RULES

Dispute Settlement

On 9th October 2002 the LDC Group circulated a proposal (TN/DS/W/17) to modify the Dispute Settlement Understanding (DSU). The LDC Group proposal was based on the fact that, to date, no LDC Member has sought to resolve a trade dispute through the WTO dispute settlement system (DS). This is not because LDCs have had no concerns worth referring to the DS, but owing to structural and other difficulties that are posed by the system itself.

Specifically the LDCs have proposed, in TN/DS/W/17, that:

- Article 4.10 of the DSU should be changed to read as follows: "During consultations Members should give special attention to the particular problems and interests of developing countries Members *especially those of least-developed country Members".*

- Where a LDC is involved in the consultations, due consideration should be given to the possibility of holding such consultations and other meetings in the capitals of LDCs.

- modification of Article 8.10 to the effect that in any dispute involving a developing country, there must be at least one panelist from a developing country.

- Dissenting judgments should be allowed in the DS system through a rule that the Members of the panel or Appellate Body should each deliver a judgment and the final decision be taken on the basis of a majority.

- Ministerial Declarations and Decisions which confer specific rights to developing countries including the *Decision on Measures in Favour of Least-Developed Countries* should have legal force and treated as if they were "covered agreements" within the meaning of the Agreement Establishing the World Trade Organization.

- Compensation under Article 22.2 of the DSU should be made mandatory and a strong case for monetary compensation can be made.

- all WTO Members would collectively have the right and responsibility to enforce the recommendations of the DSB. In the case where a developing or least-developed country Member has been a successful complainant, collective retaliation should be available automatically, as a matter of special and differential treatment.

The LDCs also re-affirm the importance to them of Article 24 (Special Procedures involving LDCs) of the DSU especially, that Members exercise due restraint in matters involving a LDC Member and to make it incumbent on the complaining party to seek the "good offices" of the Director-General.

The LDC proposal also suggests that no compensation should be sought from an LDC Member; no retaliatory measures should be taken against an LDC Member and that LDCs shall be expected to withdraw an offending measure where a case has been established against them through the DS system.

The LDC proposal recognises that the DSU allows for the WTO Secretariat to provide legal expertise to any developing-country Member that requests for such legal assistance. However, the LDC proposal suggests that the Secretariat expertise should not be constrained by ensuring the impartiality of the Secretariat.

The LDC proposal contained in TN/DS/W/17 was followed up with proposed text on DSU negotiations (TN/DS/W/37 of 22nd January 2003) However, over the last few years LDCs have not followed up on these proposals and a decision needs to be taken as to whether LDCs still see value in the proposals.

Last Update: February 2008

Regional Trading Arrangements

WTO rules say regional trade agreements have to meet certain conditions but interpreting the wording of these rules has proved controversial, and has been a central element in the work of the Regional Trade Agreements Committee. As a result, since 1995 the committee has failed to complete its assessments of whether individual trade agreements conform to WTO provisions. This is now an important challenge, particularly when nearly all member governments are parties to regional agreements, are negotiating them, or are considering negotiating them. In the Doha Declaration, Members agreed to negotiate a solution which gives due regard to the role that these agreements can play in fostering development.

The Declaration mandates 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."

Negotiations are taking place within the Negotiating Group on Rules (NGR) which reports to the Trade Negotiations Committee (TNC). The issue-identification phase of the negotiations on RTAs is nearly complete. The negotiating group is pursuing a two-track approach: identifying issues for negotiation in formal meetings and; holding open-ended informal consultations on more procedural issues related to transparency of RTAs.

One issue of concern to LDCs is how RTAs and, more particular, customs unions that LDCs are members of, will be affected by a conclusion of the Doha Development Agenda in terms of market access arrangements. The DDA will, or should, result in an across-the-board cut in bound MFN tariffs for developed and developing countries, but excluding LDCs, although the values of the cuts will be different in the two cases. The difficulty arises if a developing country is a member of a customs union which is made up of predominantly LDCs. A customs union has, as a minimum requirement, a common external tariff (CET), which means that each member of the customs union has the same tariffs applied on goods from external trading partners. If a developing country which is part of a customs union is obliged to apply a formula reduction in its tariffs as part of the Doha Round, and if the tariff cut in the bound rate is deep enough as to mean a reduction in the applied rate (which is the CET rate) then either the CET is reduced (meaning that the LDCs that are members of the customs union will also have to apply a tariff cut); or the developing country maintains the same tariff as the LDCs (meaning that the developing country concerned does not meet its tariff cut obligation); or the developing country reduces its external tariffs but the LDCs do not (meaning that the customs union no longer operates as a single customs territory). None of these solutions are acceptable so a compromise must be found during the course of the negotiations.

Fisheries Subsidies[1]

In November 2007 the Chair of the Negotiating Group on Rules circulated text that attempts to reach a consensus among WTO Members on reforms of the Agreement on Subsidies and Countervailing Measures (ASCM). The text included proposed legal text on new rules for fisheries subsidies (Annex VIII).

The Chair adopted a "bottom-up" (prohibited list) approach that listed an ambitious number of subsidies that would be banned as opposed to a "top-down" (broad ban) approach that would have banned all subsidies and listed those that were permitted. Special and Differential Treatment proposals in the Chairman's text include the following provisions:

- LDCs are exempt from the proposed rules and will have full flexibility to subsidise their fisheries sectors (Article III.1 of the Chair's text provides LDCs with full exemption from the proposed red box subsidies).

[1] This brief is based on information from the FFA Fisheries Trade Briefing, January 2008, by Liam Campling.

- Government-to-government fisheries access payments (such as under EU agreements) and their further transfer (e.g. EU fishing vessels) are permitted where the agreement is to access a developing country Exclusive Economic Zone (EEZ) and so provides legal security for subsidised access agreements, such as EC Fisheries Partnership Agreements. This exemption is subject to transparency and sustainability requirements, including science-based stock assessments prior to an agreement being operationalised.

- Subsidies which would be allowed in developing countries (non-LDCs) include subsidies to port infrastructure and other physical facilities, income support for fishers, and price support for fishers products, but all which are conditional upon environmental sustainability criteria. However, other non-LDC fishing operations, such as subsidised vessel construction, repairs, acquisition, etc., and subsidies for operating costs (e.g. fuel, bait, insurance, etc) are only allowed for decked vessels that are not greater than 10 metres in length, again subject to sustainability criteria. Environmentally sustainable subsidies for vessel construction of any size are allowed given that the vessel in question limits its operations to the EEZ of the subsidy granting state; this is effect blocks non-LDC subsidies to vessels targeting highly migratory species such as tuna.

In terms of sustainable management of marine resources, the ACP has made a statement that developing countries have capacity constraints in meeting the demanding fisheries management requirements listed in the Chairs text. This is a problem particularly for coastal fisheries in most developing countries as management and conservation measures are not calibrated in the same science-based manner as in several developed countries.

On a separate issue, LDCs may want to support the ACP request for technical assistance to developing country Members for the implementation of notification and surveillance requirements (e.g. where Members are supposed to provide the WTO Secretariat with a list of subsidies in use).

LDCs should also be aware of the obligations that arise from the conditionalities contained in Article IV.1 on the general use of subsidies that cause depletion or harm to fish stocks through the creation of overcapacity, in specific reference to highly migratory and other internationally shared stocks.