



**DISPUTE SETTLEMENT IN A WTO FISHERIES SUBSIDIES AGREEMENT:
DISCUSSION PAPER**

Communication from Canada

The following communication, dated 10 May 2019, is being circulated at the request of the Delegation of Canada.

1 CONTEXT

To meaningfully deliver on the Decision from MC11, an agreement on fisheries subsidies should be enforceable. Members have not so far engaged in detailed discussions on how dispute settlement would work in the context of such an agreement. The Dispute Settlement Understanding (DSU) provides a framework for the settlement of trade-related disputes. However, fisheries subsidies disciplines raise particular questions around dispute settlement, given that the WTO dispute settlement framework is geared towards ruling on and remedying trade effects, while fisheries subsidies disciplines also aim to address environmental effects. Moreover, Members have pointed to various specific issues that should be taken into account in the dispute settlement disciplines. The nature and extent of these challenges will be dependent on the disciplines ultimately adopted by Members.

This paper aims to generate discussion on the issue of dispute settlement, to determine which issues would merit further discussion. To that end, it identifies some of the areas where clarifications or adaptations to the dispute settlement framework could be considered and provides possible examples from WTO agreements that may be relevant, including the assessment of scientific issues, potential limits to the scope of issues that can be reviewed, the role of consultation mechanisms or alternative dispute resolution, and the appropriate nature of remedies. The goal of this paper is not to develop an exhaustive list of dispute settlement issues that may need to be addressed, but to ask pertinent questions to determine how Members envision the operation of dispute settlement for fisheries subsidies. We invite Members to come forward with additional issues and ideas.

2 ADDRESSING SCIENTIFIC ISSUES

Many of the proposed disciplines rely on scientific determinations that a panel may not be best placed to assess or review. This includes for instance proposed disciplines on subsidies to overfished stocks and proposed disciplines on subsidies leading to overfishing and overcapacity. If dispute settlement is to involve questions such as whether a stock is overfished or whether overfishing is occurring, then the dispute settlement rules may need to specify how panels, which usually deal with trade matters, should address those issues.

The presence of scientific elements in WTO disputes is not a new phenomenon and several WTO agreements offer ideas on how to address this issue. The DSU already provides, in Article 13, that panels have the right to seek information and technical advice and to request an advisory report from an expert review group on scientific and technical matters. Members may wish to consider whether this existing mechanism would be sufficient to address scientific issues in the context of a fisheries subsidies agreement.

If Members decide that enhanced or additional mechanisms are needed, other WTO agreements offer examples of what these mechanisms could be. One example, found in Article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), would be to direct panels to seek advice from experts on scientific and technical issues, for instance by consulting relevant international organizations or establishing an advisory technical experts group. There are many examples in practice where panels resorted to experts on technical and scientific issues in disputes under the SPS Agreement.¹ Another possibility would be to direct panels to rely on the expertise of specific international organizations with a fisheries mandate when looking at fisheries issues. Alternatively, disputing Members could be required to agree on an expert (or list of experts) on whom the panel could rely, on a case-by-case basis.

3 POTENTIAL LIMITS TO THE SCOPE OF ISSUES TO BE REVIEWED

Members may want to consider what elements of the agreement should be subject to dispute settlement and whether there are issues that panels can or cannot review. More specifically, many potential disciplines involve fisheries management issues such as the status of a stock and whether a vessel committed IUU fishing. If Members want to limit dispute settlement to subsidies issues, or to only certain aspects of the disciplines (e.g. whether necessary procedural steps were followed), it may be appropriate to be clear about the scope of what panels can review. This may be appropriate to ensure that decisions made under the DSU do not contradict or undermine decisions made by fisheries management organizations.

There is no provision in the DSU addressing this. Members could consider drafting supplemental provisions on what is reviewable (for instance, a provision akin to Article 17.6 of the Anti-dumping Agreement) or spelling out in each discipline what is reviewable in that discipline (for instance, the IUU discipline could stipulate explicitly whether a determination of IUU fishing by a Member is reviewable or is not).

4 CONSULTATION MECHANISMS/ALTERNATIVE DISPUTE RESOLUTION

Several Members have suggested that a robust consultation mechanism would allow Members to exchange information on fisheries subsidies and voluntarily rectify any harmful effect, thus minimizing reliance on litigation processes.

In addition to the consultations required before filing a panel request, Article 5 of the DSU already provides for the possibility for Members to use good offices, consultation and mediation procedures. These mechanisms could be used to allow for consultations on fisheries subsidies and their potential harmful effects.

Members could consider whether these existing optional mechanisms should be made mandatory for certain fisheries subsidies disputes. Members could also consider creating additional mechanisms for fisheries subsidies disputes. Those mechanisms could be in the context of dispute settlement (like Article 5 of the DSU) or established as a separate consultation process, outside the dispute settlement framework (as has been done under Article 13 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement)). A related question is whether any additional mechanism should be optional or whether Members should be required to use them before resorting to dispute settlement. In doing so, Members may also wish to consider whether accelerated timeframes would be appropriate for fisheries subsidies disputes, given the different nature of the impacts involved.

Members may also wish to examine whether there are other dispute settlement approaches, including in the context of other free trade agreements or in fisheries agreements or arrangements that may provide further insight into appropriate mechanisms for resolving disputes.

5 REMEDIES

The environmental nature of the disciplines envisioned is likely to create a need for Members to consider specific provisions on the remedies available in case of violation, while at the same time

¹ See for instance "EC – Approval and Marketing of Biotech Products", "Australia – Salmon", "Japan – Apples" and "EC – Hormones".

ensuring that such remedies are consistent with the broader mandate of the WTO. It is not clear whether the usual ways to enter into compliance under the SCM Agreement (withdrawing a subsidy or removing its adverse effects) would be adequate in the case of subsidies that are environmentally harmful. There may be a need to consider alternative or additional remedies that would mitigate the harmful effects already generated by the subsidy. This could include consideration of whether remedies should be retrospective, rather than only prospective.

Similarly, there may be a need to consider additional or alternative rules on recourse in case a Member does not implement the recommendations and rulings of a panel or the Appellate Body within a reasonable period of time. Article 22 of the DSU provides that, in such case, if no mutual compensation is agreed, the other party can request to the DSB to suspend the application to the Member concerned of concessions or other obligations. Resorting to Article 22 in the context of fisheries subsidies disputes may present certain challenges. First, the suspension of concessions would not address the environmental impacts of the non-compliance (although it may create an incentive to do so). Second, it is not clear how the level of the suspension of concessions would be determined, as there may not be a quantifiable nullification or impairment of the rights of the Member as a result from the violation. It may be worth exploring whether other forms of enforcement may be appropriate.

A related issue that Members may want to consider is whether countervailing duties should be available as a remedy to address prohibited fisheries subsidies. This mechanism may not be appropriate in the specific context of fisheries subsidies since it would not directly address the environmental effects of the subsidies.
