compilation document of all issues and proposals tabled so far, which will serve as the basis for the next phase of work post-Cancun. At this stage, delegates do not foresee that the issue of rules will gain much attention in Cancun, but expect the debate to move in accordance with the overall package, determined by the outcomes of negotiations on key issues such as agriculture. The issue of regional trade agreements may, however, crop up in other discussions at Cancun, as negotiations on the Free Trade Area of the Americas (FTAA) are proceeding alongside those of the WTO Doha Round. Major political issues will partially overlap and tensions between the two sets of negotiations might become explicit to the public — highlighting the larger issues between multilateralism, plurilateralism and bilateralism — the moment countries jockeying for position start the unavoidable process of forum shopping.

### 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 US, which has

traditionally viewed trade remedies (i.e. anti-dumping and countervailing duties) as an essential tool of its trade policy. While not a 'Friend', the EC 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 coexistence 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 by the US and EC respectively with a number of countries; the FTAA; and the projected ASEAN Free Trade Area.

### Mandated Deadlines

- Fifth WTO Ministerial Conference 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. By the end of July 2003, Members had made well over 100 submissions, including proposals, comments and questions, as well as papers outlining their general approaches to issues.

Unlike most other bodies dealing with mandates arising from the Doha Ministerial Declaration, the Negotiating Group on Rules has no interim deadlines prior to the conclusion of the 'single undertaking' on 1 January 2005, although it must report on progress to the WTO's Fifth Ministerial Conference in Cancun. Discussions so far have been free-ranging, and no shortlist has emerged on what improvements /clarifications could command consensus. The Doha mandate also contains the important caveat that the negotiations must preserve "the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives." While Members have engaged in active debate, Chair Timothy Groser (New Zealand) reported to the Trade Negotiations Committee in mid-July 2003 that the Group "will have to accelerate its work after the Cancun Ministerial Conference, and that it will need to shift its emphasis from identifying issues to seeking solutions" (TN/RL/6).

### Anti-dumping

More proposals and questions / comments have been tabled on anti-dumping (AD) than on any other issue under consideration in the Negotiating Group. The 'Friends of Anti-dumping Negotiations' generally seek a result that would make it more difficult for WTO Members to conduct repeated or questionable investigations or to set higher countervailing duties than necessary to compensate for harm.

The US leads the opposite camp, whose main aims are to ensure that Members' rights to use trade remedies are not diminished and to strengthen rules to prevent circumvention of anti-dumping measures. Egypt has actively supported this position.

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 (ADA). 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.

Issues debated during the spring and summer of 2003 included 'zeroing' in the calculation of dumping margins, which the 'Friends' suggest should be prohibited (TN/RL/W/113). Zeroing refers to a practice of calculating margins by attaching a positive value to goods that are sold in foreign markets below the home market price but conferring a zero — rather than negative — value to sales of the same good made above the home market price. The effect is to make the dumping margins — and consequent anti-dumping duties — higher.

Momentum seemed to be growing in discussions on making the 'lesser duty rule' mandatory rather than optional as is currently the case. This rule refers to ADA Article 9.1, which encourages Members not to apply higher anti-dumping duties than those necessary to offset injury to domestic industry. Australia and the EC in June supported the 'Friends' proposal (TN/RL/W/119) to make this practice mandatory, and noted that they already applied the lesser duty rule. The US however stressed that such an approach did not reflect the increased burden on parties, including submission of data.

Egypt has called for the establishment of "a common framework" for the adoption of anti-circumvention measures, which should, *inter alia*, prevent exporters and producers subject to anti-dumping measures from relocating the production of the product concerned for the sole purpose of evading the measures (TN/RL/W/110).

Members have also addressed the so-called 'sunset provision' (ADA Article 11.3), which currently allows them to extend anti-dumping measures beyond five years if national authorities determine that their removal "would be likely to lead to a continuation or recurrence of dumping and injury." In March, the 'Friends' proposed that AD measures should automatically lapse after five years. Egypt noted that "the inherent trade distortion resulting from sunset reviews could be reduced if the 12-month time limit set forth in Article 11.4 would also apply to sunset reviews."

In June, the US brought up one of its priority goals for the rules negotiations: strengthening the 'standard of review' that dispute settlement panels must use in assessing anti-dumping investigations (TN/RL/W/130). The US, which has lost many anti-dumping challenges at the WTO, has long argued that panels and the Appellate Body routinely ignore the injunction in the ADA's Article 17.6 that when several interpretations of a provision are possible, the panel "shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

The EC and Japan have submitted a joint proposal on cost saving in anti-dumping and countervailing duty investigations and measures (TN/RL/W/138), identifying "disproportionate information requirements by investigating authorities, inadequate procedural rules, unclear substantive rules and substantive rules granting too much discretion to investigating authorities" as cost drivers. Responding to these problems, they suggest measures such as: standardisation of procedures and documents; new procedural rules with a direct cost saving effect, including shorter investigation times and mandatory deadlines for reviews; and more operational substantive rules for the core areas of the ADA.

New Zealand has stressed the role of transparency in the ADA (TN/RL/W/137), noting the need for a "multi-faceted approach that looks at underlying systems, attitudes to transparency, capacity difficulties, and does not necessarily focus simply on the development of new prescriptive rules which may be binding". The proposal suggests the development of a guide to best practice options for implementing transparency provisions in the ADA.

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

### Subsidies and Countervailing Measures

Of the around 20 proposals/comments submitted on the Agreement on Subsidies and Countervailing Measures (SCM), about half focused on the improvement and clarification of the Agreement's trade remedy (i.e. countervailing) provisions, while the other half centred on subsidies, focusing on issues such as definition of 'subsidy', export and local content subsidies, export credits, remedies for prohibited subsidies, serious prejudice, non-actionable subsidies, subsidy notifications, special and differential treatment, natural resource and energy

pricing, taxation, and calculation of the amount of a subsidy.

Some of the key proposals of relevance to sustainable development, with a focus on discussions during the spring and summer of 2003 are highlighted below.

*See also the subsidies section of the Doha Round Brief 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 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." (TN/RL/W/4).

The US questioned the basis of this proposal (TN/RL/25), and offered its own concept of special and differential treatment with regard to subsidies (TN/RL/33). The latter submission stated that the US did not believe that it was "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."

India, responding to the US (TN/RL/W/68) detailed its view that the SCM agreement had been patterned on legislation already in existence in developed countries and was tailored to meet their administrative, fiscal and other structures, and reiterated the need for its amendment to better serve developing countries. India also underscored "the link between a robust export sector and economic growth in developing countries," highlighting the important role export promotion incentives and export processing zones can play in this regard.

**Non-actionable subsidies:** Until 1 January 2000, Article 8 of the SCM Agreement on non-actionable subsidies 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 and Cuba 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 referred 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 [...]."

Many countries responded and posed questions regarding Venezuela's proposal during the meetings of the Negotiating Group. A number of developing countries strongly endorsed reintroducing non-actionable subsidies, while some developed countries were more reserved. Egypt asked what criteria could be used in order to allow the effective use of non-actionable subsidies. Australia asked how and whether a development dimension should be assessed (TN/RL/W/61).

In response, and further detailing their idea, Venezuela and Cuba proposed adding to the possible definitions under the currently expired SCM Article 8 "some legitimate development goals [...], such as regional growth, technology research and development funding, production diversification and development. In principle, and without prejudice of other relevant rules and obligations, measures taken by developing country Members under those legitimate development goals should be considered as non-actionable subsidies" (TN/RL/W/108). In a subsequent proposal (TN/RL/W/131), the two countries further outlined the possibility of incorporating a new category of non-actionable subsidies for developing countries, aimed at achieving legitimate development goals. The proposal focused on, *inter alia*, diversification of production, listing measures that could be taken in pursuit of this goal. To incorporate the new category, Members could explore different avenues, including the creation of a new annex containing an indicative list of non-actionable measures.

**Prohibited subsidies:** In March 2003, the US proposed to considerably broaden the category of prohibited subsidies (TN/RL/W/78). Venezuela directed a number of questions to the US (TN/RL/W/107), regarding in particular preferential natural resources pricing, identified by the US as a "source of considerable trade distortion and friction" that should be more strictly disciplined. Venezuela also warned that within any additional notification requirements arising from new obligations "consideration should be given to incorporating the development dimension and the principle of special and differential treatment, including conditions of flexibility for the presentation of any new notification requirements." Korea (TN/RL/W/96) and Egypt (TN/RL/W/102) also singled out natural resources and energy prices.

**Fisheries subsidies:** Since the establishment of the WTO's Committee on Trade and Environment, several 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' 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 on commissioning new vessels or on enhancing the efficiency of older boats. However, in the Negotiating Group on Rules, Japan and Korea continue to insist that poor fisheries management, rather than subsidies, is the root cause of stock depletion.

In February 2003, the 'Friends of Fish' group proposed to start negotiations based on subsidies categories developed by other organisations (TN/RL/W/58), while the US suggested the expansion of prohibited subsidies under the WTO SCM Agreement to include fisheries subsidies that directly contribute to fleet over-capacity (TN/RL/W/77).

In May, the EC presented its long-awaited proposal advocating the prohibition of 'capacity-enhancing' subsidies, i.e. those destined for marine fishing fleet renewal and for permanent transfer of fishing vessels to third countries (these were subsequently referred to as 'red box' subsidies). A separate 'green box' would be created for subsidies aimed at reducing fishing capacity and mitigating any adverse social and economic effects of the restructuring of the fishing sector. These would include subsidies for scrapping vessels, economic diversification, temporary

breaks in fishing activities, modernisation of fishing vessels to improve safety, product quality or working conditions, and for promoting environmentally friendly fishing methods, as long as the output was not increased. Both boxes would be up for revision as necessary. 'Green box' subsidies would have to be notified to the SCM Committee on a regular basis, and made available to the public (TN/RL/W/82).

Chile outlined a 'red box' of banned fisheries subsidies, and an 'amber box' of subsidies that would be allowed as long as notification requirements were fulfilled (TN/RL/W/115). The 'red box' would include all subsidies that promote over-capacity and overfishing, for instance to purchase new or used ships, modernise the fleet, or reduce the cost of production factors. Subsidies in the form of positive discrimination in tax treatment or access to credit would also be banned. The 'amber box' would include all other subsidies not causing injury to other Members and duly notified.

A group of eight "small vulnerable coastal states", including Antigua and Barbuda, Belize, Fiji Islands, Guyana, the Maldives, Papua New Guinea, Salomon Islands, St Kitts and Nevis, have brought the development dimension into the debate (TN/RL/W/136). Their proposal outlined three categories of fisheries activities relevant to the small coastal states: revenue generation from access fees for distant water fleets; domestic and foreign fishers operating for export in the waters of the small coastal states; and artisan fishery operations for both domestic and export markets. They went on to propose that support and incentive measures in these areas that boost the development of vulnerable countries should be left outside the definition of a subsidy.

China has drawn attention to the contribution of aquaculture to the "protection of the world's marine

fisheries resources" and to food supply and food safety (TN/RL/W/88).

### Regional Trade Agreements

According to the latest Chair's report to the Trade Negotiations Committee (2 July 2003), the issue-identification phase concerning regional trade agreements (RTAs) is nearly complete in formal meetings. Informal consultations have focused on questions related to the 'transparency' of RTAs, identified as an important procedural issue. Members are beginning to converge on elements to be included in a package for improving the procedures, including issues related to timing, and content of RTA notifications and a more transparent RTA review process.

As to systemic issues, Members are engaged in discussing RTAs and development, RTA coverage, other regulations of commerce, and "the primacy of the multilateral trading system and possible RTA negative effects on third parties."

Countries' positions originally revealed a fault line between WTO Members heavily involved in regional trading arrangements (such as the EC, Norway, Brazil and Hungary) and those that mainly rely on the WTO for their international trade relations (such as India and Pakistan). While those more involved in RTAs have preferred keeping the rules loose within the WTO, those not so heavily involved have focused on issues such as how to avoid RTAs' negative effects on third parties. Despite the vital interest of this issue to African, Pacific and Caribbean (ACP) countries, they have not been actively involved in the work of the Negotiating Group. Chile, Turkey, Korea and India are the only developing country Members to have made submissions so far.

During the spring and summer of 2003, Members discussed three substantive submissions. An Indian discussion paper (TN/RL/W/114) — noting a surge in RTAs — highlighted

issues of concern, especially from a developmental point of view, including: limited welfare gains from RTAs due to key sectors being left out; lack of transparency; possible harm to third parties by preferential rules of origin and by fast track agreement on technical and sanitary standards; and grandfathering of RTAs into the WTO debate. Korea stressed the need for the clarification and improvement of the terms "Other Regulations of Commerce" and "Other Restrictive Regulations of Commerce" (TN/RL/W/116), which refer to regulations imposed on non-parties to the RTAs — and should not be higher or more restrictive than those prior to the agreements. Australia, Chile, Hong Kong, Korea and New Zealand submitted a proposal on transparency of RTAs, focusing on the notification process (TN/RL/W/117).

The proliferation of RTAs and the engagement in bilateral or plurilateral free trade area (FTA) negotiations of traditionally firm supporters of multilateral approaches and WTO rules, such as Japan, have changed the landscape of the RTA-WTO debate. Nonetheless, discussions have not heated up in the Negotiating Group, but remain on the backburner. More controversy 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 FTA — a key concept of the Economic Partnership Agreements currently being negotiated between the EU and ACP countries.

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

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