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FISHERIES SUBSIDIES: FRAMEWORK FOR DISCIPLINES

Communication from Japan; the Republic of Korea; and the Separate
Customs Territory of Taiwan, Penghu, Kinmen and Matsu

Revision

The following communication, dated 1 June 2007, is being circulated at the request of the Delegations of Japan; the Republic of Korea; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

FISHERIES SUBSIDIES: FRAMEWORK FOR DISCIPLINES

(The sponsors reserve their rights to
further revise the proposal in the future)

EXPLANATORY NOTES

BASIC IDEAS

A possible new discipline for fisheries subsidies is proposed as attached. In this new proposal, attempts were made to incorporate the following considerations in the new discipline.

- A practicable and workable discipline is sought.
- Equity among Members, as well as the balance between rights and duties, is sought.
- Opportunities for international collaboration are provided and, where appropriate, opportunities for stakeholder involvement in the process are sought.

MAIN ELEMENTS

In the proposed new discipline, all relevant elements contained in the WTO Ministerial Declarations were fully taken into account.

The *Doha Ministerial Declaration* noted that "we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants" and "in the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries".¹

The *Hong Kong Ministerial Declaration* noted that there was "broad agreement that the Group should 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".²

Clearly, the following specific items are the "required elements":

- To prohibit certain forms of fisheries subsidies that contribute to overcapacity and over-fishing.
- To take into account the importance of this sector to developing countries.
- Preserving the basic concepts, principles and effectiveness of the ASCM and its instruments and objectives.

The first two items are widely acknowledged in the negotiating group on rules. The last element should deserve further attention, when we discuss the issue of "top-down" or "bottom-up" approach. Proposed texts by Brazil³, NZ⁴, and USA⁵ are based on the "top-down" approach, based on

¹ WT/MIN(01)/DEC/1, 20 November 2001, para. 28.

² WT/MIN(05)/DEC, 22 December 2005, Annex D, para. 9.

³ TN/RL/GEN/79/Rev.4.

⁴ TN/RL/GEN/100.

⁵ TN/RL/GEN/145.

the "negative listing" of permitted subsidies under a broad prohibition. On the other hand, proposals from EC⁶, Norway⁷, Japan, the Republic of Korea, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu⁸ support the "positive list" approach.

Creation of simple, enforceable and effective rule is the objective of this negotiation. While demandeurs of this negotiation request to take the "top-down" approach in the beginning, Members started to reconsider the practicalities of the "top-down" approach. The situations of resource management and ecosystem dynamics vary according to each Member, and there are no uniform impacts of fisheries subsidies, especially when combined with management instrument. The "top-down" approach seriously undermines policy flexibilities under these circumstances, denying the chance for further policy developments when fisheries environment changes and policy needs arise in the future.

In addition, since the existing structure of the ASCM employs a "positive list" approach, an approach taken by the latter group can better accommodate the requirement related to "preserving the basic concepts, principles, and effectiveness" of the ASCM. This proposal also takes a "positive list" approach from these considerations.

However, the effectiveness of the new discipline may be more dependent upon the effectiveness of the notification and the review process. In this proposal, a combination of the higher level of transparency and peer-review process is proposed.

ADDITIONAL ELEMENTS

The issue of fisheries subsidies have attracted considerable attention from inside and outside the WTO community. The World Summit on Sustainable Development (WSSD) of United Nations held in Johannesburg, South Africa, in 2002, required all levels to "eliminate subsidies that contribute to illegal, unreported and unregulated fishing and to over-capacity, while completing the efforts undertaken at the World Trade Organization to clarify and improve its disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries".⁹

Consequently, the following specific element is incorporated in the proposed discipline:

- To eliminate subsidies that contribute to illegal, unreported and unregulated fishing.

SUSTAINABILITY CRITERIA

It would be inappropriate to explicitly provide some specific "sustainability criteria" in the text of the new discipline as a condition for granting subsidies. First, it is unrealistic to negotiate the text on the sustainability criteria judging from the current uncertainties involved in this issue. Complete inventory of the fisheries and fish stocks of the world does not exist under the FAO.¹⁰ Good management practice also cannot be fixed because it varies by species or ecosystems, and thus, the standards vary according to countries. The FAO *Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries* (FAO 2005) contains some requirements for the fishery managements. But this part of *the Guideline*, which extends to several pages of the published document, is under continuous review at the FAO. Also, many of the FAO instruments, such as the

⁶ TN/RL/GEN/134.

⁷ TN/RL/GEN/144.

⁸ TN/RL/GEN/114/Rev.1.

⁹ UN 2002, A/CONF.199/20, p.24 (para.31).

¹⁰ FAO, 2003, Strategy for Improving Information on Status and Trends of Captured Fisheries, p.4 (para 14).

Code of Conduct for Responsible Fisheries (FAO 1995), are non-binding and may not be a good reference for the binding regulations under the WTO rules.

Second, resource sustainability is a snapshot status in a given moment. Vessels constructed using subsidy may continue to operate for decades, and there is no guarantee that the resource continues to be sustainable during the same period of time.

In order to overcome this situation, rather than explicitly providing some specific "sustainability criteria" in the text of the new discipline, strengthening of the "notification, enquiry point and peer-review" are proposed. The subsidising Members are requested to notify detailed information relating to their fishing vessel capacities and their fishery production.

SMALL-SCALE FISHERIES

A definition of small-scale fisheries is yet to be agreed by the FAO. Rather, the FAO Working Group on Small-Scale Fisheries (Bangkok, November 2003) agreed that it would be inappropriate to formulate a universally applicable definition for a sector as dynamic and diverse as small-scale fisheries.¹¹ This sector can be characterised as (i) inshore or near-shore fishing operation, (ii) labour intensive, (iii) targeting multiple species using a large range of different fishing techniques, and (iv) supplying products to local and domestic markets while export-oriented production has increased for the last one to two decades. Use of the size of the vessel (xx gross tons or yy meters and less) should be a simple (and less disputable) criterion, taking into account the diverse situations of the sector.

The provisions for the small-scale fisheries should apply to all Members. There are commonly observed characteristics of small-scale fisheries across the countries worldwide. Small-scale fisheries contribute to household income in remote coastal areas where access to other capital or production factors is limited. Fishermen engaged in small-scale fisheries are not early adopters of technology due to lack of information and attitudes toward risk, unlike those of large-scale fisheries in the same country. In other words, they are to some extent "losers" of the domestic competitions, rather than international competitions in most cases, and thus special treatment must be extended to all Members.

S&D Treatment

S&D treatment is an important element of the new discipline. At the same time, some balance is needed between the mandates "to prohibit certain types of subsidies that contribute to overcapacity and over-fishing" and those "to take into account the importance of this sector to developing countries".

Certain flexibilities for developing country Members are provided to allow even more "policy room" for the development within their exclusive economic zones and territorial waters. At the same time, developing country Members are expected to share the appropriate burdens on conservation and management of the resource in such waters. High seas area is regarded as "commons" among Members. The UN Convention on the Law of the Sea (UNCLOS) does not distinguish between developing and developed countries in terms of rights and obligations relating to highly migratory species and straddling stocks. Prohibition and other obligation of certain forms of fisheries subsidies applicable to high seas area should be equally applied to Members. This is especially true of the situation where some of the developing country Members have built up more advanced and more competitive deep-water fishing fleet than developed country Members.

¹¹ FAO, 2005, *Increasing the Contribution of Small-Scale Fisheries to Poverty Alleviation and Food Security*, p.4.

Additional S&D treatment is provided for small-scale fisheries in developing country Members. At the same time, in order to avoid providing the "blank check", some conditions are added. Notification requirements are also applied.

- A Text Proposal –

**ANNEX [VIII] TO THE AGREEMENT
ON SUBSIDIES AND COUNTERVAILING MEASURES**

This Annex provides specific provisions regarding fisheries subsidies and forms an integral part of this Agreement.

Article 1 - Prohibition

The following subsidies¹², granted for enterprises engaged in harvesting of marine¹³ wild fish, shall be prohibited, except as otherwise provided in this Annex:

- (a) subsidies for the acquisition, and construction of fishing vessels, unless:
 - (i) they are granted for the replacement of fishing capacity following a natural and environmental disaster where fleet capacity has been reduced so that a capacity is restored to the proper level not exceeding its pre-disaster state; or
 - (ii) they are granted as incentives¹⁴ for reducing existing fishing capacity, where the gross tonnage of the new vessel is reduced by at least 50 per cent of the sum of the gross tonnage of the withdrawn vessels in the same fishery category¹⁵; and there are in place fisheries management control measures, including enforcement mechanisms, designed to prevent over-fishing in the targeted fishery, such as limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels, individuals and/or groups.
- (b) subsidies for the vessel modification, unless:
 - (i) there is no increase in gross tonnage, volume of fish hold, and engine power of the fishing vessel; or
 - (ii) the modification is undertaken for the improvement of crew safety or on-board accommodation to comply with national or international standards, without increasing volume of fish hold and engine power of the fishing vessel.

¹² A subsidy subject to this Annex must be specific within the meaning of Article 2 of this Agreement.

¹³ The term "marine" includes both anadromous (e.g., salmon) and catadromous (e.g., eels) species that spend a significant part of their life cycle in saltwater.

¹⁴ Governmental support for vessel replacement, including construction or purchase of new vessels, is assumed as a form of such incentives.

¹⁵ The term "same fishery category" means a group of fishing operations targeting for the same species.

- (c) subsidies granted for shipbuilding yards contingent upon the construction of fishing vessels;
- (d) subsidies for promoting a permanent transfer of fishing vessels to non-participants¹⁶ of regional fisheries management organizations¹⁷ as an attempt to avoid international rules and regulations of fishery operations; and
- (e) subsidies granted for a vessel engaged in illegal, unreported and unregulated fishing.¹⁸

Article 2 - Identification of Non-Actionable Subsidies

Notwithstanding the provisions of Article 1 of this Annex and Parts III and V of this Agreement, the following subsidies shall be understood as having no, or at most minimal, trade distorting effects or negative effects on fisheries resources management, and thus considered non-actionable:

- (a) government-to-government payments to obtain access for a Member's distant water fishing fleet to fisheries resources within the exclusive economic zone of another country under the following conditions:
 - (i) the terms and conditions of access, including the compensation paid by the fishing fleet, are published; and
 - (ii) 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;
- (b) subsidies for vessel decommissioning programmes under the following conditions:
 - (i) the vessels subject to such decommissions are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;
 - (ii) the fish harvesting rights, or their sub-allocations, associated with such decommissioned vessels are permanently revoked and shall not be reassigned; and
 - (iii) there are in place fisheries management control measures, including enforcement mechanisms, designed to prevent over-fishing in the targeted fishery, such as limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels, individuals and/or groups.
- (c) subsidies for small-scale fisheries, if such fisheries meet the following conditions:

¹⁶ The term "non-participants" means the countries who are neither contracting parties nor cooperating non-contracting parties, entities or fishing entities.

¹⁷ The term "regional fisheries management organizations" mean regional or sub-regional fisheries management organizations or arrangements.

¹⁸ The term "illegal, unreported and unregulated fishing" shall be interpreted in accordance with the definition set out in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of the United Nations Food and Agricultural Organization (FAO).

- (i) the size of fishing vessels is less than (XX) meters in length or (YY) gross tons;
 - (ii) the area of the authorized fishing operation is within the territorial waters and/or the exclusive economic zones;
 - (iii) there exist registration systems of fishing vessel; and
 - (iv) there are in place fisheries management control measures, designed to prevent over-fishing in the targeted fishery, which include limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels, individuals and/or groups;
- (d) government expenditures for the construction and maintenance of general infrastructure for fishing communities, such as the provision of housing, roadways, water and sanitary waste systems, and fishing port facilities;
- (e) government expenditures for social safety net for fishermen, including unemployment relief, early retirement, worker training or education, fishery insurance covering life and injury for workers and damage for boats and gears, payment for relief from natural disaster or similar environmental/economic changes, support for the temporary suspension of fishing activities, and alternative employment assistance for fishermen;
- (f) government expenditures for research on fisheries management, including data collection, surveys, data analysis, stock monitoring, sampling and assessment; and
- (g) government expenditures for measures that enhance marine resources rather than capacity to harvest those resources, such as fisheries stock enhancement, marine conservation and marine protection, including marine environment restoration, hatcheries for breeding, artificial reefs and by-catch mitigation devices.

Article 3 – Notifications, Enquiry Point and Peer-Review

3.1 Members shall notify the following information. Such information will be made publicly available¹⁹ by the Secretariat:

- (a) information on the vessels which have been improved, constructed, purchased, or withdrawn under the subsidy programs listed in Article 1, and paragraphs (a), (b) and (c) of Article 2 of this Annex, such as:
 - (i) the name of the vessel;
 - (ii) flag state;
 - (iii) gross tonnage;
 - (iv) length;
 - (v) construction year;
 - (vi) name of vessel owner;
 - (vii) main fishing areas, fishery methods, main target species; and,

¹⁹ The purpose of the information disclosure is to inform RFMOs or other relevant fishery management authorities with the data on vessels which have received subsidies, so that these fishery management bodies can take proper actions based on such information, if necessary. Information may be disclosed using the website of the WTO.

- (viii) in the case of vessel improvement, vessel's gross tonnage before and after it, as well as the year of the vessel improvement.
- (b) an assessment of how any conditions set forth in Article 1, paragraphs (a), (b) and (c) of Article 2 of this Annex have been fulfilled; and
- (c) the total vessel capacity (i.e., the number of vessels by the vessel size) registered in the Member, and export and import of vessels, and annual volume of fishery catch²⁰ by the Member with a breakdown of fish species.

3.2 Each Member shall maintain an enquiry point to answer all reasonable enquiries from other Members and interested parties in other Members concerning its subsidy programs and fisheries management systems, including measures in place to address fishing capacity and fishing effort, the biological status of managed stocks, and a status of its MCS (monitoring, control and surveillance) measures in the water where subsidized vessels potentially operate.

3.3 Upon request by all Members, the Committee on Subsidies and Countervailing Measures shall set up an ad hoc group of experts on fishery, provided in paragraph 2 of Article 24 of this Agreement, to peer-review the notifications and reports from the enquiry points as provided in paragraph 2. Such peer-review shall be conducted together with all participating Members under the Committee, upon request by any Member. The ad hoc group of experts on fishery shall be composed of three to five independent persons, highly qualified in the fields of fishery management and fishery economics. The experts will be elected by the Committee. Any report of the ad hoc expert group, along with the opinions of Members concerned on the report, if any, will be made publicly available by the Secretariat.

3.4 Upon request, the ad-hoc group of experts, if established, may provide technical assistance to developing country Members so that such Members may fulfil the notification requirements under paragraphs 1 and 2 of this Article.

Explanatory notes (not forming part of a legal text):

- Strengthening of notification provisions and keeping high level of transparency would be desirable to deter subsidies for overcapacity and IUU fishing, in addition to the prohibition on "subsidies relating to illegal, unreported and unregulated fishing."
- Paragraph 3.3 is to accommodate a need for the third-party review on notification and comments expressed by the Members. Any opinion expressed by the ad hoc group of experts is non-binding, as the Committee does not have a direct competence for fishery resource management. However, the opinion, along with the opinions of concerned Members, shall be disclosed, so that the relevant international fisheries management bodies, such as RFMOs, may take some decisions using such information.

Article 4 - Consultations and Dispute Settlement

4.1 In a dispute under this Annex involving scientific or technical questions related to fisheries, a panel may seek advice from fisheries experts chosen by the panel, in consultation with the parties to the dispute, in accordance with the procedures set forth in Article 13 of the DSU.

²⁰ The term "fishery catch" exclude the production from fisheries or aquaculture which is not covered by this Annex.

4.2 To this end, the panel may, when it deems appropriate, establish a technical advisory group of fisheries experts, or seek the assistance of the United Nations Food and Agriculture Organization or other relevant inter-governmental organizations in identifying appropriate fisheries experts, at the request of either party to the dispute or on its own initiative.

4.3 In the case of dispute relating to the small-scale fisheries in developing country Members, representative(s) from local stakeholder groups, such as community fishery management groups, may be invited as member(s) of the group referred to in paragraph 2 of this Article, in consultation with the parties to the dispute, in accordance with the procedures set forth in Article 13 of the DSU.

Article 5 – Developing Country Members

For purposes of this Annex, in addition to the provisions of Articles 27 of this Agreement and paragraph 4 of Article 3 and paragraph 3 of Article 4 of this Annex, developing country Members may employ the following treatment:

5.1 The vessel reduction requirement in paragraph (a)(ii) of Article 1, which provide that "the gross tonnage of the new vessel is reduced by at least 50 per cent of the sum of the gross tonnage of the withdrawn vessels in the same fishery category" shall not apply to developing country Members if such a developing country Member possesses monitoring, controlling, and surveillance measures to ensure that the areas of fishing operations of such vessel, newly acquired or constructed under the subsidy program, are within its territorial waters or exclusive economic zones.

5.2 The requirements for fisheries management control measures for small-scale fisheries, provided in paragraph (c)(iv) of Article 2, shall not apply to developing country Members during the period of () years after the date of entry into force of this Annex.

[Provisions for a developing country Member, which possesses export competitiveness defined in Article 27.6 of the ASCM, relating to products originated from marine capture fisheries, will be further developed.]

Explanatory notes (not forming part of a legal text)

The package for items, which takes into account the needs for developing country Members, is as follows:

- Subsidies for access fees are regarded "non-actionable" (Article 2).
- Provisions for small-scale fisheries should be established (Article 2) and flexible treatment is applied to small-scale fisheries in developing country Members.
- Less strict provisions should be applied to other fisheries solely operating in the EEZ of developing country Members, taking into account the policy room for the development in such waters. However, vessel capacity should be notified using the provisions set forth in Article 3, since larger vessels in EEZ may spill over to the high seas area.
- As for subsidies by developing country Members granted for the high seas fishery, the same treatment shall be applied as developed country Members.
- Technical assistance for notification by developing country Members can be sought (Article 4.3).
- Opportunities for stakeholder involvement from small-scale fishery communities from developing country Members are available in the case of dispute (Article 4.3).

Article 6 – Miscellaneous Provisions

Nothing in this Annex shall be construed to prevent a Member from adopting a trade measure, consistent with the relevant provisions of the GATT 1994, where appropriate.
