The World Trade Organization's
Doha Development Agenda
The Doha Negotiations after Six Years
Progress Report at the End of 2007

RULES NEGOTIATIONS

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RULES NEGOTIATIONS

OVERVIEW

The WTO and the GATT before it have helped define rules to facilitate international trade and to liberalize markets to expanded trade. The Rules negotiations in the Doha Development Agenda pertain to a subset of internationally agreed rules for international trade and deal with whether modifications to the Antidumping Agreement and the Subsidies and Countervailing Measures (SCM) Agreement should be made, whether additional rules are appropriate for fisheries subsidies, and whether additional clarifications are appropriate for regional trade agreements.

Dumping and subsidies that cause harm have been addressable under international rules since the beginning of the GATT, and under some domestic laws of individual Members before that. Contracting parties to the GATT and Members of the WTO have periodically sought to revisit these areas to clarify rules, improve disciplines or address changing conditions. Since the start of the WTO, many new trade remedy users emerged as they undertook significant trade liberalization in their trade in goods. While trade covered by trade remedies is typically quite small as a percent of total trade (often less than 1%), the use of trade remedies has drawn a lot of attention in the dispute settlement system and remained a topic of interest to many Members before the Doha Ministerial meeting in 2001. A number of countries who viewed their interests as largely exporter-oriented in nature and/or countries who perceived themselves to have defensive interests elsewhere pushed for inclusion of a review of the Antidumping and SCM Agreements as part of the Doha package. Other countries, particularly the United States, saw limited purpose in reviewing agreements which had just been renegotiated and put into place in 1995.

Because the U.S. Congress has historically viewed a linchpin to public support for expanded trade liberalization being the availability of remedies to address dumping and subsidies that injure U.S. companies and their workers, the United States was willing to have trade remedies included in the negotiations only if the negotiations would both address the underlying causes of dumping and subsidization and if any clarifications and improvements in disciplines preserved "the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives." Doha Ministerial Declaration, para. 28; 19 U.S.C. § 3802(b)(14). Moreover, U.S. negotiating objectives focus on both maintaining the effectiveness of trade remedy laws in the United States and addressing perceived problems of the panels and the Appellate Body creating

obligations never agreed to by the United States in this area. 19 U.S.C. §§ 3801(b)(3) & 3802(b)(14).

Due to concerns regarding the effect of overfishing on sustainable development objectives, it was agreed that participants would "aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries." Doha Ministerial Declaration, para. 28.

Free trade agreements (whether bilateral or regional) have exploded in numbers in the last twenty years raising many questions about whether the requirements of GATT Article XXIV are being met (and now the 1979 "Enabling Clause" and GATS Article V). The WTO Annual Report 2001, indicated that "[a]s of mid-2000, the WTO Secretariat had enumerated 114 regional trade agreements (RTAs) in effect and notified to the WTO by one or more WTO Members. Virtually all WTO Members were partners in at least one RTA, and many were partners in two or more; only Hong Kong, China; Japan; Macau, China; and Mongolia are not currently partners in a RTA * * *." Page 37. The number had increased to 215 by December 31, 2006 with many more under active negotiation including by Members not involved just six years earlier. WTO Annual Report 2007 at 50-52. While a mechanism had been developed as part of the outcome of the Uruguay Round to monitor the consistency of RTAs with WTO standards (through the 1994 Understanding on the Interpretation of Article XXIF of GATT 1994 and the establishment of the a Committee on Regional Trade Agreements, there was continued concern about RTAs at the start of the Doha round. Thus, Members agreed in paragraph 29 of the Doha Ministerial Declaration to clarify and improve "disciplines and procedures under the existing WTO provisions applying to regional trade agreements" while taking "into account the developmental aspects of regional trade agreements."

Despite the importance of regional trade agreements and the interest in trade remedies, the Rules negotiations have typically been viewed as a piece of the overall final agreement but not the primary focus (agriculture, NAMA and services). Thus, for most of the six-year period, Rules, as other areas, tended to follow negotiations in agriculture and NAMA, as can be seen in the draft decision at the Cancun Ministerial in 2003 (draft Ministerial Declaration, para. 7 of Job(03)/150/Rev.2), the decision adopted by the General Council on August 1, 2004, WT/L/579 at 3, para. 1.f, and the Hong Kong Ministerial Declaration (adopted December 18, 2005), WT/MIN(05)/DEC at para. 28 and Annex D.

MAJOR POSITIONS IN THE NEGOTIATIONS

The position of Members has varied based on the area of the Rules negotiations under discussion. Japan and Korea, for example, have had offensive interests in the antidumping portion of the negotiations, seeking various changes to the agreement either to codify WTO panel and Appellate Body decisions or make changes which can be characterized as toughening disciplines on the use of trade remedies. At the same time, both countries have had significant defensive interests in the fisheries subsidy discussions vis-à-vis the "Friends of Fish" group (including United States, Australia, Iceland, Chile, Philippines, New Zealand, Ecuador, and Peru) because of the type and levels of assistance provided in the sector and the activities of their fishing fleets and operators. In antidumping, they organized a group calling themselves "Friends of Antidumping" whose membership has varied somewhat based on the issue involved but has often included Brazil; Hong Kong; Norway; Switzerland; Chile; Singapore; and Chinese Taipei.

The United States has been in the opposite position, wanting on the one hand to restore rights that they understood themselves to have in the antidumping area and to seek clarification of obligations that would make other systems more transparent to participants and the public. At the same time, the United States has not wanted a tightening of disciplines which make it harder for injured industries to bring cases, obtain relief or obtain effective relief when granted. While such interests could be viewed as both offensive and defensive, most other Members have viewed the United States in a defensive posture in antidumping. In subsidies and fisheries subsidies, the United States has been a strong supporter of improved disciplines.

The EC has been somewhere in between these camps on antidumping and on subsidies, working with the United States on increased disciplines generally in subsidies but having sensitivities in fisheries subsidies and split on issues in antidumping, largely reflecting the EC practice.

There are many additional new users of trade remedies – India, Brazil, China, Argentina, Egypt to name a few – along with other traditional users – Canada, Australia, New Zealand, South Africa. Positions taken by countries in antidumping seem to reflect whether they view their interests as ensuring conditions of fair trade for domestic industries or protecting exporters engaged in trade remedy investigations abroad. Thus, even though China is now one of the largest users of trade remedies, its companies are subject to the largest number of investigations abroad. Where it has submitted positions, they have

typically been to tighten disciplines (helping its exporters but arguably hurting its domestic producers facing import problems). Similar positions have been taken by India and Brazil despite their much greater use of trade remedies in recent years versus having industries face challenges abroad. Many Members' positions on particular issues simply reflect particular disputes that have achieved national prominence or that potentially would force a change in national laws or practice.

In subsidies, developing countries have expressed concerns about expanding prohibited subsidy disciplines, and LDCs have been sensitive to the effect any disciplines on fisheries subsidies would have on their fishing industries and ability to obtain revenue for the sale of rights.

On RTAs, Members with relatively limited involvement in RTAs (e.g., Japan) at least initially were more interested in improving disciplines on RTAs as were Members, like the United States, who perceived that they employed a high standard for doing RTAs with trading partners. Many had a concern that variable standards for individual RTAs and/or low-quality RTAs containing too many exceptions could undermine the multilateral system rather than being a complement to it. Sensitive sectors, especially agriculture, have been carved out on many of the RTAs entered into over time, giving rise to the concern among at least some Members.

ESTABLISHMENT ON A PROVISIONAL BASIS OF A NEW TRANSPARENCY MECHANISM FOR REGIONAL TRADE AGREEMENTS

The first positive accomplishment in the Rules negotiations occurred in the summer of 2006 when the Negotiating Group on Rules approved text on a transparency mechanism for regional trade agreements. TN/RL/18 (July 13, 2006). The text was forwarded to the Trade Negotiations Committee for consideration and possible provisional adoption as an early harvest during the ongoing Doha negotiations. The General Council established the transparency mechanism on a provisional basis at its meeting on December 14, 2006. "Members are to review, and if necessary modify, the decision, and replace it by a permanent mechanism adopted as part of the overall results of the Doha Round." December 15, 2006, WTO News, Regional Trade Agreements.

Elements of the transparency mechanism include the following:

- Early announcement that Members are negotiating RTAs and forwarding information on newly signed RTAs when documents are publicly available; Secretariat will post such documents
- Notification – as early as possible, no later than immediately after ratification and before application of preferential treatment
- RTA will be considered by Members within 1 year of its notification
    - Data submissions due in 10 (20) weeks for developed (developing) countries
    - WTO Secretariat makes a factual presentation to Members (not to be used in disputes; doesn't create rights or obligations)
    - One formal meeting of Members to discuss the notification
    - All information is circulated in each official language of the WTO at least 8 weeks prior to the meeting; written questions at least 4 weeks prior; questions and answers distributed at least 3 working days before the meeting
- Any change to an RTA to be notified as soon as possible
- At the end of the implementation period for the RTA, parties shall submit a short written report on liberalization achieved vs. commitments in the RTA.

The provisional mechanism has been in place for a little more than one year. Seven signed agreements have been notified as have twenty-four agreements that are under negotiation. Similarly, seven notified agreements have gone through a factual presentation and four agreements were notified as having changes. *See* http://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm.

CHAIRMAN'S DRAFT TEXT, NOVEMBER 30, 2007, ON ANTIDUMPING AND SUBSIDIES (INCLUDING FISHERIES SUBSIDIES)

After nearly six years of meetings, paper submissions, discussions on the perceived problem and how individual proposals help address the alleged problem, the Chairman of the Rules negotiations, Amb. Guillermo Valles Galmés of Uruguay, released a draft text for Members' consideration on

November 30, 2007. The text was released despite the fact that modalities in agriculture and NAMA had not been achieved. The reasons for the timing of the release are not clear but could include a view by the Chair that differences in position by Members would require extensive negotiations once an initial draft was circulated.

At a Rules negotiating meeting in Geneva in December, Members reacted to the draft paper. While there was, as is usual, much criticism of the text for what it did or didn't contain by nearly all Members, most Members indicated they could work with the text as a basis for future negotiations although Japan, Korea and others pushed hard for a change in the text on a topic in the Antidumping Agreement that had been the focus of a great deal of attention particularly in the second half of 2007.

The WTO dispute settlement system has handled a series of cases that address how antidumping comparisons are to be made, in particular whether all dumping (price discrimination) found may be addressed or whether "offsets" are required to dumped sales for non-dumped sales. This is an issue on which major users at the end of the Uruguay Round were in agreement that they were allowed to capture 100% of the dumping found. However, the WTO Appellate Body, over strong objections from the United States, in a series of decisions ruled that the existing agreement required the provision of offsets in investigations and, later, in administrative reviews. The EC had lost the first case (brought by India) and modified its practice in investigations, though retaining the right to capture 100% of dumping where targeting was found. The EC does not have an active administrative review practice. Both the EC and Japan (and later other countries) filed challenges against the U.S. system, which captured 100% of dumping in both investigations and in reviews. The Appellate Body has broadened its construction of what is required to apparently cover most, if not all, aspects of antidumping proceedings despite a series of panel decisions disagreeing with the legal basis for the earlier Appellate Body findings.

There has been strong opposition from Congress to the decisions of the Appellate Body as violating the WTO's DSU by creating obligations that don't exist. The U.S. Administration has similarly been deeply concerned about the reasoning of the Appellate Body, although the U.S. Commerce Department formally modified its methodology in antidumping investigations, but not in reviews, with respect to the calculation of dumping margins. In 2007, the U.S. Administration put forward a proposed clarification of the ADA to permit the capture of 100% of dumping found in all phases of antidumping proceedings. The U.S. negotiators made clear to trading partners that movement was needed

on this issue from the U.S. perspective. That position was repeatedly backed up by letters from the Chairmen of the Congressional Committees of jurisdiction over trade agreements, the House Ways and Means Committee and the Senate Finance Committee.

The Chairman's draft text would clarify the rights of Members to capture 100% of dumping in many situations but not in the situation decided in the first case (EC bed linen) involving weighted-average to weighted-average price comparisons in investigations. The draft text drew fire both from those countries who liked the Appellate Body decisions or wanted other provisions added (Japan; Korea; Brazil; Chile; China; Colombia; Costa Rica; Hong Kong; India; Indonesia; Mexico; Israel; Norway; Pakistan; Singapore; South Africa; Switzerland; Thailand; and Chinese Taipei) and those who felt the Chairman's text had not gone far enough (the United States).

Because both the Antidumping and SCM Agreements have a large number of provisions that pertain to how investigations can be conducted, the required injury analysis, collection of duties, periodic reviews, etc., historically negotiations on these types of issues occur in the Antidumping Agreement context with an agreement to harmonize any changes into the SCM Agreement for countervailing duty investigations at some point. This situation exists in the current Rules text as well. Thus, other than subsidy definitions and the treatment of fisheries subsidies, most of the substantive proposed modifications are reflected in the Antidumping Agreement draft. A sampling of issues covered follows.

Issues within the Antidumping and SCM Agreements are typically quite technical. As what issues are viewed as important will vary by Member, the following list is neither comprehensive nor will it be viewed as covering all "important" issues to all Members:

(1) whether price comparisons require offsets (the "zeroing" issue discussed above);

(2) standing requirements – expanded beyond initial investigations to sunset reviews and circumvention inquiries;

(3) role of users of dumped or subsidized products – whether effect on such purchasers should be considered in determining whether to provide relief;

(4) bar on filing new petitions for a period of time after a negative determination by a government on the product from the country or countries investigated;

(5) additional clarification of causation test;

(6) definition of material retardation standard;

(7) limitations on when producers related to foreign producers or importers can be excluded from the domestic industry;

(8) anticircumvention provisions;

(9) mandatory termination of orders after 10 years; other changes to sunset provisions;

(10) modifications to transparency provisions.

Many Members claimed that not enough of their proposals had been incorporated or had been watered down, that disciplines weren't tightened enough and that the text was otherwise unbalanced from their perspective. The EC, Japan, and Korea were all in that group. The United States, while indicating its willingness to proceed from the draft, expressed concerns on a number of fronts – the clarification of price comparisons had not gone far enough, other provisions would make the remedy less effective for injured industries. Congressional Committee Chairmen with jurisdiction over trade agreements and domestic industries using trade remedies in the United States viewed the text as failing to meet U.S. negotiating objectives, failing to address the underlying causes of dumping or subsidization and weakening the effectiveness of trade remedy provisions. The draft text on antidumping appears to be the piece of the Rules negotiations that will present the greatest difficulties in reaching agreement going forward.

In the subsidies text, there had been proposals put forward by the United States and the EC to broaden the array of prohibited subsidies. These proposals were not included in the Chair's draft a fact generally embraced by developing countries. Some modifications were made to the basic SCM Agreement including language on subsidies from government loans or loan guarantees when the loan provider incurs long-term losses on the financing in question. The draft text also clarifies "specificity" and when alternative benchmarks can be used in valuing benefits received. Just as provisions in the Antidumping Agreement, the changes included in the text of the SCM Agreement drew mixed reactions, often that provisions had not gone far enough to discipline the issue of concern or had gone too far. Again, many of the eventual changes to the SCM Agreement will occur at the end of the negotiations when any changes to the Antidumping

Agreement that pertain to issues common with countervailing duty investigations under the SCM Agreement are reflected in the final SCM Agreement text.

New Fisheries Subsidies Annex

Finally, the November 30, 2007, draft text includes a new Annex dealing with fisheries subsidies. The draft text clarifies WTO disciplines on those subsidies while taking into account the importance of the sector to developing countries. In addition to prohibiting certain fisheries subsidies (a "bottom up" system where types of subsidies must be specifically listed list vs. a "top down" where everything would be viewed as prohibited unless specifically excepted as sought by the "Friends of Fish"), the draft text requires Members granting or maintaining permissible subsidies to operate a fisheries management system that regulates marine wild capture fishing within their jurisdictions and is designed to prevent overfishing. The draft text also permits developing country Members to provide certain small-scale, artisanal fisheries subsidies. Finally, novel dispute settlement provisions would presume a fisheries subsidy is prohibited if the subsidy has not been notified and require the subsidizing Member to demonstrate otherwise.

THE WAY AHEAD

The Chair of the Rules Negotiations has scheduled a series of meetings on dumping and subsidies (including fisheries subsidies) for the second half of January and for several weeks in February.

In the antidumping area, parties will be taking up certain key topics where Members have expressed interest over time to explore whether compromises within the text or other changes are possible/likely to achieve consensus. Topics to be considered include sunset, anticircumvention, product under investigation, public interest, lesser duty, causation and zeroing.

At the end of this process, the Chair may produce a second draft.

While Rules has never been the main driver in the negotiations and while much of the area (RTA transparency; fisheries subsidies) appears resolvable, it is too early to say whether a solution in the portion of the discussions dealing with antidumping will prove achievable within the negotiating group. A number of Members are likely to hold resolution of the topic subject to trade-offs in any end game at the political level. Stated differently, the area will likely be part of

any end game process for countries like Japan, Korea, the EC and others as well as for the United States. Moreover, for the United States, an outcome in Rules that weakened the effectiveness of the trade remedy provisions also has potential ramifications in the extension/renewal of fast-track legislation (at least with regard to trade remedies) and/or implementation of the overall agreement itself.