

Negotiating Group on Rules

**SUMMARY REPORT OF THE MEETING
HELD ON 3-4 NOVEMBER 2004**

Note by the Secretariat

1. The Negotiating Group on Rules ("the Group") held a formal meeting on 3-4 November 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. ELECTION OF THE CHAIRMAN
 - E. REGIONAL TRADE AGREEMENTS
 - F. OTHER BUSINESS
 - Date of the next meetings of the Group.
- B. ANTI-DUMPING
3. There was no discussion under this agenda item.
- C. SUBSIDIES AND COUNTERVAILING MEASURES, INCLUDING FISHERIES SUBSIDIES
4. The Group discussed one new submission, entitled "Fisheries Subsidies" (TN/RL/W/166) and sponsored by six participants. A co-sponsor explained that the paper offered a simple, enforceable, and flexible structure for new disciplines on fisheries subsidies. It also provided an overall negotiating framework to enable Participants to put forward specific proposals. This approach established a broad prohibition on subsidies that benefit the fishing industry. The main task of the negotiations would be to identify those subsidies that would not be prohibited under new rules. The paper identified a non-exhaustive list of programmes that would not be prohibited, such as government expenditures for management; general infrastructure; access; certain fisheries-related social insurance programmes and appropriately structured decommissioning subsidies. The paper also drew attention to special and differential treatment and the importance of addressing specific needs of Members at all levels of development. In this respect, the paper referred to a submission (TN/RL/W/136) made by a group of developing Members identifying areas of interest. The paper emphasised that identifying other specific areas of concern would assist the Group to consider at an

early stage how such concerns may be accommodated in an effective way. Other co-sponsors stressed that, with a general prohibition in place, special and differential treatment could be strengthened and grey areas avoided.

5. Some participants welcomed the paper because the top-down approach it advocated favoured simplicity, enforceability and flexibility and was more likely to result in effective disciplines than the piecemeal approach suggested by some other Participants. These Participants considered that such an approach had transparency benefits, as Members would have an incentive to come forward with the details of programmes they wished to retain. The importance of such an approach also stemmed from the fact that establishing a green box has never been a sufficient motive for compliance.

6. Other Participants considered a bottom-up approach, as presented in TN/RL/W/164, superior to a broad prohibition in terms of consistency with the Agreement on Subsidies and Countervailing Measures ("ASCM") and the Doha mandate. A bottom-up approach could categorize subsidies according to their effects, thus providing more transparency and better knowledge of prohibited as well as green subsidies. It was also superior in that it provided more flexibility according to the effects of subsidies. It was noted that subsidies, although similar in design, might have different impacts depending on how and where they are applied. A blanket ban of subsidies in a given sector was inconsistent with the basic principles and concepts of the ASCM. Further, there was not necessarily a causal link between fisheries subsidies and overcapacity and over-fishing as these are matters of resource management. To the extent negotiations targeted the trade distorting aspects of any subsidy, the discussion should focus on strengthening the rules and disciplines of the ASCM across all sectors of non-agricultural goods, instead of establishing a separate set of disciplines for fisheries subsidies.

7. Some Participants noted the need to add more subsidies relating to development considerations to the paper's non-exhaustive list of exemptions. Another Participant noted that some of the world's largest fishing nations were developing Members with extensively developed fisheries operating both within and beyond their exclusive economic zones, and there was merit in the paper's suggestion that such countries not be exempted from the disciplines developed by the Group.

8. In response, a co-sponsor submitted that the paper did not introduce new concepts into the ASCM, but avoided that by using terms that are already in the ASCM. By contrast, the concept of a properly managed fishery, suggested by some Participants, introduced new concepts into the WTO system. In response to a question, the sponsors indicated that they had not yet resolved the issue whether the proposed disciplines would apply to mariculture or aquaculture. The sponsors further indicated that they had not yet reached a defined position regarding whether subsidies not within the prohibition remained actionable or would be non-actionable.

D. ELECTION OF THE CHAIRMAN

9. The Group elected its new Chairperson, H.E. Mr. Guillermo Valles Galmés, Ambassador of Uruguay, to succeed H.E. Mr. Eduardo Perez Motta, Ambassador of Mexico.

E. REGIONAL TRADE AGREEMENTS

10. The Chairman said that the main purpose of the meeting was to continue discussions on "systemic" issues on regional trade agreements (RTAs), on the basis of heading 3 of the Chairman's *Roadmap for Discussions on RTAs' "Systemic" Issues – Rev.1*, entitled "Other Issues". He recalled that at the meetings held on 29 June and 21 September, Participants had had the opportunity to express views on "Coverage" and "Neutrality" questions, respectively under headings 1 and 2 of the *Roadmap*, and invited participants wishing to complement their views on those two topics to do so

after consideration of heading 3. He also invited Participants to share with the Group their views regarding the Group's next step on the consideration of systemic issues.

11. One Participant asked whether the Secretariat could send faxes and informal documents by electronic mail to those Participants who indicated their interest in receiving documentation in electronic format. The Chairman replied that this could be done and invited participants wishing to proceed that way to register with the Secretariat and provide it with their-mail addresses.

12. Under sub-heading 3.1 of the *Roadmap*, entitled Coherence among WTO rules relating to RTAs, a number of Participants expressed their interest in having an in-depth discussion on item 3.1(ii), regarding the application of global safeguards to RTA partners; they also noted that the negotiations should provide for a clarification of how safeguard and anti-dumping measures could be applied in an RTA.

13. Several Participants argued that global safeguards were to be applied MFN - that is also to RTA partners - in accordance with Article 2.2 of the Safeguards Agreement which clearly specified that safeguard measures were to be applied irrespective of the source. One Participant noted that safeguard measures were restrictive by nature and in operation and should be regarded as part of "other restrictive regulations of commerce" (ORRCs). The list of exceptions contained in GATT Article XXIV:8(a)(i) and (b) should be considered as non exhaustive. Also, because of the particular nature of global safeguards, their application on a selective basis would be discriminatory towards third parties and compromise the MFN principle contained in Article 2.2 of the Safeguards Agreement. Another Participant noted that safeguards were temporary measures and not a permanent withdrawal of concessions, and as such did not prohibit further integration of RTA partners. The requirement of GATT Article XXIV:8 was to eliminate duties and ORRCs on "substantially all the trade" and the term "substantially" had been interpreted by a panel and the Appellate Body to reflect some flexibility on the applicability of the regulation of commerce.

14. Other Participants supported the view that RTA parties could be excluded from the application of global safeguard measures at their discretion. One Participant noted that parties to a free-trade area (FTA) should be excluded from the application of global safeguard measures if the RTA so provided. Another Participant observed that global safeguards that were applied in accordance with the WTO Agreement could not be considered ORRCs. Several points of view were also expressed: that ORRCs in GATT Article XXIV:8 did not include measures under GATT Articles XIX and VI, since the list of exceptions was exhaustive; there was no contradiction from a legal point of view, since Article 2.2 of the Safeguards Agreement provided for the MFN application of safeguard measures, while footnote 1 of Article 2 stated that the Agreement did not prejudice the relationship between Article XIX and Article XXIV; concerns regarding inappropriate application of causality were sufficiently dealt with in the Safeguards Agreement, as interpreted by the Appellate Body; and, finally, the possibility of excluding parties to an RTA from the application of safeguard measures could be a way of gradually converging towards approaches that would not provide for such trade policy instruments, and that could also have value at the multilateral level.

15. Regarding footnote 1 to Article 2.2 of the Safeguards Agreement, one Participant was of the view that it was mostly addressed to customs unions (and not to FTAs); its last sentence was however ambiguous and a very stringent interpretation of Article 2.2 might pose a problem to a fully implemented customs union which fully conformed to the requirements of GATT Article XXIV:8. Another Participant pointed out that the last sentence of the footnote referred to "paragraph 8 of Article XXIV of GATT 1994", which covered both customs unions and FTAs, and not only to subparagraph 8(a) which dealt exclusively with customs unions, and as such left open the question of whether it applied to both FTAs and customs unions. It was also noted that this question also touched upon the differentiation between customs unions and FTAs.

16. Finally, still in regard to the application of safeguard measures *vis-à-vis* RTA parties, the point was made that parallelism was of importance in that if an RTA party targeted a country as subject of the injury determination investigation, that country should also be included in the application of the safeguard measure.

17. One Participant was of the view that, at that moment in time, item 3.1(iii) could be considered as rather academic and abstract given the wide differences in the levels of experience regarding these rules; it would not appear to be useful to start discussing it at that point.

18. Regarding development-related flexibilities (sub-heading 3.2 of the *Roadmap*), one Participant observed that although development issues were of major importance, the consideration of elements on special and differential treatment should follow a clarification and improvement of the rules and disciplines relating to RTAs. Also, recalling that the revised proposal announced by the sponsors of the submission circulated as document TN/RL/W/155 had not yet been issued, he drew Participants' attention to his delegation's comments on that submission (document TN/RL/W/165), and requested the Group to take note of it. Another Participant expressed interest in in-depth discussions regarding items 3.2(a) and (b).

19. The Group took note of the submission distributed as TN/RL/W/165.

20. Regarding RTA effects on non-parties (sub-heading 3.3 of the *Roadmap*), one Participant noted that existing rules of Article XXIV of the GATT 1994 were insufficient in addressing compensation for negative effects on third parties upon the formation or enlargement of an RTA. While Article XXIV:6 dealt with and set procedures regarding the increase of bound rates of duties, it did not contain any procedures on how to remedy trade losses due to the increase of non-tariff measures *vis-à-vis* third parties; his delegation would pursue this issue in the future.

21. Regarding the retroactive application of new RTA rules (sub-heading 3.4 of the *Roadmap*), it was noted that improved understanding of this issue was warranted, and reference was made to the Secretariat's note entitled *Issues Related to the Retroactive Application of Possible New WTO Rules on Regional Trade Agreements* (Job(03)/44/Rev.1), which described the elements involved. It was argued that the matter did not relate to a retroactive application of any new rules – which in legal terms applied only in exceptional circumstances – but rather to their application to RTAs already in force at the time of their adoption; this was distinct from the concept of "grandfathering" and both issues should be distinguished. While Participants generally noted that new rules should apply to existing RTAs and that "grandfathering" existing RTAs from the new rules was not in line with the overall purpose of the negotiations, a number of Participants referred to the need for granting existing RTAs a transition period to conform to any new rules. It was observed that a distinction needed to be made between new procedural rules and substantive rules, and in that context one Participant said that any new rules regarding examination should also apply to existing RTAs. Some Participants requested the Secretariat to modify the heading's title to better reflect the issue at stake, and it was suggested to refer instead to "exemption from the application of the new rules". The point was made that, as suggested in the past, discussion of this matter should be deferred to a later stage, once any new rules had been outlined; however, one Participant expressed the view that it would be beneficial to hold this discussion in light of and in parallel with the consideration of the new rules themselves.

22. Regarding future work on systemic issues, Participants favoured proceeding on the basis of Participants' proposals. While doubts were expressed on whether any proposals would be forthcoming, some Participants noted that it would be premature to work on this assumption; in that context, reference was made to the expected revision of TN/RL/W/155 and to the fact that during the discussion of the *Roadmap* a number of Participants had expressed strong views which might lead to the submission of concrete proposals. One Participant suggested that, given Members' collective

responsibility for this issue, a Chairman's short list of issues to be further explored might contribute positively to the discussion

23. The Chairman said that he had perceived an interest in adopting a realistic and pragmatic approach to the analysis, debate and negotiation of systemic issues. He sensed that the Group shared the view that, while Participants were not to be restricted from raising any systemic issue, discussions could be circumscribed to those issues which had been detected as particularly sensitive for some Participants and/or as having weakened the system. He informed the Group of his intention to consult with delegations on the way forward and indicated his openness to receive any suggestions that would help ensure that negotiations be conducted in a practical and efficient manner.

24. After that, the Chairman moved into informal mode to deal with "RTAs' Transparency" questions, on the basis of a revised informal note by the Chair entitled *Regional Trade Agreements – Transparency Check-List*, dated 29 October 2004

F. OTHER BUSINESS

25. The Chairman recalled that the next meeting of the Group relating to anti-dumping and subsidies and countervailing measures including fisheries subsidies would be held on 14-17 December 2004. The deadline for submission of any informal elaborated proposals for consideration in informal mode at that meeting was Tuesday, 30 November 2004, close of business.

26. The Chairman also informed the Group that the next meeting of the Group dealing with RTAs would be held on 13 December 2004. The Chairman intended, at that meeting, to propose a programme of work and dates of meetings for 2005.
