WORLD TRADE ORGANIZATION

RESTRICTED

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Negotiating Group on Rules

SUMMARY REPORT OF THE MEETING HELD ON 21-22 JULY 2003

Note by the Secretariat

1. The Negotiating Group on Rules ("the Group") held a formal meeting on 21-22 July 2003.

A. ADOPTION OF THE AGENDA

2. The Group adopted the following agenda:

A. ADOPTION OF THE AGENDA

B. REGIONAL TRADE AGREEMENTS

C. ANTI-DUMPING

D. SUBSIDIES AND COUNTERVAILING MEASURES, INCLUDING FISHERIES SUBSIDIES

E. OTHER BUSINESS

- Dates of meetings of the Group following Cancun.

B. REGIONAL TRADE AGREEMENTS ("RTAs")

3. The Chairman invited the Group to focus on the RTA-related special and differential treatment ("S&D") proposals which had been preliminarily considered at Group's meeting of 11 June 2003. He recalled that the Chairman of the General Council had referred to the Group for consideration a number of proposals regarding S&D, of which three were RTA-related, and that a progress report was due at the General Council meeting of 24 July 2003. He then read out the proposals, noting that two of them were identical, that they all referred to the *Understanding on the Interpretation of Article XXIV of the GATT 1994*, and they had been submitted by the African Group (document TN/CTD/W/3/Rev.2) and by the Least-Developed Countries (document TN/CTD/W/4/Add.1).

4. In the absence of any request for the floor, the Chairman noted that only a small number of proponents' representatives were present due to another meeting on S&D being held simultaneously. He recognized the difficulties faced by proponent delegations in that respect and assured that the three proposals were in the body of the Group's work and that they would be considered during future meetings.

5. The Chairman then turned the meeting into informal mode, to pursue discussions on the basis of a revised Chair's Informal Discussion Paper entitled *Transparency in RTAs*. At the end of these discussions, the Chairman reverted back to formal mode, indicating that discussions had been useful

and productive, and that he would pursue consultations with participants to modify and develop relevant parts of his paper.

C. ANTI-DUMPING ("AD")

6. At the outset, the Chairman opened the floor for consideration of an S&D proposal by the African Group regarding Article 15 of the Ant-Dumping Agreement ("ADA")(TN/CTD/W/3/Rev.2) which had been referred to the Group by the Chairman of the General Council. No participant took the floor.

7. The Group next considered a submission entitled "*Contribution by Venezuela on Various Aspects of the Anti-Dumping Agreement and the Agreement on and Subsidies and Countervailing Measures which may Require Clarification and Improvement*" (TN/RL/W/132). Regarding the meaning of the term "dumped imports" in the context of Article 3.1 of the ADA, one participant noted that the issue here was not so much the treatment of imports with *de minimis* dumping margins as the treatment of imports subject to an "all others" rate, while another participant inquired whether the sponsor's intention was to codify the findings of the *Argentina – Poultry* panel. Regarding whether it was possible under Article 5.8 of the AD Agreement to cumulate imports from WTO Members with imports from non-Members, two participants indicated that in their view Article 5.8 already permitted cumulation in this context. The sponsor responded that Article 5.8 ADA referred to "countries" rather than "Members".

8. The second paper considered was entitled "*The Role of Transparency in the Anti-Dumping Agreement*" (TN/RL/W/137). The sponsor considered that any country that cared about its exporters should care about ADA transparency provisions, as they were aimed at ensuring that AD procedures were fair, precise, predictable and unambiguous. Transparency was important at all stages of the process, including notification of legislation for review by other Members, timely provision of information giving parties notice of the procedures and practices that would be adopted during an investigation, and provision of a sufficient explanation and justification of the findings of the administrating authority. AD cases could be complex and costly and capacity building and technical assistance must play a key role in developing underlying administrative systems. One approach would be to develop a guide to best practice for implementing ADA transparency provisions, which would help to clarify a common approach to implementation of the ADA. This would yield tangible benefits to all Members in terms of costs and saving the time of both administrating authorities and exporting companies. The submission listed four possible ways to take this matter forward.

9. There was a broadly shared view among participants that AD transparency was important. Several participants considered that transparency and substance were inseparably linked and considered significant improvements on transparency to be necessary to a successful outcome of the negotiations. Other participants cautioned that improved transparency, while important, merely complemented substantive reforms and would not solve the underlying problem of abuse of AD; it was noted that existing provisions on transparency were not always implemented. One participant noted that the rules should not be inflexible, and that small states needed policy leverage. Another participant stated that many developing countries were major AD users and queried why the rights of Members to conduct AD proceedings should outweigh the due process rights of private entities to protect their interests in AD investigations. Regarding various options identified in the paper for moving the work forward, some participants supported establishment of a transparency working group under the auspices of the Negotiating Group as a practical way to achieve results that could be incorporated into the results of the negotiations. However, one participant considered that such a group would stretch participants' resources, and preferred to continue work in the Working Group on Implementation and/or to explore the idea of a best practices guide. Some participants considered that a best practices guide would be useful but not sufficient, and urged that a combination of options be considered.

10. The third paper discussed was entitled "*Submission from the European Communities and Japan Containing Proposals on Cost Savings in Anti-Dumping Proceedings*"(TN/RL/W/138). A sponsor stated that co-operation in AD proceedings had become increasingly costly due to the growing number of users with differing systems, shortcomings in the transparency of proceedings, and ADA provisions that gave too little guidance, rendering outcomes unpredictable. As a result, many interested parties did not participate and faced the use of best information available. It was necessary to reduce costs to ensure that parties had a real chance to cooperate. The paper identified disproportionate information requirements (in particular unnecessarily lengthy questionnaires), inadequate procedural rules, and unclear and unduly discretionary substantive rules. Cost savings could be achieved by a standardisation of procedures and documents, better procedural rules regarding disclosure and confidentiality and more operational substantive rules. The paper had an important development angle, as exporters from developing countries tended to depend more on export markets than exporters from developed countries. The other sponsor noted that the proposals on standard questionnaires and verification procedures aimed at reducing the burden on the authorities and respondents, while increasing predictability and transparency. Improved rules on disclosure would enable parties to defend their interests, thus preventing abuse. Investigations and reviews increased uncertainty and imposed a heavy burden on respondents, and authorities should conclude AD proceedings as early as possible. The paper also referred to the importance of improving substantive rules. The proposals addressed the same goal advanced by the Friends of AD Negotiations, to prevent the abuse of AD measures.

11. Most participants agreed that reducing the cost of AD investigations was important, with one noting that the same goals applied in CVD investigations. There were however a variety of views on how cost reductions could best be achieved. While broad support was expressed for the idea of standardized questionnaires, several participants cautioned that development of a model might best be left to technical bodies. It was noted that a model should serve only as a starting point, to be modified based on the needs of a given investigation, and that no arbitrary limit should be paced on length. It was queried whether any discussion of standardised questionnaires should be accompanied by discussion of whether dispute settlement claims based on an argument that the record contained insufficient information on a particular point should be barred if such information was not requested in the standard questionnaire. While one participant urged a simplified questionnaire for SMEs, another cautioned that the information required did not depend on the size of the respondent. Various participants supported shortened deadlines for investigations and mandatory deadlines for reviews, with several participants suggesting that investigations be limited to 12 months, and one participant suggesting that the Group consider the starting point for the time period. Several participants queried whether shortened investigation deadlines might not increase costs and burdens on parties, especially in developing countries, while another cautioned that shortened deadlines should not result in shortened deadlines for responding to questionnaires. Questions were raised regarding the nature, role and feasibility of a possible group of experts to review the adequacy of non-confidential summaries, including whether an *ad hoc* group might serve the purpose. It was noted that "clarifying" that disclosure of essential facts included legal assessment of the facts would create a new, potentially burdensome and costly obligation on Members; it was unclear how this would reduce costs to parties. Regarding a possible list of extreme cases that would require a positive or negative injury finding, some participants were most interested in a negative list, while one participant cautioned against *per se* rules given that an injury assessment involved a composite of variables of a different nature.

12. In response, one of the sponsors noted that, regarding non-confidential summaries, the idea was to establish a permanent Geneva-based group that could provide quick responses on request regarding the adequacy of a summary. Regarding standardised questionnaires, it was recognised that industries differed, and requests for additional information should not be excluded in case of exceptional additional needs. Merely treating the standard questionnaire as a starting point would however defeat the purpose. As for simplified questionnaires for SMEs, it was suggested to start by considering a standard questionnaire and think about SMEs as a second step. Regarding disclosure,

the sponsor doubted that an earlier disclosure of legal assessment of the facts would represent a significant additional burden.

13. The next paper discussed was entitled "*Comments by Venezuela on Document TN/RL/W/111 Submitted by Korea Concerning its View of the Improvement of the Sunset System*" (TN/RL/W/133). One participant considered that the "simple" solution of terminating AD measures after five years was not extreme, as the five-year period provided for in the ADA was sufficient. Special attention should be paid to exporters who had ceased exporting during the period of application of the measure.

14. The next paper referred to was entitled "*Egyptian Paper Containing Replies to Questions Orally Posed by Canada During the Ninth Meeting of the Negotiating Group on Rules 18-19 June 2003*" (TN/RL/W/140). The sponsor indicated that mandatory application of the lesser duty rule would seriously affect the rights of developing countries and contradict the Group's mandate. Such a requirement should apply only when developed countries investigated dumped products originating in developing countries.

D. SUBSIDIES AND COUNTERVAILING MEASURES, INCLUDING FISHERIES SUBSIDIES

15. The Chairman opened the floor for discussion of S&D proposals in the area of subsidies and countervailing measures that were referred to the Group by the Chairman of the General Council. No participant took the floor.

16. The Group next took up a paper entitled "*Second Contribution by Cuba and Venezuela to the Negotiating Group on Rules Expanding on the proposal Concerning Non-Actionable Subsidies*"(TN/RL/W/131). A sponsor explained that the document was based on ideas voiced in an earlier submission (TN/RL/W/41/Rev.1). Although the submission aimed at the formulating rules and built-in flexibilities permitting developing countries to meet their legitimate development goals, this sponsor still saw merit in rendering effective certain existing ASCM provisions for the benefit of developing countries. It referred to the added value that could result from resolving implementation-related issues and exploring means for reviving Article 8 ASCM.

17. In reaction, one participant stated that the non-actionable category of subsidies had always gone hand-in-hand with the strengthened subsidy disciplines of Article 6.1 ASCM. In order to preserve the overall effectiveness of ASCM disciplines, any such category had to be balanced against more stringent subsidy disciplines elsewhere. Several participants noted that the paper proposed an extremely broad category of non-actionable subsidies which went beyond former Article 8. Such an expansion of the non-actionable category could undermine the effectiveness of the ASCM. One participant inquired about the scope of the proposal and how it related to Article 27 ASCM.

18. The sponsor recognized the links between Article 8 ASCM and other parts of the ASCM, and was ready to work on this. It was not interested in weakening ASCM disciplines. It stressed the precarious balance between the legitimate development rights of developing countries on the one hand and the warranted strengthening, clarification and improvement of the rules and disciplines of the ASCM on the other. On the question posed, it indicated that Article 27 ASCM was, to date, the provision dealing with S&D, yet this Article, as its stood, could not accommodate the new category suggested in the paper.

19. The second paper introduced was entitled "*Further Contribution to the Discussion of the Negotiating Group on Rules on the Agreement on Subsidies and Countervailing Measures*" (TN/RL/W/139). The sponsor clarified that the paper elaborated on an earlier paper (TN/RL/W/85). On prohibited export subsidies, jurisprudence on the issue of *de facto* export subsidies placed more weight on one factor. This tilted the playing field against small- and medium-sized economies that

provided subsidies. On enforcement, it inquired what precisely "withdrawal" of the subsidy meant and how that recommendation could be enforced.

20. One participant agreed that the rules on de facto export contingency could benefit from clarification and that export propensity was only one of several factors to be considered. It questioned the relevance of export competitiveness to the analysis, as it had a different basis and rationale. Another participant saw merit in developing a list of factors to analyse *de facto* export contingency, but cautioned against an all-inclusive list given that the universe of possible factors cannot be fully anticipated and the circumstances will vary greatly across cases. It requested the sponsor to provide examples of the factors it would include in such a list. It expressed concern regarding certain concepts in the paper, in particular the existence of a small domestic market, fluctuating market conditions, and "export competitiveness". These factors were at best only tangentially related to the question of export contingency. In addition, use of the concept of export competitiveness would effectively roll back existing disciplines on export subsidies.

21. With regard to enforcement, one participant agreed about the prospective nature of remedies under Parts III and V of the ASCM, but noted that these remedies should be effective in situations where subsidies continued to confer benefits for a period after the granting of the subsidy, in particular in the case of large non-recurring subsidies. Another participant stressed the need to strike a careful balance between stronger and more effective disciplines and unpredictable disproportionate remedies being imposed through dispute settlement process.

22. On serious prejudice, several participants agreed that the remedy needed to be made more effective and operational. One participant however considered that Article 6.1 suffered from severe conceptual deficiencies and was sceptical that it could be successfully revived. The deficiencies ranged from technical difficulties in calculating the 5 per cent threshold -- on which the Informal Group of Experts could not agree -- to the near-impossibility of assessing compliance with numerical thresholds in an *ex ante* fashion. Accordingly, it believed that the deemed serious prejudice provision was history and should remain so.

23. The third paper introduced was entitled "*Comments and Views from Australia on Canada's Submission on Improved Disciplines under the Agreement on Subsidies and Countervailing Measures (Document TN/RL/W/112*)" (TN/RL/W/135). The sponsor believed that trying to reinstate Article 6.1 of the ASCM was useless as no one had really been certain of its meaning and the Informal Group of Experts itself had not been able to define it. It also noted that current jurisprudence defined a subsidy for CVD purposes to involve a benefit to the recipient, while the 5 per cent threshold was based on cost to government; this reflected certain inconsistencies within the ASCM.

24. On the sub-item of Fisheries Subsidies, a submission entitled "*Fisheries Subsidies*" and sponsored by eight participants, was introduced. A sponsor stated that some Members had identified the elimination of fisheries subsidies as possibly the greatest contribution the multilateral trading system could make to sustainable development. These Members argued that subsidies were partly responsible for the alarming depletion of many fish stocks, as much of the money was spent in commissioning new vessels or in enhancing the efficiency of old boats. The sponsors of this paper were coastal states, many of which were LDCs, with fish stocks in their exclusive economic zones which exceeded the existing capacity of their domestic fishing fleets. Significant government revenues had been generated for the sponsors from access fees from developed and developing country distant water fishing fleets. These access fees were almost always negotiated through bilateral agreements under which distant water fishing nations also provided invaluable development assistance. In order to attract investment in the fisheries sector, many developing and least developed small vulnerable costal states offered incentives to both local and foreign fishers to supply domestic processing facilities. These access fees and incentives were vital if small vulnerable coastal states were to develop their fisheries sector, particularly for some very small island states where fish were

the only resource. The sponsor urged participants to grant these access fees and incentives special and differential treatment in the current negotiations on fisheries subsidies. It referred to paragraph 28 of the Doha Declaration which reiterated the need to "…. take into account the importance of this sector to developing countries". Furthermore, the right of small vulnerable coastal states to domesticate their fisheries sector was assured under the United Nations Convention on the Law of the Sea and any possible WTO discipline should not undermine the fundamental principles of the Law of the Sea. It requested that access fees and development assistance, fiscal incentives to domestication and fisheries development, and measures undertaken by governments of small vulnerable costal states to assist their artisanal fisheries sector, be explicitly excluded from the definition of subsidy.

25. Many participants welcomed the submission, considered that the sponsors has identified legitimate interests, and expressed sympathy for the sponsors' request for S&D treatment. It was stated that management was not a proper issue for the WTO, and that the WTO should not restrict the freedom of governments to allow foreign access to their fish stocks. It was observed that access fees as such were not trade-distorting, and that current proposals would not directly restrict the ability of states to charge such fees; a subsidy issue would arise only where the fee-paying state seeking access to the fishery failed to recover those fees from its distant water fishers. It was further noted that the term "access payments" covered a variety of arrangements, which could be either harmful or beneficial, and that access arrangements that were not properly structured could lead to over-fishing and resource depletion, with little or no benefit to the developing countries as a whole. It was stated that development assistance was necessary and helpful, and should not be the subject of improved disciplines; however, subsidies to highly industrialized international fishing fleets of the developed world should not be hidden in the form of development assistance. It was observed that, in the course of development, care must be taken not to expand capacity so as to lead to over-fishing and trade distortions. Concern was also expressed regarding the suggestion to exclude certain measures from the definition of subsidy in Article 1, as the horizontal definition of subsidy should apply. It was suggested that S&D treatment be based on elements of Article 27 ASCM.

26. One participant believed that measures undertaken by governments of small vulnerable coastal states to develop their fisheries or to assist their artisanal fisheries sector could not be considered to be harmful subsidies. The effects of fishery subsidies differed depending on the management schemes in place, and it was wrong to assume that over-harvests occurred in all areas of the world. Subsidies for the domestic fishery processing sector should be handled by clarifying general ASCM rules. Sustainable development of artisanal fisheries was important and coastal nations were entitled to manage fish stocks within their EEZs under international law. Another participant emphasised that the relationship between fisheries subsidies and depletion of fish stocks had not yet been verified; problems in management were the most significant cause of depletion. The S&D aspect of the paper facilitated understanding of the situation of small-scale low technology fisheries and was worthy of consideration. The participant brought the attention of the Group to its submission to the Negotiating Group on Market Access (TN/MA/W/6/Add.39).

27. One participant inquired why the sponsors chose to categorise themselves as small and vulnerable coastal states, what type of incentives the sponsors provided, and what was meant by "artisanal" fisheries. Another participant asked the sponsors to clarify what was meant by the "domestication" of fisheries, as any exemptions from disciplines should be clearly defined; to the extent it referred to fish processing, this might relate to industrial products rather than to fish. The sponsor responded that, the definition of a group of small and vulnerable states whose interests focused mainly on fisheries fit the economic reality of the sponsors. With regard to the types of incentives provided by the sponsors, it referred to types of subsidies listed in the proposal including low interest loans, tax exemptions, direct payments of income and access fees. On artisanal fisheries, it defined it to be the small-scale fisheries which are local in nature.

E. OTHER BUSINESS

28. It was agreed that the next meetings of the Group be scheduled for 3 October (RTAs) and 7-8 October 2003 (AD and SCM including Fisheries Subsidies). As a working hypothesis and subject to the overall schedule of WTO meetings, subsequent meetings of the Group through 2003 would be 3 November and 11 December 2003 for RTAs and 27-29 October, 26-27 November and 15-17 December 2003 for AD and SCM including Fisheries Subsidies.