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Options for the Legal Form of a WTO Agreement on Fisheries Subsidies

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Reference Paper

Options for the Legal Form of a WTO Agreement on Fisheries Subsidies

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LIST OF ABBREVIATIONS

DSU	Dispute Settlement Understanding
GATT	General Agreement on Tariffs and Trade
SCM	Subsidies and Countervailing Measures
SDG	Sustainable Development Goal
TFA	Trade Facilitation Agreement
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

FOREWORD

New rules to discipline harmful fisheries subsidies are a crucial contribution that members of the World Trade Organization (WTO) could make towards the United Nations 2030 Agenda for Sustainable Development. Buoyed by the 2030 Agenda's specific target 14.6, which references the talks, negotiations have intensified with the aim of achieving an outcome on the issue at the WTO's Ministerial Conference in December 2017.

The WTO is in many ways the logical choice of framework within which to build new rules to address the perverse economic incentives at play in the global fishing industry. However, given the WTO's primary role as a framework governing trade and economic relations, negotiations with an environmental objective present a unique challenge. Negotiators are faced with difficult choices, not only regarding the substance of the obligations, but also regarding their legal form, their level of enforceability and, more broadly, how to fit a new agreement into the existing WTO legal framework as seamlessly as possible.

This paper, co-authored by Lorand Bartels and Tibisay Morgandi, contributes to ICTSD's ongoing support to the fisheries subsidies negotiation by examining the different ways in which fisheries subsidies rules could be given legal form within the WTO framework. Lorand is Reader in International Law at the University of Cambridge, while Tibisay is a Post-Doctoral Fellow at the Cambridge Centre for Environment, Energy and Natural Resource Governance at the University of Cambridge. Their paper presents a range of possible legal forms available to negotiators, from enforceable stand-alone multilateral agreements through to Ministerial Decisions and Declarations and plurilateral options. The paper's frank discussion of the benefits and limitations of each possibility aims to help negotiators to make informed decisions in view of the legal, political and practical implications of each option available to them. Importantly, it also considers how different options might be combined or used sequentially as part of a longer process of reform within the WTO framework.

WTO members have a tremendous opportunity at their Ministerial Conference in December 2017 to make meaningful progress on rules on fisheries subsidies that could support the sustainability of the world's fisheries for generations to come. We hope that this paper will assist negotiators as they build just such an agreement.

Ricardo Meléndez-Ortiz

EXECUTIVE SUMMARY

This reference paper examines a range of options for the legal form of disciplines on fisheries subsidies within the framework of the WTO.

There are five primary options. The first two possibilities are stand-alone, legally binding multilateral agreements, either in the form of an annex to the Subsidies and Countervailing Measures (SCM) Agreement (Option A) or a new multilateral agreement included alongside the existing Multilateral Agreements on Goods (Option B). An agreement in either of these forms would be enforceable through the WTO's dispute settlement system. Under Option A, members could more elegantly reference existing definitions in the SCM Agreement and could more easily use the existing subsidies committee to administer the agreement. Under either Option A or Option B, members would need to decide whether to use the general rule regarding "countermeasures" in dispute settlement or the more flexible SCM rule. Adoption of these options requires consensus or a two-thirds majority vote.

A third set of options concerns Ministerial Decisions. These can set out authoritative interpretations (Option C1) or waivers (Option C2) which are less relevant in the context of fisheries subsidies. More relevantly, a third kind of Ministerial Decision is frequently used to signal legal changes (Option C3). Ministerial Declarations (Option C4) have also been used to similar effect. Declarations are usually used to express factual agreement, while both Decisions and Declarations can also be used to signal a political commitment to undertake certain conduct. Both Decisions and Declarations have the same legal status, which is essentially interpretative, but carries strong political weight. Whether to use one or the other appears to be largely a diplomatic choice. Their adoption requires consensus, or a simple majority vote.

A fourth option (Option D) would see members individually inserting commitments on fisheries subsidies into their schedules of concessions on trade in goods pursuant to a Ministerial Decision. The main challenge with implementing this approach is political; because the commitments would be enforceable, members making them might want to coordinate, so that commitments among a "critical mass" of members entered into effect at the same time. Finally, members could choose to adopt a plurilateral agreement on fisheries subsidies (Option E) that could be added to the WTO Agreements. This would be enforceable only as between those members who joined it, but could establish more ambitious disciplines among willing members and act as a benchmark for multilateral negotiations.

From a purely political standpoint, there is an obvious trade-off between enforceability and political feasibility. A stand-alone multilateral agreement would establish commitments for all members that would be enforceable under the WTO dispute settlement system, but would require consensus. Members could also consider building towards an enforceable new agreement via a trajectory from a Declaration to a Decision and finally to a formal amendment of the WTO Agreements.

1. INTRODUCTION

This paper looks at various legal options for implementing possible WTO disciplines to reduce fisheries subsidies. It considers several scenarios.

The first scenario assumes the adoption of a stand-alone text with multilateral effect. The main questions concern how this should be done; that is, as a new multilateral agreement on goods (following the model of the 2017 Trade Facilitation Agreement (TFA)), as a stand-alone annex to the SCM Agreement (following the model of the 2017 Amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)), or as a Ministerial Decision adopted at a Ministerial Conference (following the model of the 2001 Doha Declaration on TRIPS and Public Health or the 2015 Nairobi Ministerial Decision on Export Competition). These options differ in terms of their adoption procedure, the binding force of the text, including enforcement in dispute settlement proceedings, and their political feasibility.

There are also other scenarios. One is that new disciplines be effected by other means, such as a new stand-alone plurilateral agreement (like the Government Procurement Agreement). Another is that the disciplines take the form of individual scheduled commitments, which could be unilateral or follow a multilateral agreement (e.g. the 1996 Ministerial Declaration on Trade in Information Technology Products or the 2015 Nairobi Ministerial Decision on Export Competition). Again, these scenarios differ in terms of their adoption, legal force, and feasibility.

This reference paper is structured in four parts.

First, the paper provides a short summary of the *context* in which the current negotiations on fisheries subsidies within the WTO have arisen. This section outlines the overall structure of the WTO Agreements and introduces the main issues arising in relation to the legal form of new fisheries disciplines, as these have emerged in members' proposals to date.

Section 3 explores two means of establishing a new *stand-alone multilateral agreement* to regulate fisheries subsidies. One is a new agreement annexed to, and thus made part of, the SCM Agreement (Option A). The second is a new agreement on trade in goods to be inserted, alongside the SCM Agreement, into Annex 1A of the WTO Agreement (Option B).

Section 4 explores the option of using a *Ministerial Decision* to establish fisheries subsidies disciplines. Such a Decision could be of a type specifically provided for in the Marrakesh Agreement Establishing the World Trade Organization, namely an authoritative interpretation of the SCM Agreement (Option C1) or a waiver of existing obligations under the SCM Agreement (Option C2). Or it might be of another, unspecified type, as provided for in Article IV:1 of the WTO Agreement (Option C3). Ministerial Declarations are considered separately (Option C4).

Section 5 discusses another option, namely that of members states setting *individual commitments* in their schedules annexed to the General Agreement on Tariffs and Trade (GATT) 1994 (Option D).

Section 6 briefly analyses the option of a new plurilateral agreement (Option E).

The paper concludes with a summary of the available options and an evaluation of their various advantages, trade-offs required, and political feasibility and viability.

2. CONTEXT

The current fisheries subsidies negotiations result from the WTO Hong Kong Ministerial Declaration, which noted that there was broad agreement among members to "strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing,"[1] and which also indicated that such disciplines should take the form of amendments to the SCM Agreement.[2]

Current negotiations have been reinvigorated by the United Nations Sustainable Development Goals (SDGs), and in particular SDG 14.6 which aims, by 2020, to

> prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognising that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation.

The 2007 Chair Text[3] and subsequent proposals by members have generated several substantive options for regulating fisheries subsidies. These centre on the prohibition of certain subsidies (as defined in the SCM Agreement) that have negative effects on fisheries. Importantly, because the reason for prohibiting certain fisheries subsidies is not contained in the existing text of the SCM Agreement, the envisaged disciplines aim to prohibit subsidies that might not otherwise be prohibited or actionable under that agreement. It is also important to note proposed exceptions to the prohibitions, but also that some exceptions have also been proposed to existing SCM disciplines. There is therefore a strong interrelationship between the disciplines under discussion and the existing text of the SCM Agreement.

1 WTO Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, 22 December 2005, Annex D: Rules I. Anti-Dumping and Subsidies and Countervailing Measures including Fisheries Subsidies, para. 9.

2 WTO Hong Kong Ministerial Declaration, Annex D: Rules I. Anti-Dumping and Subsidies and Countervailing Measures including Fisheries Subsidies, para 1.

3 TN/RL/W/213, 30 November 2007.

3. STAND–ALONE MULTILATERAL AGREEMENT (OPTIONS A & B)

3.1 Annex to SCM Agreement (Option A) or Annex 1A Agreement (Option B)

Since the 2007 Chair Text, members' proposals have generally been drafted in the form of new disciplines that would be contained in a stand-alone legally binding text with the status of a multilateral WTO agreement. The 2007 Chair Text on the other hand proposed that this stand-alone text be set out as a new annex to the SCM Agreement, similar to the way that the TRIPS Amendment (mainly) took the form of an annex to the TRIPS Agreement (Option A). However, a stand-alone legally binding text with the status of a multilateral WTO agreement could also take the form of a completely new multilateral agreement on trade in goods alongside the SCM Agreement in Annex 1A of the GATT 1994, along the lines of the new Trade Facilitation Agreement (Option B). The following evaluates these two options. Box 1 sets out the current structure of the WTO Agreements, for reference.

Box 1: WTO Agreements

Agreement Establishing the World Trade Organization

Annex 1: Multilateral Trade Agreements
- Annex 1A: Multilateral Agreements on Trade in Goods
- Annex 1B: General Agreement on Trade in Services
- Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

Annex 2: Dispute Settlement Understanding

Annex 3: Trade Policy Review Mechanism

Annex 4: Plurilateral Trade Agreements
- Agreement on Government Procurement
- Agreement on Trade in Civil Aircraft

Source: World Trade Organization (1999)

3.2 Legal Issues

Both Options A and B involve a legally binding agreement establishing new obligations enforceable through the WTO dispute settlement system (although with some variations to be discussed). Both options would therefore have a strong effect on members' fisheries subsidies policies.

3.2.1 Considerations in support of Option A

This said, there are two main reasons why Option A is preferable. The first is one of legal architecture. All of the proposals to date are based on definitions in the SCM Agreement. This means that it is more elegant for an annex to the SCM Agreement to cross-reference to those definitions than for a new agreement to cross-reference to them. Second, and more importantly, having the new text as an annex to the SCM Agreement would facilitate the use of the SCM Committee to administer the new disciplines.

3.2.2 Considerations ambivalent as between Options A and B

There is also a third consideration, with ambivalent effects on a choice between these two options. This has to do with the way the new obligations can be enforced.

WTO law is ordinarily enforced by permitting a successful complainant to suspend concessions or other WTO obligations "equivalent" in value to the negative trade effects suffered by that complainant as a result of the violation.[4] This is different for remedies concerning prohibited subsidies under the SCM Agreement. In that case, a successful complainant will be authorised to adopt "appropriate countermeasures." These are more flexible than the usual WTO enforcement mechanism insofar as they do not do not need to be calculated in terms of trade effects. This is particularly relevant to fisheries subsidies disciplines, which are not primarily intended to protect economic interests, but rather are intended to protect environmental interests. An appropriate countermeasure could therefore be the restriction of access to ports, such as proposed by New Zealand and others,[5] regardless of whether its economic effect is equivalent to the loss of any market access for any given WTO member.

It must be acknowledged that there is a mixed jurisprudence on the extent to which "appropriate countermeasures" for existing prohibited subsidies can be delinked from trade effects. Support for such an interpretation can be found in the *Brazil – Aircraft* arbitration, where the arbitrator determined that "when dealing with a prohibited export subsidy, an amount of countermeasures which corresponds to the total amount of the subsidy is 'appropriate'."[6] On the other hand, some years later, the arbitrator in *US – Cotton* took the view that there should be a link between appropriate countermeasures and trade effects of prohibited subsidies. That arbitrator said that "the trade-distorting impact of that measure on the complaining party provides a basis from which to assess the appropriateness of proposed countermeasures in a given case."[7] What this shows is that it is, in principle, perfectly possible for "appropriate countermeasures" to be delinked from the trade effects of the obligations being enforced. For clarity, it would be desirable to state expressly that "appropriate countermeasures" to enforce prohibited fisheries subsidies should not be linked to the trade effects of these subsidies.

The question then is whether this means that it would make sense for the new disciplines to take the form of an annex to the SCM Agreement, to facilitate resort to "appropriate countermeasures" under that agreement. On one view, this would certainly be the case. However, there is a counter-argument, which is that some members may be reluctant to admit that "appropriate countermeasures" under the SCM Agreement should ever be delinked from the trade effects of the measures against which these countermeasures are directed. It might be possible to respond to such a counter-argument by ensuring that any express description of "appropriate countermeasures" as delinked from trade effects should be limited to those targeted at prohibited fisheries subsidies, and not other prohibited subsidies. But, in practice, there might be a legitimate concern that even with such a qualification, such delinkage would affect the determination of ordinary "appropriate countermeasures." In conclusion, what could be an argument in favour of a new annex to the SCM Agreement could also be an argument in favour of a new stand-alone text.

3.2.3 Issues equally applicable to Options A and B

There is another issue that needs to be resolved for both Options A and B. This is the need to anticipate and resolve potential conflicts between the new text and existing WTO law, including the existing SCM Agreement. For example, a number of proposals have identified exceptions to the new disciplines for certain subsidies, for example to promote fisheries

4 Article 22.7 of the WTO Dispute Settlement Understanding.

5 TN/RL/GEN/186, para. 3.3 (27 April 2017).

6 WT/DS46/ARB, para. 3.60 (28 August 2000).

7 WT/DS267/ARB/1, para. 4.72 (31 August 2009).

management, as well as in relation to special and differential treatment for developing countries. In general, these proposals appear to intend to limit the application of the new exceptions to the new rules (thereby ensuring that subsidies covered by these exceptions could still be actionable under the SCM Agreement if they had trade-distorting effects). In such cases, the new disciplines do not raise any conflicts issues. A proposal by Indonesia, in contrast, suggests that developing countries should be able to subsidise certain fishing activities "[n]otwithstanding the provisions of the ASCM …"[8] Whether to establish such an exception to existing rules is an important policy question that would need to be resolved regardless of which option is chosen.

3.3 Adoption Procedure

Both Options A and B involve an amendment to the annexes of the WTO Agreement. This means, in both cases, resort to the procedure for amending those annexes as set out in Article X of the WTO Agreement,[9] and in particular Article X:3, which concerns "[a]mendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A … of a nature that would alter the rights and obligations of the Members."

Article X establishes three procedural stages. First, an amendment must be proposed to the Ministerial Conference by a member or a relevant council, which in this case would be the Council on Trade in Goods.[10] Next, the Ministerial Conference takes a decision on whether to submit the proposed amendment to the members. This decision should be taken by consensus within 90 days, or within a longer period if this is decided by the Ministerial Conference.[11] If consensus is not reached within that period, a decision to submit the proposed amendment to members may be taken by a two-thirds majority vote.[12] Once put to the members for acceptance, amendments "shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it." This procedure was adopted for the Trade Facilitation Agreement, which was concluded in December 2013 and entered into force in 2017.

3.4 Political Feasibility

The main difficulty with amendment under Article X:3 (which applies equally to Options A and B) is, in practice, the requirement for a consensus requirement, even if in theory it is possible for an amendment to be put to members and adopted with a mere two-thirds majority vote. This does not mean that an amendment of this type is impossible. The Trade Facilitation Agreement followed this procedure, and the TRIPS Amendment was adopted by similar means. However, there can be a time lag for such amendments to come into force. The TFA was finalised at the 2013 Bali Ministerial Conference, and came into force a little over three years later, on 22 February 2017. The TRIPS Amendment took significantly longer, from 2003 to January 2017.

8 TN/RL/GEN/189/Rev.1 (13 July 2017).

9 There are several types of amendments that are not relevant here. These are amendments to provisions on decision-making, scheduled commitments to the GATT, and the principal WTO most favoured nation obligations, which require acceptance by all WTO members (Article X:2), amendments to the Dispute Settlement Understanding (DSU) and the Trade Policy Review Mechanism, which likewise require acceptance by all WTO members (Article X:8), amendments that do not alter the rights and obligations of WTO members, which take effect for all WTO members upon acceptance by two-thirds of members (Article X:4), and some amendments to GATS and TRIPS (Article X:5 and X:6).

10 Article X:1 of the WTO Agreement.

11 Article X:1 of the WTO Agreement. Presumably this decision would be taken by consensus or, failing that, a simple majority, as per Article IX:1 of the WTO Agreement.

12 Article X:1 of the WTO Agreement.

4. MINISTERIAL DECISION OR MINISTERIAL DECLARATION (OPTION C)

Another option for the adoption of a stand-alone text is a Ministerial Decision or Ministerial Declaration. There are several types of Ministerial Decision, each with different legal implications. One is an authoritative interpretation under Article IX:2 of the WTO Agreement (Option C1). The second is a waiver under Article IX:3 of the WTO Agreement, such as the 2003 waiver on TRIPS and Public Health (Option C2). A third is a Ministerial Decision taken under Article IV of the WTO Agreement, such as the Ministerial Decision on Export Competition adopted at the 2015 Nairobi Ministerial Conference (Option C3). A fourth option is a Ministerial Declaration, also taken under Article IV of the WTO Agreement, but which usually does not purport to establish the same type of legal obligations as Ministerial Decisions under that provision (e.g. the Ministerial Declaration on Export Competition adopted at the 2013 Bali Ministerial Conference) (Option C4).

4.1 Legal Issues

4.1.1 Option C1 (authoritative interpretations under Article IX:2 of the WTO Agreement)

The most straightforward use of an authoritative interpretation is to reduce the meaning of an ambiguous term to one single meaning. In theory, however, it could also be used to expand the meaning of a term to include a meaning that is not the ordinary meaning of the term. However, there are three limits to the use of authoritative interpretation as an effective means of giving legal effect to fisheries subsidy disciplines.

The first limit is that authoritative interpretation always requires that there be an existing term that can be interpreted. Authoritative interpretation cannot be used to invent an entirely new rule delinked from an existing word. Relevantly, the SCM Agreement does not have terms that are capable of being interpreted in such an expansive way as to incorporate the sophisticated disciplines that have been proposed for prohibited fisheries subsidy disciplines. In addition, Article IX:2 states that authoritative interpretations cannot "undermine the amendment provisions in Article X." This operates as a further limit on the use of such a mechanism to alter the rights and obligations of members.[13] It is true that there may be some flexibility on this point. Thus, Ehlermann and Ehring have argued that:

> One should not speak of an instance of "undermining" each time when an authoritative interpretation attempts to achieve something that could also be achieved through an amendment. … The last sentence of Article IX:2, therefore, does not stand in the way of permitting authoritative interpretations to modify the law, it only limits the extent to which this may occur. (2005, 811)

They suggest for example that a "should" might become a "shall." But they also draw the line at the introduction of entirely new rules (2005, 811–12). As the proposals on the table are directed at substantive new prohibitions, this means that an authoritative interpretation would not be a suitable legal form for more extensive new disciplines.

4.1.2 Option C2 (waivers under Article IX:3 of the WTO Agreement)

Another type of Ministerial Decision is a waiver of WTO obligations. It is not necessary to discuss these in any detail, however, because this type of Ministerial Decision does not seem to be of practical use for the new disciplines being proposed, in particular because waivers cannot create obligations, only diminish them.

13 It is less clear how Article XI:2 decisions relate to amendments under Article X:4 that do not alter WTO rights and obligations.

Further, it is an instrument that should only be used "in exceptional circumstances" and that is subject to annual review to establish that such circumstances continue to be present. This does not seem appropriate for fisheries subsidy disciplines which would be designed to be permanent.

4.1.3 Option C3 (Ministerial Decisions under Article IV:1 of the WTO Agreement)

WTO members also have a practice of using a third kind of instrument to signal a legal change, these being Ministerial Decisions adopted at the WTO's biennial Ministerial Conferences (or in the interim by the General Council). These decisions typically refer to Article IX:1 of the WTO Agreement, which concerns voting rules, but formally they are adopted under Article IV:1 of the WTO Agreement (Nottage and Sebastian 2006, 1004). This provision states that:

> The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

Even though Ministerial Decisions are customarily adopted by consensus, formally they can be adopted by a simple majority of the votes cast.[14] This leads Nottage and Sebastian (2006) to sound a note of caution as to the extent to which these decisions might alter WTO rights and obligations. They suggest that such decisions might have interpretive value, as per Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties,[15] but would stop short of being able to amend rights and obligations. In addition, such Decisions might also be used to relinquish the right to invoke dispute settlement procedures, provided the relinquishment is made clearly.[16] But this is as far as they can go.

In short, insofar as they are not enforceable under the WTO Dispute Settlement Understanding,[17] Ministerial Decisions (whether described as such or contained in Ministerial Declarations) are not legally binding, although they could, as noted, be used to interpret existing provisions of the WTO Agreements under certain circumstances. However, Ministerial Decisions can still have an important political function, by signalling a political commitment to undertake further action.

4.1.4 Option C4 (Ministerial Declarations under Article IV:1 of the WTO Agreement)

A final option is a Ministerial Declaration adopted at a biennial Ministerial Conference. It is frequently observed that there is no provision in the WTO Agreement providing for Ministerial Declarations, but by necessity, if these are truly decisions of the WTO and not of the WTO members operating outside the WTO, Ministerial Declarations must be considered to be adopted under Article IV:1 of the WTO Agreement, discussed earlier. This means that they have the same legal status as the Ministerial Decisions just described. The difference between Ministerial Decisions and Ministerial Declarations lies not in their legal form, but rather in their content. Often the former are

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14 Article IX:1. The number of "votes cast" can be fewer than that of the total WTO membership.

15 Vienna Convention on the Law of Treaties, 1969. The Appellate Body has treated as "subsequent agreements" both a Ministerial Decision and a Committee Decision which for different reasons did not satisfy the conditions of Article IX:2 of the WTO Agreement: WTO Appellate Body Report, *US - Clove Cigarettes,* WT/DS406/AB/R, adopted 24 April 2012, paras 260-267 and WTO Appellate Body Report, *US - Tuna II (Mexico),* WT/DS381/AB/R, adopted 13 June 2012, paras 371-372. The Appellate Body also indicated that the Panel might have considered referring to the Accountancy Disciplines developed under the GATS as a "subsequent agreement": WTO Appellate Body Report, *US - COOL*, WT/DS384/AB/R, adopted 23 July 2012, para. 451 n 914.

16 See WTO Appellate Body Report, *Peru - Agriculture*, WT/DS457/AB/R, adopted 31 July 2015, para. 5.25.

17 WTO dispute settlement procedures apply only to obligations contained in the "covered agreements" specified in Annex 1 of the DSU.

used in relation to conduct, while the latter are used in relation to facts, for example, to indicate that members share a certain understanding of a legal or factual state of affairs. But sometimes Declarations are used to express a softer form of conduct obligation, and Decisions a harder form of conduct obligation. For example, the Bali Ministerial Declaration on Export Competition stated that members "reaffirm our commitment … to the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect" and "undertake to ensure to the maximum extent possible that … The progress towards the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect will be maintained."[18] The Nairobi Ministerial Decision on Export Competition stated, in contrast, that "[d]eveloped Members shall immediately eliminate their remaining scheduled export subsidy entitlements as of the date of adoption of this Decision."[19] But even this dichotomy is porous, with some Ministerial Declarations containing very fixed obligatory language. For example, the Declaration containing the so-called Information Technology Agreement stated that "each party shall bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, with respect to [certain products]."[20] Exactly the same could—and probably should—have been said in a Ministerial Decision.

The difference between Decisions and Declarations therefore appears to be one of diplomatic choice. While Declarations are usually used to express factual agreement, they can also be used to signal a political commitment to undertake certain conduct. That strays into the territory normally occupied by Decisions. But it does not really matter, because both have the same legal status, which is essentially interpretative, although these instruments could probably also be used to signal restraint in exercising dispute settlement or other rights. To the extent that the commitments begin in a softer way, and end up in harder form, one possibility is to work with a trajectory from a Declaration to a Decision and finally to a formal amendment of the WTO Agreement. That was the path followed with the 2001 Doha Ministerial Declaration on TRIPS and Public Health, which was followed by the 2003 General Council Decision on the Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health,[21] and finally the TRIPS Amendment which came into effect in 2017.

4.2 Adoption Procedure

The adoption procedure for these different forms of Ministerial Decision differs slightly.

Article IX:2 of the WTO Agreement establishes a two-stage procedure for "authoritative interpretations." First, the Council for Trade in Goods (in this case) is to make a recommendation to the Ministerial Conference (or the General Council). The decision to make the recommendation must be by consensus, or failing that majority vote. Next, the Ministerial Conference may decide to adopt the recommendation by a three-quarters majority of all WTO members.

For waivers, Article IX:3 of the WTO Agreement establishes a slightly different procedure. The Council for Trade in Goods (in this case) must submit a request for a waiver to the Ministerial Council, but this time the decision to submit the request for a waiver must be by consensus within the Council for Trade in Goods. The Ministerial Conference then decides, by consensus or majority vote, on a

18 WT/MIN(13)/40, 11 December 2013, paras 2 and 8.

19 WT/MIN(15)/45, 19 December 2015, para. 6.

20 WT/MIN(96)/16, 13 December 1996, para. 2. This Declaration was not multilateral, but was rather made on behalf of 15 WTO members (counting the European Communities as one and Switzerland representing the customs union of Switzerland and Liechtenstein).

21 WT/L/540 and Corr.1, 1 September 2003.

period of a maximum of 90 days to consider the request. During that period it may adopt the request by consensus. If it does not, the waiver may be adopted by three-quarters of all WTO members. Waiver requests and decisions must also state the exceptional circumstances justifying the waiver, and decisions must be kept under annual review.

For other Ministerial Decisions (and Declarations), the procedure is much simpler. Under Article IV:1 of the WTO Agreement, such decisions are taken by consensus or failing that by simple majority vote.

4.3 Political Feasibility

There have not yet been any authoritative interpretations within the WTO. This may be because this mechanism has not been appropriate for the sorts of legal change that have been proposed to date, or it may be a signal of the political difficulty of changing WTO law by this route (or possibly both). Nonetheless, as this is not an appropriate mechanism in the case of fisheries subsidy disciplines, it is not necessary to speculate on this point. In contrast, there have been many waivers, but again, this solution is not appropriate in the present case. Most importantly, there have been numerous WTO Ministerial Declarations and Decisions, beginning with those adopted at Marrakesh in 1994. This indicates that, at least as a fall-back option, such a decision should be relatively easier to obtain than a formal amendment to members' rights and obligations.

5. SCHEDULED COMMITMENTS (OPTION D)

Thought might perhaps be given to another solution, which is the adoption of individual bound commitments in members' schedules of concessions and commitments pursuant to a Ministerial Decision (either as a stand-alone Decision or contained in a Ministerial Declaration, as discussed previously). Precedents for such Decisions, with implementation in members' schedules of concessions annexed to the GATT 1994, are the Information Technology Agreement and the Nairobi Decision on Export Competition. In both cases, members undertook in these instruments to amend their schedules and commitments.

5.1 Legal Issues

The legal effect of Ministerial Decisions and Declarations has already been discussed. The legal effect of scheduled commitments is another issue. So far, the mechanism for enshrining scheduled commitments on trade in goods in WTO law has been to annex them to the GATT 1994. Such schedules then have the binding status of treaty law pursuant to Article II:7 of the GATT 1994. Their binding effect can arise through two provisions. Normally, commitments would be rendered obligatory under Article II:1(a) of the GATT 1994, which states: "Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement."

There is no restriction on the commitments that can be undertaken in such a schedule, provided that they relate to trade in goods (Bartels and Häberli 2010). In the case of subsidies, it works a little differently. The Agreement on Agriculture required WTO members to include subsidy commitments in Part IV of their schedules, which were also annexed to the GATT 1994. However, rather than relying on Article II:1(a) of the GATT 1994 (recourse to which, incidentally, might still be possible), the Agreement on Agriculture contains its own obligations referring to these scheduled commitments. So, for example, Article 3.2 of the Agreement on Agriculture states: "Subject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule."

In practice, this has meant that disputes on agricultural subsidy commitments have cited provisions such as this in the Agreement on Agriculture rather than Article II:1(a) of the GATT 1994. However, there is no reason in principle why Article II:1(a) of the GATT 1994 could not also be invoked in response to a failure to abide by a commitment contained in a schedule annexed to the GATT 1994.

This has several consequences in relation to the possibility of enshrining fisheries subsidy disciplines in members' schedules. First, it is legally possible for members to include a prohibition on fisheries subsidies in their own schedules. Such prohibitions could also be subject to exceptions qualifying the prohibitions, although such exceptions would not be able to override any other WTO obligations (and therefore there would be a difficulty with the Indonesian proposal mentioned earlier). Moreover, failure to respect such prohibitions could be raised under Article II:1(a) of the GATT 1994. However, as discussed, the remedy for non-compliance with such an obligation would be the suspension of WTO concessions or other obligations of a value calculated in terms of the trade effects of any violation. That would be an inappropriate sanction for a violation of fisheries subsidy obligations.

5.2 Adoption Procedure

A WTO member has a right to modify its own schedule pursuant to Article XXVIII of the GATT 1994. In practice, other WTO members can object to the certification of such modifications, although there are also mechanisms for failures to agree on such modifications. In this case, it is unlikely that there would be any objections,

as the modifications would entail further commitments only on the modifying member.[22]

This solution might not carry all the advantages of a multilateral agreement on fisheries subsidies. It would also run into the difficulty already identified in terms of enforcement, namely, that retaliation would take the form of the suspension of concessions and other obligations calculated in terms of trade effects.

5.3 Political Feasibility

A possible difficulty with Option D is political. It could be difficult to convince members to amend their schedules individually without the security of knowing that other members will amend their schedules at the same time. However, the individual amendment of schedules could be effectively coordinated through use of a protocol that conditions the entry into effect of the amended schedules, based on reaching a "critical mass" of participants as defined in the protocol.[23] Moreover, this procedure could be used prior to obtaining the degree of agreement that would be required for other formal changes, in particular amendments to the WTO Agreement under Article X:3.

22 Procedures for Modification and Rectification of Schedules of Tariff Concessions, Decision of 26 March 1980 (L/4962).

23 This protocol mechanism has been used advantageously in the case of modifications to services schedules on basic telecommunications and financial services.

6. PLURILATERAL AGREEMENT (OPTION E)

A further option is for a subset of WTO members to adopt fisheries subsidy disciplines in the form of a new plurilateral agreement, along the lines of the Government Procurement Agreement and the Agreement on Trade in Civil Aircraft.

6.1 Legal Issues

Plurilateral agreements have legal effect only for the parties that have concluded them. This makes them a useful means of establishing rights and obligations in cases where consensus cannot be achieved. They are (or can be made) enforceable using the WTO dispute settlement procedures, as between the parties to the agreement.

6.2 Adoption Procedure

A plurilateral agreement may be adopted under Article X:9, which states that "[t]he Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4."

6.3 Political Feasibility

There is not much advantage in a plurilateral over a multilateral agreement (whether a stand-alone Annex 1A agreement or an Annex to the SCM Agreement). A plurilateral agreement would have the same disadvantages, legally speaking, as those discussed, and it would also have the political disadvantage of reducing the formal scope of coverage of any such agreement in terms of enforceable rights and obligations. It would, therefore, be very much second-best as an alternative to a multilateral agreement.

However, a plurilateral agreement could play a role in a longer sequence of reform. A plurilateral agreement could in theory establish more ambitious disciplines than it would be possible to agree multilaterally: plurilateral members could take on obligations in order to establish a benchmark for further multilateral agreement. Given that the commitments would relate to unilateral subsidy reductions, which by definition would benefit all other WTO members without discrimination, it might not be difficult to generate consensus to incorporate a plurilateral agreement on subsidies into Annex 4 of the WTO Agreements.

7. CONCLUSION

In terms of the effectiveness of new disciplines on fisheries subsidies there is little doubt that the most appropriate option is to establish a new binding multilateral agreement enforceable by WTO dispute settlement procedures. There are essentially two options for such an agreement. Option A is for such an agreement to take the form of an annex to the SCM Agreement; Option B is for such an agreement to take the form of a new multilateral agreement on trade in goods, like the Trade Facilitation Agreement. There are architectural advantages to Option A, as well as dispute settlement advantages, in the sense that remedies for non-enforcement can more easily be made flexible under the SCM Agreement. However, it is possible, with creative drafting, also to incorporate these elements in a stand-alone agreement as per Option B. In terms of the adoption procedure and political feasibility of these two options, there is no difference. Both can only be achieved by a formal amendment of the WTO Agreement (and its annexes) under Article X:3 of the WTO Agreement, requiring a minimum of a two-thirds vote of the total WTO membership. That this can be achieved in a relatively short time is borne out by the Trade Facilitation Agreement, which took only a little over three years from negotiations being finalised to coming into force. But it can take longer, as for example the 14 years it took for the TRIPS Amendment, although one explanation for this lengthy delay is that the ratification hold-outs already benefited from the same rights under the 2003 TRIPS Decision.

Other multilateral techniques for achieving legal change would be less immediately effective, but could be used sequentially to work towards formal amendments to the WTO Agreements. Given the substance of the proposals, which are concerned with establishing new obligations, it makes no sense to adopt a waiver from existing obligations (Option C2). An authoritative interpretation (Option C1), a Ministerial Decision (Option C3) and a Ministerial Declaration (C4) could also not be used to add binding new obligations. Nonetheless, a Ministerial Decision or Declaration would have significance as signalling a political commitment to institute legal change either on a unilateral basis (as with the Information Technology Agreement or the Nairobi Decision on Export Competition), or to set the framework for a later binding formal amendment (as with the Doha Declaration on TRIPS and Public Health). These two types of Decision could also most likely be used to relinquish dispute settlement rights, as discussed. In this respect, there is a trade-off between the legal effectiveness and the political feasibility of these options.

There are two other legally effective options, but these have legal and political drawbacks. The first of these is for WTO members to amend their GATT 1994 schedules to incorporate binding commitments on the prohibition of fisheries subsidies (Option D). Such commitments could be conditional, or include exceptions to their coverage. They could also be enforced under the GATT 1994, although that enforcement would have to take the form of the suspension of concessions or other WTO obligations calculated according to the trade effects of the illegal subsidies. Given that under the new disciplines, fisheries subsidies are prohibited regardless of their trade effects, this is an undesirable outcome. Another possible drawback with this option is one of reciprocity: a protocol or some other means would be needed to ensure that the commitments of participating members enter into force at the same time.

Finally, Option E is to institute new fisheries subsidy disciplines by way of a new plurilateral agreement. The only real advantage to such an option would be to set a higher benchmark for disciplines than would be achievable multilaterally. A plurilateral fisheries subsidies agreement would require a consensus decision to take effect, and although other WTO members might enjoy the benefits of the participants' subsidy reform, the agreement would only be enforceable as between the participants themselves.

The result is that members desiring to achieve an effective outcome should aim for a binding multilateral agreement, preferably by way of an annex to the SCM Agreement (as most propose) or, with creative drafting, as a stand-alone multilateral agreement on trade in goods. However, work towards the same disciplines could also be set in train in the form of a Ministerial Declaration or a Decision, which could then be given more binding legal force at a later date, either by way of individual commitments (properly sequenced to preserve reciprocity) or by a subsequent multilateral agreement.

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