

RELATION BETWEEN ARTICLE I AND ARTICLE V OF THE CHAIR'S TEXT

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

The following communication, dated 3 June 2008, is being circulated at the request of the Delegations of Korea and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

I. INTRODUCTION

1. During the WWF-UNEP Workshop on Disciplining Fisheries Subsidies held on 1-2 March 2007 (TN/RL/W/207), the Rules Chair pointed out that "the impacts of fisheries subsidies on resources and on trade can depend heavily on the context in which subsidies are employed." The Chair's draft text (TN/RL/W/213), however, overloaded the weight of conservation of fisheries resources onto the prohibition of subsidies and did not consider "the context in which they are employed." Further, it included a provision (Article I of the Fisheries Subsidies Annex) that prohibits a wide range of fisheries subsidies, although it has never been established that there is an evidence-based causal link between these subsidies and the depletion of fisheries resources.

2. During the course of the fisheries subsidies negotiations, we and several other Members have suggested a failure to implement an effective fishery management system as "the context" the Chair referred to. They have suggested that with a sound fisheries management measure in place¹, the provision of fisheries subsidies may not necessarily lead to over-fishing or overcapacity. In this regard, it was suggested that more weight be placed on the fisheries management system rather than on the prohibition of fisheries subsidies. Possible ways to provide incentives for proper fisheries management systems were also sought.

3. On the other hand, it was also recognized that fisheries subsidies have their own legitimate social and political policy objectives to pursue. Thus, one of the negotiation goals should be to strike a balance between the two needs; the need for sustainable fish stocks and the need for fisheries subsidies to perform their diverse functions.

4. In view of this and in an effort to help the Negotiating Group on Rules "steadily move from [the] first draft Chairman's texts (which were intended to provoke discussion on the broad parameters of possible outcomes to the negotiations) to draft final texts (which by nature will have to describe a gradually emerging consensus)" as stated in the Chairman's Working Document of 28 May 2008, we

¹ See TN/RL/W/232 page C-3.

would like to put forward the following proposal to address the issue associated with the relations between Article I and Article V.

5. This paper's main focus is the relationship between Article I and V, and therefore, is without prejudice to our views on other parts of the Chair's draft text. We will revisit other issues, such as appropriate scope of Article I and II, the exception of small scale fisheries etc, at the later stage.

II. EXPLANATION OF THE PROPOSAL

A. ARTICLE I

6. For the aforementioned reasons, we would like to propose to provide a proper linkage between Articles I and V. More specifically, we propose that Article I subsidies be prohibited only where there is no sufficient reason to believe that their possible negative impacts are controlled by an effective fisheries management system. For this purpose, we suggest the following two requirements regarding the fisheries management system for the subsidies listed in Article I to be allowed. When one of these requirements is not met, the subsidies shall be prohibited. First, as a substantive requirement, a subsidizing Member is required to properly maintain all the elements listed in Article V in its fisheries management systems. Second, as a causality requirement, the subsidizing Member is required to demonstrate that its provision of fisheries subsidies is not likely to cause over-fishing or overcapacity because of its well-functioning fisheries management system. In addition, for transparency purposes, the Member is required to notify their scientific assessments on the impacts of those subsidies.

7. I.1(h) has been moved to a separate paragraph since subsidies on IUU should, given their nature, be prohibited and no exemption should be allowed.

8. It is also suggested that paragraphs (d) and (e), which are in nature out of the scope of this negotiation, be deleted.² In fact, to our best knowledge, no Member has suggested to prohibit those subsidies during the course of negotiations before the circulation of the Chair's text last November.

9. In the case of the original Article I.2, neither sufficiently clear rationale for its necessity nor clear-cut interpretative gauge for "an unequivocally over-fished condition" has been presented and as such it is apparent that this provision is unoperational. Therefore, this provision should remain deleted until we have a better understanding of this proposed paragraph.

10. Finally, the exception to subsidies on natural disaster relief as contained in the footnote to the chapeau of Article I.1 has been moved to Article II (general exception), but the language remains basically the same.

B. ARTICLE II

11. The title of Article II is suggested to be slightly changed in order to make clearer its relationship with Article I.

12. We suggest deleting the linkage between Article II and Article V by taking out the phrase "and subject to the provision of Article V" from the chapeau of Article II. The reasoning is the following: the current Chair's text allows the granting of subsidies in Article II only when a Member maintains its fisheries management system in accordance with Article V. In our view, however, most subsidies listed in Article II are not intended to support Member's domestic fish production but to contribute to promoting sound fisheries practices or otherwise to have beneficial social functions, such as safety,

² See TN/RL/W/232 page C-4, 5.

not linked to fishing capacity. Because of this, these subsidies should not be discouraged but rather encouraged. There seems to be no logical linkage between Articles II and V. However, we are open to discussion on this issue and, therefore, a bracket is placed in the phrase proposed to be deleted.

13. In the case of the original Article II(e) exception, no sufficient reasons for its necessity have been introduced so far. It seems that no legal and practical implications of this paragraph have been fully understood by Members. Therefore, until Members fully appreciate the rationale for this provision, we suggest that Article II(e) remains deleted.

Annex – Suggested Modifications to Articles I and II of the Chair's Draft Text

Article I

Prohibition of Certain Fisheries Subsidies

I.1 Except as provided for in Articles II and III, ~~or in the exceptional case of natural disaster relief³~~, the following subsidies within the meaning of paragraph 1 of Article 1, to the extent they are specific within the meaning of paragraph 2 of Article 1, shall be prohibited where a subsidizing Member fails to properly maintain all the elements in Article V in its fisheries management system or a subsidizing Member fails to demonstrate, for example, through the peer review stipulated in Article V, that its fishery management system is likely to prevent over-fishing or overcapacity in light of the objective, design, and intended function of the system:

- (a) Subsidies the benefits of which are conferred on the acquisition, construction, repair, renewal, renovation, modernization, or any other modification of fishing vessels⁴ or service vessels⁵, including subsidies to boat building or shipbuilding facilities for these purposes.
- (b) Subsidies the benefits of which are conferred on transfer of fishing or service vessels to third countries, including through the creation of joint enterprises with third country partners.
- (c) Subsidies the benefits of which are conferred on operating costs of fishing or service vessels (including license fees or similar charges, fuel, ice, bait, personnel, social charges, insurance, gear, and at-sea support); or of landing, handling or in- or near-port processing activities for products of marine wild capture fishing; or subsidies to cover operating losses of such vessels or activities.
- ~~(d) Subsidies in respect of, or in the form of, port infrastructure or other physical port facilities exclusively or predominantly for activities related to marine wild capture fishing (for example, fish landing facilities, fish storage facilities, and in or near port fish processing facilities).~~
- ~~(e) Income support for natural or legal persons engaged in marine wild capture fishing.~~
- (d) Price support for products of marine wild capture fishing.

³ ~~Subsidies referred to in this provision shall not be prohibited when limited to the relief of a particular natural disaster, provided that the subsidies are directly related to the effects of that disaster, are limited to the affected geographic area, are time limited, and in the case of reconstruction subsidies, only restore the affected area, the affected fishery, and/or the affected fleet to its pre disaster state, up to a sustainable level of fishing capacity as established through a science-based assessment of the post-disaster status of the fishery. Any such subsidies are subject to the provisions of Article VI.~~

⁴ For the purposes of this Agreement, the term "fishing vessels" refers to vessels used for marine wild capture fishing and/or on-board processing of the products thereof.

⁵ For the purposes of this Agreement, the term "service vessels" refers to vessels used to tranship the products of marine wild capture fishing from fishing vessels to on-shore facilities; and vessels used for at-sea refuelling, provisioning and other servicing of fishing vessels.

- (e) Subsidies arising from the further transfer, by a payer Member government, of access rights that it has acquired from another Member government to fisheries within the jurisdiction of such other Member.⁶
- (h) ~~Subsidies the benefits of which are conferred on any vessel engaged in illegal, unreported or unregulated fishing.~~

I.2 In any case, subsidies the benefits of which are conferred on any vessel engaged in illegal, unreported or unregulated fishing⁷ shall be prohibited. ~~In addition to the prohibitions listed in paragraph 1, any subsidy referred to in paragraphs 1 and 2 of Article 1 the benefits of which are conferred on any fishing vessel or fishing activity affecting fish stocks that are in an unequivocally overfished condition shall be prohibited.~~

I.3 For the purpose of paragraph 1, a subsidizing Member shall, in its notification of subsidies referred to in that paragraph made in accordance with Article 25, or in the information it supplies in accordance with Article V, include science-based assessments that demonstrate possible impacts of those subsidies on marine fish stocks and/or the preventive effects of its fisheries management system on them.

Article II

~~General~~ Exceptions to Article I

Notwithstanding the provisions of Article I, ~~and subject to the provision of Article V~~:

- (a) For the purposes of Article I.1(a), subsidies exclusively for improving fishing or service vessel and crew safety shall not be prohibited, provided that:
 - (1) such subsidies do not involve new vessel construction or vessel acquisition;
 - (2) such subsidies do not give rise to any increase in marine wild capture fishing capacity of any fishing or service vessel, on the basis of gross tonnage, volume of fish hold, engine power, or on any other basis, and do not have the effect of maintaining in operation any such vessel that otherwise would be withdrawn; and
 - (3) the improvements are undertaken to comply with safety standards.
- (b) For the purposes of Articles I.1(a) and I.1(c) the following subsidies shall not be prohibited:

subsidies exclusively for: (1) the adoption of gear for selective fishing techniques; (2) the adoption of other techniques aimed at reducing the environmental impact of marine wild capture fishing; (3) compliance with fisheries management regimes aimed at sustainable use and conservation (e.g., devices for Vessel Monitoring Systems); provided that the subsidies do

⁶ Government-to-government payments for access to marine fisheries shall not be deemed to be subsidies within the meaning of this Agreement.

⁷ The terms "illegal fishing", "unreported fishing" and "unregulated fishing" shall have the same meaning as 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.

not give rise to any increase in the marine wild capture fishing capacity of any fishing or service vessel, on the basis of gross tonnage, volume of fish hold, engine power, or on any other basis, and do not have the effect of maintaining in operation any such vessel that otherwise would be withdrawn.

- (c) For the purposes of Article I.1(c), subsidies to cover personnel costs shall not be interpreted as including:
 - (1) subsidies exclusively for re-education, retraining or redeployment of fishworkers⁸ into occupations unrelated to marine wild capture fishing or directly associated activities; and
 - (2) subsidies exclusively for early retirement or permanent cessation of employment of fishworkers as a result of government policies to reduce marine wild capture fishing capacity or effort.
- (d) Nothing in Article I shall prevent subsidies for vessel decommissioning or capacity reduction programmes, provided that:
 - (1) the vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;
 - (2) the fish harvesting rights associated with such vessels, whether they are permits, licences, fish quotas or any other form of harvesting rights, are permanently revoked and may not be reassigned;
 - (3) the 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; and
 - (4) the fisheries management system in place includes management control measures and enforcement mechanisms designed to prevent overfishing in the targeted fishery. Such fishery-specific measures may include limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels, individuals and/or groups, such as individual transferable quotas.
- (e) Nothing in Article I shall prevent subsidies on natural disaster relief when they are limited to the relief of a particular natural disaster, provided that the subsidies are directly related to the effects of that disaster, are limited to the affected geographic area, are time-limited, and in the case of reconstruction subsidies, only restore the affected area, the affected fishery, and/or the affected fleet to its pre-disaster state, up to a sustainable level of fishing capacity as established through a science-based assessment of the post-disaster status of the fishery. ~~Nothing in Article I shall prevent governments from making user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programmes.~~

⁸ For the purpose of this Agreement, the term "fishworker" shall refer to an individual employed in marine wild capture fishing and/or directly associated activities.

Article V

Fisheries Management

V.1 Any Member granting or maintaining any subsidies as referred to in Article I, [Article II] or Article III.2(b), shall operate
