WORLD TRADE ORGANIZATION

RESTRICTED

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Negotiating Group on Rules

SUMMARY REPORT OF THE MEETING HELD ON 26 & 28 APRIL 2004

Note by the Secretariat

1. The Negotiating Group on Rules ("the Group") held a formal meeting on 26 & 28 April 2004.

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. OTHER BUSINESS

- Date of the next meeting of the Group.

B. ANTI-DUMPING

3. The group considered two new submissions. The first, entitled **"Proposals on Determination of Normal Value"** (TN/RL/W/150), was sponsored by 11 Participants. A co-sponsor explained that it set forth four proposals for strengthening disciplines on the determination of normal value under Article 2 of the Anti-Dumping Agreement ("ADA").

4. The first proposal was to clarify the "sufficient quantity" or "5% viability" test. The co-sponsor explained that, due to a lack of clear rules, Members' practices in this area varied, and discretion given to investigating authorities undermined the fairness of the proceedings. The paper proposed that the sufficient quantity test be applied at the beginning of the investigation with regard to sales of the like product as a whole in the domestic market of the exporting country, including sales later determined to be outside the ordinary course of trade, as it was essential for both the authorities and respondents to know from the outset what data would be used in the calculation of normal value. It also suggested a clearer definition of what constituted "domestic sales".

5. The second proposal involved clarification of the phrase "in the ordinary course of trade". The paper proposed an exhaustive list of specific exceptional kinds of sales which should be deemed to be outside the ordinary course of trade. In addition, it proposed that the below-cost test be performed with respect to the aggregate value and costs of all sales of the like product during the period of investigation and not on a transaction-specific basis. This proposal was based on the business reality that companies do not typically determine profitability of their operations on a transaction-specific basis, but rather on a production-line basis.

6. The third proposal was the improvement of disciplines on the investigating authorities' discretion, which had allowed the imposition of an excessive burden on respondents by requiring them to recalculate their cost data on a specific categorization different from their normal accounting systems. Taking into account commercial realties, the paper proposed that the period of data collection must correspond to the fiscal year or period of respondents and that the authority must accept each respondent's data as long as they are in accordance with the generally accepted accounting principles ("GAAP") of the exporting country.

7. Finally, the paper proposed stringent disciplines in calculating constructed normal value. The paper proposed that the authorities use, in all circumstances, actual data pertaining to the production and sales of the respondents, and proposed a specific rule on the profit level to be used in calculating the constructed value in cases where home-market sales failed the aggregate below-cost test.

8. Other co-sponsors elaborated on the paper. Concern was expressed about the vagueness of the current provisions regarding normal value. The paper addressed the bias of methodologies that in many cases resulted in discarding a potentially large proportion of ordinary business transactions. It also proposed to improve disciplines relating to the methodology to be applied when authorities use constructed normal values. Participants were encouraged to discuss the best approach to performing the viability test as well as different approaches to constructing normal value, for example, what is the appropriate level of profit when the selling price is below total cost yet still contributes to recovering a certain portion of the fixed cost. Participants were requested to suggest what the "Y" per cent referred to in the sales-below-cost proposal should be in order to determine a substantial portion of such sales and whether their accounting systems are in accordance with GAAP. It was noted that the sponsors would submit additional proposals in the area of fair comparison.

9. Regarding the period of data collection and investigation ("POI"), one Participant proposed that the dumping POI start from the month when the investigation was initiated to exactly 12 months back. Another Participant inquired whether the domestic industry should have to suffer injury for 12 months before an investigation could be initiated and what would happen if dumping only started in the last 6 months of the period. Regarding the proposal to allow respondents to submit production and sales data for an entire product cycle, one Participant inquired whether this meant that when the world market was in a downturn and the domestic industry was already selling at a loss, it had to accept that products sold at prices that did not cover costs had to be admitted. One participant had no problem with the proposed 12-month POI, yet stressed that flexibility should be provided. Clarifications were also sought regarding whether AD investigations should be limited to cost data for the year preceding initiation or whether the data should be the freshest the investigating authority could get. It was also observed that, while an investigating authority should use a company's fiscal or accounting year where possible, these periods might differ among companies in a country, and it was necessary to use the same period for all companies.

10. Regarding the "sufficient quantity" test, one Participant recalled that one of the first decisions which must be made in any investigation is the market to be used as a basis for normal value. In order to avoid unnecessary reporting burdens, this decision was usually made based on limited initial responses indicating aggregate market volumes and values and other general information. For this reason, the sufficient quantity test must be made as simple as possible while still producing a valid result. One Participant inquired about the situation where a determination that there are sufficient sales is made, but in conducting the investigation no sales in the ordinary course of trade were found. Another Participant agreed that the viability test should be done at the very beginning, including also sales which might, in the course of an investigation, turn out not to have been made in the ordinary course of trade.

11. With respect to the use of respondent's books and records, one Participant recalled that Article 2.2.1.1 of the ADA established these books and records as the normal basis for accounting information if they were consistent with local GAAP. However, the sponsors mischaracterised the

usefulness of GAAP in the context of an AD proceeding. With the exception of particular costs included as "cost of goods sold", GAAP did not address allocation of fixed costs to product units or how costs were to be allocated to individual products. Thus a statement that a particular set of books and records was in accordance with GAAP was no guarantee that costs of production based on those records had been properly allocated. The proposal gave companies wide discretion to misrepresent their costs. The more common problem, which was not addressed by the paper, was when a respondent asked the investigating authority to accept costs that were allocated on a basis other than what the company used in its normal books and records. Another Participant concurred, noting that the crucial point was that companies suggest specific allocations which they often propose only in the context of an AD investigation and in fact usually allocate differently. Another Participant requested clarification regarding the terms "unconsolidated financial statement" and "internal financial statement". Were these statements prepared on the basis of the GAAP of the exporting country? Were they audited by a certified public accountant? How would their accuracy be ensured and what should be the relevant period for which such statements could be considered during the investigation? Another Participant indicated that the proposals concerning acceptance of data in accordance with GAAP and the level of specificity required failed to take into account the reality of dumping determinations.

12. Regarding sales in the ordinary course of trade, one Participant found merit in improving the definition of what should be included and excluded regarding sales to employees, taking into account that such sales may be an important part of a company's sales. Another Participant noted that there was a question how to define sales in the ordinary course of trade and what to include in or exclude from such definition. With respect to sales to related parties, there were different approaches and views and the consequences were important.

13. Regarding the proposal that the authorities seek cost information only where there was sufficient information regarding sales below cost in the complaint, one Participant asked how this related to the obligation in Article 5.3 of the ADA regarding sufficient evidence to justify any initiation of an investigation, especially as this provision did not require the petitioner to provide detailed information that may be used during the course of the investigation. Another Participant inquired whether the proposal would lead to a situation where the investigating authority would not be able to ask for cost data at all any more. It was also observed that such an approach would require company-specific cost data that petitioners were unlikely to have.

14. With respect to the proposal that a sales-below-cost determination be made for sales of the like product as a whole, one Participant considered that the proposal did not address concerns regarding selective sales below cost. Another Participant believed that the proposal deviated from the Article 2.4 obligation to make a fair comparison. The approach denied the right to establish different normal values for different models, types or qualities of a subject product and suggested instead one global test. What if the product mix on the domestic market and the product mix exported were completely different? The proposal would obligate an investigating authority to compare the price for certain export models with loss-making prices in the market of the export country.

15. Regarding the proposal to eliminate the phrase "particular market situation", one Participant noted that this required a good deal of thought, as this clause had been used when situations occurred which had not been addressed by the Uruguay Round negotiators. Concerns could arise regarding economies in transition, situations where the market is in a particular situation because there is government interference or because there is a monopoly situation and all these occurrences had to be addressed if the general formula of particular market situation was to be deleted. Another Participant considered that participants should indicate cases in which they had relied on the existence of a particular market situation to disregard certain sales. It believed that the term "particular market situation" could not be considered as applying to almost any set of circumstances.

16. Regarding constructed normal value, one Participant observed that the proposed changes reflected the view that selling costs and profits should be based on the accounts of each company. The problem was that the investigating authority might not find reliable company-specific data for the like product, and the company might not have sales of the same general category of products. In addressing these circumstances, the ADA recognized that for a product there is a market and in this market the actors will probably operate under similar conditions. As for the proposal to use a zero profit figure in some circumstances, a "reasonable" profit could not be zero, as companies that made no profits would stop doing business. Similarly, why should general and administrative costs be excluded in constructing normal value when those costs existed? Another Participant observed that Article 2.2.2 did not provide precise guidance on how to use the three alternative methodologies to determine SG&A and profits when calculating the constructed value. It was thus necessary to enhance the legal certainty for application of this provision.

17. A co-sponsor reacted to some of the comments made. In situations where there were no sales of the like product in the ordinary course of trade, the resort to constructed value was inevitable. On the issue of cyclical markets, if there is a typical pattern then the company will set its price so that it can make a profit over the whole cycle. This had to be taken into account in determining whether the company is making a profit. Regarding the proposal to require below-cost sales allegations in the complaint and how it related to Article 5.3 of the ADA, there was a relationship and further elaboration was required as to what kind of information petitioners had to submit. Regarding "particular market situations", this issue should be dealt with in the context of what constitutes a sale in the ordinary course of trade. Regarding product mix, this issue was important and could certainly change the outcome of the calculation of normal value and fair comparison. Nevertheless, even if there were different models within the product under investigation, normally companies determine price so that they can make a profit on a production-line basis. Thus, the below-cost test should be done for the like product as a whole.

18. The second paper introduced was entitled **"Three Issues Identified for Discussion by the Negotiating Group on Rules"** (TN/RL/W/153). The first issue related to small economies and the establishment of regional trade remedies authorities. The sponsor reminded the Group that it had previously raised the idea of establishing such authorities in order to take into account the needs of developing and least-developed countries. The sponsor had suggested that the Group consider how such regional authorities could function, and discuss any changes to the ADA and the Agreement on Subsidies and Countervailing Measures ("ASCM") that might be necessary. The sponsor thus offered some initial questions to the Group. These included: would the regional authorities conduct all aspects of trade remedy cases on behalf of individual Members, would they collect the duties for all Members or would national authorities responsible for collection, would investigations filed with such an authority examine imports and the domestic industry with respect to a single Member or with respect to all regional Members, and if measures are taken, do they apply to imports into a single Member or into all regional Members?

19. The second issue related to the right of Members to distribute monies collected from AD and CV duties. This issue has been addressed in dispute settlement and in reviews of Members' legislations in the AD and SCM Committees. While it was beyond question that Members had the sovereign right to distribute government revenues as they deemed appropriate, various WTO agreements imposed certain disciplines as to the manner in which such revenues are distributed. For example, the nature of such disciplines was, in large measure, the subject of the ASCM. One important question was whether, as indicated by the Appellate Body, monies collected from AD and CV duties should be subject to special constraints not applicable to government revenues collected from other sources. In light of this, it believed that this Group should discuss the recognition of the right of Members to distribute such monies.

20. The third issue related to facts available. The sponsor observed that the best source of information for any determination is the actual data of responding parties; however, those data are

within the control of those parties that may choose whether, and to what extent, to participate in an AD investigation. Thus, the ADA contained a delicate balance of rights and obligations between importing and exporting Members that encouraged responding parties to provide all necessary verifiable information to the administering authorities to conduct the investigation. This balance would be upset if a respondent was able to pick and choose the pieces of information it submitted depending on whether or not it thought the actual information was beneficial to is interests. Members should consider whether the ADA should be clarified to insure that respondents have an incentive to provide all necessary information, and not to do so selectively or to misrepresent the significance of information. Members should also consider whether the rules in this area should be harmonized between the ADA and the ASCM.

21. Various Participants expressed interest in the idea of regional trade remedies authorities. It was observed that regional authorities could represent a practical approach to accommodating small economies that lack the resources to maintain a national authority. Such consolidation of efforts could lead to efficiencies that would translate into significant cost-savings. Small economies were invited to share their experiences and interests on this issue. Two Participants noted that measures could only be applied to more than one Member in the case of a customs union, and that it was only be in this context that an AD or CVD measure should be applied in respect of more than one state.

22. Regarding the distribution of monies collected from AD and CV duties, various Participants observed that the proposal related to the Continued Dumping Offset and Subsidy Offset Act of 2000, the so-called Byrd Amendment, which had been found to be inconsistent with the WTO Agreement. They considered that the Negotiating Group was not the right forum to discuss this issue. Questions were posed regarding the aim of the paper and whether it represented a deviation from the sponsor's view that any changes should preserve the basic concepts and principles of the agreements. One Participant noted that, although the paper stated that the sponsor intended to comply with its WTO obligations, it was not clear whether the sponsor had identified this issue with a view to changing rules to justify the Byrd Amendment. Such an outcome would never be accepted in this negotiation. Another Participant observed that, notwithstanding the DSB ruling, it was the right of any Participant to raise any issue it wished to negotiate in the Group, without prejudice to the outcome. If the sponsor wished to expend its political capital on this issue, it was entitled to do so.

23. Regarding facts available, various Participants agreed that the best source of information for an AD determination was that supplied by the respondent and welcomed discussions on the use of facts available. However, some Participants did not agree that the ADA was balanced, as it allowed the authorities to use facts available even though the respondent may have acted to the best of its ability and was fully cooperative. Attention was drawn to another proposal, under which facts available could only be used to substitute for missing or rejected information and the authorities would be required to use any and all necessary information submitted by respondents, provided that the information was verifiable and appropriately submitted. Although some Participants supported providing incentives for cooperation, others expressed concern that the proposal could ultimately distract respondents from submitting information. As far as harmonization between the ADA and the ASCM was concerned, one Participant was willing to look at harmonization to the extent circumstances did not differ. It referred in this respect to private/government contracts, with respect to which it might be illegal to reveal information.

24. The sponsor stated that the purpose of the paper was to identify topics that could be of interest to the Group. All Members had the right to table issues, even if they were controversial. Regarding regional authorities, it noted an overwhelming consensus to continue discussions. Regarding the distribution of monies, the sponsor referred to footnote 6 of the paper confirming its intention to comply fully with its WTO obligations.

C. SUBSIDIES AND COUNTERVAILING MEASURES, INCLUDING FISHERIES SUBSIDIES

25. The Group considered a paper entitled **"Fisheries Subsidies: Overcapacity and Overexploitation"** (TN/RL/W/154). The sponsor considered that the Doha mandate on fisheries subsidies related to environmental, trade and development objectives. The question was what form new disciplines might take. It was important to get a structure that offered effective rules that would genuinely help reform the economics of the sector and was robust in the long term. There were important commonalities in the three submissions by other Participants that offered initial proposals: each called for a prohibition as a starting point for new disciplines. The sponsor took the same position: based on experience, it had serious doubts about the value of further developing disciplines on actionable subsidies. It was better to keep it simple, and simply ban subsidies that contribute to problems in the sector. As to what should be prohibited, previous submissions focused on overcapacity and, to some degree, over-fishing and over-exploitation. While addressing over-capacity was important, it didn't go far enough. The focus should be on the impact of fishing on fish stocks, which was a product of both capacity and activity or *fishing effort*. While concern about capacity would focus on capital costs, concern about effort must focus also on operating costs. Reform of the sector required effective disciplines on both. The sponsor noted that requiring complainants in a WTO panel to show overcapacity and over-fishing would be a recipe for trouble. It thus suggested applying cost and revenue impacts as the basis for new tests. It proposed a broadly based prohibition, applying in principle to the full range of programmes liable to contribute to over-capacity or over-fishing or other trade distortions, with reduction of fixed or variable costs or enhancement of revenues as the basic tests to be applied. This prohibition would need to be balanced by a set of negotiated exceptions along with politically and commercially realistic transitional provisions.

26. Various Participants agreed that fisheries subsidies disciplines should focus on prohibitions. In terms of the nature and breadth of the prohibition, some Participants agreed that any disciplines should prohibit subsidies that reduced costs or increased revenues, that the prohibitions should be broad-based and that any exceptions should be narrowly defined. Others Participants considered that the proposal amounted to a blanket ban that went too far. It was observed that such an approach presumed a causal link between subsidies and overcapacity/over-fishing. One Participant inquired whether the proposal presumed that overcapacity/over-fishing existed in all countries, and whether countries not affected by such conditions would be subject to disciplines. Participants asked how a cost/revenue test differed from the benefit test in the ASCM, and whether a cost-based test would cover both upstream and downstream activities or only relate to fishing capacity. In terms of the structure of the disciplines, some Participants welcomed the idea of a "negative list" of subsidies that would not be prohibited, and remarked that this would provide an incentive to notify. Other Participants observed that a negative list approach was inconsistent with the basic structure of the ASCM, would require Participants to negotiate exceptions for developing countries and poorer areas of their territories, and would not accommodate new programmes. It was suggested that hybrid approach combining a positive list specifying types of programmes that are most injurious with a negative list for other types of programmes was possible, and that a decision about this issue need not be taken until criteria for which subsidies should be prohibited were determined. One Participant observed that the issue of overcapacity and over-fishing was a matter of resource management rather than subsidies.

27. The sponsor suggested that Participants put forward proposals for what programmes would be included/excluded, the characteristics of such programmes and the legal basis for including/excluding them. The aim of the negative list was to cover, in a transparent way, the totality of practices and make clear which programmes were covered by disciplines, the exceptions and transitional periods, etc. Regarding management regimes, although in theory such regimes could mitigate the impact of subsidies on fish stocks, in practice, the vast majority of the regimes in place today did not. There was plenty of work to be done in this area in other fora, and it should not be a primary focus at the WTO. In order to avoid tests that would involve the WTO in areas which were outside its traditional competence, the proposal focused on the economic tests of costs and revenues. As for the distinction

between the these tests and the existing language on benefit, there was indeed a large overlap. There could however be subsidies which did not have cost or revenue impacts and were not of a commercial nature. The sponsor saw merit in further examining the relationship between those sorts of tests and the existing language in the ASCM.

D. OTHER BUSINESS

28. The Chairman announced that the next meeting of the Group will be held on 7 & 8 June 2004. This meeting would be comprised of both formal and informal components. The deadline for further informal elaborated proposals for consideration at that meeting would be 24 May 2004, close of business.