

**ACCESS FEES IN FISHERIES SUBSIDIES NEGOTIATIONS**

Communication from the ACP Group

The following communication, dated 1 June 2007 is being circulated at the request of the ACP Group.

1. For the purpose of this communication, Fisheries Access Agreements ("FAAs") are defined as contractual arrangements whereby governments or private fishing fleets pay coastal states for access to fisheries resources within the coastal states' exclusive economic zones ("EEZ").<sup>1</sup> The UNCLOS<sup>2</sup> provides the legal basis and economic motivation for the negotiation of access agreements between coastal states and distant water fishing nations ("DWFNs") or their fleets. In addition, it clearly states that access agreements may be subject to terms and conditions including the "payment of fees and other forms of remuneration"<sup>3</sup>, commonly referred here to as fishery access payments. We understand that FAAs come in two main forms. They may be *government-to-government* (whereby the DWFN government purchases fisheries access rights from coastal state governments), or *private-to-government* (whereby the private sector of the DWFN purchases those fisheries access rights from the coastal state governments).<sup>4</sup> It is the former that falls under the ambit of WTO fisheries subsidies negotiations and hence forms the subject matter of this communication.

2. Through a stocktaking exercise, we note that a few of proposals on fisheries subsidies tabled within the Negotiating Group on Rules have addressed the issue of fishery access payments. There is a general agreement amongst the WTO membership that government-to-government payments are not subsidies and hence should be excluded from a subsidy prohibition. We commend the United States for articulating an explicit exclusion of government-to-government transfer of funds for obtaining access rights from the scope of new disciplines. However, this exclusion does not constitute a concession from a negotiating standpoint. Government-to-government transfers of funds clearly constitute state-state payments for the legitimate trading of a natural resource consistent with the UNCLOS. Pursuant to Article 1.2 of the SCM Agreement, a subsidy defined in Article 1.1 is subject to the SCM Agreement disciplines regarding prohibited subsidies (Part II), actionable subsidies (Part III) and countervailing measures (Part V) only where the alleged subsidy is "specific". Article 2 of the SCM Agreement provides that a subsidy must be "specific to an *enterprise or industry or group of enterprises or industries ... within the jurisdiction of the granting authority*". The transfer of funds

<sup>1</sup> The breadth of the EEZ is an area not exceeding 200 nautical miles from defined baselines. Article 57, 1982 United Nations Convention on the Law of the Sea ("UNCLOS").

<sup>2</sup> Refer to UNCLOS Article 62.4(a) which states that where a coastal state does not have the capacity to harvest its determined entire allowable catch, "it shall, through agreements or other arrangements ... give other States access to the surplus of the allowable catch".

<sup>3</sup> Article 62.4(a), UNCLOS.

<sup>4</sup> International Centre for Trade and Sustainable Development (ICTSD), Natural Resources, International Trade and Sustainable Development: Fisheries Access Agreements, 2006, pp. 73-74 <[http://www.trade-environment.org/output/icts/resource/Fish\\_accessagreements.pdf](http://www.trade-environment.org/output/icts/resource/Fish_accessagreements.pdf)> accessed 17 April 2007

from a DWFN government to a coastal state *government* does not result in a subsidy that is specific to an *enterprise or industry*, and certainly not to one *within the jurisdiction* of the DWFN. Furthermore, they would not qualify as a subsidy subject to current disciplines of the Agreement on Subsidies and Countervailing Measures ("ASCM").

3. The debate today is steered towards a second-level of transactions relating to FAAs, which deal with the onward transfer of fishing rights from the DWFN government to its private fishing fleets and the possibility of a subsidy component therein. A reported characteristic of some government-to-government FAAs is that the DWFN government transfers those access rights to its private fishing fleet for less than the full amount of the access fees paid to the coastal government.

4. To address this issue, **Brazil**<sup>5</sup> has proposed specific language as follows, "In case of a government-to-government payment for access by foreign vessels to fishing resources of a developing country's maritime jurisdiction or to quotas or any other rights established by any regional fishery management organization or arrangement ("access rights"), a fishery subsidy shall be deemed to exist if a benefit is conferred in the onward transfer of those access rights from the paying government."

5. **Argentina**<sup>6</sup>, in its most recent proposal states that there is "a growing consensus that government-to-government payments are not deemed to be fisheries subsidies."<sup>7</sup> Yet Argentina's proposal also provides that "[I]t is understood, however, that the general disciplines [on fisheries subsidies] should include the instances in which the transfer of such rights by a government to specific enterprises is not done in exchange for a fair trade price".<sup>8</sup>

6. **Norway**, as we understand, has not proposed a textual language, but has expressed willingness to consider suggestions along the lines of mandating the fishing industry of developed Members to pay back their governments for the financing of such arrangements.

7. The **US**<sup>9</sup> proposal considers onward transfer of access rights to be actionable under certain conditions. The proposed Article 2.2 of TN/RL/GEN/145 reads, "The further transfer of those access rights to the Member's fishing fleet is covered by this Annex but is not prohibited under Article 1, provided that: (i) the Member's fishing fleet pays compensation comparable to the cost the fleet would otherwise have to pay for access to the fisheries resources; (ii) the terms and conditions of access, including the compensation paid by the fishing fleet, are published; and (iii) the access arrangement provides for a science-based assessment and monitoring of the status of the fisheries resources in question and for compliance with applicable fishery management systems".

### ***Concerns of the small coastal and island states of the ACP Group***

8. The role of revenues from fishery access payments in the economic development of small island and coastal states of the ACP is very significant and cannot be underestimated. As an example, according to a study commissioned by the International Centre for Trade and Sustainable

---

<sup>5</sup> WTO document TN/RL/GEN/79/Rev.4, 13 March 2007

<sup>6</sup> WTO document TN/RL/GEN/138/Rev.1, January 2007.

<sup>7</sup> Paper from Argentina, Fisheries Subsidies: Special and Differential Treatment, TN/RL/GEN/138/Rev.1, 26 January 2007, para. 6.

<sup>8</sup> *Ibid*, Para. 6. This can be contrasted with Argentina's earlier, broader, proposal which states, "Payments or other financial transfers received in direct or indirect exchange for access by foreign vessels to fishing resources of a developing country's EEZ or any other rights established by a regional fisheries management organization shall be exempt from the prohibition [on fisheries subsidies]". Paper from Argentina, Fisheries Subsidies: Special and Differential Treatment, TN/RL/GEN/138, 1 June 2006, p. 5.

<sup>9</sup> WTO document TN/RL/GEN/145, 22 March 2007

Development (ICTSD)<sup>10</sup>, more than 25 per cent of total government revenue is obtained from access fees in several of the Pacific Island Countries. Access fee income (apart from direct impacts on revenue generation), have an indirect and positive impact on employment generation, value-addition (growth of upstream and downstream activities) and stimulating effects on the development of fishing efforts in coastal and island states. Hence, all transactions relating to fisheries subsidies including onward transfer of rights should be excluded from disciplines as bringing any element of fisheries access arrangements into the scope of new disciplines would have a bearing on the total amount of fishery access payments made at the government-to-government level.

9. We are all aware that for a financial contribution to be considered as a subsidy under the ASCM, it is necessary that it confers a benefit on a recipient. The notion of "benefit", within the meaning of the provisions of the ASCM, refers to the requirement that the financial contribution "places the recipient in a more advantageous position" with jurisprudence confirming that the "only logical basis for determining the position of the recipient ... absent the financial contribution is the market".<sup>11</sup> Since the fishery access payments made are usually the result of a series of bilateral negotiations with the DWFNs, there appears to be no workable "market" benchmark against which one can examine whether the recipient is better off than it would otherwise have been.

10. An additional complicating factor is that it is not always easy to segregate whether the amount paid in "access fees" by a DWFN government to the coastal state represents only the commercial rate for access to those fisheries or also includes a component of development assistance. The Appellate Body has confirmed that the interpretation of "benefit" in Article 1.1(b) should focus on whether there is a benefit to a recipient rather than a cost to government.<sup>12</sup>

11. We thus remain convinced that all transactions related to fisheries access fees should be exempted from any new disciplines on fisheries subsidies. While an explicit exclusion of government-to-government transfer of funds is merited under new rules for purposes of security and predictability, the onward transfer of DWFN rights should also be treated as non-prohibited and non-actionable for all of the reasons outlined above.

---

<sup>10</sup> Mbithi (2006), "Fisheries Access Agreements – Trade and Development Issues", Issue Paper no.2, International Centre for Trade and Sustainable Development, April 2006, pp. 13

<sup>11</sup> Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, para. 9.112. Endorsed in Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, paras. 149-161.

<sup>12</sup> *Ibid*, para. 155.