WORLD TRADE ORGANIZATION

RESTRICTED

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Negotiating Group on Rules

SUMMARY REPORT OF THE MEETING HELD ON 18-19 JUNE 2003

Note by the Secretariat

1. The Negotiating Group on Rules ("the Group") held a formal meeting on 18-19 June 2003.

A. ADOPTION OF THE AGENDA

2. The Group adopted the following agenda:

A. ADOPTION OF THE AGENDA

B. ANTI-DUMPING

C. SUBSIDIES AND COUNTERVAILING MEASURES, INCLUDING FISHERIES SUBSIDIES

D. SPECIAL AND DIFFERENTIAL TREATMENT PROPOSALS REFERRED TO THE GROUP BY THE CHAIRMAN OF THE GENERAL COUNCIL

E. OTHER BUSINESS

- Report to the TNC
- Date of the next informal and formal meetings of the Group.

B. ANTI-DUMPING

3. The first paper introduced was entitled *"Identification of Issues under the Anti-Dumping Agreement that Need to be Improved and Clarified within the Current Negotiations on WTO Rules"* (TN/RL/W/110). The sponsor highlighted certain provisions identified in its submission that in its view required clarification and improvement. It focused on circumvention, mandatory application of the lesser duty rule by developed countries in anti-dumping ("AD") procedures targeting developing countries in order to render Article 15 ADA more effective, application of the 12-month time-limit set forth in Article 11.4 ADA to sunset reviews, and improving newcomer reviews under Article 9.5 ADA in order to prevent their misuse by exporters and producers to circumvent AD measures. It proposed specifying in further detail the conditions for determining the existence of threat of material injury, inserting a provision guaranteeing payment of interest on refunded AD duties under Article 9.3 ADA, and taking into account in the determination of all-others rates dumping margins based on constructed normal values in appropriate cases.

4. Regarding the lesser duty rule, various participants questioned whether lesser duty should be treated as a special and differential treatment ("S&D") issue, because as a matter of logic AD duties should never exceed the level necessary to eliminate the injury caused by dumped imports. It was noted that many AD investigations were between developing countries. The view was expressed that

it should be possible to devise rules that were workable and non-burdensome for all. On sunset reviews, some participants agreed that AD measures should be temporary, but preferred that all AD measures without exception be terminated at the latest five years from imposition. As regards threat of material injury, although some participants agreed that the provisions of the ADA relating to this issue could benefit from clarification and improvement, one participant expressed concern that the proposal could increase recourse to AD measures. On circumvention, some participants considered that it was difficult to distinguish between normal business practices and so-called circumvention; it was essential to have a clear and common understanding of the scope and nature of the problem before considering whether a multilateral framework was necessary to tackle the problem. In this regard, reference was made to ongoing discussions in the Informal group on Anti-Circumvention. Other participants considered that circumvention needed to be addressed to preserve the effectiveness of the AD instrument, with one participant noting that transparent rules would protect the rights of all parties.

5. The next paper, entitled *"Proposal on Price Undertakings"* (TN/RL/W/118), was sponsored by 11 participants. A co-sponsor stated that the main objective of the submission was to facilitate the use of price undertakings as an alternative to AD duties by eliminating ambiguities in Article 8 ADA. The proposal envisioned eliminating the discretion to reject undertakings, requiring investigating authorities to explain why undertakings are rejected, clearly establishing that undertakings should be analysed individually for each exporter, requiring investigating authorities to inform exporters abut the possibility to negotiate undertakings, and addressing issues relating to changed circumstances. Several co-sponsors noted that undertakings provided as much protection from injurious dumping as duties yet caused less disruption to exporters. The relationship between the proposal on lesser duty and that on undertakings that eliminate the injury caused by dumping was noted. Other co-sponsors emphasized the importance they attached to various aspects of the proposal.

6. Various participants spoke regarding the proposal on price undertakings. Regarding discretion, several participants considered that undertakings should be freely entered into by all sides. Regarding company-specific undertakings, one participant was concerned that this could allow investigating authorities to enter into preferential arrangements with favoured exporters, while another wondered whether it was practical to negotiate price undertakings with all exporters in cases where numerous exporters were involved. A number of participants welcomed proposals for greater transparency. One participant noted that it already invited comments on, and disclosed pursuant to Article 8.3 ADA, the reasons for rejection of price undertakings. Another observed that the right to comment on undertakings should be available to all parties. While certain participants agreed that parties should be able to request an examination of changed circumstances, one participant asked whether proponents were seeking something beyond the reviews already provided for in the ADA, while another noted that an investigating authority must be able to reject unwarranted requests. Several participants noted the difficulty of defining "minor non-compliance", and called for flexibility with respect to determining what was a minor or major non-compliance issue.

7. The next paper, entitled *"Proposal on Prohibition of Zeroing"* (TN/RL/W/113), was sponsored by 14 participants. A co-sponsor indicated that this proposal was intended to clarify that the practice of zeroing is prohibited in all AD proceedings, and independently of the methodology used. WTO jurisprudence had clarified that investigating authorities shall not, in the course of their calculation and before arriving at the final dumping margin of a product under investigation, replace negative margins with zeros. Due to the lack of clear provisions prohibiting zeroing, some investigating authorities divided a product into several models, calculated dumping margins for each model, and aggregated them by zeroing out negative margins to end up with a high dumping margin, or calculated dumping margins for each transaction in a review process without offsetting positive margins with negative margins. These practices created artificially high dumping margins to provide excessive protection for domestic industries. Other co-sponsors emphasised that the practice of zeroing undermined the objective of ensuring a fair price comparison, eroded disciplines governing

the use of AD measures and allowed investigating authorities to distort the results of price comparisons and inflate dumping margins. Several co-sponsors noted that determining dumping margins for sub-periods of the period examined had effects similar to zeroing and should likewise be prohibited.

8. Divergent views were expressed on this paper. Some participants welcomed the proposal, noting that zeroing had already been found to be prohibited and that it should be clarified that the prohibition also applied in reviews under Article 9 and 11 ADA. One participant however recalled that as long ago as 1960 a Group of Experts reported that the ideal method of fulfilling the principles of Article VI of GATT 1947 was to make a determination of dumping regarding each single importation of the product concerned, and collect that amount from the importer at the time of entry. However, when the entry was not dumped, no Member proposed to credit the importer with the amount by which the entry was not dumped. It also noted that differences between investigations and reviews may justify differences in methodologies. Another participant noted that although a prohibition on zeroing might decrease dumping margins, it might also increase the volume of goods considered "dumped" for the purpose of assessing injury and causation, which could in turn increase the number of AD duties imposed. One participant noted that zeroing referred not to the use of model by model comparisons, but to what was done thereafter. Regarding multiple averaging periods, one participant asked how exceptional developments such as inflation or devaluation should be addressed, while another stated that the prohibition on zeroing should apply when combining the results of different sub-periods. It was also submitted that it was desirable to be able to split a period for comparison purposes so that a finding of no injury or no causation could be made when for instance no dumping has been detected in the last quarter of an investigation. Several participants suggested that prohibiting zeroing when comparing a weighted average normal value to individual export transactions could render the provision in question meaningless.

9. The next paper, entitled *"Proposal on Lesser Duty"* (TN/RL/W/119) was sponsored by 15 participants. A co-sponsor explained that under the ADA there was neither a mandatory provision on lesser duty nor any clear guidance on the method for calculating a lesser duty level. The paper proposed making application of the lesser duty rule mandatory. In determining AD duties, Members should consider not only the extent to which products are dumped, but also the extent to which a duty was necessary to remove the injury caused by dumping. The paper also clarified methods for calculating the duty adequate to remove the injury caused by dumping. Other co-sponsors stated that application of a lesser duty, if mandatory, would benefit both consumers and importers in importing Members. The co-sponsors urged participants to suggest possible methodologies for determining the duty necessary to eliminate the injurious effects of dumping. In this context, one co-sponsor noted that, when exploring various methodologies, a series of alternatives should be explored to allow the authorities to consider on a case-by-case basis the various circumstances and the particular features of the market for the product under investigation.

10. Various participants agreed in principle that AD duties should not exceed the amount necessary to offset the injurious effects caused by dumped imports, but stressed that the methodology would require careful consideration. In this respect, the need for flexibility was emphasized. Some participants asked whether the sponsors were suggesting that the various proposed methodologies be applied on a flexible case-by-case basis or were posing the adoption of one methodology to apply to all cases, and noted that a basket of methods could be the best approach. On the other hand, some participants had concerns regarding the proposal. One participant queried whether the proposal helped to fulfill the Group's mandate. This participant noted that the application of non-transparent methodologies was itself abusive. Further, the proposal failed to address concerns about increased costs and burdens on the investigating authority and parties associated with adding this obligation to the ADA, especially as, in a truly transparent system, the amount of data parties would have to submit could be substantial. Another participant observed that the proposal would add an additional obligation that developing countries could not meet.

11. The next paper introduced was entitled *"Concept Paper on Trade Remedy Rules - Evidence of Trade Distorting Practices"* (TN/RL/W/129). The sponsor recalled a previous submission regarding the role of trade remedies in responding to trade-distorting government practices[1], but noted that international price discrimination may flow from the operation of competitive advantages or common and legitimate business practices. However, the ADA contained no mechanism to distinguish between "normal price discrimination" and "unjustified price discrimination". The paper floated three possible ideas for exploration and deliberation by participants. First, to improve existing provisions relating to initiation of an investigation with a view to weeding out unwarranted AD cases that had nothing to do with unfair trade at an early stage. To this end, it proposed addition of a requirement that clear and sufficient evidence of trade-distorting practices that have led to injurious dumping be provided to support relevant petitions. Second, to provide exporters or producers with an opportunity to present evidence that they are not earning above-market profit margins in their home market, or that there does not exist a home-market sanctuary which enables them to enjoy artificial advantages. Third, to stipulate that prior to initiation of any investigation, Members concerned shall consult with a view to considering evidence of dumping and injury; identifying any trade-distorting practices that may have led to a situation of injurious dumping; and resolving any situation of injurious dumping and trade distortions through appropriate settlement or undertakings.

12. Some participants shared the views expressed by the sponsor. It was submitted that the ADA does not reflect current international business realities, and that the exclusion of below-cost sales from normal value says nothing about relative prices. Other participants however questioned the feasibility of the proposed approaches, which would require additional information in already complex investigations, as well as a definition of "trade-distorting practices". One participant suggested an *ex post* approach, whereby adoption of a large number of AD measures in a particular sector or sub-sector would give the multilateral system a signal that it might be advisable to adopt supplementary measures, such as sectoral negotiations, to complement AD duties. Another participant stated that the sponsor's approach put the very basis of the ADA in doubt, and queried whether it would preserve the basic concepts and effectiveness of the ADA. It was observed that Members have sovereign rights to respond even to normal activities and behaviours which impose negative effects on others, and that there was no valid rationale justifying injurious dumping, a practice that all Members had agreed is condemned. Several participants considered that, while trade-distorting practices or a distorted home market were one cause of dumping, they were not the only such cause.

13. The sponsor responded that it was not proposing to rewrite Article VI of GATT 1994, but merely exploring and examining the basic rationale behind AD measures. It emphasised that this was just a concept paper and that it was not at this point making any concrete proposals.

14. The next paper was entitled *"Further Issues Identified under the Anti-Dumping and Subsidies and Countervailing Measures Agreements for Discussion by the Negotiating Group on Rules"* (TN/RL/W/130). The sponsor stated that although its paper covered a variety of topics, a common theme centred on issues of transparency and abuse. With greater clarity, disclosure and knowledge of the facts, a reduced opportunity for abuse would prevail. It focused its presentation on four issues. Regarding exchange rates, the ADA provided only general guidance; for example, there had been several disputes regarding how Article 2.4.1 should apply in the case of a sharp devaluation. At a minimum, Members should agree on transparency; the ADA should be clarified to require that all Members use exchange rates from sources of recognized authority, and to disclose such sources to all interested parties. Second, the Group should consider requiring all Members to issue preliminary determinations, making available, in sufficient detail, preliminary findings and conclusions reached based on the available data. This would help to ensure that all interested parties had a full opportunity to identify issues warranting further development or argument in order to defend their interests prior to a final determination. The third issue related to the condition of the domestic industry in a threat of

[1] *"Basic Concepts and Principles of Trade Remedy Measures"* (TN/RL/27).

material injury analysis. Neither the ADA nor the ASCM specified how the current condition of the domestic industry was relevant to such an analysis. The fourth issue was standard of review. When Members negotiated the ADA, they agreed to a special standard of review contained in Article 17.6 ADA. Experience had shown that panels and the Appellate Body, in a number of cases, had reached the unwarranted conclusion that applying customary rules of interpretation of international law resulted in a single permissible interpretation of most provisions of the ADA, thus failing to address meaningfully whether an individual Member's interpretation of the ADA was permissible. This approach was at odds with the underlying premise of Article 17.6(ii), which explicitly contemplated that applying customary principles of international law will admit of more than one permissible interpretation. Participants should consider whether Article 17.6 should be addressed to ensure that the provision was applied as intended, and whether a similar provision should be included in the ASCM.

15. Several participants shared the sponsor's concerns on exchange rates, with one participant referring to difficulties it had encountered in some investigations in the area of exchange rate fluctuations and high inflation. Regarding affiliated parties, one participant noted that it would be making proposals on other aspects of this issue, while another asked for examples of the problem. Regarding the nature and composition of investigating authorities, on participant observed that in the case of a Member with two investigating authorities, the issue was coordination to ensure consistency with WTO rules. Regarding the condition of the domestic industry in threat cases, some participants agreed that Article 3.7 of the ADA should be further clarified and improved and requested the sponsor to provide its perspective of the improvement sought. Regarding standard of review, some participants shared the sponsor's concerns, while others were of the view that panels and the Appellate Body had correctly interpreted the ADA. Regarding disclosure, one participant agreed that the ADA should clearly state that the authorities must fully disclose the calculation of each respondent's dumping margin to the respondent concerned. Regarding market segmentation, one participant stated that the ADA allows a sectoral approach as a method to determine injury to the domestic industry as a whole, and asked the sponsor how it would like to improve the ADA further. Regarding the definition of dumped imports, one participant agreed that it was appropriate to examine the methods to identify "dumped imports" under Article 3.1 where the authorities had limited their examination to certain exporters or producers under Article 6.10 ADA, and noted that the identification must be based on dumping determinations under Articles 2 and 6.10 ADA. On examination of impact, one participant saw benefit in identifying more factors within Article 3.4 ADA for examination, but did not believe that the Group should limit the factors that the authorities should consider, as these would differ on a case-by-case basis. Regarding privatisation, one participant noted that dispute settlement had occurred in this area and the result was that privatisation at arms' length extinguished any benefits from subsidies given to the previous owner. This approach was in line with the basic principles of the ASCM to use a market benchmark for subsidy analysis, and any clarification of the ASCM provisions should go in this direction.

16. The sponsor provided preliminary responses to certain questions raised. Regarding market segmentation, it wished to clarify that investigating authorities have discretion to engage in market segmentation analysis as part of the analysis of the entire domestic industry. Regarding affiliated parties, it recalled a case where there were two facially unrelated companies but, after further review, it discovered that one of the board members on one company was making pricing decisions in the other company.

17. A number of other follow-up papers were discussed. On the paper entitled *"Replies to Questions from India (TN/EL/W/106) and Hong Kong, China (TN/RL/W/109) on Australia's General Contribution on Anti-Dumping (TN/RL/W/86) and Like Product (TN/RL/W/91)"* (TN/RL/W/121), one participant emphasised the need for more clarity regarding the concept of duty absorption before the Group could move to the stage of developing rules in this area.. It stated that caution should be

exercised in dealing with such a concept as it could lead to further unwarranted protection to the domestic industry.

18. On the submission entitled *"Korea's View on the Improvement of the Sunset System"* (TN/RL/W/111), one participant considered that a proposal for the automatic, mandatory termination of AD measures after five years was not the improvement of the sunset system, but its elimination. The sunset provisions reflected a delicate balance of rights and obligations between importing and exporting Members by providing that AD measures be terminated after five years *unless* doing so would likely lead to the continuation or resumption of dumping and injury. The proposal offer no possibility to keep a measure in place, even where repeated reviews had shown that a company had continued to dump throughout the five-year period. The participant stated that since 1998 it had terminated nearly half of its AD/CV measures through the sunset review process. Another participant believed that the review rules should be applied in the same manner as those used in the initial investigation except that an investigating authority could apply different rules in the review if facts had changed. The sponsor reiterated its view that the sunset system does not work properly and that the only way to address these problems was automatic termination of measures at the end of the five-year period.

19. On the submission entitled *"Comments by Australia on the Proposal by Various Members on Facts Available (TN/RL/W/93)"* (TN/RL/W/124), a co-sponsor of TN/RL/W/93 clarified that the authorities should use data based on an objective examination of all information obtained in the course of investigations or reviews. Even when the authorities used facts available, they should ensure that information from a secondary source was accurate and reliable through verification within the meaning of Article 6.7 and Annex I ADA and other means. While a party submitting information had the responsibility to cooperate with the authorities, the task of examining its validity was on the authorities. A mere assertion of inaccuracy was not a reason to resort to facts available, but must be substantiated. While Annex II.5 provided some guidance, the problem lay in the arbitrary rejection of properly submitted and usable information. The same co-sponsor responded to oral comments regarding TN/RL/W/93. The fact that a respondent could not provide all the information requested did not relieve the authorities from their responsibility to determine the existence of dumping fairly and accurately. As the best source of information for calculation of margins was the verified responding parties' data, authorities should use all information submitted by them that was verifiable, germane to the investigation, not proven be inaccurate and usable without undue difficulties. The proposal sought to balance the need to facilitate the collection of information from the original source and the requirement for a fair and objective determination of the existence of dumping. While respondents' co-operation was a necessary element for an AD investigation and a responding party must act to the best of its ability, the current ADA did not give clear definition of "co-operation". A respondent should not be subject to less favourable facts available simply because a small portion of the information requested was not supplied or because the party was unable to submit substantial portions of information despite its reasonable efforts.

20. One participant foreshadowed a paper it intended to submit identifying issues meriting clarification and improvement.[2] The first issue was the need to clarify whether imports from all origins, including non-WTO Members, could be cumulated. The second issue related to the definition of "dumped imports" under Article 3.1 ADA. The third issue related to the meaning of the term "timely opportunities" within the meaning of Article 6.4 ADA and Article 12.3 ASCM. The fourth issue involved the meaning of the requirement in Article 12 ADA and Article 22 ASCM to include in determinations "sufficient detail" regarding findings and conclusions. The fifth issue related to clarifying the relationship between the requirements in Article 5.5 ADA and Article 11.5 ASCM to avoid publicising an application and to notify the government of the exporting Member. The sixth issue related to the disclosure of essential facts under Article 6.9 ADA and Article 12.8 ASCM, and in

[2] Subsequently circulated as document TN/RL/W/132.

particular clarification of the content of the disclosure and the time period provided to interested Members to defend their interests.

C. SUBSIDIES AND COUNTERVAILING MEASURES, INCLUDING FISHERIES SUBSIDIES

21. The first paper was entitled *"Improved Disciplines under the Agreement on Subsidies and Countervailing Measures"* (TN/RL/W/112). The sponsor stated that the negotiations offered an opportunity to minimize the scope for evasion and abuse of the Agreement's disciplines and remedies while at the same time ensuring its continued effectiveness. Two key issues identified were the need to clarify the concept of specificity and to define the factors that may be relevant in a subsidy pass-through analysis. The Group should also consider reinstatement and enhancement of the deemed serious prejudice provisions; and more specifically should explore how disciplines in respect of start-up incentives, which can have obvious trade-distorting effects, could be improved. Regarding the issue of "subsidized domestic like products", the sponsor suggested exploring practical modalities to ensure that the countervail process takes account of the amount of subsidisation benefiting the domestic like product. It considered that developing and developed countries shared a mutual interest in advancing the issues presented in this submission, and expressed its readiness to discuss specific proposals for the consideration of the special circumstances of developing and least developed countries.

22. A number of delegations made comments or raised questions regarding various of the ideas advanced in the paper. Regarding reinstatement of deemed serious prejudice provisions, one participant stated that this would not be inconsistent with its overall position of strengthening disciplines, while another was interested in the issue. However, another participant noted that it did not agree to the deemed serious prejudice provisions in the Uruguay Round, hence it was applied provisionally for five years; it was essential to examine not only the rate of subsidization, that is the 5% threshold, but also other conditions for deemed serious prejudice. Another participant had concerns about reinstating the presumption, as it was fraught with difficulties. It questioned the interrelationship between the reinstatement of the 5 per cent deeming level and the 15 per cent threshold for start-up subsidies indicated in Annex IV ASCM. On specificity, several participants agreed that clarification might be helpful, but cautioned that flexibility was required and that bright-line tests might be counterproductive; one other participant considered that this issue was already clear and needed no further clarification. Regarding subsidized domestic like products, one participant considered that it tended to undercut the purpose of countervailing measures, which was to offset the injurious effects of subsidized imports, while another was sceptical about how it could work in practice.

23. The next submission introduced was entitled "*Third Submission by India to the Negotiating Group on Rules (Agreement on Subsidies and Countervailing Measures)"* (TN/RL/W/120). The sponsor sought clarification and improvement on certain issues. Regarding a verification system for drawback schemes, a separate verification of inputs actually consumed in the production process was impractical due to the large number of small and medium enterprises and to costs which might not be commensurate with the duty concessions extended. One way to address the problem would be to presume that a reasonable and effective verification system existed where standard input-output norms or similar averaging procedures are developed for determining the average amount of various inputs required for the manufacture of one unit of the final product. Such a presumption would not have trade-distorting effects as an investigating authority would be entitled under Article 12.6 ASCM to examine the records of each exporter to find whether the application of standard procedures had resulted in over-rebate in a particular instance. The sponsor also proposed that capital goods and consumables be included in the definition of inputs consumed in the production process. While certain Members had suggested that this problem could be addressed by reducing tariffs on capital goods, in some developing countries tariffs contributed significantly to government revenue and were necessary to fund crucial developmental expenditures. Regarding substitution drawback, the sponsor

noted that small and medium size exporters often do not directly import inputs, and proposed to clarify that sale of an entitlement to obtain duty-free imported inputs in substitution drawback schemes was not a subsidy, provided such inputs were imported within two years and that the sale of such an entitlement was not made at a premium. On export competitiveness, the sponsor submitted that the ASCM did not address the eventuality that, after reaching export competitiveness in a particular product, export competitiveness could be lost. Regarding export credit schemes, the sponsor explained that unreasonable benchmarks had been used by certain investigating authorities against developing country exports when determining the benefit arising from such schemes.

24. Various participants noted that the issues identified had previously been discussed in the implementation context and welcomed their discussion in the Group. Regarding verification of duty drawback, one participant acknowledged the problems facing developing countries in implementing complicated rules in this area and was willing to discuss practical problems. Another participant asked how the proposal differed from the current ASCM and how it could be implemented without any undue loss of transparency or accuracy. Regarding capital goods, one participant wondered how the proposal could be made operational, while another noted that, while theoretical arguments could be made questioning the approach set out in footnote 61 ASCM, a theoretical argument could also be made questioning differential treatment of direct and indirect taxes under the ASCM. On export competitiveness, while some participants encouraged considering a solution based on the work done already in this area, another participant was of the view that allowing a delay in a country's phase-out obligations would weaken the existing disciplines on export subsidies; the current periods for developing and Annex VII countries to phase out export subsidies were more than adequate. Regarding export credits, one participant requested clarification on the issue of benchmarking, as there might be a different market for foreign currency loans than for domestic currency loans. Another participant stated that the current disciplines did not take into account differences among Members; differences in country risks between developing and developed countries generated unfair asymmetries where export credits are concerned. It raised similar concerns regarding guarantees, as item (j) of Annex I ASCM put Members with lower credit ratings at a clear disadvantage.

25. Follow-up comments were made regarding the submission contained in TN/RL/W/78. One participant agreed that the issue of natural resource and energy pricing merited further clarification, as dual pricing resulted in lower prices for domestic producers and caused major distortions. Another participant considered that certain proposals contained in TN/RL/W/78 went beyond the scope of paragraph 28 of the Doha Declaration. It opposed expanding the scope of the prohibited category and recalled that, although many developing countries had managed to gain new space in the international trade arena in the last years, they would continue to need help from governments when pressures were made on their legitimate development requirements.

26. The sponsor of TN/RL/W/41 indicated that it would be submitting a new paper making its proposal more concrete.[3] It recalled that the Ministers had agreed at Doha to consider as non-actionable all measures relating to legitimate developmental objectives such as regional development, financing of research and development, and diversification of production and implementation of environmentally-sustainable production methods. Consideration should be given to the categories of non-actionable subsidies which would be included within Article 8; perhaps this could be done in connection with an indicative list of national measures that could represent an Annex to the ASCM.

27. Regarding fisheries subsidies, a submission entitled *"Possible Approaches to Strengthen the Disciplines Relating to Fisheries Subsidies"* (TN/RL/W/115) was introduced. The sponsor believed that two categories of fisheries subsidies should be established. The first was a prohibited "red box" category of subsidies of a commercial character (those that lower costs or increase revenues or production) or directly promote over-capacity and over-fishing. As all subsidies have some trade

[3] Subsequently circulated as TN/RL/W/131.

effects, all other subsidies would be in an amber box, which would contain two sub-categories: those subsidies that had been notified plus those that could be assumed to have minimal trade effects (subsidies for small-scale fishing, for research or for resource management), and those that had not been notified. Regarding the first sub-category, if a Member felt that it was being harmed it would have to demonstrate that the subsidy was causing prejudice, while in the second sub-category, the subsidising Member would have to demonstrate its subsidies were not causing prejudice to the complaining Member. Lastly, the sponsor emphasised the need to improve notification quality. To this effect it suggested examining existing data in other fora, and having the Secretariat an updated table of notifications in this sector.

28. Various participants welcomed the submission and considered the proposals it contained to be useful and constructive. Several delegations were particularly interested in the proposed prohibited subsidy category, and noted that the focus on subsidies that contribute to overcapacity and overfishing was consistent with the approach taken by certain other participants. However, one participant noted the need to link the list of prohibited subsidies to Articles 1 and 2 ASCM. Another delegation noted that direct subsidies that reduced costs, enhanced revenues or increased production existed in other sectors, and asked what rationale existed for treating fisheries subsidies differently. Another delegation asked whether the proposed prohibition would be limited only to migratory species, given the submission's focus on shared stocks, and why, if a prohibition was necessary to encourage the conservation of fish stocks, some participants were also endeavouring to facilitate fisheries trade through sectoral tariff elimination, as that would provide a greater incentive to increase exploitation of fish stocks than subsidies. While this participant had a view that some fisheries subsidies were harmful, it could not accept the idea of a blanket prohibition on a wide range of products without proof of cause and effect. Interest was also expressed in the proposed reversal of the burden of proof regarding certain amber subsidies, with one participant considered the proposed link between notification and burden of proof to be a creative and potentially useful approach to the universally recognized notification problem. However, several participants expressed doubts on the establishment of a link between notification requirements and the proposed amber category, while another did not understand why there should be a special rule to this effect in the fisheries sector. Several participants appreciated the paper's recognition of the need to distinguish between those subsidies with adverse effects and those which contributed to sustainability of fisheries resources. The right of developing countries to be granted S&D treatment regarding coastal non-commercialised fisheries was also emphasized.

29. Follow-up comments were made regarding document TN/RL/W/82. One participant stated that there was no need for special rules on fisheries subsidies from the trade-distortion perspective. However the participant understood that a solution to the overexploitation issue was of primary importance to sustainable development, and had contributed to discussions in the Committee on Trade and Development and the Food and Agriculture Organization. Without prejudice to its view that the Group's mandate did not include discussion of fisheries subsidies from an over-exploitation perspective, the participant noted that it would be more natural for proponents to address trade-distorting subsidies that were unrelated to over-exploitation under the general clarification and improvement of the existing ASCM, while the focus should be on only fisheries subsidies causing overexploitation. In this respect, the approach of the sponsor of TN/RL/W/82 had a certain consistency. However, other points raised in the paper were not appropriate. Regarding the proposal for an absolute prohibition of subsidies for vessel construction, this proposal needed to be discussed further as the effect of subsidies on fish resources depended on the status of resources and management. An unconditional prohibition of subsidies for vessel construction would be unfair for countries with proper fishery management measures for avoiding overexploitation; the impact of subsidies on resources should be assessed on a case-by-case basis. On the other hand, the participant understood ideas that subsidies contributing to over-capacity should be non-actionable. Participants advocating tighter disciplines should present actual cases demonstrating that subsidies were causing overexploitation. Another participant asked whether a prohibition on subsidies for fleet renewal

would extend to all such subsidies regardless of the health of the fish stocks the vessels involved would pursue. The sponsor of TN/RL/W/82 replied that it saw no link between a prohibition on subsidies granted to fishing fleets and the state of fish stocks.

D. SPECIAL AND DIFFERENTIAL TREATMENT PROPOSALS REFERRED TO THE GROUP BY THE CHAIRMAN OF THE GENERAL COUNCIL

30. The Chairman drew participants' attention to a letter from the Chairman of the General Council referring nine S&D proposals in the areas of AD and SCM to the Group. The proposals related to Article 15 ADA and Articles 27.1, 27.4, 27.8, 27.9, 27.13 and 27.15 ASCM.

31. Regarding Article 27.1 ASCM, a co-sponsor explained that deletion of the verb “may” from the preambular portion of the provision was justified as subsidies had played an important economic role in the development of the now developed countries and that developing countries should not be deprived of this right as well. Another co-sponsor noted that this proposal did not suggest any significant change, but rather gave an affirmative connotation to the preamble of Article 27.1 ASCM. Regarding other proposals, no sponsor took the floor.

32. Several participants expressed their readiness to discuss the proposals. They noted the lack of concrete proposals from least-developed countries in the Group and requested further detailed elaboration on the current proposals to allow the Group to move these issues forward, including on how the proposal on Article 27.9 ASCM differed from the existing provision. One participant was not sure that the undisciplined use of subsidies was an appropriate development tool. It noted that several of the proposals raised the issue of extensions for developing country export subsidy programmes under Article 27.4 ASCM. It reminded Members that, under both the normal extension procedures of Article 27.4 and the special extension procedures agreed to at Doha, over 20 developing countries had received extensions for over 70 export subsidy programmes.

33. Regarding Article 15 ADA, one participant noted that this issue had been subject to extensive work in the Anti-Dumping Committee where several proposals were discussed, yet no consensus had been reached.

E OTHER BUSINESS

34. The Chairman proposed that the Group meet informally on 25 June 2003 to hear comments on the Chairman’s Report to the TNC, and that the next formal meeting of the Group be held on 21-23 July 2003, with 21 July set aside for Regional Trade Agreements. Proposals on S&D would be taken up within each relevant agenda item.