WORLD TRADE ORGANIZATION

RESTRICTED

TN/RL/M/8
10 June 2003

(03-2965)

Negotiating Group on Rules

SUMMARY REPORT OF THE MEETING HELD ON 5-7 MAY 2003

Note by the Secretariat

1. The Negotiating Group on Rules ("the Group") held a formal meeting on 5-7 May 2003.

A. ADOPTION OF THE AGENDA

2. The Group adopted the following agenda:

B. REGIONAL TRADE AGREEMENTS

3. No participant raised any issues under this agenda item.

C. ANTI-DUMPING

4. The first paper, entitled **"Proposal on Reviews"** (TN/RL/W/83), was sponsored by 13 participants. The sponsors explained that the proposal sought a solution to the problem of the arbitrary introduction of rules, procedures and methodologies in reviews that differ from those in original investigations due to lacunae in the current Anti-Dumping Agreement ("ADA"). There were five key elements: (a) to clarify that the provisions which apply to original investigations, including *de minimis* thresholds, also apply to reviews, whenever applicable; (b) to clarify that only exporters and importers can request administrative reviews under Article 9.3 ADA; (c) to clarify that the dumping margin in an administrative review under Article 9.3 shall be based on all imports from a specific exporter that were entered into the importing Member for not less than one year, and not on an individual import basis; (d) to improve the rules so that reviews are not unfairly extended to the prejudice of respondents; (e) to clarify, through the development of harmonized indicative lists relating to the assessment of dumping and "likelihood of injury" in revocation reviews under Article 11.2, that the burden of proof is on those parties advocating the continuation of an AD order. It was emphasized that current conditions and pricing practices should be examined and that recycling of old material from initial investigations should not be permitted.

5. One participant considered that, although predictability was important, it should not come at the expense of accuracy. Regarding *de minimis* thresholds, why permit dumping to continue at a level

of 2 percent when the goal of the ADA was to remedy all the injurious dumping? Regarding the proposal that only an importer or exporter be allowed to request an Article 9.3 review, how did this fit with the mandate to maintain the effectiveness of the ADA? Regarding Article 11.2 reviews, to impose an affirmative burden of proof would effectively require the authority to prove what will happen in the future, a burden which was inconsistent with the likelihood standard and would be impossible to satisfy. Likewise, why bar authorities from considering evidence from the record of the original investigation, when that record reflected the conduct of respondents when they operated without the discipline of any measure? The participant supported the suggestion that authorities be encouraged to pay interest if excessive duties collected were not refunded within 90 days following completion of a review; its own paper went further to suggest that all excess duties collected should be refunded with interest.

6. Another participant, while supportive of the objectives of the proposal, was concerned that the effectiveness of the ADA against the persistence and recurrence of unfair trade should not be undermined. The interests of exporters would be best served by severing links to past calculations and injury determination. The emphasis should be on demonstrating, on the basis of updated information, that continued application of the measure, or the applicable rate of duty, was no longer justified. Regarding exporters that were excluded from the market due to a prohibitively high AD duty, the participant could not agree to a presumption that the termination of measures would not lead to continuation or recurrence of dumping. An exporter should be given the opportunity to provide information on exports to other markets where AD measures did not apply; an assessment as to whether such exports being dumped should be made in light of the findings.

7. Several participants agreed that rules governing reviews should be clearer and that they should generally be the same as those applicable to original investigations. One participant cautioned that while Articles 2 through 6 ADA were a starting-point for reviews, modifications might be required in view of the particularities of review proceedings. For example, while a review might show *de minimis* dumping or negligible import volumes due to an undertaking, this might not be decisive given that the question was what would happen if the undertaking lapsed. The participant also asked whether, where for example an investigating authority is confronted in a review with a situation where export sales have been made to a related party and are thus no longer reliable, circumstances have changed such that another methodology should be applied as compared to the original investigation. To what extent should changed circumstances be taken into account in reviews?

8. The next paper introduced, sponsored by the same 13 participants, was entitled **"Proposal on Facts Available"** (TN/RL/W/93). The sponsors explained that the best source of information for calculating dumping margins was a respondent's actual data and that the primary purpose of using "facts available" was to fill in gaps arising from a lack of information, not to punish respondents that had acted to the best of their ability. However, some investigating authorities used facts available even where respondents had acted to the best of their ability, and had refused to consider information on the grounds it was not provided in a manner and within the time period requested. In addition, high margins often resulted from the abusive use of the *least* favourable facts available. To address these problems, Article 6.8 ADA should be amended to reflect the primary purpose of the "facts available" rules. The authorities should not resort to facts available unless they had made all reasonable efforts to obtain necessary information from respondents and specified in detail the information considered insufficient. Further, as long as information submitted by a respondent meets certain conditions, the authorities should use the information, even if not all the required information has been submitted. Authorities must make sure, when choosing information from various sources, that the selected information represents the prevailing state of the industry and market, not a minor and exceptional situation within the industry. Finally, in order to strengthen disciplines on the use of "adverse facts available", it was imperative to clarify situations in which respondents can be deemed to have been non-co-operative and the use of facts available thus permissible.

9. Several participants noted that the rules on "facts available" reflected a delicate balance of rights and obligations of importing and exporting Members. One participant observed that some parties had an incentive to provide information selectively or to misrepresent the significance of information, and the authorities needed effective tools to address such situations. The proposals that facts available be used only to substitute for missing or rejected information and that authorities be required to use all verifiable information submitted would give nearly full control of an investigation to a respondent. Furthermore, information could be submitted past appropriate deadlines, or in an unusable form, or could be complete but misrepresented. In addition, this proposal could result in less accurate determinations by creating an incentive to withhold data. With respect to the use of information from secondary sources, the participant enquired whether authorities would be precluded from using information contained in the application, as currently provided for. Finally, with respect to the proposal to define a co-operative party as one that provides "a substantial portion of the entire information requested by authorities", would the proponents also accept that the authorities may utilise adverse facts available in the event a party withholds a substantial portion of the necessary information?

10. Another participant noted that the purpose of "facts available" was to fill in gaps in the necessary information, whether resulting from deliberate action of a party or the unavailability of information. Regarding the reference to "significantly impeding the investigation" in Article 6.8 ADA, this provision could be useful to counteract extreme behaviour. As for requiring the authorities to choose, as facts available, information from a secondary source that appropriately represents the prevailing state of industry in the relevant market, such information might not be available to the investigating authority. As regards a proposed definition of "cooperation", the participant was not sure whether such a definition was needed, given that information might be missing even where a party cooperated.

11. Several participants shared the view that the provisions on "facts available" should be reviewed. One participant agreed that Article 6.8 should clearly provide that "facts available" may be used only to substitute missing or rejected information, and not the entire submission concerned. Further, an interested party should be given a full opportunity to provide the additional information requested and, if information was rejected, the investigating authorities should provide reasons. For parties that did not fully co-operate, the authorities should be entitled to use facts available and should not be expected to justify in detail the facts used. Another participant observed that an exporter that did not have the information requested should not be punished.

12. The next paper, entitled **"Agreement on Anti-Dumping Practices and Subsidies and Countervailing Measures - Illustrative Common Issues"** (TN/RL/W/104), was sponsored by 10 participants. A sponsor stated that this submission identified a few illustrative issues, which although common to the ADA and Part V of the ASCM, were disciplined differently without any known specific reason for such asymmetry. The areas identified, which were non-exhaustive, related to definition of domestic industry (Article 4.1 ADA and 16.1 ASCM), interested parties (Article 6.12 ADA and 12.10 ASCM), provisional measures (Article 7 ADA and 17 ASCM), refund or reimbursement of the duty paid in excess (Article 9.3 ADA and 19.4 ASCM), expedited reviews (Article 9.5 ADA and 19.3 ASCM) and retroactivity (Article 10 ADA and 20 ASCM). The exercise of harmonization/improvement should continue throughout the negotiations in order to avoid establishment of new unjustified differences.

13. Various participants supported the idea of developing common rules for AD and CVD. One participant however suggested approaching harmonization with caution so as not to eliminate appropriate differences between the ADA and ASCM. An important part of this discussion would be which Agreement had the better rule; participants should not assume that the more specific or restrictive would be preferable in every case. Regarding the proposal to harmonize the rules

governing the duration of application of provisional measures, another participant enquired whether the proponents wished to apply the periods in the ADA or the ASCM.

14. The next paper introduced was entitled **"Communication from Argentina"** (TN/RL/W/81). The sponsor was of the view that although the Uruguay Round ADA was an improvement over previous Codes, the concepts on which its application were based needed to be clarified, as they had not prevented disputes arising. It agreed with some other participants that the primary objective of the Group was to clarify and improve the disciplines of the ADA in order to minimise the risk posed by discretionary application. It had identified in its paper a non-exhaustive list of provisions and issues requiring consideration: sales between related parties; normal value/sales between related parties in the domestic market of the exporting country; construction of the export price; like product; cumulative imports; ex-officio initiation of AD investigations; confidential information; reviews; and best information available.

15. Several participants reacted positively to the paper, noting that it echoed similar concerns expressed in their own proposals. Regarding confidential information, one participant requested more information on what the proponent had in mind. Regarding reviews, this participant sought more information concerning the proponent's views on how new shipper reviews should be conducted where no export sales had occurred nor sales contracts concluded. Another participant enquired whether the sponsor agreed with certain other participants that reviews should be carried out on the basis of the same rules as are applicable to investigations.

16. The next paper introduced was entitled **"General Contribution to the Discussion of the Negotiating Group on Rules on the Anti-Dumping Agreement"** (TN/RL/W/86). The sponsor indicated that, with the exception of duty absorption, the issues raised had already been identified in the Group. The same participant introduced a paper entitled **"Article 9.4 of the WTO Anti-Dumping Agreement: Dumping Margins for Each Sampled Exporter based on Facts Available"**. The paper referred to a lacuna in the ADA in relation to the level of AD duty to be applied to uninvestigated exporters and producers where all sampled margins were based on "facts available". It stressed the need to find solutions to overcome this lacuna. The same participant introduced a paper entitled **"'Like Product' within the meaning of the WTO Anti-Dumping Agreement"** (TN/RL/W/91). The sponsor proposed to consider Article 2.6 ADA in light of WTO jurisprudence, to reflect more fully the approach being taken by AD administrators and to give greater clarity to this Article than existed at present. It proposed replacing the word "identical" in Article 2.6 with "goods which have essentially the same physical characteristics", and incorporating a non-hierarchical list of criteria in the definition of "like product". The sponsor enquired whether separate criteria should be developed to distinguish between "likeness" for the purposes of ADA Article 2 relating to dumping determinations and ADA Article 3 relating to injury determinations.

17. Regarding the "General Contribution" paper (TN/RL/W/86), several participants questioned the sponsor's view that in some areas it might be appropriate to maintain the discretion of investigating authorities. Concern was also expressed regarding the proposed "codification" of dispute settlement rulings, as these were not intended to create rights and obligations. Regarding the sponsor’s suggestion that the lesser duty rule might be inappropriate in case of systematic and persistent dumping, one participant asked whether the idea was prompted by problems in implementing the lesser duty rule or by the view that a persistent dumper should be excluded from the benefits of the rule, while another argued that systematic and persistent dumping had no basis in economic theory. Regarding duty absorption, one participant stated that this concept did not exist in the ADA and enquired how it could be improved or clarified in the context of the Doha mandate. Another participant questioned why there was a need to address duty absorption given that AD duties already remove the injurious effect of dumping. One participant posed written questions relating to lesser duty rule and duty absorption which are reflected in document TN/RL/W/106 entitled

"Questions from India on Australia's Paper on General Contribution to the Discussions of the Negotiating Group on Rules on the Anti-Dumping Agreement".

18. Regarding the paper on Article 9.4 ADA (TN/RL/W/90), concerns were raised that the proposal to allow the authorities to calculate an "all others" rate based on "any other reasonable method" where no sampled exporter cooperated with the investigation would increase uncertainty and give the authorities undue discretion.

19. Regarding the paper on "like product" (TN/RL/W/91), participants had differing views as to whether "WTO jurisprudence" could provide guidance on how the term "like product" is to be understood in the context of the ADA. In addition, several participants questioned the need to develop separate criteria for like product determinations under Articles 2 and 3 of the ADA. They also questioned the idea of replacing the word "identical" with "goods which have essentially the same physical characteristics", as the proposed wording left more room for arbitrary interpretation and possible abuse. One participant observed that, read in the context of ADA Articles 2.2.2, 2.4 and 3.6, a like product need not be identical to the product under consideration.

20. The sponsor provided preliminary responses to comments made and questions raised. Regarding "codification" of dispute settlement rulings, the sponsor had used the term loosely, not in the sense that the Appellate Body or Panels had any role in amending the Agreement, but rather to underline that their rulings could be useful in identifying gaps and ambiguities in the ADA. As regards duty absorption, the sponsor wanted to ensure that an effective remedy was in place if duty absorption occurred. Regarding like products, the sponsor believed that even if the current definition of like product and the word "identical" were not changed, it would be helpful if relevant WTO jurisprudence were incorporated into the current definition.

21. The eighth paper introduced was entitled **"Identification of Additional Issues under the Anti-Dumping and Subsidies Agreements"** (TN/RL/W/98). The sponsor indicated that properly addressing the topics in its paper would not only help to preserve the basic concepts, principles and effectiveness of the ADA/ASCM, but would benefit all Members. Turning to some of the specific issues, the sponsor proposed clarifying the ADA's treatment of causation in light of Appellate Body rulings that authorities have an affirmative obligation, not referred to in the texts of the ADA/ASCM, to separate and distinguish the injurious effects of factors other than dumped imports. While the Appellate Body had recognized the difficulty in conducting this analysis, it had provided no specific guidance. On "domestic industry", some Members limited injury analysis to those firms which supported an application, leading to a distorted picture of the condition of the domestic industry. The ADA/ASCM should be clarified to specifically address this practice. On favoured exporter treatment, some Members discriminatorily excluded from an investigation and any subsequent measures exporters that were producers in the same exporting country of the same merchandise subject to investigation; the ADA/ASCM could specifically address such abuses.

22. Several participants welcomed the submission and/or the identification of certain issues therein. As regards causation, one participant agreed that the negotiations should clarify how the authorities separate and distinguish effects of other factors in practice. Regarding domestic industry, some participants shared the sponsor's concern. However, one participant cautioned that under the proposal all domestic producers would have to submit detailed information which could lead to unworkable procedures and more use of poor information or resort to facts available. This participant noted that producers not part of the domestic industry can be examined as an "other factor" when it comes to causal link. On favoured exporter treatment, several participants noted that ADA Article 9.2 already prohibited such discriminatory treatment. Regarding cross-cumulation, several participants considered it inappropriate to cumulate dumped and subsidized imports together for the purpose of considering two separate trade remedy measures. Regarding fragmented industries, one participant queried whether sampling might not be appropriate.

23. The sponsor responded to certain of the comments and questions. Regarding favoured exporters, the sponsor had encountered situations where products were excluded from investigations due to particular relationships between companies. Although the sponsor agreed that duties should be collected on a non-discriminatory basis in respect of any product, clarification of Article 9.2 was called for as other Members had alternative interpretations. With respect to cross-cumulation, the sponsor was not proposing to count the same goods twice; if goods from a single country were alleged to be both dumped and subsidized, the volume of those goods would only be counted once. If dumped and subsidized goods whose prices had been impacted by both dumping or subsidization competed with each other and with the domestic like product in the same market, the injurious impact would collectively hammer the domestic industry. With respect to excluding exporters found not to have dumped/received a countervailable subsidy, a uniform interpretation of ADA Article 9.3 and ASCM Article 19.4 was needed given the different interpretations by Members. While ADA Article 9.3 stated that no duty should be assessed where merchandise was found not to have been dumped, other Members had expressed the view that although duties could not be assessed in this situation that did not preclude future reviews in which that company could be found to have dumped.

24. The next paper referred to was entitled **"Submission of the Arab Republic of Egypt on the Clarification of Certain Provisions of the Anti-Dumping Agreement" (**TN/RL/W/105). The sponsor identified in its paper currency conversion (Article 2.4.1 of the ADA) and material retardation (Footnote 9 of the ADA) as possible issues for clarification and improvement. There was no discussion of this paper.

25. As for the follow up papers, two participants provided answers to written questions posed in document TN/RL/W/80 entitled **"Clarifications sought by India on the Submissions by the United States (TN/RL/W/35) and Canada (TN/RL/W/47)"**.

26. The sponsor of document TN/RL/W/35 explained that as regards public access to memoranda adopted, Members should maintain a public record where parties could obtain all non-confidential information submitted by parties to an investigation. The term "memoranda adopted" referred to any document that the investigating authority explained in its determination, including what information it used in making its determination. As for verification outlines, they should reduce the need to resort to the use of facts available, as they informed companies, in advance, what an importing Member needed to review during verifications. This provided exporters with the opportunity to prepare properly for the verification, thus reducing the likelihood of problematic or failed verifications. Regarding administrative protective order procedures, these procedures were followed by its authorities for granting access to confidential information. Although they were tailored to meet the needs of its own legal system, all Members should be able to develop and implement similar procedures to permit access to confidential information while ensuring that it was protected and not disclosed inappropriately.

27. The sponsor of TN/RL/W/47 provided written answers in document TN/RL/W/92 entitled "Responses from Canada to Certain Questions Posed by Korea in TN/RL/W/65, Australia in TN/RL/W/62, Egypt in TN/RL/W/79 and India TN/RL/W/80".

28. On the follow-up submission entitled **"Egyptian Paper Containing Replies to Questions posed by Australia in Document Number TN/RL/W/73"** (TN/RL/W/101), the sponsor requested that this paper be read in conjunction with more detailed submissions it had provided to the Group in TN/RL/W/65 & 67 & 90 and 79, in which the sponsor clarified its position regarding the different submissions of other participants.

29. In relation to the follow-up submission entitled **"Fourth Set of Questions from the United States on Papers Submitted to the Rules Negotiating Group"** (TN/RL/W/103), some participants provided oral responses to some of the questions posed. Regarding questions relating to

different approaches on sunset, one participant mentioned that improving the current sunset mechanism by specifying indicative lists to be considered in the review would be sub-optimal since it would not discipline AD authorities' discretion in the predictive or speculative assessment process of such reviews. The proposed alternative simple approach to terminate AD orders automatically after a certain period would enhance the operation of the sunset provisions.

30. In the ensuing general discussion, several participants expressed views on sunset reviews. One participant stated that, in the absence of a new investigation, it could not be determined whether continued imposition of measures was necessary to prevent injurious dumping from reoccurring. The Group should consider how the rules governing sunset reviews could be properly enforced so as to guarantee the rights of exporters. In its submission (TN/RL/W/79) it had stated that the current system could be improved by providing that the level of duties could be modified in the context of a sunset review to reflect new dumping/injury determinations and that sunset reviews must be completed within a prescribed time limit (e.g. 12 months). However, the participant was reluctant to insert a list of factors in the ADA that authorities would have to consider in determining whether expiry of a duty was likely to lead to a continuation or recurrence of dumping and injury. Developing countries should be given special treatment under such proposals, as their small markets could not bear the interim period between investigations where there was clear evidence that a domestic industry was suffering from injurious dumping. Another participant commented on the sunset proposal contained in document TN/RL/W/76. The first element in that proposal, the lack of clarity in Article 11.3 ADA, merited further examination. However the second element, the bar on new initiations within at least six months following the termination of an AD measure, would distort the balance of rights and obligations under the ADA.

D. SUBSIDIES AND COUNTERVAILING MEASURES, INCLUDING FISHERIES SUBSIDIES

31. The first paper was entitled **"General Contribution to the Discussions of the Negotiating Group on Rules on the Agreement on Subsidies and Countervailing Measures"** (TN/RL/W/85). Regarding prohibited subsidies, the sponsor suggested clarifying and making more predictable the rules on *de facto* export contingency. It did not propose to loosen the rules on export subsidies, but simply to clarify them in an area where their application was subjective and discriminatory. It also referred to the question of the meaning of "withdraw" in the context of prohibited subsidies. Regarding non-actionable subsidies, it stated that one such category – non-specific subsidies – still existed, but it was open to considering the reinstatement of a non-actionable category. Regarding Article 6.1 ASCM, it did not necessarily agree that the presumption of serious prejudice should be reinstated. The Group should first look at calculation issues, as Article 6.1 ASCM should not be reinstated without knowing how the thresholds would be calculated.

32. Several participants agreed with the sponsor that, wherever possible, parallel provisions on AD and CVD should be harmonized, that consideration should be given to formalising the approach the SCM Committee had developed for the implementation of Members' notification obligations, and that the work of the "Informal Group of Experts" would provide a good basis for further work on the codification of analytical and quantitative subsidy methodologies. Regarding *de facto* export subsidies, one participant acknowledged that *de facto* export subsidization was difficult, but considered that the extent to which a company exported *was* relevant. Participants sought clarification regarding the pertinence of export competitiveness to *de facto* export subsidization. The sponsor responded that it intended to submit further papers in relation to prohibited subsidies, Article 6 issues in terms of serious prejudice, and the possibility of looking at export competitiveness as a means of getting some predictability in what is a subjective analysis.

33. The third paper introduced was entitled **"Elements of a Steel Subsidies Agreement"** (TN/RL/W/95). The sponsor recalled a communiqué from the OECD High level Group on Steel instructing the Disciplines Study Group to begin work "on the elements of an agreement for reducing

or eliminating trade distorting subsidies in steel". Pursuant to that decision, the OECD Secretariat had drafted a list of questions and propositions relating to 17 proposed elements of a steel subsidies agreement. The sponsor had submitted comments addressing these proposed elements, as had other participants, and was presenting them here in order to keep the Group fully informed. Its comments should not be considered as official positions or negotiating proposals, nor as necessarily indicative of the views of other participants in the OECD steel process. The Disciplines Study Group continued to make progress. An informal meeting in Washington was productive in identifying and clarifying the critical issues, and the OECD Secretariat had issued a second draft of a potential agreement. The goal was to conclude work on the development of the elements this year, and to make as much progress as possible before Cancún.

34. Several participants indicated that they were participating in the work on steel, and that it was useful to keep the Group informed. However, one participant had reservations about whether the work being done in the OECD should be brought to the WTO. While disciplines on subsidies were important, the Group's focus should be to clarify ADA and ASCM provisions and to stop the abuse and misuse of its related measures and procedures.

35. A number of participants commented or posed questions concerning **"Subsidies Disciplines Requiring Clarification and Improvement"** (TN/RL/W/78), which had been introduced at a prior meeting. One participant noted that prohibited and non-actionable subsidies were part of a balance intrinsic to the ASCM, so if the category of prohibited subsidies was enlarged, the use of CVD should also be curtailed. As the Doha mandate reaffirmed the general objective of environmental protection, the definition of non-actionable subsidies in the environmental sector, such as tax incentives for cleaner production or application of polluter pay principle, should be attempted. If the Group identified subsidies which were as disruptive of world markets as export and import substitution subsidies, the participant could support expanding the prohibited category, provided that the reference in Article 3.1 to conflicting provisions in the Agreement on Agriculture were maintained. Regarding equity capital, the ASCM needed clarification and the general rule must remain that investment decisions of governments must not be inconsistent with commercial practice. However, to question Members' possibility to make such decisions would go beyond the Group's mandate. Finally, the participant agreed that the understanding reached in the SCM Committee regarding compliance with subsidy notification obligations could be reflected in the ASCM, but doubted that this would improve considerably the discipline of Members regarding this obligation. It suggested other means to increase compliance such as penalising non-notifications, while finding ways to ease the burden on ASCM Annex VII Members.

36. Regarding the sponsor's suggestion to include the subsidies identified in Article 6.1 ASCM in an expanded prohibited category of subsidies, one participant doubted that these subsidies had the same degree of trade distorting effects as subsidies contingent upon export performance or the use of domestic over imported goods. Domestic subsidies were provided in order to achieve certain policy objectives by affecting resource allocation in the domestic market and, unlike the subsidies identified Article 3 ASCM, did not lead to any direct trade distortion. Clarifying disciplines on domestic subsidies called for careful consideration; subsidies should not be *a priori* prohibited without examining their trade distorting effects. As for improving compliance with subsidy notification obligations, the participant emphasized the importance of examining ways to reduce the burden of notification and providing capacity building in response to the needs of developing countries. Another participant enquired whether the sponsor envisaged inclusion of those start-up incentives that are deemed to cause serious prejudice under paragraph 4 of Annex 4 of the ASCM in an extended prohibited subsidies category.

37. The sponsor of TN/RL/W/78 provided preliminary answers to questions posed. With respect to the link between dark amber and green subsidies, there was a historical link perceived by Members in the Uruguay Round and if discussions were foreseen regarding a green light category, tighter

disciplines would be needed in the red light category. As regards government-equity infusions, while not questioning governments' sovereign right to invest in the private sector, these investments could lead to market distortions whether directly or indirectly. As for expansion of the red light or dark amber category, the sponsor was ready to look at ways to make it easier for developing countries and make sure they receive necessary technical assistance in the area of subsidies notifications.

38. On the sub-agenda item of Fisheries Subsidies, four submissions were introduced and discussed. The first submission was entitled **"Questions from Japan Concerning Papers on Fisheries Subsidies Issues"** (TN/RL/W/84)**,** which posed questions on the papers TN/RL/W/77 and TN/RL/W/58. With respect to TN/RL/W/77, the sponsor asked when participants had reached a consensus to provide better disciplines on subsidies that promote over-capacity and over-fishing, or have other distorting trade effects. It enquired whether "artisanal" fisheries meant small-scale coastal fisheries and whether subsidies to medium- and large-scale fisheries in developing countries would be subject to discussion. It enquired whether the production distortion of shared stocks caused by fisheries subsidies was the only reason the sponsor believed that fisheries subsidies differed from others and should be treated in a special fashion. It also asked if the Group's discussion on fisheries subsidies should be limited to those provided to shared stocks fisheries and whether the sponsor had reasonable grounds to conclude that certain kinds of fisheries subsidies distorted trade to the same degree as export subsidies and thus needed tighter disciplines than other sectors. Regarding the improvement of notifications, the participant wondered whether this objective could be achieved within the framework of the Committee on Subsidies and Countervailing Measures. As for TN/RL/W/58, the sponsor of TN/RL/W/84 enquired about the grounds to proceed to categorization even though there was no consensus to do so, and the direction the sponsors envisaged for future discussion on fisheries subsidies with a mere reference to lists developed by various organizations with different objectives. It also asked if any Member had requested consultations under ASCM Article 7.1 regarding fisheries subsidies, what consultations were carried out and why the said injury was not rectified in the consultations.

39. In reaction to these questions, the sponsor of TN/RL/W/77 stated that the source for its view that there was a consensus to address these issues in the Group was the Doha mandate, where Ministers had clearly singled out fisheries subsidies for special attention. Paragraph 28 of the Doha Declaration specifically referred to paragraph 31 on Trade and Environment which in turn recognized the importance of enhancing the mutual supportiveness of trade, environment and development, with regard to the fisheries subsidies negotiations. As regards the term "artisanal fisheries", it referred to small-scale fisheries that employed labour intensive harvesting, processing and distribution technologies to exploit marine and inland fishery resources. Such fisheries typically targeted local rather than export markets. The sponsor intended to include medium- to large-scale fisheries in developing countries in the discussions, while acknowledging the needs of those countries to develop their fisheries in a sustainable manner. It was ready to consider how special and differential treatment might apply to disciplines on fisheries subsidies. Furthermore, the participant did not intend to limit the discussion of improved disciplines to those provided to shared stocks; disciplines needed to be comprehensive enough to cover all significant fishery subsidies programmes that contributed to over-capacity or over-fishing or had other trade-distorting effects. It was open as to whether fisheries' specific factors should be taken into account in structuring disciplines, or whether a given stock is depleted. The possible reintroduction of ASCM Article 6.1 could be useful in strengthening disciplines on fisheries subsidies. As regards subsidy notifications to the SCM Committee, the current system was not providing useful and comprehensive information about particular fisheries programmes.

40. Likewise, certain co-sponsors of TN/RL/W/58 noted that there were many types of subsidies in the sector, both "good" and "bad", and that the various attempts at categorization provided a useful basic resource to identify types of subsidies in the fisheries sector and to consider case by case how they might be addressed in this negotiation. Their paper was intended to take stock of work done on

categorization and to provide an additional resource for work on clarification and improvement of disciplines in the sector. As for consultations under ASCM Article 7.1, examples previously provided highlighted the practical difficulties of applying subsidies disciplines in the fisheries sector.

41. In reaction to these responses, the sponsor of TN/RL/W/84 considered that the Doha mandate did not prejudge the work of the Group nor instruct the Group to negotiate sector-specific rules for fisheries subsidies. Advocates of disciplines had not shown any particularities in the sector, nor any distinctive distortions caused by fisheries subsidies, that would justify such an approach. Nor had they established that over-capacity and over-fishing was within the mandate. This was the initial phase of the negotiations, and further clarifications and more comprehensive responses to the questions posed were required before moving to the next stage of the discussions.

42. Document TN/RL/W/77 was also discussed in a submission entitled **"Korea's Comments on the Submission of the United States TN/RL/W/77"**(TN/RL/W/97). The sponsor did not agree with the interpretation of the Doha mandate provided by the sponsor of TN/RL/W/77; fisheries subsidies were not singled out. The negotiations should focus on the trade effects of subsidies, not the environmental dimension and stock depletion, which were outside the scope of the Group's mandate and should be dealt with in the Committee on Trade and Environment.

43. Also regarding document TN/RL/W/77, one participant enquired about the status of a fisheries subsidy that could be seen as promoting over-capacity when looked at in isolation, but which was granted in the context of a management regime that promoted sustainable development of the resource and that aimed at ensuring renewal of stocks. It also wondered if the sponsor was suggesting that there would be discussions of fishery management regimes in the context of the discussions of the subsidy notifications. In reaction to this query, the sponsor acknowledged the influential relationship between the subsidies regimes and the management programmes.

44. The second submission was entitled **"Comments from the People's Republic of China on the United States Proposal on Fisheries Subsidies"** (TN/RL/W/88). One participant welcomed the sponsor's interest in improving disciplines on fisheries subsidies that contributed to over-capacity and over-fishing or had other trade-distorting effects. However, this participant had reservations regarding a possible green light category, as it could undermine effective and improved disciplines. Thus, while it recognized that some subsidy programmes did reduce overcapacity and enhance sustainability, this should not be the starting-point of the discussions. As for aquaculture, wild and capture fisheries had certain unique features that the current WTO rules were not well suited to address, but aquaculture should not escape appropriate and effective disciplines.

45. The next paper was entitled **"Submission of the European Communities to the Negotiating Group on Rules – Fisheries Subsidies"** (TN/RL/W/82). The sponsor stated that its submission reflected and followed its internal reform of the Common Fisheries Policy, the main objective of which was to provide for sustainable exploitation of fisheries resources, as part of a wider sustainable development agenda taking account of the environmental, economic, and social aspects in a balanced manner. It believed that a sustainable fisheries policy, which restored fish stocks' productivity, would offer improved economic and social returns to both the industry and society as a whole.

46. The sponsor explained that subsidies given to the sector by the sponsor and its Member States were roughly Euros 1 billion annually. Before the reform, around 50 per cent of the subsidies went to the fishing fleet while the rest were devoted to on-shore industry, infrastructure and aquaculture. Although the sponsor had had a common fisheries policy for 20 years, adjustments had not kept pace with growth in capacity or sharply falling fish stocks. Although a large part of the subsidies was granted for vessel decommissioning, structural aid for fleet renewal was still being given. The result was that although the fleet was significantly reduced in terms of tonnage and engine power, technological improvements meant that the overall capacity-reducing effect was limited. It became

clear that subsidies to investment in fishing fleets did not contribute to achieving a sustainable fisheries industry. This type of subsidy artificially reduced costs and risks of investment in an already over-capitalized industry and promoted over-supply of capital. Each newly subsidized vessel reduced the productivity and profitability of every other vessel in the fishery concerned. As a consequence, the sector attracted more resources than would have otherwise been the case. As stocks declined, quotas were reduced. This led to an increase in fishing effort and a race for fish. To fish harder more capacity was required and to pay for the investment more fish were needed and such a vicious circle could have never been sustained. In 2002, the sponsor was faced with a growing number of fish stocks that were on the verge of collapse and a fleet that was too big for the available fish. This resulted in diminishing catches, reduced economic returns, dependence on public aid, loss of jobs and the gradual weakening of coastal communities. The most effective way to cut this over-capacity was to ban capacity-enhancing subsidies. This measure was contemplated with very stringent rules to limit the entry of new vessels, a one-off aid package to withdraw over-capacity, and last but not least, with significant reductions in allowable catches.

47. Against this background, the sponsor proposed the introduction of two fisheries specific boxes into the ASCM. The first was a red box, which would prohibit any subsidies which increase capacity (essentially those for construction of new vessels or the modernization of existing vessels in any way that increased their capacity). The second was a green box where a number of subsidies could still be given, either because they contributed to the overall objective of reducing capacity or because they mitigated social effects inherent in capacity reductions. An effective control of this type of solution also required a workable system of subsidies notifications and not simply depending on the good will of Members to notify. It suggested that a subsidy could only be claimed to be green and thereby non-actionable under the ASCM if it had been notified.

48. The sponsor addressed two additional issues. Effective fisheries management was also essential to prevent over-fishing. However, fisheries management issues were difficult to reconcile with the mandate and expertise of the Group or even with the Agreement under negotiation. Several international organizations such as FAO, UNEP and the OECD were examining these issues; this raised the question whether these organizations could come up with a coherent set of solutions to fisheries management. Regarding the treatment of developing countries on fisheries, the sponsor was deeply committed to listening to concerns and requests of developing countries. They were in the best position to identify their own specific needs, which might not be identical for each country concerned. To this end, each developing country should present to the Group a list of its needs in this area.

49. A number of participants welcomed the submission and saw value in its general direction. In particular, some participants were pleased that the sponsor recognized the link between subsidization and over-fishing, sought to categorize subsidies based on effects, and built on the traffic light approach of the ASCM. Other participants however enquired about the aspects of peculiarities of the fisheries sector that could not be dealt with in the framework of the current ASCM. Several participants agreed with the sponsor's view that, while fisheries management issues were important and needed to be addressed, the Rules Negotiating Group was not well equipped to address them; however, one participant noted that subsidy and management issues were interwoven and that both should be addressed in other fora. Several participants also welcomed the focus of the sponsor on the need for transparency regarding fisheries subsidies.

50. A variety of views were expressed regarding the sponsor's proposal to prohibit subsidies which increase capacity. One participant stated that over-capacity contributed to over-exploitation of fisheries resources and thereby distorted trade. Such subsidies - particularly those in the form of direct payments and cost reducing transfers – should be disciplined. One approach was to discuss ways of prohibiting capacity-enhancing subsidies, and it found the sponsor’s suggestion relating to a revised list of prohibited subsidies interesting. Several other participants welcomed the sponsor's approach, but believed that the proposal on prohibited subsidies was too narrow, and that a more

comprehensive approach, such as a ban on all subsidies that promote over-capacity or distort trade, would be preferable. For several participants, the prohibition should be focused on trade-distorting subsidies. The issue of circumvention of the prohibition was also raised: for example, would a ban on subsidies for permanent transfers of fishing vessels to third countries clear the way for subsidising temporary transfers? It was also asked whether under the proposal governments could subsidize vessel construction where the vessel was for delivery to an owner based in and operating under the jurisdiction of another country. By contrast, one participant asked why the proposed prohibited subsidies caused over-exploitation and trade distortion, and why the current ASCM did not address them adequately.

51. A range of views were expressed on the proposal to create a green box of non-actionable subsidies. Various participants had concerns about negotiating green box measures, at least before agreeing to a category of sweeping prohibitions. Certain participants considered that a green box gave rise to a risk of circumvention and should thus be tightly linked to capacity reductions. Regarding the specific subsidies proposed for a green box, several participants queried how subsidies for modernization of fishing vessels to improve safety, product quality and working conditions helped reduce fishing capacity. It was observed that a firm would have to meet these costs in order to compete or meet regulatory requirements. One participant suggested that subsidies for under-exploited and artisanal fisheries should be permitted.

52. As for the special treatment for developing countries, one participant observed that fisheries are important to the economies of many developing countries and that success in prohibiting harmful fisheries subsidies would benefit those countries, but noted that the fisheries sectors in many such countries would not be able to benefit from new world market opportunities without help. Several other participants considered that special and differential treatment for developing countries was important, with one developing participant signalling its intention to table a proposal regarding its needs in this area.

53. The sponsor responded that its proposal for a red box was not to be read restrictively; it proposed to ban all subsidies that create capacity, and its submission merely identified examples of such subsidies. The red and green boxes fit well together: the red box would ban capacity-creating subsidies, while the first category in the green box would encompass capacity-reducing subsidies. As for the second category in its proposed green box, it was meant to help in the dealing with the negative social effects of capacities reductions.

E. OTHER BUSINESS

54. It was agreed that the next formal meetings of the Group would be held on 11 June 2003 (RTAs) and 18-19 June 2003 (AD/SCM). The 18-19 June meeting would start with AD.