

FISHERIES SUBSIDIES: SPECIAL AND DIFFERENTIAL TREATMENT

Communication from Argentina, Chile, Egypt and Uruguay¹

Revision

The following communication, dated 25 January 2011, is being circulated at the request of the Delegations of Argentina, Chile, Egypt and Uruguay.

I. INTRODUCTION

1. In the framework of the negotiations on new disciplines related to fisheries subsidies, Special and Differential Treatment has particular relevance due to the combination of two elements which are not found simultaneously in other disciplines: sustainability and development. As some Members expressed in a previous communication², the future disciplines on special and differential treatment could have significant impact on world fisheries stocks, as well as on the ability of developing countries to promote sustainable development and reduce poverty. Consequently, WTO Members face the delicate responsibility of negotiating disciplines that provide a balance between both aims.

2. Due account must be taken of the fact that, at present, the term developing countries encompasses a group of economies with diverse productive and financial capabilities and which, at the same time, face diverse needs for revenue and income distribution. Therefore, a number of countries have to cope with the economic limitations of sectors of the population which directly or indirectly depend on fisheries and that frequently find themselves in a position of great vulnerability. In these cases, government aid may constitute the only one support in favor of the establishment of food security programs and improvement in the quality of life for an important part of the population. Nevertheless, this is not the only possible relationship between development and fisheries activities. At the same time, there is increasing competition among certain developing countries for access to fisheries resources and for market access for fisheries products, particularly as regards international waters.³

3. In view of the former considerations, an adequate calculation of the financial aid should take into account effective conservation criteria, bearing in mind that fisheries resource depletion and

¹ The present proposal of legal text is submitted as a response to the call of the Negotiating Group on Rules's Chair for making contributions to the debate on the subject of fisheries subsidies. This document does not prejudge on future contributions by co-sponsors on the same subject, and is open to commentaries and subscription by other Members.

² TN/RL/W/243 (from Australia, Chile, Colombia, Iceland, New Zealand, Norway, Pakistan, Peru and United States).

³ TN/RL/W/218, paragraph 26 (from New Zealand).

overexploitation would imply the exhaustion of the special and differential treatment discipline in itself, and would therefore have a contrary effect to the one originally foreseen, that is, a set of provisions to facilitate Members' social and economic development, not just a collection of measures addressed to alleviate a short run situation.

4. To that extent, it is important to point out that a long run development of fisheries activity requires sustainability criteria which should be applied to all fisheries resources; that is to say, not only fish stocks within national jurisdictions, but fish stocks fished in international waters and straddling and highly migratory species as well.

5. It should be also stressed that the majority of WTO developing Members are signatories of the United Nations Convention on the Law of the Sea (UNCLOS) and have adopted several provisions of the FAO Code of Conduct for Responsible Fisheries, even though the latter is not mandatory. The FAO has produced several reports on the worrying state of overexploitation of the majority of fisheries in the world.⁴ Besides, fisheries subsidies negotiators have taken part in several seminars sponsored by NGOs, in which the urgent need for action to revert the current state of the vast majority of fisheries in the world has been directly and convincingly highlighted.⁵

6. The current communication aims to make a contribution to the definition of the core concepts that should form part of an S&DT discipline, especially in light of Chair's text of November 2007 and of prior communications by several Members.⁶ The starting point is the premise that S&DT provisions shall be substantive and appropriate, allowing Members to address development necessities, as well as subsistence and health security, while establishing clear parameters for defining objective situations in which subsidies could be granted or maintained, in order not to represent a threat to fisheries resources.

II. EXPLANATION OF THE PROPOSAL

7. The sponsoring delegations of this communication consider that, in order to reflect an adequate balance between sustainability and development, the conditions under which a developing country could exercise its right to grant or maintain subsidies to fishing activities in accordance with the future disciplines to be adopted should be:

- a) with regard to capacity:
 - i) the existence of under-exploited or unexploited fisheries resources within its jurisdiction (exclusive economic zone);
 - and,
 - ii) the lack of enough fishing capacity to exploit the natural resource in a sustainable way.
- b) with regard to infrastructure: the improvement in physical port facilities exclusively or predominantly for activities related to marine wild capture fishing, in jurisdictional waters, related to the livelihood of fishers and their families, and in compliance with FAO Code of Conduct.

⁴ See e.g. "The State of World Fisheries and Aquaculture 2008", Fisheries and Aquaculture Department, Food and Agriculture Organization of the United Nations, Rome, 2009.

⁵ See e.g. documents TN/RL/W/184 and TN/RL/W/218 (both from New Zealand).

⁶ For instance, documents TN/RL/GEN/138, TN/RL/GEN/138/Rev.1, and TN/RL/W211 (from Argentina); TN/RL/GEN/151 and TN/RL/GEN/151/Rev.1 (from Argentina and Brazil), TN/RL/W/234 (from Argentina, Chile, Colombia, Ecuador, Mexico and Peru), and TN/RL/W/243 (from Australia, Chile, Colombia, Iceland, New Zealand, Norway, Pakistan, Peru, and United States).

8. Compliance with these two conditions would allow to reach a balance between exploitation and sustainability in any circumstance, and this would allow the diverse situations prevailing within the group of WTO Developing Country Members to be taken into account.

9. Reaching such equilibrium would necessarily require the future disciplines to be flexible and dynamic, in order to be able to keep pace with technological changes and adapt to developmental change in beneficiary countries. The latter is one of the reasons why it is considered convenient and desirable to avoid the use of static parameters such as boat length, percentage of participation in marine capture fisheries, etc. in the definition of conditionalities for the S&DT disciplines. Besides, whenever possible, it would be desirable to avoid the use of terms which do not have a generalized and agreed definition among WTO Members, such as "small scale fisheries" or "artisanal fisheries", in order to avoid not only the circumvention of disciplines, but also unnecessary controversies with respect to the scope of these definitions.

10. It should be also stressed that S&DT provisions (as well as general exceptions) should be contingent upon a general discipline on prohibitions. Consequently, **the current proposal will be subject to modifications and changes, depending on the final design of the rest of the disciplines and, particularly, of those referring to prohibition and general exceptions.**⁷

11. Nevertheless, a change in the level of coverage would not necessarily imply a change in the structure of the S&DT discipline which, broadly, could be described on the basis of the following three necessary elements:

- a) definition of S&DT beneficiaries
- b) conditionalities required in order to access to the benefit;
and,
- c) exceptions to conditionalities.

a) Beneficiaries of Special and Differential Treatment

12. According to the Doha Declaration⁸ and the Hong-Kong Ministerial Declaration of 2005⁹, the beneficiaries would be all developing Members. Besides, special attention shall be paid to least developed countries (LDC).

13. In addition, there is certain consensus among Members as to the necessity of a special consideration to subsistence activities, which are essential for a great number of inhabitants in developing countries. According to what has been said above, any reference to concepts such as "artisanal fisheries" and "small scale fisheries" has been avoided, due to the fact that Members have not reached agreement as regards their definition. Hence, in relation to the subject of "subsistence activities", the present proposal keeps the definition used in a former communication.¹⁰

b) Conditionalities

14. The sponsors consider that the conditionalities shall be strict, and aimed at the compliance with the exigencies of two distinct subjects: **sustainability and transparency**. In the first case, the current proposal takes up the text of the former communication TN/RL/GEN/138/Rev.1, according to

⁷ Articles I and II respectively, of Chair's Text of November 2007, TN/RL/W/213. This mention has the sole purpose of providing Members with a reference, and shall be understood as being without prejudice to the final structure and wording of provisions contained in the new disciplines once the negotiation is finished.

⁸ WT/MIN(01)/DEC/1.

⁹ WT/MIN(05)/DEC, paragraphs 2 and 9, Annex D.

¹⁰ TN/RL/GEN/138/Rev.1.

which the developing Member shall grant or maintain a subsidy only when its fishing capacity is insufficient to cover the level of allowable catch (that is to say, the level established by the Member itself within its jurisdiction), taking into account that this allowable level shall not exceed the maximum sustainable yield (MSY).¹¹ The former provision shall be complemented to the prohibition established in Article I.2 of the Chair's text of 2007 (subsidies affecting fish stocks that are manifestly overfished¹²), and the provisions in Articles IV (unfavorable effects), V (fisheries management), VI (notifications) and VIII (dispute settlement), in whichever form they are finally incorporated to the disciplines.¹³ Such provisions will also apply to subsidies granted or maintained for physical infrastructure related to fisheries; in addition, these latter subsidies will have to be in compliance with the FAO Code of Conduct.

15. With regards to transparency, the co-sponsors consider that this is a cornerstone to the new disciplines. In order to reassure the effectiveness of the new disciplines, all exceptions –including Special and Differential Treatment exceptions– shall be adjusted to fulfill transparency requirements. Special consideration is given in Article III.5 of the current proposal to the case of those countries that may need technical assistance in order to fulfill those transparency provisions.

c) Exceptions to conditionalities

16. Exceptions to conditionalities shall be restricted to the case of those least developed country Members of WTO, which have been already included in other dispositions of the Agreement on Subsidies and Countervailing Measures (paragraph a) of Annex VII).¹⁴ The proposal provides less strict conditionalities in the case of fishing activities related to the subsistence of fishers and their families within the territory of developing Members.

17. None of the cases mentioned in the latter paragraph should be subject to the specific conditionalities of special and differential treatment (Articles III.2, III.3 and III.4 of the text *infra*); nevertheless they would be subject to the conditionalities considered in other articles of the Annex (in particular, Articles I.2, IV, V, VI and VIII).¹⁵ In order to facilitate the fulfillment of the latter, special provisions could eventually be considered (for instance, longer periods to implement and notify the programs).

¹¹ This conditionality would require Members to comply with international rules currently in force, with regards to conservation of resources within Members' jurisdiction, including territorial waters, EEZ and high seas. With regards to fishing in EEZ, UNCLOS Article 61 prescribes that coastal States parties shall ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by over-exploitation. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub-regional, regional or global.

¹² The term "unequivocally", in the document TN/RL/GEN/213, proved to be very difficult to define, as evidenced by the comments of the majority of the Members. As a consequence, in this communication the term "manifestly" has been incorporated, as previously introduced by the United States in his last communication TN/RL/GEN/165 and in accordance with the definition provided there (footnote 3, page 5, of the stated communication).

¹³ See footnote 7 to section II, "Explanation of the Proposal", *supra*.

¹⁴ The flexibility for those least developed members is considered in Article III.1 of Chair's text of November 2007, and has been supported by several Members in a previous declaration (TN/RL/W/243, point 18).

¹⁵ See footnote 7, *supra*.

ANNEX VIII

FISHERIES SUBSIDIES

Article III

Special and Differential Treatment

III.1 In the case of developing country Members, subsidies referred to in paragraphs I.a) and I.c) of Article I of this Annex¹⁶, shall not be prohibited, subject to the provisions established in this article.

III.2 A developing country Member may only maintain or grant subsidies referred to in paragraph 1 if that Member has reliably notified that its domestic fishing capacity¹⁷ is substantially lower¹⁸ than that needed to cover the total allowable catch¹⁹ of exploited stocks²⁰ exclusively in the maritime domain²¹ of the Member.

III.3 Notwithstanding the provisions of Article III.2 above, a developing country Member that maintains or grants fisheries subsidies pursuant to paragraph 1 of this Article shall ensure that, even if fully utilized, the resulting fishing capacity²² will not exceed the level of sustainable catch of the exploited stock.

III.4 In the case of developing country Members, subsidies referred to in paragraph 1.d) of Article I of this Annex²³ shall not be prohibited, only if:

- a) they have as ultimate purpose the repair, renewal, modernization, or any other modification or improvement of physical port facilities, exclusively or predominantly dedicated to certain activities related to marine wild capture fishing²⁴ (for example, piers, mooring, fish landing and gathering facilities, as well as facilities for treatment of fisheries resources landed in port, and security and hygiene conditions);

¹⁶ See footnote 7, *supra*.

¹⁷ For the purpose of this Article, "domestic fishing capacity" means the capacity of fishing vessels flagged by a Member State, owned by companies constituted under the domestic law of that Member State, and operated by crews the members of which are in the majority nationals of that State.

¹⁸ For the purpose of this Article, "substantially lower" means less than [X%] of the capacity needed to cover the total allowable catch.

¹⁹ For the purpose of this Article, "total allowable catch" refers to quantitative limits imposed by the Member State on the catch of a given species or a group of species, which must be based on the best scientific information available and allow the maximum sustainable yield of the species or group of species to be reached or maintained without affecting existing fisheries or the marine ecosystem as a whole, in accordance with the United Nations Convention on the Law of the Sea and the FAO Code of Conduct for Responsible Fisheries.

²⁰ "Exploited stocks" shall mean all fish stocks that are being exploited below levels which are capable of producing a long term maximum sustainable yield (including the ones with no or almost no fishing activities), based on the best scientific evidence available.

²¹ For the purpose of this Article "maritime domain" refers to the areas subject to the sovereignty or jurisdiction of the Member State as established in the United Nations Convention on the Law of the Sea.

²² "Resulting fishing capacity" means the total capacity authorized by the Member for the fishing of a stocks or group of stocks within its jurisdiction, namely the domestic fishing capacity plus the capacity of other vessels authorized by the Member to fish within its jurisdiction.

²³ See footnote 7, *supra*.

²⁴ These activities are defined below in Article III.8.b and footnote 27 of the present article.

- b) they are granted or maintained in compliance with the FAO Code of Conduct for Responsible Fisheries.

III.5 Notwithstanding the provisions in Article VI (Notifications), to the ends of the abovementioned notification in Article III.2, and the grants established in Article III.3, a developing Member granting subsidies in compliance with the present article shall include in its notification to the Committee on Subsidies and Countervailing Measures a Register of vessels which shall contain information that will permit to establish *ex ante* the level of fishing effort in their operations regarding the fishing resource subjects to exploitation. To that end, it will be credited in the register the specific characteristic that properly describes the level of potential fishing effort of the vessel.²⁵ Similarly, physic changes or transformations in the vessels registered shall be informed, together with a measure of the variation in fishing effort, as the result of transformations occurred or the incorporation of new vessels to the Register.²⁶ Besides, the Register will contain a list with all valid fishing licenses belonging to vessels benefited by subsidies mentioned in Article III.1. These licenses shall apply solely for the species or group of species defined in accordance with the provisions of this Annex, and may not be used for the fishing of other species;

III.6 Subsidies mentioned in this article shall be subject to provisions of Articles I.2 (overexploited stocks), IV (unfavorable effects), V (fisheries management), VI (notifications) and VIII (dispute settlement) of this Annex.

III.7 Members shall give due regard to the needs of developing country Members in complying with the requirements of this Annex, including the conditions and criteria set forth in this Article and in Articles V (fisheries management) and VI (notifications), and shall establish mechanisms for, and facilitate, the provision of technical assistance in this regard, bilaterally and/or through the WTO Secretary. Members mentioned in paragraph 8.a *infra* shall have a time period of [X] years in order to implement the measures of this Annex.

III.8 Paragraphs 2 and 3 of this Article shall not apply to:

- a) developing country Members mentioned in paragraph a) of Annex VII.
- b) subsidies provided by developing country Members to fishing activities related to the subsistence of fishers and their families.²⁷

²⁵ For the purpose of this article, "specific characteristic that properly describes the level of potential of fishing effort of the vessel" means structural characteristics of fishing vessels, such as length of the boat, hold capacity, power of the main engine or working surface of the ship.

²⁶ For an effective application of this proposal, the disciplines contained in Article VI (Notifications) are fundamental.

²⁷ These are activities exclusively performed in jurisdictional waters, provided that (a) the activities are carried out by fishermen on an individual basis, or through organizations of few members, including, but not necessarily, the family members; (b) they satisfy the conditions to be classified within the lowest category of economic activity; and (c) the basic scope of the activities encompasses to obtain the means for family livelihood, including small scale profit trade.