

**FISHERIES SUBSIDIES: CONTINUATION OF WORK ON
SPECIAL AND DIFFERENTIAL TREATMENT**

Paper from Argentina

The following paper, dated 11 June 2007, is being circulated at the request of the delegation of Argentina.

I. INTRODUCTION

1. The Chairman of the Rules Group has initiated a technical consultation process on various aspects relating to negotiations on the future fisheries subsidies discipline. In this context, on 30 January 2007, he circulated a "non-paper" in which he set forth a number of questions on various aspects of the proposals submitted to date, notably on the possible inclusion of "sustainability criteria".
2. Bearing in mind that its proposal on special and differential treatment (TN/RL/GEN/138 and TN/RL/GEN/138/Rev.1) includes elements relating to sustainability, and notwithstanding the oral replies given at the meetings of 12 and 13 February and 27 and 28 March, Argentina felt that it should submit this paper as a further contribution to the discussions.
3. It should be noted that from Argentina's point of view, special and differential treatment should grant developing and least-developed countries the flexibility to implement policies to develop, within sustainable limits, their national fishing capacity, and to grant subsidies to artisanal fisheries.

II. "NON-PAPER" FROM THE CHAIRMAN DATED 30 JANUARY 2007

4. Two sets of questions posed by the Chairman in his "non-paper" of 30 January 2007 are addressed below from the perspective proposed by Argentina in papers TN/RL/GEN/138 and TN/RL/GEN/138/Rev.1.

A. National fisheries management systems: During the December discussion, there was broad support for the idea that any Member that would be permitted to provide an otherwise prohibited subsidy (either via a horizontally-applicable exception or via S&D provision) would need to have in place a sound national fisheries management system.

Questions to be answered include:

Would a requirement that national fisheries management systems be "in keeping with" the *FAO Code of Conduct for Responsible Fisheries* be sufficient, and if so how would "in keeping with" be defined?

5. In paper TN/RL/GEN/138/Rev.1, Argentina listed a number of subsidies which should be prohibited by the future discipline, but to which developing countries could have recourse under certain cumulative conditions (Articles X.2 and X.3 of the draft legal text in paper TN/RL/GEN/138/Rev.1). One of these conditions is that developing country Members intending to grant or maintain such subsidies shall demonstrate that "*they have a national fisheries management system in line with the FAO Code of Conduct for Responsible Fisheries (1995)*" (Article X.3(c) of the draft legal text).

6. The relationship established between the national fisheries management system and the 1995 FAO Code of Conduct would be similar to that required, for example under the TBT or SPS Agreements, between technical regulations or sanitary or phytosanitary measures and "relevant international standards" or "international standards, guidelines or recommendations" (for SPS, the Codex Alimentarius for instance) which are of a voluntary nature.

7. The literal meaning of the expression "in keeping with"¹ is such that no additional definition would be needed, since the expression in itself indicates that the national fisheries management system must be in "in harmony with" or "in conformity with" the 1995 FAO Code of Conduct, i.e. it must follow the principle guidelines of the Code of Conduct for Responsible Fisheries in respect of good fishing practices.

How relevant, if at all, to WTO rule-making are the possible legal implications for the Code of Conduct in the FAO context of any explicit requirement related to it at the WTO? In particular, is it a matter of concern for WTO that some elements of the Code, which is a voluntary instrument, could have legal consequences for WTO Members via a WTO rule?

8. Linking the future discipline on fisheries subsidies to an international standard involves a practice that is not unknown in the WTO Agreements (TBT or SPS). Although the 1995 FAO Code of Conduct for Responsible Fisheries is by and large a voluntary instrument, the majority of its provisions are mandatory as they either incorporate binding international instruments² or form part of customary international law.³

9. It should also be kept in mind that the countries participating in the FAO Committee on Fisheries (most of which are also WTO Members) review the implementation of the Code of Conduct for Responsible Fisheries every two years and propose steps to ensure that it is implemented correctly, thus contributing to its validity as a universally recognized guide to good fishing practices.

If no reference were made to the Code of Conduct itself, what would be the necessary elements of a sound national fisheries management system?

¹ According to the New Oxford Dictionary of English (page 1001), the expression "in keeping with" means "in harmony with" or "in conformity with".

² Article 1 of the FAO Code of Conduct states that "This Code is voluntary. However, certain parts of it are based on relevant rules of international law, including those reflected in the United Nations Convention on the Law of the Sea of 10 December 1982. The Code also contains provisions that may be or have already been given binding effect by means of other obligatory legal instruments amongst the Parties, such as the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993, which, according to FAO Conference resolution 15/93, paragraph 3, forms an integral part of the Code".

³ Cf. UNEP document "Sustainability Criteria for Fisheries Subsidies", 2007, page 16: "The Code of Conduct represents a substantial and growing body of international norms of responsible fishing. The Code itself enjoys a breadth of support and an absence of dissent that is rare even for a "voluntary" agreement. And many of its core elements are replicated in binding international instruments, including UNCLOS, the UN Stocks Convention, and the UN Compliance Agreement".

10. The Code is a comprehensive instrument establishing the principles and standards applicable to the conservation, management and development of fisheries. Hence, in Argentina's view, it would be unwise to identify only some of its principles or concepts for inclusion "in isolation" in the future fisheries subsidies discipline. Removing such principles or concepts from their context would necessarily lead to their re-wording or re-interpretation, a task which would clearly exceed the WTO's specific sphere of competence.

What, precisely, would a country's obligation be, i.e. would having legislation in force that *de jure* contained certain required elements (e.g. scientific stock assessments, licensing, quotas, data reporting, etc.) be sufficient or would each element need to respond to specified criteria?

11. In order to grant or maintain the subsidies prohibited by the general discipline, a developing country would have to prove that a national fisheries management system had been incorporated into its domestic legislation and that the principles and elements of this system were "in keeping with" those required under the 1995 FAO Code of Conduct for Responsible Fisheries. Such elements would therefore have to meet the "criteria" set forth in the Code.

Would having legislation be enough, or would be the country in question also have to demonstrate that it was enforcing its own law adequately?

12. A developing country Member intending to maintain or grant fisheries subsidies under special and differential treatment would have to ensure, *inter alia*, that it had a "valid" national fisheries management system in keeping with the 1995 FAO Code. In accordance with the Code, this would have to include an adequate system of monitoring, surveillance and penalties to ensure compliance with good fishing practices, since it is assumed that a State has the obligation to enforce its own domestic legislation.

13. With regard to the effective incorporation of the Code's guidelines into domestic legislation, it should be noted that FAO has been working on this issue for several years. Pursuant to Article 4 of the Code, the FAO Committee on Fisheries (COFI) is required to monitor the Code's implementation. To this end, a questionnaire was prepared and sent to all FAO Members, and the results were used to provide COFI with information on the domestic measures adopted to implement the Code.⁴

What sort of notification would be needed, and how frequently?

14. The lack of transparency in the field of fisheries subsidies is a problem recognized by all Members, so that strict disciplines in this area are necessary. Argentina has therefore proposed that future disciplines relating to transparency also extend to special and differential treatment.

15. Notifications should be comprehensive enough to demonstrate that the conditions authorizing special and differential treatment are met. The developing country Member should provide information on the state of the resource upon which the fishery for which the subsidy is intended relies and on the fulfilment of the other conditions established in the discipline. Such notification must be given when adopting or planning a fisheries subsidies programme, and there should be an obligation to provide regular notifications so that the rest of the Members are kept informed of the programme's development.

Would compliance be self declared? If the subsidizing Member had to demonstrate that it had such a system in place, what sorts of information would need to be provided for such a demonstration?

⁴ For further information go to the following link: <http://www.fao.org/docrep/meeting/003/x9187e.htm>.

16. In taking recourse to special and differential treatment, a developing country Member must demonstrate that it is in the situation described in Article X.2 and that it fulfils the conditions set forth in Article X.3 of the draft legal text proposed in papers TN/RL/GEN/138 and TN/RL/GEN/138/Rev.1. In other words, it must provide data, including objective biological indicators, on the state of the fisheries resource, and information on compliance with standards applicable to fisheries and with other measures adopted in this regard which aim to preserve fisheries resources and which comply with standards included in specific international instruments, such as the 1995 FAO Code of Conduct.

In reviewing any such demonstration or self-declaration, what sorts of substantive criteria would be needed to judge compliance?

17. The necessary criteria are set forth in the 1995 FAO Code of Conduct for Responsible Fisheries.

What sort of notification review process and what specific DS mechanisms would be necessary for judging compliance?

18. No changes would need to be made to regular DSU mechanisms. As for the review process, Argentina has duly expressed its support for the idea of creating a broad review mechanism on fisheries subsidies.

What sort of specialized expertise would be needed to make any such judgements, and how could WTO obtain that expertise? Would a standing expert body be required, or would an ad hoc approach suffice?

19. Article 13 and Appendix 4 of the DSU already provide that a panel may request information or technical advice from any individual or body which it deems appropriate. In the case of fisheries, arrangements different to those already in place are not considered necessary.

B. Exploitation status of a fish stock as basis to allow/prohibit certain subsidies

Surplus

Would the individual countries be responsible for determining the level of MSY or total allowable catch for a given fishery, the level of current exploitation, and thus the existence of a surplus? On what would it demonstrate that these conditions were fulfilled?

20. The Argentine proposal reflects Article 61 of the United Nations Convention on the Law of the Sea which provides that "*The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone*". National authorities are therefore responsible for determining the levels of exploitation, taking account of the conservation and preservation of living resources.

21. In order to ensure, however, that such a determination is acceptable from the point of view of conservation, footnote 7 of the draft legal text proposed by Argentina in paper TN/RL/GEN/138/Rev.1 sets forth the minimum standard to be complied with when making the determination. It 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 Code of Conduct for Responsible Fisheries*".

Would all countries be expected to apply a uniform methodology in performing these assessments?

22. Not necessarily all developing Members would have to use the same methodology⁵, although assessments must satisfy the established standards.

How would the reliability of assessments of a surplus be judged, e.g. the soundness of the stock assessment process (in which case, what standards would be applied, and how would WTO know which were the right standards?); or on the basis of the results, i.e., absolute calculations of fishing capacity and total allowable catch, or similar concepts (in which case, what data sources could be used to corroborate the results?)?

23. The reliability of an assessment derives from the extent to which the determination is based on procedures that are widely accepted at international level. For instance, methods for assessing fishery resources are standardized and of almost universal implementation, e.g. "Manual of Methods for Fish Stock Assessment - Part 1, Fish Population Analysis (FAO)".

24. It should be noted that the Code of Conduct for Responsible Fisheries indicates the importance of taking into account, *inter alia*, the following elements: uncertainties relating to the size and productivity of the stocks, biological reference points and risk analysis, levels and distribution of fishing mortality, the impact of fishing activities, including discards and bycatch, and the environmental context, including the socio-economic dimension. A developing country Member must therefore be able to provide the essential information on which its assessment is based.

Could FAO assessments be used as a backstop to country self-assessments (in the sense that a country could not declare a surplus of a stock that had been identified by FAO as depleted or over-exploited)?

25. Given that the required scientific assessment must be formulated in accordance with recognized international standards, no other sources would be needed.

To the extent that enforcement relied upon outside data sources (e.g. the FAO) how could it be ensured that the legal status of the data in the WTO context would not cause the data to become unreliable (overly optimistic as to stock status)?

26. Argentina's proposal in paper TN/RL/GEN/138/Rev.1 suggests a system in which it would not be necessary to have recourse to outside information or statistics.

What sort of mechanism(s) and institutional arrangements would be needed at WTO to verify the existence of a surplus?

27. No specific institutional arrangement would be necessary, since the role of the WTO, the panels or the Appellate Body would not be to determine the existence of a surplus, but to verify that the national determination had been made in accordance with recognized international methods and on the basis of the scientific information available.

⁵ For example, Article 7.6.6 of the Code of Conduct for Responsible Fisheries acknowledges that recognition should be given to the particularities of indigenous peoples and local fishing communities which are highly dependent on fishery resources for their livelihood.

Would the process of notification and review involve verification of surpluses and/or soundness of assessment methods? On the basis of what information could this be done by a WTO Committee?

28. We support the idea of a broad notification and monitoring process. As is the case in the various WTO committees, the information would be based on countries' contributions and be subject to a multilateral review process.

Would panels be called upon to verify existence of surpluses and/or soundness of assessment methods? If so, how? Would this imply in all such disputes the need for assistance from experts?

29. Panels must not decide on specific issues of fisheries management, such as the maximum sustainable yield (MSY) or surplus species. If assistance from experts were needed, recourse could be taken to the procedures already provided for under Article 13 and Appendix 4 of the DSU.

What sorts of safeguards could be used to prevent subsidized capacity from moving to a fishery where no surplus existed (including from being used in IUU fishing)?

30. In the Argentinean proposal, recourse to a subsidy programme is limited to a particular species or group of species. Moreover, licences would not be applicable to the exploitation of fisheries that do not offer sustainable exploitation conditions.

How would the rules operate where, within the area of operation of the subsidized vessel there is a mixture of surplus and over-exploited species? How would further depletion of the over-exploited species be prevented?

31. The Argentinean proposal takes this situation into account, since it stipulates that the requirements must be met whether in respect of a species or group of species. Subsidies could not be used to increase national capacity unless selective fishing gear or manoeuvres could be used to exploit the fishery in question.

Where the species in question was a cross-boundary or highly-migratory stock, how could the rules ensure that the subsidies of one country would not affect the rights of others in respect of the same fishery?

32. Argentina is aware that the disciplines must take into account the issue of shared species and feels that this matter should be discussed in detail at Negotiating Group meetings. One option would be to exclude from special and differential treatment the possibility of using subsidies when the intention is to exploit shared species.

Would there be a role for RFMOs' quota enforcement mechanisms in this regard (where applicable)?

33. Argentina's proposal envisages the possibility of subsidizing when quotas are granted within the framework of an RFMO. Consequently, in such cases, it would be possible to resort to a mechanism of this type.

How can it be ensured that, at the time of subsidization, the surplus will persist over the foreseeable lifespan of the subsidized new vessel? (That is, what to do where the surplus may last for only a few years, while the lifespan of the vessel would be 20-30 years?)

34. In order to comply with the requirements set forth in Argentina's proposal, the number of vessels in the fishery (including subsidized vessels) must correspond to a balanced MSY.⁶ Moreover, the existence of a fisheries management plan in keeping with the Code of Conduct for Responsible Fisheries would ensure that the means were in place to address any eventual decline in fishing resources.

Given the typical time lag between performing a stock assessment and publication of the results (published data are usually lagged by 2-3 years) how could it be ensured that by the time data became available, the reported surplus still existed?

35. Given that the system proposed by Argentina does not depend on the publication of results, the above problem would not be relevant. Nevertheless, it should be noted that the majority of management systems publish their figures immediately.

⁶ Cf. UNEP document "Sustainability Criteria for Fisheries Subsidies", 2007, page 4: "A leading benchmark in efforts to define fishery health is the concept of "maximum sustainable yield" or "MSY". Both the UN Convention on the Law of the Sea and the UN Code of Conduct for Responsible Fisheries identify MSY as the overarching objective of fisheries management, as do a number of other international instruments. According to the FAO, MSY can be defined as: The highest theoretical equilibrium yield that can be continuously taken (on average) from a stock under existing (average) environmental conditions without affecting significantly the reproduction process."