

FISHERIES SUBSIDIES

Proposal by Norway

The following communication, dated 24 January 2007, is being circulated at the request of the Delegation of Norway.

Over the last two years the discussion has progressed from a more conceptual phase to a phase where it is more focused on convergence. The discussion has become more specific but has been complicated by the fact that there are fundamental conceptual differences between a top-down and a bottom-up approach; although in practice – when necessary exceptions are being discussed – the differences may be smaller in reality. Nevertheless, in terms of legal drafting and the problem of crafting workable definitions that are simple and operational, these conceptual problems pose difficult challenges.

With this submission, Norway attempts to do two things: firstly to put forward a proposal that we hope can bring the discussion substantially further in terms of scope and ambition for a discipline on Fisheries Subsidies, and secondly to suggest a way in which such a discipline can be drafted so as to avoid some of the problems Members have pointed to during the discussions of previous proposals.

The text of Norway's proposal is set out in the Annex to this paper.

Scope of the discipline

Members have discussed this issue at length. There is no consensus on a general prohibition against all forms of subsidies in the fisheries sector. No-one has attempted to define what the fisheries sector is, although many Members are of the opinion that inland fisheries are outside the scope, that the aquaculture industry should be exempted, that there is a difference between inshore fisheries (subsistence, artisanal, small-scale, etc.) and fisheries on the high seas – where large-scale overcapacity is predominant and where the absence of national jurisdiction aggravates the problems and challenges of overfishing. Furthermore, there is no consensus on other kinds of government support to the processing industry – mostly in the form of, *inter alia*, price support for fishery products and support to build warehouses and freezing facilities.

Developing countries

Many small developing countries have been particularly troubled by the proposal to discipline government financing of access agreements. This mainly involves the access of foreign fishing vessels along the coast of African states, in the Indian and Pacific Ocean, predominantly for tuna vessels, to the fishing grounds of small island states that rely heavily on this form of income. We are not proposing to include access fees in the discipline; however we would be willing to consider suggestions that make it necessary for the fishing industry of developed Members to reimburse their governments for the financing of such access agreements.

On S&D, the issues raised by a large number of developing countries relate to small-scale and artisanal fisheries as well as the general issue of "policy space". These Members would like to have the option, although this might not be their current policy, of financing the build-up of fishing capacity. Such build up might be justified in the case of under-utilised fish stocks. The issue of "policy space" is also linked to the issue of the possibility of taking measures, as appropriate, for development purposes.

On the other hand, a number of developing country Members have called for stricter disciplines on the use of fisheries subsidies in general, as this is detrimental not only in relation to overcapacity and overfishing, but also because of the trade-distorting effects of subsidies in relation to access to markets, price undercutting by subsidised products in important world markets, etc.

Furthermore, 50 per cent of world trade in fish and fish products is generated by developing countries and seven of the world's top ten fish producers are developing countries. It would render this exercise with little effect if developing countries were granted full exemption from the discipline.

Small-scale and artisanal fisheries

Members have attempted to define this activity. India's and Brazil's proposals¹ are complicated and difficult to operationalize because they involve a set of definitions (up to ten) of discretionary parameters. This is implicitly recognised by the fact that the FAO has not been able to agree on a uniform definition of small-scale and artisanal fisheries.

Scope – revisited

According to an empirical study, the major bulk of government transfers to the fisheries sector are made by developed countries.² OECD figures on transfers demonstrate that, on average, around 70 per cent of the transfers are used to finance either biological research and fisheries management systems or are measures financing infrastructure, such as harbours and fishing community installations. These are all measures that the majority of WTO Members agree should fall outside the scope of the new discipline.

According to the above-mentioned OECD study, the remaining 30 per cent of government transfers are largely subsidies for the building of fishing vessels. In our approach, the initial discipline on Fisheries Subsidies should concentrate on overcapacity and overfishing, i.e. on subsidies that build up or maintain fishing capacity in one way or another. Thus we propose to focus on subsidies granted for the acquisition, building, maintenance, repair or up-grading of fishing vessels including any technical or electronic equipment onboard the vessel.

New rules in this area would thus, in real terms, be both ambitious and have a real impact, provided that we can find effective disciplines that take into account the range of political constraints described above, mostly relating to small-scale fisheries and considerations related to the development dimension.

A discipline for fishing vessels

A new discipline should therefore concentrate on the fishing vessels. The legal text that is being proposed by Norway takes this as its point of departure. In the proposal, a fishing vessel means

¹ TN/RL/W/203 and TN/RL/GEN/79/Rev.3

² "Subsidies in the OECD Fisheries Sector: A Review of Recent Analysis and Future Directions", Cox & Schmidt, OECD, Dec. 2002

any vessel intended for use for the purpose of commercial exploitation of fishing resources, including fish processing vessels and vessels engaged in transshipment.

Furthermore, we have made a distinction between large and medium-sized vessels on the one hand and small vessels on the other, assuming that most "damage" is caused by the larger vessels. This is mostly a function of their range of operation; they can move with high speed, and they have a large operational radius.

We have chosen to make this distinction applicable to all Members, particularly because it is very difficult to justify that there is a difference in the "damage" caused by a large boat from a developing country Member compared with that from a developed country Member. The distinction tries to extract the essence and at the same time avoid the pitfalls of complicated definitions, which in any case would be very discretionary. Thus, we do not attempt to define artisanal fisheries, small-scale fisheries, subsistence fisheries, etc. We simply chose to define a small boat as a proxy for a difficult definition and at the same time accept that even if the definition is crude, it is nevertheless simple and workable. Furthermore, the starting point that we have suggested is one of several options that could be used as a specific *de minimis* level – for example a level that is based on a numerical value indicating the amount of support per vessel, per programme or per country.

We base the distinction between large and small vessels on one parameter – the length of the fishing vessel. Even such a parameter is of course not without complications in terms of definition and circumvention – but if any criterion is the same worldwide – this will work for all Members. A criterion relating to fishing capacity on the other hand would not work. Members will probably not be able to agree on a uniform system that is acceptable to all, because Members apply very different systems: gross tonnage of vessel, volume of fishing hold, motor power of the engine, etc.

As a point of departure, we have chosen to set the limit for making a distinction between small and larger vessels at 15 metres. As we have previously stated, this limit of 15 metres applies to all Members, developing and developed alike. Some may say that this limit is arbitrary and to a certain degree it is. However, in our empirical research, we have found that this limit captures the various practices and realities in a wide range of different fisheries around the globe – namely small scale fisheries in one form or another.

S & D provisions

The implication of paragraph 2 of our proposal is that developing countries may subsidise fishing vessels up to 20 metres in length, provided that they fulfil certain conditions. We have drafted provisions that seek to address development aspects and needs by expanding on concepts put forward by other Members. We have thus set a new limit, 20 metres, and an additional criterion – that relates to the scope of operation of the vessels (this limit is, *inter alia*, reflected in India's proposal³ relating to its definition of artisanal fisheries).

Not all Members have declared Exclusive Economic Zones. However, the majority of Members have established areas of national fisheries jurisdiction, which in most known cases extends at least to between 4 and 12 nautical miles from the baselines. Again, this is a crude measure – and a proxy for saying that these vessels have a limited scope of operation – and thus less potential to cause harm in international fisheries. On the other hand, such limitation is difficult to monitor and enforce (for other Members). We therefore propose that a condition for developing countries granting a subsidy should be that the scope of operation of the vessel is limited through appropriate provisions of domestic law/regulations. Such provisions may be enforced by stipulating the relevant conditions for

³ TN/RL/W/203

granting the subsidy and/or when a fishing licence for the fishing boat is being issued. For obvious reasons, such conditions should be monitored and controlled, also after the subsidy has been granted.

The third parameter in the boat discipline is also only applicable for developing country Members and relates to a very difficult and perhaps controversial aspect – namely that of capacity build-up linked to underutilised fish stocks. Although we would stress that there are many good grounds for not allowing such capacity build-up, we have nevertheless sought to elaborate a discipline that would allow for such build-up for development purposes, and at the same time lay down certain criteria intended to ensure that such build up does not have undue detrimental effects on the fish stocks. Again, this poses certain definitional problems, but they are not insurmountable. Furthermore, it is clearly in the developing countries' own interest that such exploitation is conducted within sustainable limits.

There seems to be consensus that developing countries should not have "a blank check" in capacity build-up. We have drafted provisions whereby a condition for allowing capacity build-up is that the Member in question must elaborate a management plan to ensure that the stocks in the fishery in question are not endangered.

In our proposal, we have taken account of the discussion between Members relating to the role of the FAO and other international bodies. We have not envisaged any specific role for the FAO. However, in our view the scientific/biological bodies of RFMOs (Regional Fisheries Management Organisations), and other scientific and biological organisations, such as the ACFM (Advisory Committee for Fisheries Management) of the ICES (International Council for the Exploration of the Seas) are capable of assessing whether there are underutilised stocks in any particular part of the ocean. Such bodies are also well suited to assessing whether any particular management and exploitation plan will ensure that underutilised stocks are not overexploited.

We believe that our proposal adequately and realistically addresses the concern about not issuing a blank check. The element of discipline in the proposal is that any management plan shall be approved by an independent institution, *inter alia*, a biological research institute or an RFMO (provided that it has biological expertise).

Furthermore, the management plan must be notified to the WTO and may thus be subject to questions, discussion, etc. in the Committee on Subsidies and Countervailing Measures in cases where another Member is not satisfied that relevant conditions have been met by the subsidizing Member. In the event of a subsequent dispute, the issue would be whether an approval has been given and notified, not whether there was scientific or fishery reasons for giving such an approval.

Green box and the issue of actionability

This proposal is based on the simple concept of a new discipline as an additional element to the general discipline of the Agreement on Subsidies and Countervailing Measures (ASCM). This means in principle that all non-prohibited subsidies will continue to be permitted, even though they are actionable. In our view, the discipline should be additional and limited to the scope of that addition discipline, in other words in principle, we are only extending the list of prohibited subsidies in Article 3 in the ASCM.

As is clear from the proposal, the proposed discipline applies to certain subsidies directed towards fishing vessels. This implies that all other currently permitted subsidies (specific subsidies that confer a benefit within the meaning of the ASCM) are allowable, though actionable.

Any re-introduction of a green box in the ASCM poses both more general and definitional issues that have to be resolved in a satisfactory manner if they are to be included in a discipline in a meaningful way.

In addition to the issue of keeping all subsidies actionable versus a possible reintroduction of a green box discussed above, there are other considerations. Such reintroduction would, for instance when elaborating the scope/definition of the elements of the green box, pose the question of what kind of government measures fall within/outside the scope of the ASCM itself. Infrastructure measures and the financing of management systems are examples that spring to mind.

If we were to define green box exceptions, they would thus have to be government measures/transfers that are both, at face value, evidently specific and which confer a benefit (within the meaning of the ASCM). Certain types of social measures might fall within this category – typically relief/retraining/unemployment measures. Such measures could be of a more general nature and not specifically directed towards fisheries. Other categories could typically be related to "safety on board" measures or measures that aim to fulfil certain defined environmental objectives. More energy-efficient engines would be an example of this category.

On balance, we have not proposed the reintroduction of a green box although, as can be seen from our proposal, we have carved out in the proposal (footnote 3) certain subsidies from the general boat prohibition. This exception is very limited in scope, but addresses some of the government actions that many Members would find laudable – and could thus be considered "green" or "greenish". The exceptions we have proposed are all for good causes, such as:

- safety, exemplified by the installation of distress-signal apparatus or control and management equipment. An example of such support would be support to install tamper-free electronic fishing logbooks that would serve important scientific and management purposes as well as being essential instruments in combating IUU fisheries;
- satellite monitoring equipment is increasingly becoming an important instrument in world fisheries to control the activities of fishing vessels and to monitor prohibitions relating to specific fishing areas;
- equipment that reduces environmentally harmful emissions would also serve laudable purposes. Many Members apply special tax measures for environmental purposes in order to reduce emissions.

In spite of the merits described above, we have not defined such subsidies as green. We have recognized the utility of such exceptions by allowing them, but at the same time, for the reasons described in this chapter, recognized that such subsidies would fall within the category of actionable subsidies.

Decommissioning programmes

We have included the treatment of decommissioning programmes as a separate paragraph (paragraph 4) in the proposal. The reasons are twofold; first to emphasize that such programmes are not included in the prohibition, and second that such programmes are only acceptable as long as essential conditions are met. The vessel must be scrapped or otherwise permanently and effectively prevented from being used for fishing purposes anywhere in the world; and any funds or disbursements to a recipient benefiting from any such decommissioning programme must not be reinvested in fishing vessels by the recipient.

A related issue raised in the proposal from the European Communities⁴ is the possible subsidy for transfer of vessels – presumably used – to foreign owners. We have not included this specifically, as it would be covered by the existing prohibition in Article 3 of ASCM on export subsidies.

Transparency and notification requirements

A large number of Members have pointed to the inadequacies of the current notification regime. From our point of view, we recognise that a major reason for the lack of transparency is the fact that a large part of government transfers, which de facto are granted to recipients in the fisheries sector, cannot be identified in specific budget lines. Furthermore, Members may apply allocation criteria that are general in character, but that, when the selection is made, in fact benefit recipients in the fisheries sector. We do not have any specific proposals in this respect.

However, we have elaborated a proposal for an incentive mechanism to notify, in a specific form, which should also provide for greater transparency. This mainly relates to the exception clauses of the discipline. Although they are not captured by the prohibition, subsidies for building vessels, etc, of less than 15 metres must be notified, in order for them to be allowed. Similar provisions are included for the notification of S&D measures. This creates greater discipline and greater transparency, to the benefit of all WTO Members.

Thus, all programmes within the scope of exception from the general prohibition for all Members, including developing Members, must be notified in order for the exception to come into play.

Transitional periods and review

The proposal reflects the fact that we believe that it is useful to gradually "phase in" the application of the new discipline after three, five or ten years depending on the development status of the Member in question.

Furthermore, we propose that the Annex and its operational implications should be examined by the Committee on Subsidies and Countervailing Measures five years after its entry into force, in order to assess whether the new provisions contribute to the objective of reducing overcapacity and overfishing, and also to expand the discipline if warranted.

⁴ TN/RL/GEN/134

ANNEX [VIII] – FISHERIES SUBSIDIES

This Annex forms an integral part of the ASCM and covers additional provisions relating to certain subsidies in the fisheries sector.

[Contextual heading: Prohibited subsidies]

1. The following subsidies which confer a benefit⁵ and which are specific, as set out in Articles 1 and 2 of the ASCM, shall be prohibited:
 - 1.1. Any subsidy granted for the acquisition, building, maintenance, repair or up-grading of fishing vessels⁶ exceeding 15 metres overall length, including any technical or electronic equipment⁷ onboard the vessel.

[Contextual heading: Special and differential treatment for developing country Members]

2. Notwithstanding the provisions of paragraph 1 of this Annex, developing country Members may grant subsidies as set out under paragraph 1.1 to fishing vessels with an overall length of 20 metres or less and whose main area of operation is within that Member's area of fisheries jurisdiction extending up to 12 nautical miles from the baselines. Members shall, through their domestic law, ensure that this requirement is enforced after the subsidy is granted.
3. A developing country Member may nevertheless grant such subsidies as are listed in paragraph 1.1 to fishing vessels with an overall length of 28 metres or less, for the purpose of exploiting underutilised fish stocks within its area of fisheries jurisdiction, provided that any build-up of fishing capacity is consistent with a comprehensive resource management plan based on scientific advice for the sustainable management and exploitation of such fish stocks. The management and exploitation plan shall have been approved by an internationally recognised competent management or scientific body and the approved plan shall be notified in accordance with paragraphs 5, 6 and 7 of this Annex.

[Contextual heading: Special provisions]

4. Members shall through their domestic law ensure that:
 - 4.1. Any fishing vessel subject to a decommissioning programme is scrapped or otherwise permanently and effectively prevented from being used for fishing purposes anywhere in the world; and
 - 4.2. any funds or disbursements to a recipient benefiting from any such decommissioning programme are not reinvested in fishing vessels by the recipient.

⁵ The provisions set out in Article 14 of the ASCM shall apply whenever an assessment of whether a subsidy confers a benefit.

⁶ For the purpose of this Annex, fishing vessels means any vessel intended for use for the purpose of commercial exploitation of fishing resources, including fish processing vessels and vessels engaged in transshipment.

⁷ This comprises, *inter alia*, engines, fishing gear, fish-processing machinery or any other equipment onboard the vessel. The prohibition does not cover the installation of equipment for safety or for control and enforcement purposes. Neither does the prohibition cover equipment fitted for the purpose of reducing environmentally harmful emissions.

[Contextual heading: Notification requirements]

5. Any fisheries subsidy set out in paragraph 1.1:
 - (a) granted to fishing vessels of 15 metres overall length or less;
 - (b) granted under the exceptions set out in paragraphs 2 or 3 of this Annex;
 - (c) where the provisions of paragraph 4 of this Annex apply; or
 - (d) granted during the transitional periods as specified under the provisions set out in paragraphs 8 or 9 of this Annex;

shall be notified to the WTO and to the Committee set out in Article 24 of the ASCM in advance of its implementation. Any such notification shall be made, *mutatis mutandis*, in accordance with the provisions of Article 25 of the ASCM.

6. For any other fisheries subsidies, the notification requirements of the ASCM apply in their entirety.
7. Any subsidy granted under the provisions of this Annex which is not notified to the WTO shall be considered to be prohibited for that Member. Members who do not grant any subsidies subject to the notification requirements of paragraphs 5 and 6 of this Annex shall notify that no such subsidies have been granted.

[Contextual heading: Transitional periods]

8. The provisions set out in this Annex shall apply after a transitional period of three years, except for developing country Members and for least-developed country Members, for which the provisions apply after a transitional period of five years and ten years respectively from the entry into force of this Annex. The applicable transitional period shall be used to bring subsidy programmes in conformity with this Annex.

[Contextual heading: Least-Developed country Members]

9. If a least-developed country Member deems it necessary to apply subsidies prohibited under this Annex beyond the ten-year transitional period, it shall not later than one year before the expiry of this period enter into consultation with the Committee on Subsidies and Countervailing Measures, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the least-developed country Member in question. If the Committee determines that the extension is justified, the least-developed country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the least-developed country Member shall phase out those fisheries subsidies within three years from the expiry of the last authorised period.

[Contextual heading: Review]

10. The provisions of this Annex shall be reviewed by the Committee on Subsidies and Countervailing Measures after a period of five years from its entry into force with a view to making any necessary modification to this Annex.
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