

FISHERIES SUBSIDIES—ARTICLES I, II, V AND VI

Communication from Australia

The following communication, dated 16 September 2010, is being circulated at the request of the Delegation of Australia.

Introduction

1. Australia continues to attach the greatest importance to a meaningful and ambitious outcome in the fisheries subsidies negotiations. Australia supports the current draft text of November 2007 as enabling a suitable level of ambition and structure to disciplines on fisheries subsidies. Australia considers that the "roadmap" process was a useful exercise both in exploring in a deeper way the views of Members but also in allowing Members to elaborate on their respective views on elements of a possible outcome in this area. By submitting this proposal, Australia seeks to highlight areas where further technical, text-based intensive work is required by the Group and to generate further constructive discussion on possible solutions.

2. Australia has reflected further on the draft text before Members and in line with securing an ambitious outcome in these negotiations, proposes the addition of a new category of subsidy which should be prohibited. Australia also sets out some further views on areas of the current text where the concepts could be clarified or improved. In doing so, Australia has retained the current draft text on the basis that we continue to believe that this architecture forms a good basis for further in-depth negotiations.

Destructive fishing practices

3. Australia considers that there are a number of current fishing practices which have a serious adverse impact on high seas fisheries and habitats. In particular, Australia has concerns over the impacts of fishing practices, including bottom trawling and large-scale drift-nets, including on the high seas, which have destructive impacts on vulnerable marine ecosystems. Permitting the continued subsidisation of these practices in our view would not be consistent with our mandate. Australia therefore proposes that a further category of subsidy should be included in the list of prohibited fisheries-specific subsidies.

4. Australia has taken a strong position in other fora in relation to international commitments on sustainable fisheries. Destructive fishing practices have long been recognised to be harmful to the sustainability of the world's oceans. In 2007, the UN General Assembly (UNGA) adopted Resolution 61/105 of 8 December 2006 on sustainable fisheries including in relation to adopting and implementing measures regulating bottom fisheries. This was reaffirmed in UNGA Resolution 64/72 of 4 December 2009. The South Pacific Regional Fisheries Management Organisation (SPRFMO)

preliminarily agreed in November 2009 on an interim measure which limits bottom fishing and bans the use of deepwater gillnets in the SPRFMO Convention area.

5. Australia proposes that subsidies which support destructive fishing practices should be prohibited. The structure of a new category of prohibited fisheries subsidy would be similar to the current draft Article I.1(h) prohibition relating to subsidies provided to any vessel engaged in illegal, unreported or unregulated fishing.

6. We consider such an approach would be consistent with the approach taken for similar existing provisions under the General Exceptions in Article II which allow only subsidies which are aimed at reducing the environmental impact of marine wild capture fishing. We consider the proposal by the United States in TN/RL/GEN165 proposing a new Article II(b) highlights this well.

Textual Clarifications: General Exceptions

7. Australia proposes some suggested clarifications to the language contained within Article I relating to references to subsidies. The proposed textual clarifications and amendments to Article I seek to ensure internal consistency with the existing Subsidies Agreement. In our view, the text needs to distinguish between subsidies and the benefit of a subsidy (which is an element of its legal character).

8. Certain types of fisheries subsidies may be beneficial to fish stocks and are therefore included in the General Exceptions of the current draft text. These subsidies include income support for fishworkers to exit the industry or subsidies for vessel decommissioning and capacity reduction (which may be required, for example, to create marine protected areas). However, there is also a risk that these subsidies could lead to overcapacity or over-fishing, such as income support which encourages fishworkers to remain in the industry or vessel decommissioning which results in boats fishing in another part of the world. The rules on these exceptions therefore need to be elaborated and clarified to ensure that Members are not discouraged from providing good subsidies while also ensuring that these subsidies do not create overcapacity or over-fishing. For example, in our proposed changes below, we highlight the need to separate vessel decommissioning and capacity reduction into two separate exceptions with more targeted conditions.

- ***Income support/personnel costs:*** In relation to the inclusion of subsidies for early retirement or permanent cessation of employment of fishworkers (covered under Article II(c)(2), Australia supports consideration of the placement and clarification of the scope of the term "personnel costs" under Article I.1(c). Australia proposes clarifying the prohibition of "income support" under Article I.1(e). The proposed language means that support for staying in the industry and encouraging fishing effort would be prohibited but support for exiting the industry would fall outside this definition.
- ***Governmental activities, including R&D:*** Australia sees merit in clarifying that certain governmental activities, including R&D in certain strict circumstances and governmental services related to fisheries management systems could be included as general exceptions or at least by way of footnote to state that these measures do not constitute subsidies for the purposes of the Annex VIII. The addition of a footnote to Article V ¹ is proposed but Australia is open to the appropriate placement of such a provision within the Annex (for

¹ While the proposed textual amendments are based on document TN/RL/W/213, we believe the proposed revised text from the United States (contained in document TN/RL/GEN/165) clarifies the structure and commitments under Article V.

example, within Article II). The proposed text has drawn on New Zealand's textual proposal (contained in document TN/RL/GEN/141) on non-prohibited subsidies.

- ***Vessel decommissioning and capacity reduction programmes:*** In relation to Article II(d), Australia supports the inclusion of subsidies for vessel decommissioning or capacity reduction programmes within the scope of the general exceptions in Article II(d). Australia also agrees that any vessel subject to a subsidy for decommissioning has to be permanently removed from the industry. However, we consider that there needs to be some improvement to the clarity of the current draft text. We consider that there needs to be a distinction in the text between vessel decommissioning programmes and broader capacity reduction programmes, which may not be associated with the decommissioning of vessels.

9. Firstly, Australia considers that because the structure and language of the current draft text of Article II(d) does not make a distinction between vessel decommissioning programmes and capacity reduction programmes, it is therefore unclear whether a subsidy programme must contain the elements listed under sub-paragraphs (1) through (4) or whether this provision describes subsidy programmes which may contain these elements. Australia considers that some of the conditions under Article II(d) do not reflect the complexity of the industry and may need to be worded more carefully.

10. Secondly, in Australia's view, in drawing a distinction between vessel decommissioning programmes and capacity reduction programmes, the text needs to be clear that vessel decommissioning programmes should result in the decommissioning of the vessel and may not have an impact on licences. [We note Footnote 6 of the US proposed revised text contained in TN/RL/GEN/165 would seem to provide a broad definition of "vessel decommissioning programme" to include capacity reduction programmes.] On the other hand, a capacity reduction programme may relate to simply revoking licences (and these licences would only apply to the territorial waters of the Member). For example, a buyout of licences or fishing effort may relate to multiple licences. It is not uncommon for a fishworker to hold multiple licences and operate only one vessel. A fisher may still use the vessel to fish under licences that have not been sold or surrendered. Thus, requiring the relinquishment of vessels associated with licenses may be impractical (Article II(d)2-3). It is therefore unclear how the criterion for scrapping a vessel under Article II(d)(1) – which is relevant to vessel decommissioning programmes – can be applied as a relevant criterion for capacity reduction programmes.

11. Thirdly, It is unclear why a Member should be permitted only to subsidize capacity reduction programmes which include obligations about decommissioning vessels and harvesting rights in accordance with Article II(d)(1). It should be acceptable to subsidise capacity reduction programmes that do not provide for vessel decommissioning, thereby not restricting Members' efforts to reduce capacity (which may have a beneficial impact on the sustainability of the fishing effort). Australia is mindful that the dual purpose of capacity reduction programmes is to ensure fishing activities are ecologically sustainable (which may involve measures to address over-fishing and rebuilding of fish stocks to sustainable levels that would allow resumption of fishing) and to manage the impacts of fishing on marine ecosystems. Therefore, strict conditions would need to apply to capacity reduction programmes in order to ensure the reduction in overall catch. Fishers would need to be prevented from acquiring the fishing rights of foregone licences, thereby ensuring catch reduction. Australia is open to discussing possible solutions. A possible mechanism could set time limits for medium term departure (say 5 years) from the industry with some restrictions on future re-acquiring of licences/quotas.

Notifications, Surveillance and Peer Review

12. Notifications, surveillance and peer review are important elements of the text to ensure the overall outcome on fisheries subsidies is effective. Australia proposes some minor textual amendments to clarify (i) the various notification requirements; (ii) the peer review provisions; and (iii) further transparency measures.

13. **Notifications:** The notification process will be a vital element of the Fisheries Annex. Australia considers that there should be a requirement in the notification process to indicate applicable domestic legislation and any international standards including those related to other organisations.

14. Australia considers that the WTO should make use of fisheries expertise which resides elsewhere. The WTO's competency should relate to ensuring that Members comply with the subsidy disciplines set down in the proposed Annex. That requires information on the programs in order to be able to assess the type of program and whether it meets the criteria in either Article II or Article III.

15. In Australia's view, while regional or international organisations may assist in fulfilling for example a fisheries management requirement, it would still be incumbent on an individual Member to ensure that its obligations are fulfilled and notified to the Subsidies Committee. We envisage that Members would need to notify that they are members of a regional organisation which requires implementation of management or other obligations and would need to outline that it has domestic structure/programs/measures in place to comply with the regional organisation. Where relevant, Members would need to indicate in a notification to the Subsidies Committee whether (i) a peer review has been conducted by a relevant institutional body (either FAO or other competent organization), and (ii) whether the peer review concluded positively with relation to the fisheries management of the species being subsidised, and whether this is consistent with criteria established under Article II, IV and V of the Chair's text.

16. **Peer Review:** There are different provisions within the Chair's text relating to peer reviews, specifically Article III.2(b)(3), Article V.1 and Article VI. These peer review provisions require different types of notifications and reviews. We consider there would be merit in further discussion on the inter-relationship of these provisions.

17. Australia considers that the peer review should not be shifted to the WTO. In our view, the WTO has no competence to conduct peer reviews on Members' fisheries management plans. Rather, the role would be to ensure that the subsidizing Member has the necessary fisheries management in place and the specific obligations or conditionalities are met. The peer review under Article V.1 would require a notification relating to any relevant fisheries management legislation or mechanisms, including any modification of mechanisms or legislation and whether a peer review has been undertaken by the FAO or other relevant international organisation.

18. Article VI.4 clarifies that notifications made to other organisations as well as documents related to the reviews conducted by those organisations are to be included in a notification to the WTO. Australia agrees with the approach in Article VI.4 and considers that this should not impose an additional burden on Members, given the documentation has already been submitted to another organisation. However, the current text is unclear as to whether the WTO needs to be notified of the fact that fisheries management systems required under Article V have been peer reviewed in the FAO. We acknowledge that there is an appropriate cross-reference to Article VI.4 in Article V but this should be clarified through the use of the same language in Article VI.4.

19. **Additional Transparency Provisions:** Currently Article VI.5 of the Chair's text provides the right to Members to request information on notified subsidies. It also refers to Article 25.9. However, we do not consider that this adequately provides for Members to request information about

any subsidy provided by another Member, not just the "notified subsidies" as it is currently expressed in Article VI.5.

20. We consider that Article 25.8 of the Subsidies Agreement, whereby any Member may request information on the nature and extent of a subsidy provided by another Member that may not have been notified, should also be included in Annex VIII. Further, Article VI.6 already appears to provide for this at least as it relates to IUU fishing as it enables another WTO Member to bring IUU fishing activities to the attention of the Committee.

TEXTUAL PROPOSAL – ARTICLES I, II, V AND VI

(Amendments are in bold and strikethrough text based on TN/RL/W/213
of 30 November 2007)

ANNEX VIII

FISHERIES SUBSIDIES

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 relief², 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:

(a) Subsidies ~~the benefits of which are conferred on for~~ the acquisition, construction, repair, renewal, renovation, modernization, or any other modification of fishing vessels³ or service vessels⁴, 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 licence 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**⁵ for natural or legal persons engaged in marine wild capture fishing.

(f) Price support for products of marine wild capture fishing.

² 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.

³ 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.

⁴ 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.

⁵ For the purposes of this Annex, the term "income support" includes support for developing, increasing or maintaining active or latent fishing effort.

(g) 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

Insert new category:

"Subsidies provided to any vessel engaged in fishing practices which have or may have significant adverse impacts on vulnerable marine ecosystems and habitats (including bottom fishing and large scale drift-net fishing) and which are not conducted in accordance with relevant provisions of international instruments aimed at ensuring the sustainable use and conservation of marine species)."

(h) Subsidies ~~the benefits of which are conferred on~~ provided to any vessel engaged in illegal, unreported or unregulated fishing.⁷

I.2 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.

Article II

General Exceptions

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

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(d) Nothing in Article I shall prevent subsidies for vessel decommissioning ⁸ ~~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 ⁹ 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

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.

⁸ The term "vessel decommissioning programme" includes government assistance to vessel owners and license holders for the permanent retirement of vessels from fishing." [text partly drawn from US proposed draft text contained in TN/RL/GEN/165]

⁹ Throughout this Annex, the term "fish harvesting rights" includes permits, licences, fish quotas or any other form of harvesting rights.

- (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.

Insert new category:

(e) Nothing in Article I shall prevent subsidies for capacity reduction programmes¹⁰, provided that:

- (1) **the fish harvesting rights that are the subject of the programme are permanently revoked and may not be reassigned;**
- (2) **the holders of such fish harvesting rights are required to relinquish any harvesting rights that could qualify such holders for any present or future harvesting rights in the fishery to which the programme applies; and**
- (3) **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.**

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Article V

Fisheries Management¹¹

V.1 Any Member granting or maintaining any subsidy as referred to in Article II or Article III.2(b) shall operate a fisheries management system¹² regulating marine wild capture fishing within its jurisdiction, designed to prevent overfishing. Such management system shall be based 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, 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

¹⁰ **The term "capacity reduction programme" includes the permanent retirement of fish harvesting rights from a specific fishery for the purposes of removing overcapacity from that fishery.**

¹¹ 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.

¹² **For the purpose of this Annex, governmental activity directly associated with the creation and implementation of fisheries management systems and the enforcement of fisheries management rules shall not be deemed to be subsidies. Such activity could include research to inform fisheries management decision makers, including data collection, surveys, data analysis and stock monitoring, sampling and assessment.**

successor instruments. The system shall include regular science-based stock assessment, as well as capacity and effort 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 privileges¹³. 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 subsidy¹⁴. References for such legislation and mechanism, including for any modifications thereto, **and that the systems have been notified and peer reviewed in the FAO**, shall be notified to the Committee on Subsidies and Countervailing Measures ("the Committee") pursuant to the provisions of Article VI.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 **pursuant to the provisions of Article VI.3bis**.

Article VI

Notifications and Surveillance

VI.1 Each Member shall notify to the Committee in advance of its implementation any measure for which that Member invokes the provisions of Article II or Article III.2; except that any subsidy for natural disaster relief¹⁵ shall be notified to the Committee without delay¹⁶. In addition to the information notified pursuant to Article 25, any such notification shall contain sufficiently precise information to enable other Members to evaluate whether or not the conditions and criteria in the applicable provisions of Article II or Article III.2 are met.

VI.2 Each Member that is party to an agreement pursuant to which fishing rights are acquired by a Member government ("payer Member") from another Member government to fisheries within the jurisdiction of such other Member shall publish that agreement, and shall notify to the Committee the publication references for it.

VI.3 The terms on which a payer Member transfers fishing rights it has obtained pursuant to an agreement as referred to in paragraph 2 shall be notified to the Committee by the payer Member in respect of each such agreement.

¹³ 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.

¹⁴ If the Member in question is not a member of the FAO, the notification for peer review shall be to another relevant international organization. The specific information to be notified shall be determined by the relevant body of the FAO or such other organization.

¹⁵ As provided for in Article I.1 and footnote 77.

¹⁶ For the purposes of this provision, "without delay" shall mean not later than the date of entry into force of the programme, or in the case of an ad hoc subsidy, the date of commitment of the subsidy.

VI.3bis Each Member shall notify to the Committee contact information for the enquiry point concerning its fisheries management system as referred to in Article V.2.

VI.4 Each Member shall include in its notifications to the Committee the references for its applicable domestic legislation and administrative procedures, and for its notifications made to other organizations, as well as for the documents related to the reviews conducted by those organizations, as referred to in Article III.2(b)(3) and Article V.1. Members shall include information on whether such organizations have the mandate and scope to undertake a peer review including for the relevant fish species and the type of peer review undertaken, and whether the stock assessments and management systems notified to other organizations pursuant to Article V.1 have been undertaken.

VI.5 Other Members shall have the right to request information about the notified subsidies, including about individual cases of subsidization, about notified agreements pursuant to which fishing rights are acquired, and about the stock assessments and management systems notified to other organizations pursuant to Article V.1. Each Member so requested shall provide such information in accordance with the provisions of Article 25.9. Members shall also have the right to request information about any alleged subsidy provided by another Member in accordance with the provisions of Article 25.8 or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

VI.6 Any Member shall be free to bring to the attention of the Committee information from pertinent outside sources (including intergovernmental organizations with fisheries management-related activities, regional fisheries management organizations and similar sources) as to any apparent illegal, unreported and unregulated fishing activities.

VI.7 Measures notified pursuant to this Article shall be subject to review by the Committee as provided for in Article 26.
