

FISHERIES SUBSIDIES: PROPOSED NEW DISCIPLINES

Revised Proposal from the Republic of Indonesia

Revision

The following communication, dated 5 September 2007, is being circulated at the request of the Delegation of the Republic of Indonesia.

INTRODUCTION

1. Indonesia has taken into account the views expressed in the Group to date, including papers submitted by Argentina and Brazil to the Group at its last session and discussion of the many issues raised there. In light of this discussion and what Indonesia sees as convergence of the direction of the Group on several issues, Indonesia has undertaken to revise the text it submitted in July to reflect these views, and to clarify several areas of its text that gave rise to certain questions.
2. The delegation of Indonesia is hopeful that its revised text will provide a basis for further discussion and convergence of views around the important issues involved in this negotiation. The revisions focus primarily on five areas of the text. We also submit a version of the Revised Proposal which shows all changes made from the July 2, 2007 Proposal.
3. First, in this revision to the draft Proposal Indonesia seeks an approach that brings together the "top down" and "bottom up" approaches to classifying fishery subsidies. Whereas the July Proposal broadly defined fishery subsidies as "prohibited" in Article 2, and then proceeded in Article 3 and Article 4 (exemptions and special-and-differential treatment, respectively) to make certain subsidies allowable, the Revised Proposal broadly defines fishery subsidies as "actionable", with Article 3 and 4 defining subsidies that are, with conditionality, non-actionable. The reasons for this change are explained below.
4. In studying the ASCM and the draft proposals for fisheries subsidy disciplines, we found that the word "prohibited" was being used differently in the ASCM and in the fisheries subsidies discussions, and we think it is confusing and unwise to have different meanings for the same word. In the ASCM, the term "prohibited" is applied only to export subsidies or import substitution subsidies, and the term is not used – as it was being used often in our fisheries negotiations – as a generic term for a subsidy that is subject to disciplines. Thus, Annex Article 2 was redrafted to make clear that Article 2 fisheries subsidies, unless named as exceptions in Articles 3 or 4 of this Agreement, are "actionable" under existing ASCM multilateral dispute settlement proceedings or domestic-track countervailing duty proceeding if the subsidized fishery activity caused adverse effects as currently defined by the ASCM *or as defined in this Annex as an adverse effect on the fishery resource (Article 6)*. Moreover, by implication of the wording of Annex Article 2, the Fisheries Annex would not prohibit subsidies that were not already defined as "prohibited" under the existing ASCM.

5. Accordingly, the Revised Proposal does not prohibit any subsidies not otherwise prohibited by the ASCM. The Revised Proposal can still be considered "top down", however, because it first deems all subsidies as (potentially) actionable, and then carves-out exemptions or S&D treatment in Articles 3 and 4. Indonesia notes that the Revised Proposal represents a significant strengthening of disciplines for fishery subsidies over that of the existing ASCM because of the introduction of the concept of "adverse effect on a fishery resource" as an alternative, additional condition for applying subsidy remedies, including countervailing duties when there is "injury" to a fishery resource.

6. Second, the Revised Proposal makes some changes/clarifications in special and differential (S&D) treatment (Annex Article 4) and, in particular, the conditionality for artisanal and small-scale fisheries. The Revised Proposal represents a clarification, rather than a significant substantive change, from the July Proposal. New Zealand has usefully labelled Indonesia's approach to S&D treatment as a "cascade approach". Thus the cascade approach contained the text of Annex Article 4, which explains the differences in the three categories about which certain Members raised questions, can be summarized in the following table:

S&D Treatment Cascade – Article 4

Type of Fishing	Location	Vessels	Conditionality
Artisanal	Territorial waters and mostly close to shore	Proportional ratio between gross tonnage and engine power and utilize primarily manual gear	Full support for subsistence fisheries allowed
Small Scale	<ul style="list-style-type: none"> • Within 12 nautical miles; or • The Member's own archipelagic waters 	Below 20 meters dimension	<ul style="list-style-type: none"> • Limited to fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel • Contingent on Art. 4.5 factors
All Vessels	<ul style="list-style-type: none"> • Within Member's own EEZ; or • High seas fishing quota or RFMO; or • Regional fisheries management arrangement 	Not applicable	<ul style="list-style-type: none"> • Limited to fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel • Contingent on Art. 4.6 factors

7. Third, an area of significant revision is that of Annex Article 6, adverse effects. Indonesia has clarified the language of this Article and made its structure parallel to that of the corresponding structure of the existing ASCM text on adverse effects (ASCM Article 5), serious prejudice (ASCM Article 6), and injury (ASCM Article 15). We believe that the changes will make the application clearer, and by having the ASCM and the Annex consistent in their approach, it will make enforcement and interpretation easier. In short, the Revised Proposal makes clear that, with the

exception of subsidies meeting the exceptions (Article 3) or S&D treatment (Article 4), fishery subsidies remain actionable if they cause adverse effects as under the existing ASCM (Article 5) and/or if they trigger the adverse effects to fishery resources outlined in Fisheries Annex Article 6. We have also clarified where a remedy would apply. For the multilateral track (parallel to ASCM Part III dispute settlement), the adverse effect to the fishery resource can occur in any market in which a Member's interests are shown to be adversely affected. For the domestic countervailing duty track (ASCM Part V), there must be injury to the fishery resource within the Member's exclusive economic zone (EEZ) or archipelagic waters.

8. Fourth, the Revised Proposal addresses technical assistance to developing country Members. In response to comments by a number of other Members, Indonesia has clarified the Proposal that the technical assistance to developing country Members should be on mutually agreed terms and conditions.

9. Fifth, the Revised proposal addresses the role of fishery expertise in the implementation of the new Annex, particularly in assessing conditionality of under Article 3 and Article 4 (exceptions and S&D treatment) and in determining adverse effects to the fishery resource. The July Proposal suggested establishing new bodies and vesting them with certain powers based on their expertise; the Revised Proposal recognizes the issues by other Members, such as the lessons learned from the history of reliance on the Permanent Group of Experts under the existing ASCM process, and has redrafted the text to allow for further exploration of this issue among the negotiating Members.

10. Finally, Indonesia appreciates the written questions and comments which it has received. It has replied to the Members in relation to those Members' particular comments and questions regarding the July Proposal. In many cases, Indonesia believes that the revisions and clarifications incorporated in the Revised Proposal provide the best response to these submissions.

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 fisheries¹ or to aquaculture.²

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 indirectly³, 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.

¹ "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.

² "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.

³ 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 actionable under Article 2, provided that:

- (a) a benefit is not conferred by the onward transfer of such rights to the Member's fishing fleet, in that 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

Fishery Subsidies Actionable

No Member shall cause, through the use of any fishery subsidy included in paragraphs 1 and 2 of ASCM Article 1, adverse effects to the interests of other Members as defined in ASCM Article 5 or adverse effects to fishery resources as defined in paragraph 6.1 to this Annex, except as otherwise provided in this Annex.

Article 3

Exceptions to Actionable Subsidies

3.1 Notwithstanding Article 2, the following subsidies are not actionable:

- (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;⁴
- (c) Fisheries stock enhancement, including marine conservation and protection, marine environment restoration, protection and development of a Member's own archipelagic waters⁵, artificial reefs, hatcheries for breeding and by-catch mitigation devices⁶;
- (d) Improving vessel and crew safety⁷, provided that the improvement is undertaken to comply with international or domestic standards; and there is no increase in fishing

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

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

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

⁷ 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.

capacity⁸, 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.⁹
- (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 state¹⁰, 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;¹¹
 - (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.

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

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

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

¹¹ 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 the ASCM and Articles 2 and 3, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its artisanal fisheries activities¹², 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.

Such subsidies are not actionable.

4.2 Notwithstanding the provisions of the ASCM and 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.

Such subsidies are not actionable.

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.

Such subsidies are not actionable.

4.4 Upon the request of developing country Members, and with reference to guidance provided by the UN [Fish Stocks Agreement], developed country Members shall provide technical assistance on mutually agreed terms and conditions 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 meet the definition of paragraph 4.2 contingent on a showing that:

- (a) The Member has a fishery management plan in place that is effectively monitored and adequately enforced;

¹² 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.

- (b) The fishery does not adversely affect resources governed by the fishery management plan; and
- (c) The small-scale fishing activities will not adversely affect fishery resources of other Members or the resources governed by relevant RFMO's.

4.6 Fishing subsidies meet the definition of paragraph 4.3 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 on mutually agreed terms and conditions to develop the capacity to initiate, implement and enforce compliance with a fishery management plan in keeping with the FAO Code of Conduct on Responsible Fisheries and 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, the biological status of managed stocks and other fishery resources.

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. Reports will be published annually in a form available to the public.

5.3 In reviewing notifications, the Committee is encouraged to consult with and seek information from fishery experts, as authorized by Article 24.5 of the ASCM.

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

Adverse Effects

6.1 For purposes of ASCM Part III, no Member should cause, through the use of any fishery subsidy referred to in Article 2 of this Annex, adverse effects to a fishery resource,¹³ i.e.:

- (a) injury to the fishery resource of another Member;¹⁴
- (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, in particular the benefits of concessions bound under Article II of GATT 1994, as a result of an effect on a fishery resource;
- (c) serious prejudice to a fishery resource of another Member.

6.2 Injury to a fishery resource in the sense of paragraph (a) of Article 6.1 of this Annex shall be based on positive evidence and involve an objective examination of the volume of the fishery activity and the effect of the fishery activity on the fishery resource.¹⁵

6.3 The examination of the injury from fishery activity shall include an evaluation of all relevant fishery resource factors, 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
- (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.

¹³ Nothing in the concept of adverse effects to a fishery resource shall prejudice the ability of a panel to find adverse effects as otherwise defined in Article 5 of the ASCM for products covered by Article 2 of this Annex. An adverse effect to the fishery resource is an alternative additional means of meeting the ASCM adverse effects standard.

¹⁴ The term "injury to the fisheries resource" has the same meaning in ASCM Part III and ASCM Part V, except as specified by paragraph 6.8 of this Annex.

¹⁵ This provision parallels ASCM Article 15.1.

This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.¹⁶

6.4 Where fishery activities of more than one country are simultaneously subject to a proceeding, the effects of such activities shall be cumulated only if they determine that the amount of subsidization established in relation to the imports from each country is more than de minimis as defined in paragraph 9 of ASCM Article 11 and the fishery activity of each country is not negligible.¹⁷

6.5 It must be demonstrated that the fishery activity is, through the effects of subsidies, causing injury within the meaning of this section. The demonstration of a causal relationship between the fishery activity and injury to the fishery resource shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized fishery activity which at the same time are injuring the fishery resource, and the injuries caused by these other factors must not be attributed to the subsidized fishery activity.¹⁸

6.6 The effect of the subsidized fishery activity for a particular product covered by this Annex shall be assessed in relation to any fisheries resource covered by this Annex.¹⁹

6.7 Serious prejudice to a fishery resource in the sense of paragraph (c) of Article 6.1 of this Annex shall be presumed to arise 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.

6.8 For purposes of a countervailing duty proceeding under ASCM Part V, injury shall include the provisions of section 6.2 through 6.6 of this Annex, except that the fishery resource examined shall be exclusively within the Exclusive Economic Zone or archipelagic waters of the Member investigating injury to its fisheries resource. Injury for the purposes of a countervailing duty proceeding under ASCM Part V may also be determined according to the standards of Article 15 ASCM, even if it is a fishery subsidy covered by this Annex.²⁰

¹⁶ This provision parallels ASCM Article 15.4, using the factors contained in Indoensia's July 2, 2007 Proposal.

¹⁷ This provision parallels ASCM Article 15.3 on the issue of multiple countries being investigated in a countervailing duty proceeding.

¹⁸ This provision parallels ASCM Article 15.5 on the need for proof of causation.

¹⁹ This provision parallels ASCM Article 15.6 on "like product". However, for purposes of the adverse effects to fisheries resource test, the "like product" determination would not be the same as in a standard injury test that measures trade effects to a like product. For example, a fishing activity for bluefin tuna that "injures" the dolphin resource of another Member could be covered by these provisions, despite the fact that the bluefin tuna fishing might not be "injuring" the bluefin tuna catch.

²⁰ Nothing in the concept of adverse effects to fisheries resources or injury to a fishery resources shall prejudice the ability of a panel or investigating authority to find adverse effects or injury as otherwise defined in Article 5 and Part V of the ASCM. An adverse effect to fisheries resources or injury to a fisheries resource is an alternative additional means of meeting the traditional adverse effects or injury standard of Part III and Part V of the ASCM.

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.
