

**FISHERIES SUBSIDIES:
SPECIAL AND DIFFERENTIAL TREATMENT**

Communication from Brazil, China, India and Mexico

The following communication, dated 8 February 2010, is being circulated at the request of the Delegations of Brazil, China, India and Mexico.

This legal draft was the result of contributions from the co-sponsors as well as other delegations that actively participated in the drafting process. It remains open for the subscription of other delegations.

This document is intended to follow up on the latest contributions by Developing Country Members regarding **the special and differential treatment issue (S&DT) and the applicable controls in the future disciplines on fisheries subsidies**. Those contributions include the joint statement on S&DT presented by Brazil, China, Ecuador, Mexico and Venezuela (document TN/RL/W/241/Rev.1) and legal text proposals such as the ones circulated by China, India and Indonesia (TN/RL/GEN/155/Rev.1) and by Brazil and Argentina (TN/RL/GEN/151/Rev.1).

This text is an attempt at putting together all those contributions side by side with the Chair's November 2007 draft consolidated text, taking into account the debate on the pertinent questions of the December 2008 roadmap for fisheries subsidies.

Our main objective is to make real the Hong Kong mandate in that "appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns".

The focus on S&DT and its applicable controls is the reason why only Articles III, IV and V of the Chair's first draft text are dealt with in this document. **This does not mean that the proponents agree with the Chair's suggestions on the other parts of that draft text**, rather the proponents just seek to convey what they believe is needed for fulfilling the Hong Kong mandate regarding S&DT.

Our assumption here is that the prohibition of subsidies causing excessive fishing effort and negatively impacting fisheries resources can and shall be reconciled with the important role of fisheries subsidies in the economic development of developing countries. The applicable controls should allow developing countries to achieve development priorities, poverty reduction, and address their livelihood and food security concerns.

On the issue of **small-scale, artisanal fisheries**, the proponents decided to bring forward a **definition based on socio-economic criteria**, inspired by the current Article 6.2 of the Agreement on Agriculture. We believe that this is the best way for striking a satisfactory balance, in the absence of internationally-agreed definitions on those fisheries activities by other Organizations more directly involved in fisheries issues. Each Member should be able to work on its own definition, insofar as the criteria set forth in the future WTO disciplines are observed.

On the **larger scale fisheries**, criteria such as the boat size and the area of capture were replaced with **provisions structured on the rights Members have under the international law**. For those activities the controls in Articles IV and V would fully apply, in order to implement the Hong Kong mandate consistently with its main goal: to bar harmful fisheries subsidies that create over-fishing and produce overcapacity, as well as distort trade or production. Artificial distinctions such as the Exclusive Economic Zone limitation and the 10 meters threshold were thus deleted.

The provision of fisheries adverse effects in Article IV were strengthened by a definition of these effects in paragraph 2, followed by a list of situations where fisheries adverse effects would be deemed to exist. We are suggesting two types of analyses under that Article: a complete one in which the occurrence of fisheries adverse effects would have to be demonstrated by the complaining Member; and a simplified one in which only the aspects presented as "shortcuts" would need to be demonstrated.

Article V was streamlined by means of splitting its paragraphs concerning the content of fisheries management systems, the relationship between them and international standards and, finally, transparency obligations. On the content aspect, this proposal follows the principle that **only the core elements of fisheries management systems should be included in the final Agreement, leaving room for their implementation by Members on a case by case basis and adequate to their fishing activities**. Notwithstanding their attempts on that matter, the proponents' views on Article V are dependent on a final understanding on its scope and coverage, in particular its application beyond the S&DT exceptions and the nature of the overall notification requirements of the fisheries disciplines.

This legal draft is a work in progress and does not constitute Members' final position on the subject.

Article III

Special and Differential Treatment of Developing Country Members

III.1 The prohibition of Article 3.1(c) and Article I shall not apply to least-developed country ("LDC") Members.

III.2 For developing country Members other than LDC Members, **the subsidies referred to in Article I.1 shall not be prohibited**

- (a) ~~Subsidies referred to in Article I.1 shall not be prohibited where those subsidies relate exclusively to marine wild capture fishing performed on an inshore basis (i.e., within the territorial waters of the Member) with non-mechanized net retrieval, provided that (1) the activities are carried out on their own behalf by fishworkers, on an individual basis which may include family members, or organized in associations; (2) the catch is consumed principally by the fishworkers and their families and the activities do not go beyond a small profit trade; and (3) there is no major employer-employee relationship in the activities carried out. Fisheries management measures aimed at ensuring sustainability, such as the measures referred to in Article V, should be implemented in respect of the fisheries in question, adapted as necessary to the particular situation, including by making use of indigenous fisheries management institutions and measures.~~

where the benefits of those subsidies are conferred on low income, resource poor or livelihood fishing activities, provided that these activities are performed by fishworkers on an individual or family basis or employed by associations or micro-enterprises or individual boat owners. Fisheries management measures aimed at ensuring a sustainable level, such as the measures referred to in Article V, should be implemented in respect of the fisheries in question, adapted as necessary to the particular situation, including by making use of indigenous fisheries management institutions and measures.

III.3 (b) In addition, subject to the provisions of Article V, **the following subsidies referred to in Article I.1 shall not be prohibited for developing country Members other than LDC Members:**

- (a) (1) Subsidies referred to in Articles I.1(d), I.1(e) and I.1(f) ~~shall not be prohibited.~~
- (2) ~~Subsidies referred to in Article I.1(a) and I.1(c) shall not be prohibited provided that they are used exclusively for marine wild capture fishing employing decked vessels not greater than 10 meters or 34 feet in length overall, or undecked vessels of any length.~~
- (b) (3)(2) ~~For fishing and service vessels of such Members other than the vessels referred to in paragraph (b)(2);~~ **Subsidies referred to in Articles I.1(a) and I.1(c), shall not be prohibited where their purpose is to exploit stocks over which the subsidizing Member has (i) jurisdiction, sovereignty or sovereign rights¹ or (ii) fishing quotas or any other fishing rights²**

¹ For the purpose of this article, "jurisdiction, sovereignty or sovereign rights" shall mean the exclusive rights a Member has under the international law with respect to the exploitation of natural resources in areas such as the Territorial Sea and the Exclusive Economic Zone.

established by a regional fisheries management organization or arrangement (RFMO)³ or applicable international instruments for identified target stocks, provided that (i) ~~the vessels are used exclusively for marine wild capture fishing activities of such Members in respect of particular, identified target stocks within their Exclusive Economic Zones ("EEZ");~~ (ii) those stocks ~~are have been~~ subject to prior scientific status assessment conducted in accordance with relevant international standards, aimed at ensuring that the resulting capacity does not exceed a sustainable level **as determined by their maximum sustainable yield.** ~~;~~ and (iii) ~~that assessment has been subject to peer review in the relevant body of the United Nations Food and Agriculture Organization ("FAO").~~

III.4 ~~III.3~~ Subsidies referred to in Article I.1(g) shall not be prohibited where **the access rights are acquired by a developing country Member and** the fishery in question is within the EEZ of a developing country Member, provided that the agreement pursuant to which the rights have been acquired is made public, and contains provisions designed to prevent overfishing in the area covered by the agreement ~~based~~ **referenced** on internationally-recognized best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at ensuring the sustainable use and conservation of marine species, **where they exist**, such as, inter alia, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks ("Fish Stocks Agreement"), the Code of Conduct on Responsible Fisheries of the Food and Agriculture Organization ("Code of Conduct"), the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas ("Compliance Agreement"), and technical guidelines and plans of action (including criteria and precautionary reference points) for the implementation of these instruments, or other related or successor instruments. These provisions shall include requirements and support for science-based stock assessment before fishing is undertaken pursuant to the agreement and for regular assessments thereafter, for management and control measures, for vessel registries, for reporting of effort, catches and discards to the national authorities of the host Member and to relevant international organizations, and for such other measures as may be appropriate.

III.5 ~~III.4~~ Members shall give due regard to the needs **and resource constraints** of developing country Members in complying with the requirements of this Annex, including the conditions and criteria set forth in this Article and in Article V.

III.6 ~~and~~ **Members** shall establish mechanisms for, and facilitate, the provision of technical assistance **for developing country Members** in this regard, bilaterally and/or through the appropriate international organizations.

² For the purpose of this article "fishing quotas or any other fishing rights" means enforceable quantitative limits, established through scientific assessment, imposed on fish volumes for specified period, or limits to fishing efforts on a given fishery, area or time as may be incorporated in conservation measures.

³ If the Member in question is not a member of the FAO, the peer review shall take place in another recognized and competent international organization. **For the purpose of this Annex, RFMOs are international organizations or arrangements which:** (a) carries out management activities over specific fisheries in a determined area; (b) are open to new entrants; (d) publish a list of all conservation measures in force; (c) have specific procedures to deal with illegal, unreported and unregulated fishing; (d) and have a decision-making process in accordance with an agreement, convention or procedure.

Article IV

General Discipline on the Use of Subsidies

IV.1 No Member shall cause, through the use of any subsidy [*referred to in paragraphs 1 and 2 of Article I*], **fishery adverse effects to the interest of other Members in respect of identifiable wild marine fish stocks.**

IV.2 For the purpose of paragraph 1, fishery adverse effects shall include any case in which it has been demonstrated that the subsidizing Member's fishing capacity⁴ for those stocks has increased above the level necessary to harvest a sustainable allowable catch⁵ and it has resulted in more than moderate exploitation, so that there remains no potential for further non-subsidized expansion of production. ~~depletion of or harm to, or creation of overcapacity in respect of, (a) straddling or highly migratory fish stocks whose range extends into the EEZ of another Member; or (b) stocks in which another Member has identifiable fishing interests, including through user specific quota allocations to individuals and groups under limited access privileges and other exclusive quota programmes.~~ The existence of such situations shall be determined taking into account available pertinent information, including from other relevant international organizations, **and referencing to** ~~Such information shall include the status of the subsidizing Member's implementation of internationally-recognized best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at the sustainable use and conservation of marine species, where they exist,~~ such as, inter alia, the Fish Stocks Agreement, the Code of Conduct, the Compliance Agreement, and technical guidelines and plans of action (including criteria and precautionary reference points) for the implementation of these instruments, or other related or successor instruments.

IV.3 Fishery adverse effects in the sense of paragraph 1 shall be deemed to exist in the following situations:

- (a) a Member invoking any of the exceptions provided in Articles II, III.3 and III.4 does not have a national fisheries management system in place compliant with Article V;
- (b) a subsidy referred to in Article I is used for fishing stocks the status of exploitation of which is declared "overexploited", "depleted", or "recovering" by a regional or international organization with jurisdiction over the fishery in question, or has other equivalent status; or
- (c) a subsidy referred to in Article I results in the increase of the gross tonnage, volume of fish hold and/or engine power of the subsidizing Member fishing vessels with respect to any fishing stock the status of exploitation of which is declared "overexploited", "depleted", or "recovering" by a regional or international organization with jurisdiction over the fishery in question, or has other equivalent status.

IV.4 ~~IV.2~~ Any subsidy referred to in this Annex shall be attributable to the Member conferring it, regardless of the flag(s) of the vessel(s) involved or the application of rules of origin to the fish involved.

⁴ For the purpose of this Article, "fishing capacity" means the total capacity authorized by the Member for the fishing of identifiable wild marine fish stocks or group of stocks.

⁵ For the purpose of this Article, "sustainable allowable catch" means a total allowable catch below levels which are capable of producing a long term maximum sustainable yield, based on the best scientific evidence available.

Article V

*Fisheries Management*⁶

V.1 Any Member granting or maintaining any subsidy as referred to in Article II or Article ~~III.2(b)~~ **III.3 and III.4** shall operate a fisheries management system regulating marine wild capture fishing within its jurisdiction, designed to prevent overfishing. Such management system shall be ~~based~~ referenced on the relevant internationally-recognized best standards and practices for fisheries management aimed at ensuring the sustainable use and conservation of marine species, **where they exist**, such as, inter alia, the Fish Stocks Agreement, the Code of Conduct, the Compliance Agreement, technical guidelines and plans of action (including criteria and precautionary reference points) for the implementation of these instruments, or other related or successor instruments.

V.2 ~~The A~~ fisheries management system **within the meaning of paragraph 1** shall include regular science-based stock assessment, as well as capacity, effort **and catch-based** management measures, ~~including harvesting licences or fees; vessel registries; establishment and allocation of fishing rights, or allocation of exclusive quotas to vessels, individuals and/or groups, and related enforcement mechanisms; species-specific quotas, seasons and other stock management measures; vessel monitoring which could include electronic tracking and on-board observers; systems for reporting in a timely and reliable manner to the competent national authorities and relevant international organizations data on effort, catch and discards in sufficient detail to allow sound analysis; and research and other measures related to conservation and stock maintenance and replenishment.~~ To this end, the Member shall adopt and implement pertinent domestic legislation and administrative or judicial enforcement mechanisms. It is desirable that such fisheries management systems be based on limited access privileges⁷.

V.3 **Members shall notify** information as to the nature and operation of these systems, including the results of the stock assessments performed, ~~shall be notified to the relevant body of the FAO, where it shall be subject to peer review prior to the granting of the subsidy.~~ References for such the legislation and mechanism **required under paragraph 2**, including for any modifications thereto, shall be notified to the Committee on Subsidies and Countervailing Measures ("the Committee") pursuant to the provisions of Article VI.4.

V.4 ~~V.2~~ Each Member shall maintain an enquiry point to answer all reasonable enquiries from other Members and from interested parties in other Members concerning its fisheries management system, including measures in place to address fishing capacity and fishing effort, and the biological status of the fisheries in question. Each Member shall notify to the Committee contact information for this enquiry point. **The Committee shall discuss issues related to fisheries management system brought to its attention by any Member in a dedicated session at least on an annual basis.**

⁶ Developing country Members shall be free to implement and operate these management requirements on a regional rather than a national basis provided that all of the requirements are fulfilled in respect of and by each Member in the region.

⁷ Limited access privileges could include, as appropriate to a given fishery, community-based rights systems, spatial or territorial rights systems, or individual quota systems, including individual transferable quotas.