

# WORLD TRADE ORGANIZATION

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Negotiating Group on Rules

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## FISHERIES SUBSIDIES: PROPOSED NEW DISCIPLINES

### Proposal from the Republic of Indonesia

The following communication, dated 29 June 2007, is being circulated at the request of the Delegation of the Republic of Indonesia.

#### Introduction

1. Indonesia has noted the broad range of views expressed by Members in this group on many of the issues involved in this negotiation. The United States (TN/RL/GEN/145), New Zealand (TN/RL/GEN/100 and TN/RL/GEN/141) and Brazil (TN/RL/GEN/79/Rev.3) have offered legal text for framework proposals based on a broad prohibition of subsidies that can contribute to overcapacity and overfishing. Alternative proposals from Japan, Korea and Chinese Taipei (TN/RL/GEN/114/Rev.1), the European Communities (TN/RL/GEN/134) and Norway (TN/RL/GEN/144) have addressed a much narrower range of subsidies, and much narrower concerns. In addition, work such as Argentina's proposal for special and differential treatment for developing countries (TN/RL/GEN/138/Rev.1) has been helpful, as have other contributions. We note that much of the technical work in the Group over the last year, including the identification of appropriate exceptions and the discussions of Argentina's proposals, has been premised on a broad prohibition as the backbone of new disciplines, which we support.

2. This statement follows on our remarks in the May and June meetings, and introduces a draft text that we hope will serve as the basis of discussion for issues critical to Indonesia as a developing country, and critical to this negotiation.

3. The text articulates a proposed resolution of some of the issues with which we in the Rules Committee have been struggling, and also lays out a new framework for the work of the Committee in several important areas. Namely:

- It requires technical assistance to developing countries in several areas important to their participation in this effort to discipline subsidies that contribute to overfishing and overcapacity. This includes assistance to develop the capacity to initiate, implement and enforce compliance with fishery management plans, full membership in regional fishery management organizations (RFMO's) adjacent to their exclusive economic zones, assistance to develop and maintain an enquiry point, and flexibility in terms of responding to requests for sophisticated fisheries management data. It also includes longer transition periods to implement the agreement;
- It defines artisanal fishing and small scale fishing in ways that allow for control of their capacity to access fishery resources and to utilize the flexibility to which they should be entitled;

- It specifically allows for enhanced ability to protect marine resources in archipelagic waters;
- It lays the basis for a new interpretation of Article 5 and Part V of the Agreement on Subsidies and Countervailing Measures for adverse effects to a Member's fishery resources, and also clarifying that both the multilateral and domestic tracks should be available for this purpose; and
- It provides that those parts of this agreement requiring assessment of issues related to the status of fishery and biological resources will be addressed by fishery experts.

Each of these five areas are summarized below.

### **Explanation of the Proposal**

4. ***Technical Assistance.*** Many delegations have spoken to the need for technical assistance to developing countries in the context of this negotiation. Indonesia would like to point to two areas in which developing countries have specific needs, both of which relate to the content of this agreement. The first is for assistance for fisheries management. In several areas of the agreement we have proposed that subsidies be allowed contingent on a showing that they are not harming the resource. However, many developing countries cannot do this unless they have the capacity to initiate, implement and enforce compliance with a fishery management plan. We have previously observed in this Committee that attention paid to subsidies in the fisheries sector without recourse to stock assessment has the potential to lead to overexploitation of fisheries resources and subsequent distortion of the sector. We therefore propose that on the request of a developing country Member, developed countries shall provide technical assistance to develop the capacity to initiate, implement and enforce compliance with a fishery management plan adequate to participate fully in this agreement.

5. We likewise propose that developed countries shall provide assistance to developing country members so requesting it to participate fully in regional fishery management organizations adjacent to their exclusive economic zones. For developing countries that may have only a handful of vessels capable of fishing in such waters, full participation in RFMO's is costly and often unlikely to be funded. This sometimes means that such vessels must either take the risk of fishing illegally or cease fishing altogether. We feel that there should be no such barrier to full developing country participation in RFMO's. Full participation by developing countries, including in RFMO scientific and research program activities, can only help to address the overcapacity and overfishing that now characterize many of the world's fisheries.

6. ***Artisanal and Small-Scale Fishing.*** Indonesia has carefully considered attributes of both kinds of fisheries and has concluded that both should receive special and differential treatment. Artisanal fishing is primarily subsistence fishing and assistance should be allowed subject to conditions, which we have noted relate to their being close to shore, and certain specified engine-size to tonnage ratios, primarily operated by individuals or families. Small scale is defined as operating within 12 nautical miles, and below 20 meters. However, since small-scale fisheries can have considerable effects on resources, they should be narrowly and objectively defined and subsidies to them made contingent on a showing that they are not harming the resources of a Member's own fisheries management plan, the resources of another Member or the resources governed by an RFMO. As noted, developing countries may need help to make this kind of showing, and should be able to request assistance from developed countries for this. These exceptions for small scale fishing and fishing in a developing country's own EEZ are available to developing countries contingent on a showing that there is no present or likely future effect on the fishery resource.

7. ***Archipelagic Waters.*** As previously noted, Indonesia is an archipelago of over 17,000 islands. As such, its fisheries share with other archipelagic states unique features of seasonality, species heterogeneity and species interactions that make it especially problematic to manage. Indonesia has therefore proposed, not to exempt archipelagic waters from this agreement because we believe subsidies disciplines should apply there, but rather to exempt from the prohibition measures to conserve and protect the archipelagic marine environment, and to protect and develop archipelagic waters as a unit.

8. ***Adverse Effect to Fishery Resources/Clarification of Multilateral and Domestic Tracks.*** Building on proposals made by the United States and Brazil, Indonesia proposes that an additional measure of harm to a domestic industry be added, as an "adverse effect on fishery resources" to Article 5 and Part 5 of the ASCM. It also proposes to clarify that both the multilateral and domestic tracks should be available to address fisheries subsidies. This would in effect allow countries to investigate, and if warranted impose, countervailing duties on the fishery products of Members causing an adverse effect upon the domestic industry in part because of harm to the fishery resource. Indonesia has also retained the language proposed by the United States on "serious prejudice" to ensure that the multilateral track is also available under this Annex.

9. ***Fishery Expertise.*** Finally, in order to ensure that decisions on fishery resource issues are made by individuals with the requisite expertise, Indonesia proposes that fisheries experts be explicitly engaged on matters arising under this agreement. Indonesia proposes that decisions on showings of compliance with exceptions to the general prohibition, and in particular, a request by a member to examine whether there is an adverse effect in the case of a particular subsidy notification, be made by a subcommittee of the SCM Committee that includes fishery experts from member governments and those identified by relevant international organizations. Fisheries experts would also be required in domestic injury proceedings involving adverse effects to a fishery resource.

10. There are many other elements of this text that will warrant discussion, and we have identified here only those major areas where the text breaks new ground. While we have provided explicit text, we are interested in exploring the precise wording to capture agreement on these concepts.

## **Attachment**

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

#### ***Preamble***

Members,

*Recalling* the commitment at Doha to clarify and improve WTO disciplines on fishery subsidies.

*Noting* the current state of world fishery stocks and the desire of Members to address subsidies that have a harmful effect on them;

*Conscious* of the negative effects of overcapacity and overfishing on these fisheries resources;

*Reaffirming* that provisions for special and differential (S&D) treatment are an integral part of the WTO Agreements;

*Determined* to strengthen ASCM provisions with a view to making them more precise, effective and operational in relation to fisheries;

*Considering* the social and economic importance of the fisheries sector to developing country Members;

Hereby *agree* as follows:

#### ***Article 1***

##### ***Definitions and coverage***

- 1.1 This Annex provides for specific provisions regarding fisheries subsidies and it is an integral part of the Agreement on Subsidies and Countervailing Measures (ASCM).
- 1.2 A subsidy as used in this Annex is a subsidy within the meaning of paragraph 1 of Article 1 of the Agreement on Subsidies and Countervailing Measures (ASCM). A subsidy subject to this Annex must be specific, pursuant to Article 2 of the ASCM.
- 1.3 This Annex shall not apply to inland fisheries<sup>1</sup> or to aquaculture.<sup>2</sup>
- 1.4 This Annex covers any subsidy that confers a benefit to or on behalf of any company and/or person linked in fact or in law, directly or indirectly<sup>3</sup>, to enterprises engaged in the harvesting of marine wild capture fisheries. Fisheries subsidies shall encompass any subsidy programme and/or the disbursement made under such programme.

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<sup>1</sup> "Inland fisheries" are fisheries which are carried out in freshwater or estuaries of a Member and whose target species are those that spend all of their life-cycle therein.

<sup>2</sup> "Aquaculture" is the farming of aquatic organisms, including fish, molluscs and crustaceans, provided that no capture fisheries is used to feed raised fish or is farmed.

<sup>3</sup> The term "directly or indirectly" is used in this Annex in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994.

- 1.5 Harvesting includes the on-vessel processing of fish and transport of fish from one vessel to another or from a vessel to shore, but it does not include inland or on-shore processing or other post-harvest handling or activity.
- 1.6 This Annex does not cover government-to-government payments to obtain access for a Member's distant water fishing fleet to fisheries resources within the territorial sea or exclusive economic zone of a developing country, or to quotas or other rights established by any regional fishery management organization (RFMO) or arrangement. The further transfer of such rights to the Member's fishing fleet is covered by this Annex but is not prohibited under Article 2, provided that a benefit is not conferred by the onward transfer of such rights to the Member's fishing fleet, in that:
- (a) The Member's fleet pays compensation comparable to the value of the access of the resource;
  - (b) The access arrangements provide for compliance with applicable fishery management plans and for a science-based assessment and monitoring of the status of the fishery resources covered by the access arrangements; and
  - (c) Such payments are notified pursuant to Article 5 herein.

## ***Article 2***

### ***Prohibition***

A Member shall neither grant nor maintain any fishery subsidy, except as otherwise provided in this Annex.

## ***Article 3***

### ***Exceptions to the Prohibition***

- 3.1 Nothing in Article 2 of this Annex shall prevent government assistance for:
- (a) Provision of a social safety net for fishermen, including early retirement schemes, re-education, training or alternative employment assistance, unemployment relief, life insurance, support for the temporary suspension of fishing activities.
  - (b) Fisheries research, including data collection, surveys, data analysis, and stock monitoring, sampling and assessment;<sup>4</sup>
  - (c) Fisheries stock enhancement, including marine conservation and protection, marine environment restoration, protection and development of a Member's own archipelagic waters<sup>5</sup>, artificial reefs, hatcheries for breeding and by-catch mitigation devices;<sup>6</sup>
  - (d) Improving vessel and crew safety<sup>7</sup>, provided that the improvement is undertaken to comply with international or domestic standards; and there is no increase in fishing

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<sup>4</sup> This is limited to fisheries research that does not result in commercial sale of the fish harvested.

<sup>5</sup> Archipelago is as defined in Article 46 of UNCLOS 1982, and calculation of the archipelagic baselines is defined in Article 47 thereof.

<sup>6</sup> This provision is aimed at measures that enhance marine resources rather than capacity to harvest those resources.

<sup>7</sup> Programmes or activities aimed primarily at vessel modernisation or repair do not fall within this sub-paragraph. The construction of vessels is not permitted under this sub-paragraph.

capacity<sup>8</sup>, such as the volume of fish hold or engine power of a vessel subject to such program.

- (e) Construction and maintenance of general infrastructure for fishing activities, such as wharves and fishing ports and related facilities, roadways, water and sanitary waste systems, the provision of housing and other forms of community development infrastructure.<sup>9</sup>
- (f) Short-term emergency relief, recovery adjustment programs and replacement of fishing capacity following natural or environmental disasters, provided that fishing fleet capacity is not restored beyond its pre-disaster state<sup>10</sup>, except that special flexibility shall be given to developing countries pursuant to Article 4.
- (g) Assistance and user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programs, and other expenses related to administration and operation of fishery management programs, including allocation and monitoring of licences, permits, quotas, vessel numbers and catch returns.
- (h) Vessel decommissioning programmes, provided that the:
  - (i) vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;<sup>11</sup>
  - (ii) fish harvesting rights associated with such vessels, whether they are permits, licenses, fish quotas or any other form of harvesting rights, are permanently revoked and may not be reassigned; and
  - (iii) owners of such vessels, and the holders of such fish harvesting rights, are required to relinquish any claim associated with such vessels and harvesting rights that could qualify such owners and holders for any present or future harvesting rights in such fisheries;
  - (iv) there are in place fisheries management plan 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, provided that special flexibility should be given to developing countries, including any technical assistance requested by any such developing country as provided in Article 4 below.

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<sup>8</sup> Fishing capacity is understood here to mean the ability of a vessel or fleet of vessels to catch fish.

<sup>9</sup> General infrastructure for fishing communities shall also not be considered to be regionally specific under the ASCM.

<sup>10</sup> Restoration to pre-disaster state is not intended to restore a pre-disaster state of over-capacity.

<sup>11</sup> Vessels decommissioned for legitimate research and training purposes, with no commercial functions, need not comply with the conditions of this exception.

#### ***Article 4***

##### ***Special and Differential Treatment of Developing Country Members***

- 4.1 Notwithstanding the provisions of Articles 2 and 3, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its artisanal fisheries activities<sup>12</sup>, defined herein as those which:
- (a) Operate within its territorial waters and mostly close to shore;
  - (b) Use vessels of [proportional ratio between gross tonnage and engine power] and which utilize primarily manual gear; and
  - (c) Are operated by individual fishermen or family members for the purpose of subsistence or local trade.
- 4.2 Notwithstanding the provisions of Articles 2 and 3, a developing country Member shall be allowed to grant or maintain subsidies to its small-scale fisheries for the purpose of fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel. For the purposes of this section, small-scale fisheries shall be defined as those that:
- (a) Are below 20 meters dimension; and
  - (b) Operate within the Member's 12 nautical mile limit or the Member's own archipelagic waters.
- 4.3 Notwithstanding the provisions of Articles 2 and 3, a developing country Member shall be allowed to grant or maintain subsidies for the purpose of fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel, provided that the purpose is to exploit:
- (a) Fisheries in the Member's own Exclusive Economic Zone; or
  - (b) Rights held by the Member in high seas fishing quotas or any other rights established by a regional fisheries management organization (RFMO) or a regional fisheries management arrangement.
- 4.4 Upon the request of developing country Members, developed country Members shall provide technical assistance to developing country Members to allow them to participate fully in any RFMO adjacent to their exclusive economic zone or archipelagic waters.
- 4.5 Fishing subsidies under part 4.2 shall be allowed contingent on a showing that:
- (a) The Member has a fishery management plan in place that is effectively monitored and adequately enforced;
  - (b) The fishery does not adversely affect resources governed by the fishery management plan;
  - (c) The small-scale fishing activities will not adversely affect fishery resources of other Members or the resources governed by relevant RFMO's; and

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<sup>12</sup> Artisanal fisheries activities shall include on-board handling (including but not limited to provision of cool boxes, fish holds and other measures to encourage hygiene and sanitation and to preserve fish quality) and post-harvest handling.

- (d) Determinations of adverse effects on fishery resources will be made by fisheries experts convened by the Committee pursuant to procedures under Sections 5 and 6.
- 4.6 Fishing subsidies under part 4.3 shall be allowed contingent on a showing that the developing country Member has:
  - (a) Underexploited resources in its EEZ; or
  - (b) A right to high seas fishing quotas or extra quota in a RFMO.
- 4.7. Upon the request of developing country Members, developed country Members shall provide technical assistance to developing country Members to develop the capacity to initiate, implement and enforce compliance with a fishery management plan adequate to provide the showing required by Sections 4.3, 4.4 and 4.5 herein.

## **Article 5**

### ***Notifications and Enquiry Points***

- 5.1 A Member asserting that a subsidy covered by this Annex qualifies for an exception pursuant to Sections 3 and 4, with the exception of artisanal fisheries under Section 4.1, shall include in its annual notification, *mutatis mutandis*, under Article 25 of the ASCM, information fully describing the fisheries benefiting from the subsidy and describing how the subsidy conforms to the conditions set forth in the exception. Information shall include, where relevant, measures to address fishing capacity and effort, and the biological status of managed stocks.
- 5.2 The Committee on the ASCM will annually review such notifications and report to Members on the extent to which Members are availing themselves of such exceptions. The Committee may appoint a special subcommittee including fishery experts drawn from Member governments and those individuals recommended by relevant multilateral institutions with fisheries expertise for this purpose.
- 5.3 Upon the request of any Member, the Committee shall convene a subcommittee composed pursuant to Section 5.2 to review a particular notification and report to the Committee its findings on whether the subsidy or subsidies of a Member conforms to the conditions of the exception claimed, including whether the subsidy adversely affects the fishery resources of a Member. The subcommittee's report shall indicate whether:
  - (a) The Member claiming the exception has a national fisheries management plan in place, which includes, *inter alia*: conservation and management measures based on the best scientific evidence available; fisheries management control measures (fisheries monitoring, surveillance, control and enforcement mechanisms); mechanisms established to identify and quantify fishing capacity; vessel registration and licensing system; limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels; and timely and reliable statistics available on catch and fishing effort in sufficient detail to allow sound statistical analysis; and
  - (b) The volume of the total catch by a Member of target species and the number of vessels used in those fishing operations are decreasing, as compared to the total catch volume and number of vessels it had during the previous year, and
  - (c) Whether the subsidy claimed is causing or likely to cause adverse effect to the fishery resources of a Member or fishery resources governed by a relevant RFMO or other arrangement.



- 5.4 Each Member shall maintain an enquiry point to answer all reasonable enquiries from other Members and interested parties in other Members concerning its fisheries management plan, including measures in place to address fishing capacity and fishing effort and the biological status of managed stocks. Special flexibility shall be given to developing countries with respect to instituting enquiry points, including flexibility to develop such enquiry points with the help of technical assistance. Upon the request of developing country Members, developed country Members shall provide technical assistance to develop the capacity to initiate and implement compliance with this Section.

## **Article 6**

### *Serious Prejudice and Adverse Effects Notification*

- 6.1 Serious prejudice in the case of a fishery subsidy covered by this Annex shall be presumed to arise under Article 6.3 of the ASCM when:
- (a) There is an increase in the subsidizing Member's capacity to produce the product due to the subsidy; or
  - (b) An increase in the subsidizing Member's relative share of production of the like product, as compared to non-subsidized production, over a representative period sufficient to demonstrate clear trends in production.
- 6.2 An adverse effect to the domestic industry shall be presumed to arise under Article 5 of the ASCM and Part V of the ASCM when there has been found an adverse effect to the fishery resources of a Member. Other than a countervailing duty investigation under Part V, a finding of adverse effect to the fishery resources of a Member shall be determined by a panel including fisheries experts, drawn from Member governments and those individuals recommended by relevant multilateral institutions. In an investigation under Part V, the investigating authorities shall include fisheries experts in their investigative process. They may base their finding of injury to the domestic injury either as defined in Article 6.3 below in terms of fisheries adverse effects, or according to the regular material injury standard for a countervailing duty investigation, or both.
- 6.3 A panel's or investigating authority's determination of fisheries adverse effect<sup>13</sup> shall be based on information including:
- (a) The total catch (in volume terms) by the Member of target species and by-catch, with breakdown by fishery, and the number of vessels used in those catching operations, with breakdown by operated location areas;
  - (b) The criteria and scientific information used to set the status of the fishery;
  - (c) Whether the fishery in question is under management of a regional fisheries management organization or arrangement and which are the nature of the monitoring and the quantitative limits applicable to the Member;
  - (d) National fisheries management plans in place, with sufficient information to enable Members to evaluate and to understand their framework and operation; and

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<sup>13</sup> Nothing in the concept of fisheries adverse effects shall prejudice the ability of a panel or investigating authority to find adverse effects as otherwise defined in Article 5 of the ASCM. A fisheries adverse effect is an alternative additional means of meeting the adverse effects standard.

- (e) Government-to-government payment for access by foreign vessels to fishing resources of a developing country's maritime jurisdiction or to quotas or any other rights established by any regional fishery management organization or arrangement ("access rights"), with breakdown by recipient country, total amounts paid, amounts received on the onward transfer of the access rights, fisheries data (in accordance with items (a) and (b) of this paragraph) and other relevant information.
- (f) Information on the biological status of relevant marine ecosystems.

#### ***Article 7***

##### ***Prevention of circumvention***

Members shall not have recourse to rules of origin (preferential or non-preferential), the flag of a vessel and access rights, among others, as a means to undermine the objectives set out in the preamble and to circumvent their obligations under this Annex.

#### ***Article 8***

##### ***Review***

The provisions of this Annex shall be reviewed by the Committee after a period of 8 (eight) years from the date of its entry into force, with a view to determining whether any modification is necessary.

#### ***Article 9***

##### ***Transitional provisions***

- 9.1 Any fisheries subsidy which has been established within the territory of a Member before the date of the entry into force of this Annex shall be notified to the Committee in no later than 90 days after that date.
- 9.2 From the entry into force of this Annex, there shall be a period of three years for developed country Members and a period of five years for developing country Members to gradually phase out and eliminate fisheries subsidies that are inconsistent with the provisions of this Annex. The starting point of the reduction shall be the 2003-2005 average of the fisheries subsidies prohibited under Article 2. Members shall not be allowed to adopt new prohibited fisheries subsidies or to extend the scope of any existing prohibited fisheries subsidy.
- 9.3 Any least-developed country Member shall phase out its fisheries subsidies within an eight-year period, preferably in a progressive manner, from the date of entry into force of this Annex. If such least-developed country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the Member in question. If the Committee determines that the extension is justified, the Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the least-developed country Member shall phase out those fisheries subsidies within 3 (three) years from the end of the last authorized period.

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