

Negotiating Group on Rules

**SUMMARY REPORT OF THE MEETING
HELD ON 16 MARCH 2004**

Note by the Secretariat

1. The Negotiating Group on Rules ("the Group") held a formal meeting on 16 March 2004.
 - A. ADOPTION OF THE AGENDA
 2. The Group adopted the following agenda:
 - A. ADOPTION OF THE AGENDA
 - B. COMPILATION OF ISSUES AND PROPOSALS IDENTIFIED BY PARTICIPANTS IN THE NEGOTIATING GROUP ON RULES – TN/RL/W/143
 - C. PAPERS SUBMITTED SINCE THE LAST MEETING OF THE GROUP
 - (i) ANTI-DUMPING
 - (ii) SUBSIDIES AND COUNTERVAILING MEASURES, INCLUDING FISHERIES SUBSIDIES
 - D. ORGANIZATION OF THE WORK OF THE GROUP
 - E. OTHER BUSINESS
 - Identification of contact persons
 - B. COMPILATION OF ISSUES AND PROPOSALS IDENTIFIED BY PARTICIPANTS IN THE NEGOTIATING GROUP ON RULES – TN/RL/W/143
3. The Chairman stated that the Compilation put together in one place, in a systematic fashion, all issues raised and proposals made to date by Participants in respect of Anti-Dumping and Subsidies and Countervailing Measures, including Fisheries Subsidies, thus offering an overview of the range of issues and proposals before the Group, clustered by subject matter. The Compilation was not intended to provide a detailed explanation of issues and proposals, but rather to give an overview of their key elements. Conceptual elements, general policy positions, etc. were not reflected in this document, but were contained in the original submissions listed in the Annex to the Compilation. The Compilation reflected the range of issues and proposals put before the Group as of the date of its circulation; it would be periodically updated to reflect the identification of additional issues and proposals. The placement of issues and proposals within the Compilation did not and could not prejudice their substance. The Chairman invited delegations' comments and concrete suggestions regarding the manner in which their issues and/or proposals were addressed in the Compilation.

4. All Participants taking the floor welcomed the Compilation, which they considered to be useful and well-organized. One Participant hoped that a revised version could be made available before the summer break, and encouraged Participants to submit drafting suggestions as soon as possible. Another Participant noted that, while the Compilation was useful, it could not be considered the sole basis for the Group's future work; the Group should continue discussions based on the original submissions and questions and answers, which contained valuable technical details and analysis. This Participant suggested that the Compilation identify the Participants submitting the relevant proposals. A third Participant noted that the Compilation did not limit or prejudice the future work of the Group or preclude the submission of future proposals.

C. PAPERS SUBMITTED SINCE THE LAST MEETING OF THE GROUP

(i) ANTI-DUMPING

5. The first paper, entitled "Proposal on Issues Related to Affiliated Parties" (TN/RL/W/146), was sponsored by 11 Participants. A co-sponsor introducing the paper referred to problems relating to the concept of affiliation in the AD Agreement. One problem was the lack of a clear definition of affiliation for the purpose of dumping margin calculations. This caused some investigating authorities to develop their own definitions and expand the scope of investigations unnecessarily. Such practices were burdensome to respondents, and it was not reasonable for the authorities to resort to facts available just because a respondent could not respond to such widely-expanded inquiries. Another problem was that the authorities sometimes abused their discretion with respect to the treatment of transactions between affiliated parties, choosing data that increased dumping margins. The paper proposed to clarify the definition of affiliation and improve the treatment of such transactions. The definition of affiliation proposed adopted the criterion of "control", under which one party is regarded as being affiliated to other parties when it controls, is controlled by, or is under common control with the others. This definition was based on the idea of "identity of economic interests" and was consistent with the criteria of "consolidation" in internationally accepted accounting standards. The treatment of affiliated party transactions proposed was simple and transparent so as to prevent the authorities from picking and choosing data on a result-oriented basis.

6. Other co-sponsors elaborated further on the paper. It could not be assumed that affiliation automatically resulted in unreliable prices, and stricter disciplines and definitions were needed to clarify when and to what extent data from actual transactions could be discarded. Reference was made to instances where authorities adopted an excessively broad interpretation of affiliation which led to the unreasonable disregard of actual data and excessive resort to facts available. It was also highlighted that the relationship between parties had to be objectively identified by considering economic interests between them and analysing the power to control each other. While the authorities might have to test sales to affiliated parties for the purpose of determining normal value, there was a need for reliable and justifiable data related to sales expenses and costs. The co-sponsors also called for clear guidelines prohibiting investigation of affiliated parties exporting the same product as if they were a single responding party. The co-sponsors intended to propose additional disciplines relating to Article 2 of the ADA, in particular other issues relevant to transactions in the ordinary course of trade, with a view to strictly regulating practices leading to biased results such as zeroing and the automatic discarding of transactions between affiliates or transactions involving sales below cost.

7. Divergent views were expressed regarding this paper. One participant expressed concern regarding the proposed definition of affiliated parties. Simply because parties were found to be affiliated did not necessarily mean that sales between them would be disregarded – this determination turned on a second-level examination of prices, the nature of the relationship and the purpose for which the sales were to be used. An unduly narrow definition of affiliation could prevent the authorities from examining such issues. The sponsors proposed a narrow and legalistic definition of affiliation based solely on the legal power to exercise voting rights on companies' shares, while many factors could cause the authorities to examine a sale with greater care. Affiliated parties could have

many reasons to cooperate in setting prices, not the least of which may be simple accounting or tax planning purposes. While the paper noted the complex problems associated with affiliated parties, the proposed solution would do little more than turn a blind eye to the problem. One way to move this issue forward would be to discuss how the sponsors determined affiliation, and how they have overcome the problems discussed.

8. Another Participant welcomed the paper, both because the huge information requirements imposed by some investigating authorities regarding transactions between affiliated parties could render cooperation prohibitively expensive, and because clarification could make dumping determinations more predictable. As for the solutions proposed, the definition of affiliation proposed (normally a 50 per cent shareholding) was a very high threshold and did not cover all situations where prices were not at arm's-length, such as where companies were linked by shareholdings below the 50 per cent threshold but had family links. Regarding what should be done where transactions took place between affiliated parties and prices were influenced by the relationship, the issue was complex. The proposal envisioned that, where it was not possible to simply discard such transactions, because for example few if any transactions remained, the authorities should nevertheless use the affected transactions. This Participant was not comfortable with such an approach. There was a balance to be struck between the search for reliable data and the need to avoid excessive information collection from respondents, and the proposal privileged the latter aspect. Participants should strive to reconcile these objectives in a more optimal way.

9. One Participant referred to Article 15 of the Customs Valuation Agreement for guidance as it contained a definition of related parties and provided tests to be applied in determining the acceptability of the transaction value. While the Customs Valuation Agreement served a different purpose, it dealt with the same concept and could be relevant. Another Participant queried how the proposals in the paper related to the transaction-to-transaction methodology which is a preferred methodology for small economies.

10. A co-sponsor reacted to the comments made. Regarding the definition of affiliated parties, established practice based on international accounting standards for tax and accounting purposes should be the basis of all the discussions from now on. The proponents' purpose was to bring further clarity and predictability to dumping calculations, and to avoid hampering the normal business activities of, or imposing unnecessary burdens on, respondents. There could be many instances where prices would be influenced, however the ability of one party to influence another was not enough to deem transaction prices unreliable. Such influence was the very essence of the ordinary course of business and the authorities should not interfere in such activities.

11. The second paper discussed was entitled "Replies by the European Communities to Questions on TN/RL/W/67 – Reflection Paper of the European Communities on a Swift Control Mechanism for Initiations" (TN/RL/W/142). The Participant posing the questions continued to have concerns and questions about the procedure proposed for discussion in the Group. It queried what relevance, if any, establishment of such a panel would have on requests to extend the deadline for submission of questionnaire responses under Article 6.1.1, and whether such panels might be requested solely to give parties more time to respond to questionnaires. In addition, the Participant was concerned about the proposal on binding arbitration.. Was the sponsor suggesting that an importing Member should be forced into binding arbitration before its actions were found to be inconsistent with the AD or Subsidies Agreement? It also believed that in order for a swift control mechanism to function properly, parties needed prompt access to the factual information which led to initiation. If the Group were to pursue this issue, it would need to discuss how to adopt enforceable requirements on transparency of initiation procedures.

12. The third paper discussed was entitled "Replies by Argentina to Comments and Questions by Egypt (TN/RL/W/81 & 67) – TN/RL/W/144. The Participant posing the questions commented, with respect to the determination of the normal value in circumstances where producers and exporters are

associated within the meaning of Article 2.3 of the ADA, that it failed to understand what could prevent the investigating authorities from taking into account manifest distortions resulting from such an association. The Participant was also of the opinion that the reference to the terms "association" and "compensatory arrangement" in Article 2.3 provided sufficient guidance to the investigating authorities in determining the reliable/unreliable nature of the export price. It considered that the absence of disputes concerning the application of Article 2.3 since the establishment of the WTO provided an interesting indication on the lack of necessity to clarify or improve this matter.

13. The fourth paper discussed was entitled "Replies to the Questions from India on TN/RL/W/35" – TN/RL/W/147. The sponsor of the paper emphasised that procedural fairness was an important theme and was essential to the rule of law in the legal and administrative systems of civil societies. These concepts not only helped to ensure a fair and open decision-making process that benefited all WTO Members, but also helped to maintain the strength and effectiveness of the instruments. The sponsor encouraged other Members to share their experiences and ideas for implementing and improving investigatory procedures and procedural fairness rules at the national level.

(ii) SUBSIDIES AND COUNTERVAILING MEASURES, INCLUDING FISHERIES SUBSIDIES

14. The only paper referred to in this context was entitled "Replies to Questions Posed by Australia (Document TN/RL/W/135) on Canada's Submission on Improved Discussions under the Agreement of Subsidies and Countervailing Measures" – TN/RL/W/145. There was no discussion regarding this paper.

D. ORGANIZATION OF THE WORK OF THE GROUP

15. For the purposes of this agenda item, the Chairman turned the meeting into informal mode to exchange views regarding the organization of the future work of the Group. At the end of these discussions, the Chairman reverted to formal mode to announce that the next meeting of the Group would be held on 26-28 April 2004. The meeting would include detailed discussions in informal mode regarding elaborated proposals. In order to be discussed in informal mode at the April meeting, elaborated proposals had to be submitted to the Secretariat by COB on Thursday, 8 April 2004 so that they could be translated and circulated as Job documents. As a matter of fairness to all Participants, the Chairman intended to be very firm with respect to this deadline. Participants were requested to exercise restraint in not submitting too many elaborated proposals at the outset, keeping in mind that they would have a full opportunity to put in elaborated proposals on all issues. Participants were further requested to ensure that such elaborated proposals were sufficiently precise and detailed as to permit a useful and comprehensive discussion, and to be prepared to discuss and explain in depth the details of and rationales for such elaborated proposals.

E. OTHER BUSINESS

16. The Chairman referred to his request that the Secretariat assemble a list of contact persons for the Rules negotiations. He invited participants who had not yet done so to identify their contact person(s) to the Secretariat. Although the list had no official status, it could facilitate communications with and among participants.
