

PAPER ON FISHERIES

Paper from the European Communities

The following communication, dated 11 May 2005, is being circulated at the request of the Delegation of the European Commission.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/75), also be circulated as a formal document.

1. Introduction

The EC shares the observation made recently by the Chairman of the Group, that negotiations on new rules for fisheries subsidies have significantly advanced in recent months. Discussions have moved on from the question of whether any disciplines are indeed possible or even desirable, and have increasingly focussed on the extent and form of such disciplines. This is a very positive development, and the EC commends members for moving so decisively in this very positive direction.

There is one crucial aspect, however, which has so far not received the attention of the Group which, in our view, it deserves. This is the issue of how any subsidy disciplines which are drawn up by the WTO on fisheries subsidies are actually implemented in practice.

2. Why is special enforcement of fisheries subsidy disciplines so important?

By the end of these negotiations, there is little doubt that the significant efforts made by Members in this Group will result in the drawing up of a very comprehensive set of rules prohibiting a whole range of subsidies which are currently allowed in the fisheries sector. It would be most unfortunate if these extensive efforts remained unrewarded because effective enforcement of any new rules had not been adequately addressed. It cannot be simply assumed that the creation of a WTO ban on fishery subsidies will automatically result in the discontinuance of such incentive policies without an effective enforcement mechanism.

Many may say that proper enforcement has never proved easy as the record under the current Agreement on Subsidies and Countervailing Measures (ASCM) has clearly shown. But, from the start of these negotiations, we have been breaking new ground. The aim is to create special sectoral rules for fish within the framework of the ASCM and the reason for this special treatment is that what is at stake is nothing less than the survival of many of our fish stocks and, most importantly, of the livelihoods of those depending on these resources. It is for that reason that it is worth going the "extra mile" to ensure that any ban that is agreed in these negotiations is faithfully implemented and enforced worldwide. All that is required is the same will from members as we have witnessed in identifying and banning harmful subsidies and any difficulties that may exist for the creation of effective enforcement and transparency rules can be overcome.

3. “Normal” enforcement mechanisms do not work for fisheries subsidies?

The legitimate question arises why the enforcement mechanisms applicable for WTO rules are not sufficient. For all sectors, the coverage of notifications is rather poor but it is particularly bad in the fisheries sector¹. This may be due also to the “local” nature of the fisheries sector in many countries. The EC notes that other Members have recognised this lack of transparency in their submissions to the Group and argued strongly for means to improve the situation.²

Second, effective transparency can help distinguish the distorting from the “virtuous” subsidies, i.e. ensure that capacity-enhancing subsidies are clearly identified as they are particularly harmful for the environment. The difficulty, however, is that the effects of these harmful subsidies are not immediately apparent and thus difficult to detect. Here, these subsidies lead to overcapacity of fishing vessels – an economic effect which takes time to become visible. This makes it difficult to find the “smoking gun”, i.e. the capacity-enhancing subsidy programme and the granting authority. This is exacerbated by the fact that in the fisheries sector the involvement of granting authorities at various levels of government is a common feature.

4. The EC’s experience concerning enforcement

The EC has, in its first submission on fisheries subsidies³, already shared with the Group its own experience on categorising harmful and virtuous fisheries subsidies and the rules that have been created to deal with the former. It may also prove useful for members to see how enforcement of these rules is administered in the Community. In fact, for this purpose the EC has put in place an elaborate internal state aid control system.

In essence, the system rests on four pillars.

All aid to the fisheries sector, whether financed from national or Community budget, needs to comply with the general rules as laid down in the EC’s regulation governing the Structural Fund for Fisheries (the Financial Instrument for Fisheries Guidance), in particular in relation to both the type and the allowed rates of aid.

- First, the principle of pre-notification and authorisation: Every subsidy needs to be notified to the authority in charge of operating the system (i.e. the European Commission) and authorisation obtained before it can be granted. If the planned subsidy scheme (programme) is not in line with the rules and overall policy objectives, it will be refused. Any subsidies granted unlawfully which are found incompatible with the rules must be repaid with interest. Transparency is ensured with claims, authorisations and rejections published and available on the internet⁴.

¹ See e.g. “*Environmental Benefits of Removing Trade Restrictions and Distortions: The Fisheries Sector*” Item 6 of the work programme, Note by the Secretariat, WT/CTE/W/167 of 16 October 2002 and WT/CT/W/167.Add1, of 19 June 2001; “*A Summary of Recent Work on Subsidies in the Fishing Sector*”, TC SUB/2004/Inf3, FAO Rome 2004; “*Environmentally Harmful Subsidies - Policy Issues and Challenges*” OECD Paris 2003; “*Hard Facts, Hidden Problems. A Review of Current Data on Fishing Subsidies*” A WWF Technical Paper. October 2001.

² See e.g. “*The Doha Mandate to Address Fisheries Subsidies: Issues*”, Submission from Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines and the United States, TN/RL/W/3 of 24 April 2002; “*Japan’s Basic Position on the Fisheries Subsidies Issue*”, TN/RL/W/11 of 2 July 2002.

³ TN/RL/W/82 of 23 April 2003.

⁴ See http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/stateaids_en.htm.

- Second, the principle of *ex post* surveillance: For any subsidy scheme which is in operation, annual reporting requirements ensure full transparency. Again as for pre-notifications, the system is fully transparent with the results published and made available on the internet⁵.
- Third, the incorporation of the rules and notification requirements into domestic law.
- The fourth pillar includes aids that, either because the amounts involved are small (*de minimis* rule), or because, having limited impact, they serve the objectives of conservation and sustainable exploitation of fisheries resources, as set out in the EC's Common Fisheries Policy, do not fall under the general principle of pre-authorisation. It should be stressed that, for both types there is an obligation to inform the Commission of all aids before they enter into force, and that *ex post* surveillance remains applicable.

5. Proposal concerning enforcement: domestic or WTO control

The EU is well aware that the enforcement system which it has established in the Community may not be ideal for the other Members to this negotiation. Nevertheless, in that it is a system which is applied to 25 sovereign countries it can at least serve as a guideline for identifying an enforcement system for WTO members. To take account of the differences which exist between Members in relation to transparency and enforcement it is proposed that a choice be provided as to the means by which Members demonstrate their adherence to the WTO rules. Essentially, the choice would be between a system of enforcement implemented domestically (the "domestic control system") or one imposed at the WTO level (the "WTO control system") – it should be understood of course that the substantive rules themselves would be the same, or at least have equivalent effect, for all members irrespective of which enforcement and transparency route they choose to follow. And, of course, it would also have to be ensured that any domestic control system was at least as effective as one applied at the multilateral level.

The WTO control system would need to entail a rigorous and continuous screening at the WTO level with requirements for both pre-notification and follow-up reporting of all subsidies given by all levels of government. The pre-notification to the WTO would have to be done in sufficient time for other members to examine the proposed subsidy or subsidy scheme (programme) for its WTO compatibility. Such a pre-notification mechanism already exists in other WTO Agreements (e.g. Technical Barriers to Trade and the Import Licensing Agreements). Follow-up reporting could be yearly and include, for example, data on the amounts granted in that year. Any subsidy which is not notified, or reported on, would be presumed prohibited.

By contrast, the domestic control system would rely essentially on an *ex post* monitoring system of the subsidies that are granted to the fisheries sector. Thus, Members opting for the domestic control system would have to put in place a rigorous and timely reporting system for non-prohibited subsidies (again for subsidies given by all levels of government). These periodic ex-post reports would have to be made readily accessible to the other WTO Members, for instance by placing them on a known internet site. Any subsidies not disclosed in due time in the domestic control system would be deemed prohibited. This means that there would be no presumption of prohibition if the ex-post reporting requirements were made mandatory under domestic law and were strictly respected. Members would need to notify changes in legislation that constitutes their domestic control system.

Clearly some form of de-minimis rules should be introduced. It is simply not possible to require that all subsidies, irrespective of size, require individual transparency and enforcement. The system would soon be overwhelmed by the sheer numbers involved. Block pre-notification and pre-

⁵ See *supra* footnote 4.

authorisation, as well as follow-up reporting and ex post monitoring, could be envisaged for the respective WTO and domestic control systems for de-minimis subsidies.

6. Special and differential treatment

The EC is well aware that some developing countries would, at least in the short term, face great difficulties in setting up a comprehensive domestic or WTO control system for fisheries subsidies, in spite of the de-minimis subsidies rules. In this context, of course, it should be borne in mind that the issues that are being addressed in this paper are transparency and enforcement and not the substantive rules on fisheries subsidies (e.g. prohibition, green box) for which developing countries will also require special treatment. Nevertheless, it is important that developing countries start a process whereby they would ultimately be in a position to ensure transparency and enforce any rules developed in the DDA negotiations.

Perhaps the best way forward here is to consider a phase-in period of several years for developing countries. During this phase-in, these countries should be given special help via an intensive programme on how to set up a comprehensive system for transparency and enforcement which could be either WTO based or introduced as a domestic control system. The Committee on Subsidies and Countervailing Measures could be charged with managing this programme which should be time framed. That is not to say that the Committee could not grant an extension in special circumstances but clearly there needs to be some incentive for developing countries to ensure that transparency and enforcement are progressively and systematically introduced.

7. Anticipated benefits of effective enforcement of new WTO disciplines

It is evident that the most important benefit resulting from an effective enforcement of fisheries subsidy disciplines is the real contribution it would make to the promotion of sustainable development. Increased transparency will not only generate knowledge about the types of subsidies given but will also provide a much needed insight into the impact of such subsidies both on trade and on the sustainable use of fishery resources. This information would also greatly enhance the ability of governments, the various international organisations, academia and civil society to gauge the effects of any fisheries subsidies that may still be given at the end of this DDA process.
