OECD-WTO INTERPLAY:

EXPORT CREDIT AGENCIES

-- SPEAKING NOTES --

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Good morning and thanks to Judge Morris for including me in today's roundtable on "competing" sources of norms for trade issues within the WTO's competence.

One such competing source of norms is the OECD. The area of overlap I have been asked to address this morning is constraints on the behavior of national Export Credit Agencies ("ECAs"). The relationship between OECD and WTO rules in this area has been, and remains, a subject both of negotiations and of litigation.

Because we cannot get too deeply into any of the examples being discussed today, I will give just a brief overview of this one.

I. Introduction

The WTO *Agreement on Subsidies and Countervailing Measures* ("ASCM") contains at Annex 1 an "Illustrative List of Export Subsidies" setting out numerous itemized examples of prohibited export subsidies. Two are relevant here.

Item (j) refers to the provision of export credit guarantees or insurance at "premium rates which are inadequate to cover the long term operating costs and losses of the programmes."

Then there is *Item (k)*, whose first paragraph states that the provision by governments or government-funded entities of export credits "at rates below those which they actually have to pay for the funds so employed … or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits," is a prohibited export subsidy "in so far as they are used to secure a material advantage in the field of export credit terms." Item (k)'s second paragraph then establishes a safe harbor for Members who apply the *OECD Arrangement*'s interest rate provisions, stating that an "export credit practice" which conforms to those provisions "shall not be considered an export subsidy prohibited by this agreement."

Legal issues raised by the passages just summarized include:

(1) How broad is the safe harbor in Item (k), second paragraph – does it apply generally to "export credit practices" or only to a narrow subset?

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(2) Are ECA practices of the general type addressed by items (j) and (k), but not qualifying as *per se* ASCM violations under the legal standards in items (j) and (k), therefore to be regarded as *permissible* based on an *a contrario* reading of the Illustrative List? Or, can such ECA practices still be questioned under ASCM Articles 1 and 3? For example, an export insurance program involving no long-term cost to the government might nevertheless confer on users a "benefit" as that term is defined in ASCM Article 1; could it be challenged on that basis?

Policy issues raised by these same passages (and by Brazil in the Rules Negotiating Group of the Doha Round) include whether it is appropriate for a safe harbor to link directly to a non-WTO arrangement whose terms can be revised at any time by a subset of WTO Members. That is, should WTO Members who happen to be also OECD members be in a position to modify, through decisions taken in Paris, their own WTO obligations?

Here is where things appear to stand on these points today.

II. Breadth of the Item (k) Safe Harbor

The adopted decisions[1] have taken a fairly narrow view of the safe harbor, holding that it applies only to direct lending undertaken in explicit conformity with the reference rate provisions in Articles 15-19 of the *OECD Arrangement*. This result, successfully advocated by Brazil, was not to the liking of Canada, the United States, and the EC. One noteworthy consequence is that export insurance schemes subject to Item (j) apparently cannot qualify for the Item (k) safe harbor.

III. The "*A Contrario*" Issue

The weight of opinion in adopted decisions holds that the provisions of the Illustrative List cannot be used to establish the permissibility of an export credit practice. Rather, an export practice that does not constitute a *per se* violation under a relevant Illustrative List item can nevertheless be questioned under ASCM Articles 1 and 3. This issue has now been addressed in cases involving both Item (j) and the first paragraph of Item (k).

Interestingly, when the issue was first litigated in the Regional Aircraft cases, the alignment of members was different than the one noted above. Brazil invoked an

[1] Much of the interpretation has occurred in the Regional Aircraft cases reviewing export financing measures provided by Canada and Brazil to their regional aircraft producers, with Canada challenging the Brazilian "PROEX" scheme utilized by EMBRAER and Brazil challenging financing provided through Canada's Export Development Corporation to Bombardier.

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a contrario reading of Item (k) in the course of defending PROEX, and the United States, while disagreeing with Brazil on several points, endorsed Brazil's *a contrario* argument. Canada, backed by the EC, maintained that the "use of *a contrario* inferences in the Illustrative List is inappropriate" as well as in conflict with ASCM footnote 5.[2] A compliance panel decision espousing the Canada/EC view was vacated by the Appellate Body, whose analysis made reaching the *a contrario* issue unnecessary. While the AB expressed (in *dicta*) some qualified sympathy for the *a contrario* argument, the lower panel later went out of its way to criticize this passage of the AB report. And now a suspension-of-concessions panel in the *Upland Cotton* case has rejected an *a contrario* argument, involving Item (j), that was advanced by the United States.

Perhaps bolstered by the dispute settlement decisions, Rules Negotiating Group Chairman Valles has proposed ASCM language that would expressly preclude *a contrario* interpretations of the Illustrative List. Returning to export insurance programs, the Valles approach would seem to leave such programs vulnerable to challenge even if they do not involve a cost to the government within the meaning of Item (j), if they nevertheless confer a benefit to the recipient within the meaning of Article 1 (*e.g.*, by charging less than the recipient would have to pay for similar guarantees obtained commercially).

IV. Conclusion

This is an obscure corner of the WTO rulebook, but an important one. I expect that the OECD-WTO interplay, and certainly the legal relationship between the Illustrative List and the main body of the ASCM, will continue to receive attention in the Doha Rules negotiation. And pending "legislative" clarification, these subjects may continue to arise in litigation, with unpredictable results in a system where precedent plays a limited role and diverse opinions seemingly coexist within the Centre William Rappard and in the surrounding missions.

* * *

Thanks for your generous attention. I look forward to this morning's other opening presentations, and then to your questions.

[2] Footnote 5, attached to Article 3.1(a), states that "measures referred to in Annex 1 as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement." This footnote is generally understood to refer to explicit "safe harbors" codified within the Illustrative List, such as the second paragraph of item (k) and perhaps also footnote 59 on measures taken to avoid double taxation.

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