

Negotiating Group on Rules

**SUMMARY REPORT OF THE MEETING
HELD ON 7 & 8 JUNE 2004**

Note by the Secretariat

1. The Negotiating Group on Rules ("the Group") held a formal meeting on 7 & 8 June 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
 - Statement by one Participant relating to the joint statement issued by African Trade, Customs and Immigration Ministers- African Union Ministerial Conference in Kigali, Rwanda on 27-28 May 2004.
 - Date of the next meeting of the Group.
- B. ANTI-DUMPING
3. The Group discussed one new submission, entitled "**Proposals on Fair Comparison**" (TN/RL/W/158) and sponsored by 10 Participants. A co-sponsor explained that the ADA needed to be clarified and improved because it allowed authorities to make unfair comparisons. The proposal consisted of four elements. The first was to clarify that the authorities are required to adjust selling expenses and profits for export sales and normal value symmetrically to ensure a comparison at the same level of trade. Due to ambiguities in Article 2.4 of the ADA, some authorities tended to compare export price and normal value at different levels of trade, typically by deducting some items of sales expenses or profits only from export sales to inflate or create dumping margins. The proposal would require the authorities to deduct selling expenses and profits symmetrically from both export price and normal value. The second element was the exclusion of certain sales from the calculation of export price. Although the ADA provided for the exclusion of sales not in the ordinary course of trade from the calculation of normal value, there was no specific provision about exclusion of these sales from the calculation of export price. Excluding these sales from the calculation of both export price and normal value was necessary to ensure an "apples to apples" comparison. The third element was the abolition of the last two methodologies in Article 2.4.2 of the ADA, i.e., the transaction to transaction

average to transaction methodologies, in all AD proceedings. The transaction to transaction methodology had the risk that the authorities abuse their broad discretion to choose individual home market transactions that are to be compared to individual export sales. The average to transaction methodology had become an excuse for practicing zeroing, which breached the obligation of fair comparison under Article 2.4 of the ADA. The fourth element related to model matching. The ADA did not provide any guidance for identifying identical or most closely resembling models to be compared with the models of exported products. The proposal would require authorities to use all characteristics that had a significant effect on the commercial value of the model and to provide respondents with an adequate opportunity to propose these characteristics.

4. A number of co-sponsors supported this proposal. One co-sponsor indicated that the symmetry and averaging issues were especially important, while another indicated that averaging was its main concern. Several co-sponsors noted that the averaging issue was related to the proposal on zeroing. It was observed that this submission completed the first round of comprehensive proposals on Article 2 of the ADA by the Friends of AD Negotiations.

5. Regarding level of trade/symmetrical adjustments, some Participants agreed on the need to clarify and improve the ADA. However, one Participant warned against robotic symmetry. As export and home market sales were not symmetrical, some discretion had to be given to the administrators to deal with the complex facts and differences in expenses which necessarily arose in comparing business transactions in two different markets. Further, while the ultimate responsibility for ensuring that AD calculations were in accordance with the rules rested with the administering authority, a party asserting that an adjustment was necessary, if in possession of facts necessary to establish the truth of that assertion, had a responsibility to produce those facts. The last sentence of Article 2.4 recognized this balance. Several other Participants shared these views. Regarding clarification of the first sentence of Article 2.4 by incorporating the clause "with symmetrical adjustments", one Participant believed that this could lead to arbitrary allowances. Another Participant supported the objective of ensuring that level of trade adjustments be made, whenever applicable, but needed to further reflect on the proposal as it raised significant issues. Finally, one Participant noted that there were two distinct elements: establishing the export price, and making necessary adjustments to that price. The fourth sentence of Article 2.4 already spoke to the situation where the constructed export price was not at the same level of trade as the normal value.

6. Regarding the exclusion of sales not in the ordinary course of trade from the calculation of export price, several Participants agreed that there was need for clarification. However, another Participant observed that the proponents had ignored a fundamental difference between home market and export sales in the dumping analysis. In its view, the ADA provided sufficient flexibility to deal with extreme situations. For example, a free sample of merchandise to a potential customer would not fall within the meaning of the word "sale". On the other hand, experience proved that exporters could manipulate the dumping calculation by arbitrarily designating a large number of low-priced sales as samples. Another Participant considered that the objective of an AD investigation was to determine whether export sales were dumped and causing injury. Restricting the investigation to export sales in the ordinary course of trade would unduly narrow the scope of the investigation. Regarding non-commercial sales, one Participant agreed that samples sent to a potential buyer should not be regarded as an export sale. However, it inquired about the concept of sales to employees and requested more explanation. Regarding so-called "barter trade", this situation was sometimes faced inside markets in transition, but it hadn't encountered a barter trade export transaction so far and there might not be an urgent need to regulate this issue.

7. Regarding comparison methodologies, one Participant noted that the idea of targeted dumping lacked any basis and that its law therefore only provided for average to average comparisons. Another Participant noted that the average to average methodology was often the fairest, but that the idea of eliminating the other two methodologies required further discussion; this Participant favoured

maintaining the alternative methodologies while developing parameters for their use. Another noted that, where export prices differed significantly with respect to purchaser or region, an individual to average methodology was appropriate. An average to average comparison might not always give fair results, especially when the exporter had dumped at certain points of time or in certain regions, or had significantly lowered prices and caused injury. As for the transaction to transaction methodology, it was rarely used but was appropriate in some cases. Thus all three methodologies in Article 2.4.2 should be available. Another Participant noted that it used the transaction to transaction methodology in 90% of its cases. The proposal to abolish this methodology was impractical, especially for small economies and new users. The fairness of its use of this methodology had never been challenged, and most exporters liked it. Rules on how to use this methodology might however be an option. It noted that the average to average methodology could result in non-dumped goods facing a margin. Serious research should be done before suggesting a blanket ban on a methodology negotiated in the Uruguay Round. One Participant supported the proposal to ban zeroing, but opposed eliminating the alternative comparison methodologies. Another Participant was not sure that zeroing was prohibited under the individual to individual methodology. It noted that the individual to average methodology was an exception to the average to average methodology. If zeroing were prohibited in the context of the individual to average (targeted dumping) methodology, then that methodology would generate the same result as the average to average methodology, and the exception would thereby be rendered useless. Thus, it seemed that the proposal to eliminate the two alternative methodologies was another way to try to eliminate zeroing, with the users of the individual to individual comparison methodology caught in the middle. As regards time-periods, one Participant considered it necessary to establish guidelines to be used in determining the period of data collection in cases of cyclical markets involving seasonal or agricultural products. It requested Participants who had faced cyclical market cases in carrying out investigations to share their experiences, views and approaches with the Group.

8. Regarding model matching, one Participant agreed that the authorities should use all characteristics that significantly effect commercial value or end-use of the product, including technical specifications. However, model-matching should be based on international standards rather than on product coding used by respondents or standards used in the country of export. Another Participant agreed with the sponsors on model matching, but was sceptical that it would be possible to develop an objective definition of the phrase "closely resembling". It noted that model matching had to be resolved early in the investigation in order to avoid going back to exporters with supplemental questionnaires for information. Another Participant noted that model-matching was often the best way to ensure that physical characteristics that affect price are taken into account and thus a clear procedure in the Agreement would be welcome. It agreed that when home market and export models were not identical, model-matching had to be supplemented by appropriate adjustments, but inquired about the rationale for proposing that adjustments be based on variable costs only. The ADA focused on price comparability, and there could be cases of differences in production costs which had no effect on price comparability or where differences in production costs had no effect on price comparability. Another Participant pointed out that not every difference in physical characteristics resulted in a difference in costs; due allowance should be made for differences in physical characteristics that led to differences in costs. Furthermore, it would be useful to provide respondents an opportunity to express their views on allowances in such cases, and to comment on model-matching since the respondents were the experts in the model they produce and export.

9. A co-sponsor responded that the sponsor's intention was to avoid artificial creation of anti-dumping margins and ensure predictability in anti-dumping investigations through the introduction of symmetrical comparison at the same level of trade. It submitted that comparison based on normal business practices is the best option. As regards model-matching, it hoped to continue to work with other Members in this regard.

C. SUBSIDIES AND COUNTERVAILING MEASURES, INCLUDING FISHERIES SUBSIDIES

10. Three papers were discussed under the agenda sub-item of "Fisheries Subsidies". The first was entitled "**Fisheries Subsidies: Proposed Structure of the Discussion**" (TN/RL/W/159). Its sponsor explained that the paper suggested a framework for negotiations as an alternative to that proposed by another Participant in TN/RL/W/154 where a blanket prohibition of subsidies had been proposed, with the use of a negative list for exceptions. Such a proposal was not the best way to proceed, especially as the Group had not yet discussed the role and impact of fisheries subsidies to decide the appropriate level of regulation needed. The sponsor considered that an alternative "bottom-up" approach was desirable to reach consensus in the Group. The balance of the elements shown in the Doha Declaration, in particular the element of sustainable development, should be taken into account. Also, because the definition of fisheries subsidies had yet to be established, it was unclear which subsidies would be subject to the proposed broad ban. Finally, the sponsor had provided information on fisheries subsidies it grants as well as its current status of fisheries as an annex to the paper. Many participants argued that eliminating subsidies could lead to better resource conservation, so it had decided to provide actual data indicating that the existence of such subsidies does not result in an increase of fishing capacity or fishing production. The appendix was purely for reference purposes; other Participants were urged to provide similar information.

11. The proponent of TN/RL/W/154 noted that the sponsor of TN/RL/W/159 took issue with its approach on the basis of two arguments: that there was no agreed definition of fisheries subsidies, and that the proposal lacked balance. On the definitional issue, there was a definition of a subsidy in Article 1 of the Agreement on Subsidies and Countervailing Measures (ASCM) and it saw no reason why it shouldn't use that as the basis for discussion, although it might prove necessary to define subsidies that benefit the fisheries sector. There was experience in the WTO on this, such as Annex I of the Agreement on Agriculture, which defined certain economic activities on the basis of the harmonized system. On the second issue, it commended the sponsor for identifying two types of subsidies, those relating to overcapacity and IUU fishing, that should be prohibited. It observed that overall balance could be found through the discussion of exceptions and transitional arrangements, including special and differential provisions for developing countries; subsidies that played a crucial role for sustainable development should not be prohibited. Nevertheless, it had serious concerns about focusing on capacity as a starting point as this would exclude from the outset a number of subsidies that unquestionably enhance fishing effort. For example, subsidies for operating costs were described at a UNEP meeting as among the most harmful. Other effort-enhancing subsidies that would seem to be excluded under the sponsor's proposal included price support subsidies and subsidies to infrastructure, to income, and for access to foreign fisheries. Indeed, the appendix to the sponsor's submission provided a graphic illustration why an approach that used as its starting point capacity only was unlikely to provide an effective outcome. As per that annex, over 96% of the sponsor's \$2 billion worth of annual subsidies would not be prohibited.

12. One participant believed that subsidies that had a cost or revenue impact were problematic because they distorted trade and led to increased capacity that was not economically viable. It shared the view of the sponsor that some governmental activities, including in management, were necessary and should not be considered subsidies to the sector. The aim should be to prohibit subsidies that distorted trade, as rules on capacity *per se* were not within the mandate. If trade-distorting subsidies were prohibited, then the incentive for the fisheries sector to invest in overcapacity would no longer exist.

13. Another Participant believed that regardless of the precise structure of the disciplines, the issues of defining which kinds of measures were subsidies and whether they should be permitted or banned would be central. It agreed that it would be useful to study the effects of different forms of subsidies, taking into consideration work done in other organizations such as the OECD and the FAO, including work done on identification and categorization, and referred to the ideas presented in

document TN/RL/W/78 regarding categorization. Another Participant inquired about the scope, nature and extent of the proposed co-operation with other international organizations.

14. One Participant supported the recognition that a broad prohibition would have to be balanced by exceptions and transitional provisions, including S&D provisions. In small economies, subsidies to reduce costs did not for the most part result in over-fishing and overcapacity. Rather these programmes sought to broaden the market and ensure a degree of independence and food security for the economy. It was important to look at the intent and impact of a programme rather than simply its characteristics. The need to minimize circumvention had to be balanced with a need to facilitate policy flexibility for developing countries. Another Participant considered that for many developing countries rural development and food security needs were paramount in considering issues in the fisheries sector, while attention should also be given to the development of the fishing sector itself. In many developing countries this sector had yet to develop and overcapacity and over-fishing did not come into the picture.

15. One Participant requested further clarification regards the sponsor's reference in paragraph 8 to subsidies that were "problematic" in terms of overcapacity and IUU fishing. It was concerned about the failure to mention the trade distorting effects of fisheries subsidies. Regarding the question of how to define different types of subsidies, such as those for infrastructure, construction and general services, the ASCM contained a definition which could form the basis of work. Another Participant shared the concern about infrastructure subsidies, which could contribute to over-capacity.

16. One Participant welcomed the recognition that there should be a red category for subsidies that gave rise to overcapacity, but considered that the prohibited category should not be limited to such subsidies. This Participant considered that WTO disciplines on harmful fisheries needed to be both strong and simple to be applied and enforced.

17. A Participant referred to the WSSD implementation plan, and noted that the nature of discussions under WSSD was different from the mandate of the Group. While the WSSD for instance might properly focus on subsidies that contribute to illegal, unreported and unregulated fishing and overcapacity, the focus of this Group should be on trade-distorting subsidies

18. Another Participant reiterated the importance of identifying which types of subsidies had a negative impact on resources before establishing new rules. It was ready to agree to the elimination of subsidies which contribute to IUU fishing. Also, given that overcapacity was one of the most important factors that contribute to the depletion of fisheries resources, stringent regulations on subsidies responsible for overcapacity would help limit over-fishing. It strongly supported the creation of fisheries-specific green light subsidies which would contribute to sustainable fisheries. It believed that any trade effects of subsidies should be disciplined by the existing ASCM, and that fisheries should not be treated differently from other manufactured goods.

19. A Participant believed in the importance of avoiding the use or misuse of subsidies that contribute to illegal, unreported or unregulated fishing and overcapacity. It proposed that the discussions be directed to all elements of fisheries subsidies in an effort to further improve and clarify the ASCM. It saw merit in determining the scope of the discussion rather than in discussing substantive elements sporadically. It considered the bottom-up approach as the first alternative approach. As the ASCM had its own subsidies categorizations, it proposed that subsidies given to fisheries can be identified or specified based on categorization methods to specify all subsidies provided for the fisheries sector. With respect to S&D, it suggested that the sponsor did not touch upon the interest of various developing countries both as exporting and non-exporting countries.

20. One Participant considered that overcapacity and over-fishing were a matter of resource management and there was not necessarily a causal link between fisheries subsidies and overcapacity

and over-fishing through so-called cost/revenue impact analysis. In order to accomplish the common goal of sustainable fisheries through proper resource management and prevention of overcapacity and over-fishing and IUU activities, it supported discussing fisheries subsidies disciplines in this regard. However, it urged the Group to undertake a bottom-up approach through which Participants could identify which categories of subsidies would lead to overcapacity and over-fishing or promote IUU activities and thus be prohibited. At the same time, subsidies that were not trade distorting could be recognized as non-actionable. The definition of fisheries subsidies should be consistent with Articles 1 and 2 of the ASCM. While the scope of fisheries subsidies negotiated should be limited to those related to fisheries resource management, it was imperative to target the trade-distorting aspect of all subsidies and strengthen the rules and disciplines of the ASCM across all the non-agricultural sectors; there was no merit in establishing a separate set of disciplines for fisheries subsidies. In accordance with Article 1 of the ASCM, the provision of goods and services for general infrastructure should not be considered subsidies.

21. The sponsor explained that it had not provided a concrete proposal on which subsidies should be classified as green or red, but had rather proposed a direction for the discussion. As regards trade distortion, this issue was not unique to fisheries and could be considered within a comprehensive horizontal review of the ASCM. As regards infrastructure, its fisheries management authority and fisheries port construction department were within the same government agency so it was easy to comprehend the activities of the infrastructure funding of the government. It believed that the IUU and the overcapacity issue were a good starting point for discussion. As regards the definition of subsidy, the ASCM did not provide clarity on fisheries subsidies relating to fisheries activities *per se* and there were several grey areas in this respect.

22. The second paper discussed was entitled "**Questions and Comments from Korea on New Zealand's Communication on Fisheries Subsidies** (TN/RL/W/154)" - (TN/RL/W/160). The sponsor explained that the paper is composed of two parts. The first part contained questions on the proposals in document TN/RL/W/154. First, was there any causal link between the cost/revenue impacts of subsidies and overcapacity or over-fishing? It had analysed various types of subsidies to identify a possible correlation between the cost/revenue impact and overcapacity/fishing and, as shown on page 2 of its paper, only a few of the subsidies showed a possible causal link with overcapacity or over-fishing. It was thus risky to assume causality between cost/revenue impacts and overcapacity or over-fishing. Empirical evidence also supported this view. In 1997, 77 per cent of fisheries subsidies in OECD countries were spent on infrastructure and on general services, such as research, management and enforcement that were essential for sustainable fisheries. Accordingly, it would be problematic to use a cost/revenue test as a basic test for the resource impact of subsidies. It requested the sponsor of TN/RL/W/154 to further explain the alleged causality between cost/revenue impacts and overcapacity/over-fishing.

23. The next set of questions related to the scope of subsidies subject to the new rules. Would subsidies that had cost/revenue impacts but were provided to under-exploited fisheries be prohibited on the basis of the cost/revenue test? Would subsidies for fishing households with low income levels and for small-scale fisheries also be prohibited just because they had cost/revenue impacts? How would subsidies for aquaculture and processing industries, which did not affect overcapacity or over-fishing but could cause trade distortions, be treated? It also inquired about the relationship between "cost/revenue impacts" test and the benefit test of the ASCM. All subsidies under the ASCM had a direct or indirect cost/revenue impact on the recipients and therefore it was difficult to discern any difference between the proposed cost/revenue impacts test and the benefit test of the ASCM. Thus, the proposal of TN/RL/W/154 could be presumed to prohibit fisheries subsidies without any test on questions such as overcapacity or over-fishing. The Participant believed that new disciplines on fisheries subsidies should be based on the harmful impact on fisheries resources. Large differences existed among the world's fisheries, compared with the manufacturing sectors. Small-scale subsistence fisheries coexisted side by side with large-scale commercial fisheries, and traditional

coastal fisheries with modernized distant water fisheries. These were different types of fishing and the circumstances surrounding them should be reflected in the negotiations. It also believed that particular consideration should be given to the special needs of developing Members.

24. In reaction, the sponsor of TN/RL/W/154 noted a general acceptance of the need for specific disciplines on fisheries subsidies; this was welcome progress. The sponsor of TN/RL/W/160 had suggested focusing on the harmful impact on fisheries resources, taking account of resource management regimes and levels of fish stocks. A guiding principle used in developing the proposals contained in TN/RL/W/154 was the importance of ensuring that it didn't stray beyond traditional areas of WTO competence. The arguments in TN/RL/W/160 suggested that the Membership should seek judgements from panels and the Appellate Body as to whether particular subsidies had harmful impacts and in so doing consider such aspects as the adequacy of management plans and the level of fish stock depletion. There was a question as to whether the WTO was the appropriate body to make these judgements, and that was why the proposals contained in TN/RL/W/154 looked at readily quantifiable economic indicators, such as costs and revenues, in defining the new disciplines. Another related point was that focusing exclusively on harmful effects on fisheries resources ignored the trade and market-distorting effects of subsidies.

25. Turning to the specific questions posed, this Participant noted that the sponsor of TN/RL/W/160 had provided an analysis of what it considered to be the correlation between costs/revenues and overcapacity and over-fishing. This Participant questioned the conclusion that some of these subsidies would not contribute to overcapacity and over-fishing. For example, subsidies for compensation for temporary cessation commonly were provided to compensate for the temporary withdrawal of a vessel from active fishing for a given period of time due to stock depletion, and thus had direct implications for capacity and fishing. It doubted that other categories of subsidies, such as for fisheries infrastructure, could not result in overcapacity and over-fishing. It was doubtful that subsidies that, according to OECD statistics, amounted to 70% of fisheries subsidies, did not result in a possibility of overcapacity and over-fishing. With regard to the request for further explain the link between cost/revenue impacts and overcapacity and over-fishing, it had tried to translate the notions of overcapacity and over-fishing into rules that were at once enforceable in the WTO and effective at tackling a very real problem. Subsidies that increase revenues and decrease costs would inevitably have an impact on commercial decisions. Subsidies in the sector were very large – 15-20 billion per year on a conservative estimate which represent 20% of fisheries revenues – and all this took place against the backdrop of a resource in crisis.

26. One Participant agreed that a causal relationship between cost/revenue impacts and overcapacity and over-fishing was hard to generalize, as the effectiveness of the resource management regime and the level of fish stocks had to be taken into account. It also agreed that new disciplines on fisheries subsidies should maintain a balance among trade, environment and social issues.

27. The third and last paper introduced in this context was entitled "**Fisheries Subsidies: UNEP Workshop of Fisheries Subsidies and Sustainable Management**" (TN/R17W/161). The sponsor noted that the paper contained a summary of the UNEP workshop held at the end of April.

28. One Participant noted that the summary contained some helpful elements that should be taken into account in the Group. The major idea presented at the workshop was that bad subsidies need to be disciplined while good subsidies need to be protected. Although subsidies can be harmful to fish stocks, their actual impact depends on several relevant factors including the design of the subsidy, the degree of its impact, the management regime and economic conditions of fish stocks. Also, economic, social and environmental aspects of fisheries subsidies are inextricably linked. These factors had to be reflected in the new disciplines. More empirical and analytical work was needed for effective rulemaking.

29. A Participant referred to an event sponsored by the World Wildlife Fund ("WWF") and held on 9 June 2004 regarding a study entitled "Healthy Fisheries, Sustainable Trade – Crafting New Rules on Fishing Subsidies in the WTO" released by the WWF. The WWF analysis was full of stimulating ideas and should be a valuable resource for negotiators in the months ahead.

D. OTHER BUSINESS

30. One Participant informed the Group of the joint statement concerning the WTO Rules Negotiations that was issued by African Trade, Customs and Immigration Ministers present at the African Union Ministerial Conference held in Kigali, Rwanda on 27-28 May 2004. It reads, in its relevant part, as follows: "Most African countries have only recently implemented the Anti-Dumping Agreement and the Subsidies and Countervailing Measures Agreement and are only now starting to develop a practice in compliance with those Agreements. As such, we stress that the introduction of more complex rules and disciplines at this point in time would be counterproductive and would negatively affect the African countries' rights under these two Agreements."

31. The Chairman proposed that the next meeting of the Group be held at 12-13 July 2004. After discussion, the Chairman indicated that he would hold informal consultations on this issue.
