WORLD TRADE ORGANIZATION

RESTRICTED

TN/RL/M/15
15 June 2004

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Negotiating Group on Rules

SUMMARY REPORT OF THE MEETING HELD ON 5 MAY 2004

Note by the Secretariat

1. The Negotiating Group on Rules ("the Group") held a formal meeting on 5 May 2004.

A. ADOPTION OF THE AGENDA

2. The Group adopted the following agenda:

A. Adoption of the Agenda

B. Regional Trade Agreements: Transparency

C. Regional Trade Agreements: "Systemic Issues"

D. Other Business

3. The Chairman requested participants to be on time for the meetings as he would not delay the opening of the sessions for lack of participation.

B. REGIONAL TRADE AGREEMENTS: TRANSPARENCY

4. The Chairman recalled that at the last Group's meeting he had informed participants that two papers relating to this agenda item would be made available in advance of that day's meeting. These papers were (i) a Chair's Informal Note, Job(04)/23, entitled *Regional Trade Agreements: Transparency*, dated 30 March 2004 and distributed by fax (also available in French and Spanish); and (ii) an Informal Note by the Secretariat entitled *Illustrative Background Presentation on an RTA by the Secretariat, Example Canada-Chile FTA,* dated 23 April 2004 and also distributed by fax (only available in English). He indicated that an informal debate on these papers would take place after consideration of the next agenda item.

C. REGIONAL TRADE AGREEMENTS: "SYSTEMIC ISSUES"

5. The Chairman noted that an Informal Note by the Chairman entitled *Roadmap for Discussions on RTAs "Systemic Issues"*, dated 26 April 2004, had been distributed to participants by fax on that same date, and was also available in French and Spanish. He proposed to discuss this paper in an informal mode, after considering the three formal submissions recently received under this item.

6. In introducing the first submission (TN/RL/W/151), the proponent noted that the timing appeared appropriate for the submission of a paper seeking to define basic aspects of the general framework of the Group's discussions. The purpose of the paper was twofold, namely to stress the importance of systemic discussions and to ensure that the role of the Committee on Regional Trade

Agreements (CRTA) was clarified as soon as possible. Her country believed that greater transparency of RTAs would be a significant outcome for these negotiations, but an insufficient one, and that the Group had to embark upon systemic discussions in the very near future. The real importance of clear rules was to ensure not that legal certainty existed in the event of potential conflicts within the dispute settlement system, but that the parties to RTAs were fully aware of what was expected of their agreements; i.e. the question was what elements RTAs had to include in order to complement liberalization in the multilateral trading system and for the MFN exception to be therefore "justifiable". Clarifying and improving the provisions of GATT Article XXIV and GATS Article V would provide an answer to that question. With regard to the role of the CRTA, her country believed that it was a good time to make it quite clear that the consistency of RTAs with WTO provisions should not be determined by the CRTA; a redefinition of its role was essential in the present negotiation. In practice, Members examined RTAs within the CRTA with low levels of interaction and without being able to adopt reports determining the consistency of these agreements with WTO provisions. The last such agreement to be "approved" was between the Czech and Slovak Republics in December 1994, and it was no longer in force. Decision L/7501 stated that "The Working Party agreed that, based on the documentation provided by the Parties to the Agreement, the Customs Union Agreement between the Czech Republic and the Slovak Republic was consistent with the provisions of Article XXIV of the General Agreement". Even assuming that, as a result of these negotiations, Members were to achieve greater transparency and clear disciplines, the slightest doubt or concern would probably result in a Member preventing a consensus. Her delegation therefore proposed that the Committee examine all RTAs, in accordance with the rules and procedures under negotiation, but that no consistency determination of the agreements be made with the provisions of GATT Article XXIV and GATS Article V. It was her delegation's belief that these ideas reflected the general feeling among Members and were along the lines of the Note on Transparency circulated by the Chairman.

7. Participants generally supported the line advocated by the submission, namely that of increased transparency, better examination procedures, and clearer and improved disciplines in the form of reasonable standards that RTAs should meet. A number of participants however cautioned any attempt to require that results on procedural and substantive aspects be achieved in parallel, as this could block the progress relating to the transparency aspects of the Group's mandate.

8. Participants were in agreement with the fact that the CRTA had an important role in carrying out a thorough examination of RTAs. Divergent views were however expressed regarding the proposal to discharge the CRTA of its consistency assessment role. Several participants concurred with the view that it was not appropriate to request the CRTA to approve or disapprove RTAs; in their view, negotiations should result in significantly improved transparency of RTAs within the CRTA, an exercise, as noted by some, which could be similar to the Trade Policy Review Mechanism (TPRM). Conversely, several other participants, while recognizing the inoperability of the present CRTA process, did not agree to leave RTAs' consistency assessment solely with panels and the Appellate Body. In that respect, one participant suggested that the definition of a compensation mechanism to deal with negative effects of non-tariff measures (NTMs) in an RTA could provide an alternative to dispute settlement. A number of participants noted that, in any case, there was a need to clarify the legal status of the examinations carried out by the CRTA, and any documentation circulated in its context, in relation to the dispute settlement mechanism. It was also pointed out that a clarification was needed on whether changes in the CRTA's role would require a modification of its terms of reference (TORs).

9. Reacting to comments regarding the CRTA's role and TORs, the Chairman requested the Secretariat to prepare a background note on the establishment of the CRTA. One participant suggested that information be also provided regarding the rules of procedure of the CRTA.

10. Divergent views were expressed regarding the proposal that any new transparency procedures be also applied to agreements notified under the Enabling Clause. Some participants pointed out that

a change of procedures for agreements notified under the Enabling Clause represented a risk of dilution of the rights provided under this Clause. Other participants stressed that improvements in transparency could in no way result in impairment of rights under the Enabling Clause. It was also noted that if the factual analysis of the RTA was made by the Secretariat, increased transparency would not represent a burden to developing countries.

11. Reacting to the comments made, the proponent said that the negotiations provided an opportunity to redefine the role of the CRTA *vis-à-vis* the examination of RTAs; any such redefinition should be in line with the expected outcome of the negotiations in terms of increased transparency. She proposed that the legal nature of the issues not be over-emphasized, that efforts be concentrated on reaching a final package, and that only then the legal form that the results would take could be considered. Noting that the current TORs of examination of an RTA, be it on goods or services, contained language very similar to that used in the TORs of a dispute settlement case, and as such provided for a consistency assessment of the RTA, she said that the dispute settlement mechanism represented the last step in conflict resolution, and that consultations at various levels should be carried out before engaging on that path. She also clarified that the proposal would not result in an exercise similar to the TPRM. Contrary to the latter, the examination of an RTA was agreement-specific and done only once instead of periodically as in the case of TPRM. A further distinction was that, in the context of an RTA, Members would remain free to make recourse to dispute settlement. Finally, she noted that the question to define a compensation mechanism to deal with negative effects of NTMs in an RTA needed to be further elaborated and discussed.

12. In introducing the second submission (TN/RL/W/152), the proponent said that it identified issues which would be appropriate for analysis in the systemic discussions on GATS Article V. She noted that the objective was to ensure that services questions would not be left aside Her delegation was pleased to note that the roadmap incorporated several of the issues mentioned in its paper. In addition to identifying potential topics for systemic discussions – though not in an exhaustive manner - her delegation would also like to explore a general issue, namely the possible similarities between GATT Article XXIV and GATS Article V. These similarities should be analyzed with regard to both transparency and systemic discussions.

13. Participants welcomed the paper and the fact that it provided that services issues be considered at the same depth as goods issues, and generally agreed on the need to include these issues in the Chair's *Roadmap* circulated informally. Some participants cautioned against complete parallelism in the treatment of goods and services issues, given that different rules and procedures applied to each of these types of RTAs. Some participants indicated their priorities for the treatment of issues raised in the proposal.

14. One participant noted that neither this proposal nor the Chairman's informal *Roadmap* dealt with the question of domestic regulations; that issue merited attention as these could nullify the value and scope of the specific commitments made under an RTA. A number of participants concurred with that comment.

15. The Group devoted attention to the proposal relating to Recognition Agreements (RAs). One participant questioned whether issues under Article VII of the GATS fell within the scope of the Group's mandate. Another participant noted that the discussions being held in the Council for Trade in Services (CTS) on RAs referred to the lack of implementation of GATS requirements *vis-à-vis* those agreements; these discussions differed significantly from the issue included in the proposal being considered. More generally, it was noted that, for technical subjects such as RAs, a linkage should be established with discussions held in the CTS.

16. Reacting to the comments made, the proponent noted that her delegation was open to discussing issues relating to domestic regulations under the "coverage" aspects of the systemic

discussions on services RTAs. She clarified that her delegation did not favour the discussion of issues regarding Article VII of the GATS in the Group; rather, the question related to the fact that, within CTS discussions, a number of Members had indicated that RAs were not notified to the WTO because they were part of an economic integration agreement notified under GATS Article V. On similarity of treatment of goods and services issues, she assured participants that her delegation did not advocate complete parallelism, as goods and services were different issues, but still thought that a certain degree of parallelism was necessary. Finally, she stressed that this proposal had been prepared and submitted to the Secretariat for circulation prior to the distribution of the Chair's roadmap.

17. Sixty-four participants had sponsored the third submission, distributed in document TN/RL/W/117. One sponsor, speaking on behalf of all the proponents, stated that the submission outlined the perspectives, as well as initial specific proposals of the sponsors in respect of the development aspects of RTAs and attendant Special and Differential treatment (S&D) in WTO Rules. The paper offered recommendations which would assist in the clarification and improvement of disciplines and procedures enshrined in existing WTO provisions governing RTAs, and which were consistent with the spirit, intent and dictates of the Doha mandate in this area. Essentially therefore, the proposals contained therein focused on GATT 1994 Article XXIV and the Enabling Clause. More specifically, the submission addressed in a holistic and coherent manner sponsors' shared concerns regarding the "development aspects" of RTAs and provided a rationale for the provision of deeper S&D. Further, appropriate clarifications and modifications in existing provisions in Article XXIV of GATT 1994 were proposed. The paper also placed the Enabling Clause in its correct context and explored its preservation as a means of providing legal cover for South-South RTAs. For most developing countries, RTAs represented a fundamental instrument of development. As such, it was critical that the multilateral framework not only be supportive of, but also complementary to, the formation and operation of such Agreements. This was central to the sponsors, since their States were currently negotiating WTO compatible Economic Partnership Agreements (EPAs) with the EU under the Cotonou Partnership Agreement. More importantly, these EPAs were an integral part of the integration processes being undertaken in their various regions and transition towards the full integration of thier economies into the multilateral trading system. It should be recalled that the existing GATT 1994 Article XXIV was largely a derivative of Article XXIV of GATT 1947. The latter had been crafted when RTAs between developed and developing countries were not a common feature of the multilateral trading system. Equally important was the fact that the only modification to these GATT 1947 rules had been enshrined in the Uruguay Round's *Understanding on the Interpretation of Article XXIV of the GATT 1994*. The limited evolution of Article XXIV had in no small way contributed to its sterility with respect to catering to the development aspects of such RTAs. The 1994 Understanding however did clarify some facets of Article XXIV and introduced the provision of a transition period for interim agreements. It was noteworthy that targeted provisions for S&D treatment to developing countries in North-South RTAs were notably absent from Article XXIV of GATT 1994. There was also no specific measure which would guaranty *de jure* S&D for developing countries in satisfying the requirements set out in Article XXIV. Indeed, the *de facto* flexibility provided by the inherent ambiguity of the language in GATT Article XXIV, as well as the permissible practices which had developed over time could neither constitute nor substitute for legally binding, operational S&D measures. There also existed a degree of incongruence between GATT Article XXIV and Article V of GATS, which pertained to Economic Integration Agreements (EIAs) in the area of Services trade. What was germane here was that Article V explicitly provided for S&D for developing countries in the application of the criteria outlined in GATS Article V:1. GATS Article V also distinguished, in Article V:3(a), between EIAs involving developing and developed countries and those undertaken solely among developing countries, in Article V:3(b), while providing flexible and more favourable treatment to developing countries in both instances. In view of the foregoing, it was the considered view of the sponsors that, from the perspective of RTAs established between developing and developed countries, S&D for the former should explicitly encompass the pertinent procedural and substantive elements of paragraphs 5 to 8 of Article XXIV of GATT 1994. With reference to Article XXIV:8(a)(i) and (b), it was the view of the sponsors that S&D for

developing countries be accorded in the form of the application of a favourable methodology and/or lower threshold levels when determining trade and product coverage in respect of meeting the "substantially all the trade" requirement. The sponsors also proposed that the term "other restrictive regulations of commerce" should be interpreted with some measure of flexibility geared at ensuring that the right of developing countries to apply contingency protection measures, inclusive of safeguards and non-tariff measures on intra-regional trade, was not constrained. Such flexibility should also safeguard the legal security and predictability of asymmetric rights and obligations of developed and developing countries. With regard to Article XXIV:5(c) and paragraph 3 of the 1994 Understanding relating to the issue of "reasonable time period", the requirements of paragraphs 5 – 8 of GATT Article XXIV should be applicable to a RTA upon the expiration of the transition period. There should also be clarification of the modality for determining "exceptional circumstances" to facilitate developing countries having easier access to a transition period in excess of 10 years. Furthermore, the trade, development and financial situation of developing countries should guide the method of approach utilised in determining the maximum permissible length of the transition period. Notwithstanding this, the sponsors shared the view that this period should not be less than 18 years. In considering Article XXIV:7 and paragraphs 7 – 10 of the 1994 Understanding, the sponsors proposed that when determining conformity of RTAs involving developing countries with Article XXIV, due account should be taken of the "development aspects". For the sponsors it was equally important that paragraph 12 of the 1994 Understanding be re-visited with a view to ensuring that the jurisdiction of the CRTA in determining the WTO compatibility of RTAs was not unduly superseded by dispute settlement proceedings and rulings. To the sponsors, the right to establish RTAs among developing countries under the Enabling Clause should not be undermined by paragraphs 5 to 9 of GATT Article XXIV. As such, the sponsors reaffirmed their view that in instances where developing countries notified RTAs under the Enabling Clause, it was the provisions of the Clause that exclusively apply in determining WTO compliance. They also reiterated that the negotiations in the area of RTA rules should not prejudice the coverage of South-South agreements under the Enabling Clause. Finally, he indicated that this submission should be viewed as containing initial proposals and clarifications; a first cut, which would be strengthened, refined, augmented and/or further elaborated, depending on the questions or concerns raised by delegations, as well as the nature of the evolution of the negotiations in this area.

18. A co-sponsor of this proposal underlined some of the salient points of the proposal, namely the need for a development dimension in the results of these negotiations; the need for the rules to provide for flexibility for agreements between developed and developing countries; the urgent need to clarify the relationship between Article XXIV and dispute settlement; and the importance of the Enabling Clause. Finally, he requested that issues raised in the proposal be incorporated in the Chair's informal roadmap on systemic issues.

19. In reacting to this joint proposal, participants noted the very preliminary nature of their comments due to the late arrival of the submission, and requested that it be thoroughly considered at the next meeting.

20. It was observed that, in essence, the proposal advocated for flexibility being provided to developing countries in the conclusion of their RTAs and that any disciplines resulting from the negotiations should provide for a certain degree of asymmetry for developed- developing countries' RTAs. Some participants stressed that while the developmental aspects of RTAs should be taken into account, S&D should not become the overriding rule with respect to RTAs. The basic principle that RTAs should not raise barriers to the trade of third parties should be maintained, and the negotiations should result in a better functioning of the CRTA and in a strengthened role for the WTO *vis-à-vis* RTAs. One participant noted that she could not agree with the underlying assumption that compliance with Article XXIV hindered development.

21. Some participants noted that the WTO already provided flexibility for RTAs; GATT Article XXIV in itself was already an exception to the MFN principle. One participant noted that flexibilities provided for in the Enabling Clause for South-South agreements and arrangements in the goods area represented one good reason for lack of S&D in GATT Article XXIV.

22. Regarding the relationship between Article XXIV and dispute settlement, a few participants noted that, as discussed earlier in the meeting, there was a need to clarify the legal status of the examinations carried out by the CRTA and the dispute settlement mechanism. The sponsor of TN/RL/W/151 noted that her proposal, which advocated that the CRTA should not determine the WTO-compatibility of RTAs, dealt precisely with this issue. In that context, the point was made that it would be useful if the co-sponsors could indicate whether they concurred with this proposal or whether they had an alternative proposal to make. Finally, one participant noted that the right of Members to have recourse to dispute settlement should not be overridden.

23. One delegation raised a number of questions regarding the EPAs under negotiation between the EU and the ACP group of States. She asked three questions to the delegation of the European Communities. First, whether these agreements were only tariff-related or also encompassed other disciplines. Second, what was the difference between these agreements and the tariff preferences granted under the Lomé Convention. Third, in the event of these agreements being finalized prior to Article XXIV negotiations, whether the idea would be to notify such agreements under Article XXIV or to request a waiver. A reply to these questions was provided along the following lines: the EPAs' negotiations had just began and they were being carried out between the European Communities and different groups of ACP countries; they encompassed an agreement going well beyond reduction of tariffs to cover also the regulatory framework and rule-making. Turning to the ACP countries, that same delegation noted that the last sentence of paragraph 5 of TN/RL/W/155 stated that the Enabling Clause should be preserved in order to provide legal cover for South-South RTAs, she asked whether they were aware that this Clause did not cover all of the disciplines encompassed by many existing South-South agreements, and whether they were considering proposing amendments to the Enabling Clause so that it extended to more disciplines.

24. A number of other issues were also raised and questions were addressed to the co-sponsors, in particular the following:

(a) that information be provided on the status of EPAs' negotiations, if possible including target rates for coverage and sectoral exclusions;

(b) whether it was the proponents' intention to submit a similar paper dealing with Article V of the GATS;

(c) whether the flexibilities being sought in terms of S&D treatment would only apply to developing countries or also to developed countries parties to the same RTA;

(d) that the co-sponsors clarify the last sentence of paragraph 8 and its footnote 2;

(e) what type of discipline would apply to the agreements contemplated in paragraph 11(ii) of the proposal, and whether this would mean that notification would only take place at the end of the transition period;

(f) that "developmental aspects" in paragraph 11(iii) be more precisely specified;

(g) that clarification be provided on the suggestion that rules of origin constituted "other restrictive regulation of commerce", as implied in paragraph 11(i);

(h) if these proposals were adopted, what did the co-sponsors see as the defining difference between those arrangements that now require a waiver and those that could be considered to be free-trade agreements;

(i) whether adoption of the proposal would actually encourage developed countries to require arrangements with some level of reciprocal benefits so as to avoid the WTO waiver process needed in the case unilateral arrangements; and

(j) what was the value-added in reaffirming what was already contained in the Enabling Clause.

25. One participant supported the proposal that flexibility be provided to developing countries in meeting the "substantially all trade" requirement of Article XXIV:8 in the context of agreements concluded with developed countries. Regarding paragraph 11(iii) of the proposal, the point was made that all participants were looking for more streamlined and efficient examination procedures. However, the proposal to have a less onerous examination should be reviewed carefully as this was proposed in the context of an RTA between developing and developed countries.

26. It was also noted that, although some current practices cast doubt on the extent to which Article XXIV was respected nowadays, the question was how the codification of such practices would actually serve the general interests of the WTO.

27. Some participants suggested that the Group should first have an in-depth analysis of systemic issues with the aim of crystallizing new rules on RTAs; once these new rules were known, the Group should then hold discussions about any additional flexibility for developing countries.

28. Reacting to the comments made, one co-sponsor requested that questions be submitted in writing so that an appropriate reply could be provided at the next meeting. He noted that the co-sponsors were not looking for having S&D as the overriding rule; rather, they were seeking to modernize Article XXIV of the GATT so that it incorporated flexibility to developing countries along the lines of Article V of the GATS. Finally, regarding other flexibilities, a major proposal was that developmental benchmarks be used to determine the transition period instead of the setting of an arbitrary period of time.

29. The Chairman said that document TN/RL/W/155 would be in the agenda for the next meeting, on which occasion its co-sponsors would have the opportunity to reply to the various questions posed by participants.

D. OTHER BUSINESS

30. The Chairman announced that the next meeting of the Group dealing with RTAs would be held on 29 June 2004, and that the deadline for submission of documentation would be 16 June 2004, close of business. This meeting would be comprised of both formal and informal components.