WORLD TRADE ORGANIZATION

RESTRICTED

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Negotiating Group on Rules

SUMMARY REPORT OF THE MEETING HELD ON 23 FEBRUARY 2005

Note by the Secretariat

1. The Negotiating Group on Rules ("the Group") held a formal meeting on 23 February 2005.

A. ADOPTION OF THE AGENDA

2. The Group adopted the following agenda:

B. ANTI-DUMPING ("AD")

3. The Group first discussed a "Senior Officials' Statement" (TN/RL/W/171) sponsored by 15 Participants. The sponsors reiterated their belief in the importance of achieving a substantial outcome in the AD negotiations and avoiding that hard-won market access benefits be undermined by protective trade remedy measures. The statement identified six broad objectives pertaining to changes the sponsors wished to see introduced to the Anti-Dumping Agreement (ADA), namely: mitigating the excessive effects of AD measures; preventing AD measures from becoming permanent; strengthening due process and enhancing the transparency of proceedings; reducing costs for authorities and respondents; terminating unwarranted and unnecessary investigations at an early stage; and improving and clarifying substantive rules for dumping and injury. The sponsors were of the view that Participants, on the road to Hong Kong, should shift to text-based negotiations as soon as possible.

4. Some Participants generally supported the six objectives identified and envisaged the need to intensify the Group's work and find pragmatic solutions to the issues raised. Others shared the sponsors' assessment regarding the progress that needed to be achieved in the Group, but emphasised that Participants should not lose sight of subsidies and countervailing measures and fisheries subsidies, where similar progress is also warranted. Other considered that the objectives did not reflect the proposals of all Participants and thus were not a proper framework for the Group's future work. One Participant called for an in-depth dialogue before embarking on text-based negotiations. Some Participants noted that there was no mention of special and differential (S&D) treatment for developing and least-developed countries among the objectives and that a balanced outcome could not be reached without introducing effective S&D provisions into the ADA.

5. The next submission was entitled "Proposal on Mandatory Application of Lesser Duty Rule" (TN/RL/W/170). The sponsor stressed the need to make application of the lesser duty rule mandatory. Building on the elements contained in another submission (TN/RL/W/119), the sponsor proposed an initial framework for certain aspects of the disciplines on determination of the injury margin. The main elements involved amending Article 9.1 of the ADA to provide for mandatory application of the lesser duty rule and providing that injury margins be determined in accordance with principles set out in a new Annex to the ADA. The sponsor proposed two broad options for determining the injury margin. It also provided four options for determining the target price for the domestic industry. It explained that the existence of injury margins should be established on the basis of a comparison on a weighted average basis of all comparable transactions or by a comparison on a transaction-to-transaction basis and that all negative values should be taken into account.

6. A number of Participants supported the main thrust of the paper that the lesser duty rule should be made mandatory. Nevertheless, concerns were expressed regarding the proposal. It was observed that the proposal omitted price suppression, depression and volume contained in Article 3.2 of the ADA and was silent regarding the factors set forth in Article 3.4 of the ADA. With respect to pricing behaviour, the proposed enquiry was far more complicated than the analysis of price undercutting described by Article 3.2 of the ADA and was not equivalent to an injury analysis. The proposed methodology for determining lesser duty redefined the concept of injury and ignored the existing provisions in Article 3 of the ADA. The suggested methodology would, in the case of a prospective system of duty collection, lead to less accurate or indeed inflated injury margins. One Participant predicted considerable complexity associated with any good faith implementation of the mechanics of this proposal which would require a multitude of highly subjective judgements.

7. Certain clarifications were requested. It was enquired how transparency would be achieved, how to identify a time when the price of the domestic like product was not affected by dumped imports, and at what level of trade the comparison would be made. Questions were also posed regarding the reference to the prices of exporters found not to have dumped, how to determine an appropriate third country, how to determine the relevant profit margin, whether there would be a hierarchy among the proposed various options reflected in paragraph 1.2 of the proposal's annex, and, in a prospective system of duty collection, what would happen if the injury margin was zero or less. The sponsor was also requested to indicate whether it applied the lesser duty rule and which methodology it used.

8. The sponsor stated that the proposal neither sought to quantify injury nor attempted to supplant the requirements of injury analysis in Article 3.4 of the ADA. Once there was a determination of dumping, injury and causal link, the issue of application of a lesser duty rule would arise. Volume effect would only be addressed through some of the options presented as a part of various methodologies for calculating target price. The sponsor did not attempt to redefine injury, but to have a methodology or mechanism for making the lesser duty rule mandatory. Regarding transparency, the sponsor explained that current requirements could apply. It acknowledged that it might not be easy to determine a time when the price of the domestic like product was unaffected by dumped imports, but suggested that two possibilities were where there were no imports during a particular period, and where there was no price undercutting during a particular period. As regards level of trade, this should be up to the investigating authority, as it would depend on the facts of each case. Regarding selection of an appropriate third country, the sponsor was hesitant to prescribe disciplines, but if additional disciplines in the context of normal value based on an appropriate third country were developed, they could be also used for purposes of injury margin determinations. Regarding reasonable profit margins, if disciplines under Article 2.2.2 were arrived at, those disciplines might also be used for purposes of injury margin determinations.

9. The sponsor clarified that paragraph 1.1 of its proposal could be applied even in a situation where dumping had just started, whereas paragraph 1.2 (a) would be relevant when dumping had gone

on for some time and prices had already been adversely affected by dumping. In case of no imports, the need might arise to look at alternatives to what was proposed in paragraph 1.1, such as the target price methodology. The sponsor's present practice was similar to the cost of production method, but more complicated than what was proposed. While the sponsor was open to discussing the desirability of a hierarchy among the options, it was of the view that an importing country defining a particular methodology and giving a reasonable explanation for departure from the notified methodology could contribute to transparency in the determination of injury margins. As to whether changes in economic conditions would render two periods incomparable, paragraph 2.2 of its proposal stipulated that the two periods should be comparable. The periods should be as close as possible, and economic conditions and conditions of competition in the two periods should be considered. Regarding situations where injury margins were zero, it was of the view that no duty would be imposed. Although it recognized the difficulties related to mandatory application of lesser duty rule in certain duty collection systems, the sponsor was willing to discuss this issue and to introduce appropriate changes to its proposal to take on board any concerns.

C. SUBSIDIES AND COUNTERVAILING MEASURES, INCLUDING FISHERIES SUBSIDIES

10. A submission entitled "Contribution to the Discussion of the Framework for the Disciplines on the Fisheries Subsidies" (TN/RL/W/172) and sponsored by three Participants was discussed. The sponsors stated that discussions on fisheries subsidies had been bogged down by disagreement among Members on whether a "bottom-up" or "top-down" approach should provide the framework for disciplines on fisheries subsidies. This submission identified the demerits of the "top-down" approach proposed by six Participants in TN/RL/W/154, and put forward a framework based on the "bottom-up" approach. The sponsors considered that the "top-down" approach was inconsistent with the basic principles of the Agreement on Subsidies and Countervailing Measures (ASCM); lacked flexibility in response to future policy needs; would cause a race for exceptions, and involved inequity among sectors. The "top-down" approach would oblige Members to bring their subsidy programmes to the WTO and get permission on a programme by programme basis from other Members, a process that would require substantial human and financial resources and could be prohibitive for even benign subsidies, especially for developing countries.

11. By contrast, the proposed "bottom-up" approach identifying the "red light" and "green light" subsidies from the viewpoint of sustainable resource management was consistent with the provisions of the ASCM and the Doha mandate. The proposal identified five types of subsidies that could lead to over-capacity and over-fishing, and thus could be classified as "red light" subsidies subject to prohibition. The proposal also identified six types of "green light subsidies" that contribute to resource management and conservation and are not trade distorting, thus should be recognized as non-actionable. It was emphasised that government support for general infrastructure did not fall under the coverage of the ASCM and thus should be outside the scope of the new disciplines.

12. Some Participants considered this submission to be a significant contribution and believed that the time was ripe to move to a more concrete discussion of existing fisheries subsidies programmes, without prejudice to Participants' views on the structure of any new disciplines. They welcomed the sponsors' acknowledgement that a number of subsidies should be prohibited. More engagement on a technical discussion on the definition and categorization of subsidies was now required. That said, these Participants rejected the paper's criticism of the "top-down" approach. The Doha mandate singled out fisheries subsidies for the very treatment to which the three sponsors objected. Under a "top-down" approach, the whole negotiation would become an exercise in transparency. By contrast, the sponsors' proposal, as currently framed, could result in disciplines that are less than the current WTO disciplines.

13. Some Participants enquired what percentage of the sponsors' subsidies would be covered by the proposed red and green boxes; what percentage of their subsidies would fall into a grey area; how

subsidies falling into the grey area such as subsidies to current costs, price and income supports, and fisheries-specific infrastructure, should be tackled; and how would it address the recognized failure of the amber box given the problems of the effects-based approach. Questions were also posed regarding the definition of capacity enhancement; how such a concept could be effectively captured in WTO rules; what was meant by small-scale subsistence fisheries in general and within the context of the sponsors' own fisheries sectors; and why the sponsors hadn't included price support in their list of prohibited subsidies.

14. On S&D, some Participants welcomed the emphasis of certain elements of the paper on small and vulnerable fisheries. It was viewed that flexibility in the application of the prohibited subsidy category to assist developing countries in achieving capacity expansion, vessel modification, sound resource management, disaster relief and infrastructure development was crucial. A clear differentiation should be made between capacity enhancement and over-capacity. Other Participants, though acknowledging the importance of S&D, were of the view that the challenge would be how to deliver such treatment in a way which would distinguish between those Members with developed fishing industries and those with fishing resources available for domestic development. Many developing countries were already major fishing nations and already had serious problems of overcapacity. It was thus presumed that they would wish to join in the application of disciplines on harmful subsidies and thereby contribute to the sustainability of fish stocks on which they depend. An important next step would be for developing countries to outline how they consider S&D treatment should be delivered in the new disciplines.

15. The sponsors found the reception of the paper to be generally positive. They emphasised that although specific reference to fisheries subsidies in the Doha mandate was made, this did not imply that it should be singled out in the negotiations. As regards government expenditure, the percentage of their subsidies covered by various boxes were irrelevant as the main issue should be the effect on resource sustainability. They welcomed the concept of transparency, but not that advocated by the "top-down" approach. The focus of the proposal was the identification of subsidies programmes falling under green and red boxes and proceeding to define the subsidies that could fall in the grey area would follow. On S&D, the sponsors acknowledged its importance and the need to elaborate further on this issue in the future.

16. On the general issue of subsidies and countervailing measures, one Participant, supported by others, flagged the need to move forward in the area of subsidies and countervailing measures in order to ensure its progress at the same pace of that of the other areas of the Rules negotiations. It urged those Participants who had previously submitted proposals in the past to submit elaborated proposals for discussion at the informal session of the Group.

D. OTHER BUSINESS

17. The next meeting of the Group will be held on 11-13 April 2005. The deadline for any informal elaborated proposals for consideration in the informal mode at that meeting will be Tuesday, 22 March 2005, close of business.