

**FISHERIES SUBSIDIES: PROPOSED NEW DISCIPLINES**

Revised Proposal from the Republic of Indonesia

Revision

The following communication, dated 4 October 2007, is being circulated at the request of the Delegation of the Republic of Indonesia.

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**INTRODUCTION**

1. Following the discussion on Indonesia's 5 September 2007 Revised Proposal (TN/RL/Gen/150/Rev.1), Indonesia has undertaken to revise the text it submitted in September to reflect those discussions.
2. The delegation of Indonesia believes that its present 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 three areas of the text. These are: prohibited subsidies, adverse effects, and special and differential treatment.
3. First, Indonesia believes that the keys to these negotiations are to put in place strong disciplines, and to make them practical and enforceable. These goals are the focus of our proposals. In terms of strong disciplines, there was much discussion in the last meeting about the mandate from the Hong Kong Ministerial meeting. As we indicated in the last meeting, we are very supportive of the mechanism of using a prohibition, provided that we all understand that it is still an incomplete solution to many of the issues that we are seeking to address. We introduce a proposed text on prohibition with this Revised Proposal. However, Members should also remind themselves about the fact that the Hong Kong mandate is completely silent on how - or even whether - new WTO rules should impose disciplines on fisheries subsidies falling outside an eventual prohibition. This curious omission indicates that there were serious issues which we had not begun to address by Hong Kong, but which need to be addressed. We believe that the overriding goal of strong disciplines for fishery subsidies requires disciplines both as to a prohibition, as well as to actionability.
4. In terms of the new Article 2 in our Revised Proposal which addresses a prohibition, we have been guided by several key principles. To be consistent with the structure and coverage of the ASCM, and to avoid definitional confusions between the ASCM and this eventual Fisheries Subsidies Annex, any prohibitions should be focused on subsidies deemed by definition to be harmful, with other subsidies being actionable and now also subjected to a strong adverse effects standard specific to fisheries. Members should be able to clearly delineate between prohibited subsidies which are deemed by their nature to cause harm to other Members, and actionable subsidies which need to be shown to cause adverse effects to other Members. To be clear, all fisheries subsidies other than those which are stated as prohibited would still be subjected to possible measures as actionable subsidies.

As we indicated in our last proposal, other than limited exceptions and S&D rules, all fishery subsidies would be captured.

5. In drafting our proposed article on prohibited subsidies, we have drawn from proposals made by other Members, including the EC, Norway, and Japan, and have sought to include each of the proposals made by those Members. We made some modifications to the scope of the prohibitions addressed in those earlier proposals. We have also added an important new class of prohibited subsidies addressed against overfishing, in terms of subsidies for fixed or variable operating costs of fishing and on-board processing. Six different types of fisheries subsidies are covered as prohibited subsidies. Thus, the resulting list of prohibited fisheries subsidies is broader and stronger than previously proposed by those Members.

6. In terms of the remaining subsidies which require strong disciplines, we have continued to work on the areas of actionable subsidies and the critical subject of the test for determining whether they are actionable, namely the adverse effects test. Members that do not had experience with actionable subsidies need to be aware that the system of actionable subsidies under the ASCM is in fact the principle means used under the ASCM to discipline subsidies to date. We have restructured some of our approach to actionable subsidies, which is now Article 3 of our Revised Proposal. We have added a section 3.2 listing several types of subsidy which are actionable. One of them is the topic of vessel decommissioning, which we moved from being exempted if meeting certain conditions, to actionable unless meeting certain conditions. We moved vessel decommissioning from the Article 4 exceptions to this new list of actionable subsidies, in order to make Article 4 of this proposal clearer as to its "green light" nature. We also added two subsidy types which other Members had proposed should be subject to being deemed to cause serious prejudice (see Art. 7.3 herein). There may be other subsidy types for which it would be useful to include in such a list. One could also take the view that such a list is unnecessary, since the definition of actionability covers these subsidies anyway. We invite Member comments and suggestions on these areas.

7. Second, we have also substantially restructured our text (formerly Article 6) on adverse effects, and in fact have split it into two Articles (now Articles 7 and 8), one article paralleling Articles 5, 6 and 7 of the ASCM relating broadly to actionable subsidies, and the other paralleling the articles in Part V of the ASCM relating to countervailing duty investigations. From comments by Members, we found that there was some confusion on the practical issues of applying the adverse effects test. Our suggestions go a long way to resolving some questions. There are still some conceptual areas on which Members need to focus, and we have noted areas that have thus far come to our attention by using brackets. For example, in Article 8.1, we have identified some of the areas where use of a test for injury to a fisheries resource is different than injury to a domestic industry, and the question of standing of recognized parties other than a domestic industry to bring a CVD application needs consideration. We invite Member feedback on these and other issues. We have added parallels from ASCM Article 15 to the practical steps for evaluating injury in Articles 8.2, 8.3 and 8.4. We have sought wherever possible to use concepts and practices in the ASCM for the new test of adverse effects to a fishery resource.

8. Third, relating to Special and Differential Treatment, we have noted that some Members commented about the conditions for these provisions in the S&D "Cascade" that we have employed. We made that conditionality clearer in this Revised Proposal, and also added some areas of coverage proposed by Brazil and Argentina in their recent paper.

9. In sum, this Revised Proposal reflects earlier responses, and represents many important areas of convergence of views, as well as addressing areas on which Members have needed to focus. The Revised Proposal is attached. We also attach a highlighted version for the convenience of Members, showing all changes from our 5 September 2007 Proposal. We welcome further comments and feedback from Members.

**Attachment**

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

*Preamble*

Members,

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

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

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

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

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

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

Hereby *agree* as follows:

*Article 1*

*Definitions and coverage*

1.1 This Annex provides for specific provisions regarding fisheries subsidies and it is an integral part of the Agreement on Subsidies and Countervailing Measures (ASCM).

1.2 A subsidy as used in this Annex is a subsidy within the meaning of paragraph 1 of Article 1 of the Agreement on Subsidies and Countervailing Measures (ASCM). A subsidy subject to this Annex must be specific, pursuant to Article 2 of the ASCM.

1.3 This Annex shall not apply to inland fisheries<sup>1</sup> or to aquaculture.<sup>2</sup>

1.4 This Annex covers any subsidy that confers a benefit to or on behalf of any company and/or person linked in fact or in law, directly or indirectly<sup>3</sup>, to enterprises engaged in the harvesting of marine wild capture fisheries. Fisheries subsidies shall encompass any subsidy programme and/or the disbursement made under such programme.

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

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

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

1.5 Harvesting includes the on-vessel processing of fish and transport of fish from one vessel to another or from a vessel to shore, but it does not include inland or on-shore processing or other post-harvest handling or activity.

1.6 This Annex does not cover government-to-government payments to obtain access for a Member's distant water fishing fleet to fisheries resources within the territorial sea or exclusive economic zone of a developing country, or to quotas or other rights established by any regional fishery management organization (RFMO) or arrangement. The further transfer of such rights to the Member's fishing fleet is covered by this Annex but is not actionable under Article 3, 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 6 herein.

## *Article 2*

### *Prohibition of Fisheries Subsidies*

2.1 Except as provided in this Annex, and without prejudice to Article 3 of the ASCM, the following subsidies, within the meaning of Article 1 of the ASCM and this Annex, shall be prohibited within the meaning of Article 3 of the ASCM:

- (a) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of vessel construction of any fishing vessel<sup>4</sup>;
- (b) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of modernization, renovation, repair or upgrading of existing fishing vessels, including engine or gear acquisition, any technical or electronic equipment<sup>5</sup> onboard the vessel, and any other significant capital inputs to fishing;
- (c) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of fixed or variable operational costs of fishing vessels and fishing activities, including on-board processing;
- (d) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for shipbuilding yards contingent upon the construction of fishing vessels;

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<sup>4</sup> For the purpose of this Annex, fishing vessel means any vessel intended for use for the purpose of commercial exploitation of fishing resources, including fish processing vessels and vessels engaged in transshipment.

<sup>5</sup> This comprises, inter alia, engines, fishing gear, fish-processing machinery, fish-finding technology, refrigerators, machines for sorting or cleaning fish, or any other equipment onboard the fishing vessel. The prohibition does not cover the installation of equipment for safety or for control and enforcement purposes. Neither does the prohibition cover equipment fitted for the purpose of reducing environmentally harmful emissions.

- (e) subsidies granted, in law or in fact, whether solely or as one of several other conditions, relating to illegal, unreported and unregulated fishing,<sup>6</sup> as well as to any fishing vessels flying "flags of convenience"; and
- (f) subsidies granted, in law or in fact, whether solely or as one of several other conditions, upon the transfer of fishing vessels to foreign owners, including through the creation of joint ventures with those countries.

2.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

2.3 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member as defined in Article 2.1 of this Annex and without prejudice to Article 3 of the ASCM, such Member may seek remedies in accordance with Article 4 of the ASCM.

### *Article 3*

#### *Fishery Subsidies Actionable*

3.1 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 Article 7.1 to this Annex, except as otherwise provided in this Annex.

3.2 Except as provided in this Annex, and without prejudice to Parts III and V of the ASCM and Articles 2 and 3.1 herein, the following subsidies, within the meaning of Article 1 of the ASCM and this Annex, shall be considered as actionable within the meaning of Article 5 of the ASCM:

- (a) Vessel decommissioning programmes, unless:
  - (i) the vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;<sup>7</sup> and
  - (ii) the 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) 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
  - (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 5 below.

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<sup>6</sup> The term "illegal, unreported and unregulated fishing" shall be interpreted in accordance with the definition set out 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 (FAO).

<sup>7</sup> Vessels decommissioned for legitimate research and training purposes, with no commercial functions, need not comply with the conditions of this exception.

- (b) subsidies granted, in law or in fact, whether solely or as one of several other conditions, where there is an increase in the subsidizing Member's capacity to produce a fishery product due to the subsidy.
- (c) subsidies granted, in law or in fact, whether solely or as one of several other conditions, where there is an increase in the subsidizing Member's relative share of production of a fishery product, as compared to non-subsidized production, over a representative period sufficient to demonstrate clear trends in production.

3.3 The list of actionable subsidies in section 3.2 above is merely illustrative, and does not limit the general rule expressed in section 3.1 above.

3.4 Whenever a Member has reason to believe that an actionable subsidy being granted or maintained by another Member, results in any adverse effects to the interests of other Members as defined in ASCM Article 5 or adverse effects to fishery resources as defined in Article 7.1 to this Annex, except as otherwise provided in this Annex, such Member may seek remedies in accordance with Article 7 of the ASCM.

#### *Article 4*

##### *Exceptions to Actionable Subsidies*

4.1 Notwithstanding Articles 2 and 3 of this Annex, 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;<sup>8</sup>
- (c) Fisheries stock enhancement, including marine conservation and protection, marine environment restoration, protection and development of a Member's own archipelagic waters<sup>9</sup>, artificial reefs, hatcheries for breeding and by-catch mitigation devices;<sup>10</sup>
- (d) Improving vessel and crew safety<sup>11</sup>, provided that the improvement is undertaken to comply with international or domestic standards; and there is no increase in fishing capacity<sup>12</sup>, such as the volume of fish hold or engine power of a vessel subject to such programme;
- (e) Construction and maintenance of general infrastructure for fishing activities, such as wharves and fishing ports and related facilities, roadways, water and sanitary waste systems, the provision of housing and other forms of community development infrastructure;<sup>13</sup>

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<sup>8</sup> This is limited to fisheries research that does not result in commercial sale of the fish harvested.

<sup>9</sup> Archipelago is as defined in Article 46 of UNCLOS 1982, and calculation of the archipelagic baselines is defined in Article 47 thereof.

<sup>10</sup> This provision is aimed at measures that enhance marine resources rather than capacity to harvest those resources.

<sup>11</sup> Programmes or activities aimed primarily at vessel modernisation or repair do not fall within this sub-paragraph. The construction of vessels is not permitted under this sub-paragraph.

<sup>12</sup> Fishing capacity is understood here to mean the ability of a vessel or fleet of vessels to catch fish.

<sup>13</sup> General infrastructure for fishing communities shall also not be considered to be regionally specific under the ASCM.

- (f) Short-term emergency relief, recovery adjustment programmes and replacement of fishing capacity following natural or environmental disasters, provided that fishing fleet capacity is not restored beyond its pre-disaster state<sup>14</sup>, except that special flexibility shall be given to developing countries pursuant to Article 5 of this Annex;
- (g) Assistance and user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programmes, and other expenses related to administration and operation of fishery management programmes, including allocation and monitoring of licences, permits, quotas, vessel numbers and catch returns.

### *Article 5*

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

5.1 Notwithstanding the provisions of the ASCM and Articles 2, 3, and 4 of this Annex, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its artisanal fisheries activities<sup>15</sup>, defined herein as those which:

- (a) Operate within its territorial waters and mostly close to shore;
- (b) Use vessels of [proportional ratio between gross tonnage and engine power] and which utilize primarily manual gear; and
- (c) Are operated by individual fishermen or family members for the purpose of subsistence or local trade.

Such subsidies are not actionable.

5.2 Notwithstanding the provisions of the ASCM and Articles 2, 3, and 4 of this Annex, 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, or bait, or ice. 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.

Provided that they meet the contingencies of Article 5.5 of this Annex, such subsidies are not actionable.

5.3 Notwithstanding the provisions of the ASCM and Articles 2, 3, and 4 of this Annex, 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, or bait, or ice, provided that the purpose is to exploit:

- (a) fisheries in the Member's own Exclusive Economic Zone; or

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<sup>14</sup> Restoration to pre-disaster state is not intended to restore a pre-disaster state of over-capacity.

<sup>15</sup> Artisanal fisheries activities shall include on-board handling (including but not limited to provision of cool boxes, fish holds and other measures to encourage hygiene and sanitation and to preserve fish quality) and post-harvest handling.

- (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.

Provided that they meet the contingencies of Article 5.6, of this Annex such subsidies are not actionable.

5.4 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.

5.5 Fishing subsidies meet the definition of Article 5.2 of this Annex contingent on a showing that:

- (a) The Member has a fishery management plan in place that is effectively monitored and adequately enforced;
- (b) The fishery does not adversely affect resources governed by the fishery management plan; and
- (c) The small-scale fishing activities will not adversely affect fishery resources of other Members or the resources governed by relevant RFMO's.

5.6 Fishing subsidies meet the definition of Article 5.3 of this Annex 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.

5.7 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 Articles 5.3, 5.4 and 5.5 of this Annex.

## ***Article 6***

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

6.1 A Member asserting that a subsidy covered by this Annex qualifies for an exception pursuant to Articles 4 and 5 of this Annex, with the exception of artisanal fisheries under Article 5.1 of this Annex, 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.

6.2 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.



6.3 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.

6.4 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 7*

### *Actionable Subsidies: Adverse Effects*

7.1 For purposes of ASCM Part III, no Member should cause, through the use of any fishery subsidy referred to in Article 3 of this Annex, adverse effects to the interests of other Members, which in addition to adverse effects as defined in Article 5 of the ASCM, shall also include adverse effects to a fishery resource<sup>16</sup>, *i.e.*:

- (a) injury to the fishery resource of another Member;<sup>17</sup>
- (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.

7.2. The examination of the adverse effects to a fishery resource from fishery activity shall include an evaluation of all relevant fishery resource factors, including:

- (a) the total catch or production or trading (in volume terms) by the Member of target species, with breakdown by fishery, and the number of vessels used in those catching or production operations, with breakdown by operated location areas;<sup>18</sup>
- (b) the criteria and scientific information used to set the status of the fishery;
- (c) whether the fishery in question is under management of a regional fisheries management organization or arrangement and which are the nature of the monitoring and the quantitative limits applicable to the Member;
- (d) national fisheries management plans in place, with sufficient information to enable Members to evaluate and to understand their framework and operation; and

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<sup>16</sup> 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 Articles 2 and 3 of this Annex. An adverse effect to the fishery resource is an alternative additional means of meeting the ASCM adverse effects standard.

<sup>17</sup> The term "injury to the fisheries resource" has the same meaning in ASCM Part III and ASCM Part V, except as specified by paragraph 7.8 of this Annex.

<sup>18</sup> For evaluation of stocks involving multi-species, for example in tropical waters, Members shall use the available scientific data to identify trends.

- (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.

This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.<sup>19</sup>

7.3 Without prejudice of Article 6 of the ASCM, serious prejudice to a fishery resource in the sense of paragraph (c) of Article 7.1 of this Annex shall be presumed to arise when:

- (a) there is an increase in the subsidizing Member's capacity to produce a fishery product due to the subsidy; or
- (b) an increase in the subsidizing Member's relative share of production of a fishery product, as compared to non-subsidized production, over a representative period sufficient to demonstrate clear trends in production.

7.4 For purposes of assessment of adverse effects pursuant to Articles 7 and 8 of this Annex, the period of data collection normally should be at least three years, and should include the entirety of the period of data collection for the subsidy investigation.

### *Article 8*

#### *Countervailing Measures: Determination of Injury to a Fishery Resource*

8.1. Members taking any countervailing duty measures under Part V of the ASCM shall do so only in accordance with the provisions thereof, except that where they avail themselves of the injury test in this Article of this Annex, they shall utilize any provisions specified in this Article of this Annex.<sup>20</sup> In particular, the following provisions shall apply to any investigations involving allegations of injury to a fishery resource:

- (a) With reference to Article 11.1, 11.4 and 11.6 of the ASCM, Members shall grant recognized consumer, industry and advocacy groups standing to submit a written application, and the authorities may decide to initiate an investigation without having received a written application by or on behalf of a domestic industry without needing to show that special circumstances exist for taking such action, it being recognized that injury to that Member's fishery resource may or may not be drawn to the attention of the Member by a domestic industry;
- (b) With reference to Article 11.2 of the ASCM, an application may refer the criteria in Article 11.2(iv) of the ASCM or the injury factors referred to in this Article of the Annex relating to injury to a fishery resource;

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<sup>19</sup> This provision parallels ASCM Article 15.4, using the factors contained in Indonesia's 2 July 2007 Proposal.

<sup>20</sup> This provision parallels ASCM Article 10.

- (c) [Consider whether the definition of "interested parties" under Article 12.9 of the ASCM needs to broaden the parties included, and in particular to grant standing to recognized consumer, industry and advocacy groups as interested parties as well as applicants, with a possible amendment to Article 16 of the ASCM];
- (d) With reference to calculation of the amount of a subsidy in terms of benefit to the recipient, in addition to the guidelines of Article 14 of the ASCM, Members may use a method consistent with the following:  
  
....
- (e) With reference to determination of the amount of any countervailing duty pursuant to Article 19.4 of the ASCM, subsidization per unit of the subsidized and exported product, the amount of the subsidy may include all subsidies found to exist in relation to the harvesting and production of such a product, including subsidies to any vessels used in such harvesting ... [give any other necessary examples].
- (f) .... [identify any other provisions that should be specific to a countervailing duty investigation involving allegations of injury to a fishery resource.]

8.2 A determination of injury to a fishery resource in the sense of paragraph (a) of Article 7.1 of this Annex in a countervailing duty investigation shall be based on positive evidence and involve an objective examination of the volume of the fishery activity and its effect on the Member's fishery stocks, and the effect of the fishery activity on the fishery resource.<sup>21</sup>

8.3 The examination of the injury to a fishery resource from fishery activity shall include an evaluation of the volume of the fishery activity, in particular whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or catch related to the product in the Member's waters. With regard to the effect on Member's fishery stocks, the investigatory authorities shall consider whether there has been a significant decrease in their fish stocks, or whether the effect of the fishery activity is to reduce stocks of migratory fisheries, reduce traditional hatching in the Member's fishing territories, or otherwise impair production or catch in the Member's waters. No one or several of these factors can necessarily give decisive guidance.<sup>22</sup>

8.4. The examination of the injury to a fishery resource from fishery activity shall include an evaluation of the effect of the fishery activity on 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;<sup>23</sup>
- (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;

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<sup>21</sup> This provision parallels ASCM Article 15.1.

<sup>22</sup> This provision parallels ASCM Article 15.2.

<sup>23</sup> For evaluation of stocks involving multi-species, for example in tropical waters, Members shall use the available scientific data to identify trends.

- (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.

This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.<sup>24</sup>

8.5 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 volume of imports from the fishery activity of each country is not negligible.<sup>25</sup>

8.6 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.<sup>26</sup>

8.7 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.<sup>27</sup>

8.8 For purposes of a countervailing duty proceeding under ASCM Part V, injury shall include the provisions of Articles 7 and 8 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.<sup>28</sup>

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<sup>24</sup> This provision parallels ASCM Article 15.4, using the factors contained in Indonesia's 2 July 2007 Proposal.

<sup>25</sup> This provision parallels ASCM Article 15.3 on the issue of multiple countries being investigated in a countervailing duty proceeding.

<sup>26</sup> This provision parallels ASCM Article 15.5 on the need for proof of causation.

<sup>27</sup> 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.

<sup>28</sup> 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 a fisheries resource 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 9***

***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 10***

***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 11***

***Transitional provisions***

11.1 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.

11.2 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.

11.3 Any least-developed country Member shall phase out its fisheries subsidies within an eight-year period, preferably in a progressive manner, from the date of entry into force of this Annex. If such least-developed country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the Member in question. If the Committee determines that the extension is justified, the Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the least-developed country Member shall phase out those fisheries subsidies within 3 (three) years from the end of the last authorized period.

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## Attachment

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

#### *Preamble*

Members,

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

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

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

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

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

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

Hereby *agree* as follows:

#### *Article 1*

##### *Definitions and coverage*

1.1 This Annex provides for specific provisions regarding fisheries subsidies and it is an integral part of the Agreement on Subsidies and Countervailing Measures (ASCM).

1.2 A subsidy as used in this Annex is a subsidy within the meaning of paragraph 1 of Article 1 of the Agreement on Subsidies and Countervailing Measures (ASCM). A subsidy subject to this Annex must be specific, pursuant to Article 2 of the ASCM.

1.3 This Annex shall not apply to inland fisheries<sup>1</sup> or to aquaculture.<sup>2</sup>

1.4 This Annex covers any subsidy that confers a benefit to or on behalf of any company and/or person linked in fact or in law, directly or indirectly<sup>3</sup>, to enterprises engaged in the harvesting of marine wild capture fisheries. Fisheries subsidies shall encompass any subsidy programme and/or the disbursement made under such programme.

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

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

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

1.5 Harvesting includes the on-vessel processing of fish and transport of fish from one vessel to another or from a vessel to shore, but it does not include inland or on-shore processing or other post-harvest handling or activity.

1.6 This Annex does not cover government-to-government payments to obtain access for a Member's distant water fishing fleet to fisheries resources within the territorial sea or exclusive economic zone of a developing country, or to quotas or other rights established by any regional fishery management organization (RFMO) or arrangement. The further transfer of such rights to the Member's fishing fleet is covered by this Annex but is not actionable under Article 3, 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 6 herein.

## **Article 2**

### ***Prohibition of Fisheries Subsidies***

2.1 Except as provided in this Annex, and without prejudice to Article 3 of the ASCM, the following subsidies, within the meaning of Article 1 of the ASCM and this Annex, shall be prohibited within the meaning of Article 3 of the ASCM:

- (a) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of vessel construction of any fishing vessel<sup>4</sup>;
- (b) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of modernization, renovation, repair or upgrading of existing fishing vessels, including engine or gear acquisition, any technical or electronic equipment<sup>5</sup> onboard the vessel, and any other significant capital inputs to fishing;
- (c) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for the purpose of fixed or variable operational costs of fishing vessels and fishing activities, including on-board processing;
- (d) subsidies granted, in law or in fact, whether solely or as one of several other conditions, for shipbuilding yards contingent upon the construction of fishing vessels;

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<sup>4</sup> For the purpose of this Annex, fishing vessel means any vessel intended for use for the purpose of commercial exploitation of fishing resources, including fish processing vessels and vessels engaged in transshipment.

<sup>5</sup> This comprises, inter alia, engines, fishing gear, fish-processing machinery, fish-finding technology, refrigerators, machines for sorting or cleaning fish, or any other equipment onboard the fishing vessel. The prohibition does not cover the installation of equipment for safety or for control and enforcement purposes. Neither does the prohibition cover equipment fitted for the purpose of reducing environmentally harmful emissions.

(e) subsidies granted, in law or in fact, whether solely or as one of several other conditions, relating to illegal, unreported and unregulated fishing,<sup>6</sup> as well as to any fishing vessels flying "flags of convenience"; and

(f) subsidies granted, in law or in fact, whether solely or as one of several other conditions, upon the transfer of fishing vessels to foreign owners, including through the creation of joint ventures with those countries.

2.4 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

2.5 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member as defined in Article 2.1 of this Annex and without prejudice to Article 3 of the ASCM, such Member may seek remedies in accordance with Article 4 of the ASCM.

### **Article 3**

#### ***Fishery Subsidies Actionable***

3.1 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 Article 7.1 to this Annex, except as otherwise provided in this Annex.

3.2 Except as provided in this Annex, and without prejudice to Parts III and V of the ASCM and Articles 2 and 3.1 herein, the following subsidies, within the meaning of Article 1 of the ASCM and this Annex, shall be considered as actionable within the meaning of Article 5 of the ASCM:

(a) Vessel decommissioning programmes, unless:

(i) the vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;<sup>7</sup> and

(ii) the 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) 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

(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 5 below.

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<sup>6</sup> The term "illegal, unreported and unregulated fishing" shall be interpreted in accordance with the definition set out 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 (FAO).

<sup>7</sup> Vessels decommissioned for legitimate research and training purposes, with no commercial functions, need not comply with the conditions of this exception.



(b) subsidies granted, in law or in fact, whether solely or as one of several other conditions, where there is an increase in the subsidizing Member's capacity to produce a fishery product due to the subsidy.

(c) subsidies granted, in law or in fact, whether solely or as one of several other conditions, where there is an increase in the subsidizing Member's relative share of production of a fishery product, as compared to non-subsidized production, over a representative period sufficient to demonstrate clear trends in production.

3.3 The list of actionable subsidies in section 3.2 above is merely illustrative, and does not limit the general rule expressed in section 3.1 above.

3.4 Whenever a Member has reason to believe that an actionable subsidy being granted or maintained by another Member, results in any adverse effects to the interests of other Members as defined in ASCM Article 5 or adverse effects to fishery resources as defined in Article 7.1 to this Annex, except as otherwise provided in this Annex, such Member may seek remedies in accordance with Article 7 of the ASCM.

#### *Article 4*

##### *Exceptions to Actionable Subsidies*

4.1 Notwithstanding Articles 2 and 3 of this Annex, 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;<sup>8</sup>
- (c) Fisheries stock enhancement, including marine conservation and protection, marine environment restoration, protection and development of a Member's own archipelagic waters<sup>9</sup>, artificial reefs, hatcheries for breeding and by-catch mitigation devices;<sup>10</sup>
- (d) Improving vessel and crew safety<sup>11</sup>, provided that the improvement is undertaken to comply with international or domestic standards; and there is no increase in fishing capacity<sup>12</sup>, such as the volume of fish hold or engine power of a vessel subject to such programme;
- (e) Construction and maintenance of general infrastructure for fishing activities, such as wharves and fishing ports and related facilities, roadways, water and sanitary waste

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<sup>8</sup> This is limited to fisheries research that does not result in commercial sale of the fish harvested.

<sup>9</sup> Archipelago is as defined in Article 46 of UNCLOS 1982, and calculation of the archipelagic baselines is defined in Article 47 thereof.

<sup>10</sup> This provision is aimed at measures that enhance marine resources rather than capacity to harvest those resources.

<sup>11</sup> Programmes or activities aimed primarily at vessel modernisation or repair do not fall within this sub-paragraph. The construction of vessels is not permitted under this sub-paragraph.

<sup>12</sup> Fishing capacity is understood here to mean the ability of a vessel or fleet of vessels to catch fish.

systems, the provision of housing and other forms of community development infrastructure;<sup>13</sup>

- (f) Short-term emergency relief, recovery adjustment programmes and replacement of fishing capacity following natural or environmental disasters, provided that fishing fleet capacity is not restored beyond its pre-disaster state<sup>14</sup>, except that special flexibility shall be given to developing countries pursuant to Article 5 of this Annex;
- (g) Assistance and user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programmes, and other expenses related to administration and operation of fishery management programmes, including allocation and monitoring of licences, permits, quotas, vessel numbers and catch returns.

### **Article 5**

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

5.1 Notwithstanding the provisions of the ASCM and Articles 2, 3, and 4 of this Annex, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its artisanal fisheries activities<sup>15</sup>, defined herein as those which:

- (a) Operate within its territorial waters and mostly close to shore;
- (b) Use vessels of [proportional ratio between gross tonnage and engine power] and which utilize primarily manual gear; and
- (c) Are operated by individual fishermen or family members for the purpose of subsistence or local trade.

Such subsidies are not actionable.

5.2 Notwithstanding the provisions of the ASCM and Articles 2, 3, and 4 of this Annex, 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, or bait, or ice. 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.

Provided that they meet the contingencies of Article 5.5 of this Annex such subsidies are not actionable.

5.3 Notwithstanding the provisions of the ASCM and Articles 2, 3, and 4 of this Annex, a developing country Member shall be allowed to grant or maintain subsidies for the purpose of fishing

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<sup>13</sup> General infrastructure for fishing communities shall also not be considered to be regionally specific under the ASCM.

<sup>14</sup> Restoration to pre-disaster state is not intended to restore a pre-disaster state of over-capacity.

<sup>15</sup> Artisanal fisheries activities shall include on-board handling (including but not limited to provision of cool boxes, fish holds and other measures to encourage hygiene and sanitation and to preserve fish quality) and post-harvest handling.

vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel, or bait, or ice, 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.

Provided that they meet the contingencies of Article 5.6, of this Annex such subsidies are not actionable.

5.4 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.

5.5 Fishing subsidies meet the definition of Article 5.2 of this Annex contingent on a showing that:

- (a) The Member has a fishery management plan in place that is effectively monitored and adequately enforced;
- (b) The fishery does not adversely affect resources governed by the fishery management plan; and
- (c) The small-scale fishing activities will not adversely affect fishery resources of other Members or the resources governed by relevant RFMO's.

5.6 Fishing subsidies meet the definition of Article 5.3 of this Annex 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.

5.7 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 Articles 5.3, 5.4 and 5.5 of this Annex.

## **Article 6**

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

6.1 A Member asserting that a subsidy covered by this Annex qualifies for an exception pursuant to Articles 4 and 5 of this Annex, with the exception of artisanal fisheries under Article 5.1 of this Annex, 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.

6.2 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.

6.3 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.

6.4 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 7

### **Actionable Subsidies: Adverse Effects**

7.1 For purposes of ASCM Part III, no Member should cause, through the use of any fishery subsidy referred to in Article 3 of this Annex, adverse effects to the interests of other Members, which in addition to adverse effects as defined in Article 5 of the ASCM, shall also include adverse effects to a fishery resource<sup>16</sup>, *i.e.*:

- (a) injury to the fishery resource of another Member;<sup>17</sup>
- (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.

7.2. The examination of the adverse effects to a fishery resource from fishery activity shall include an evaluation of all relevant fishery resource factors, including:

- (a) the total catch or production or trading (in volume terms) by the Member of target species, with breakdown by fishery, and the number of vessels used in those catching or production operations, with breakdown by operated location areas;<sup>18</sup>
- (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;

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<sup>16</sup> 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 Articles 2 and 3 of this Annex. An adverse effect to the fishery resource is an alternative additional means of meeting the ASCM adverse effects standard.

<sup>17</sup> The term "injury to the fisheries resource" has the same meaning in ASCM Part III and ASCM Part V, except as specified by paragraph 7.8 of this Annex.

<sup>18</sup> For evaluation of stocks involving multi-species, for example in tropical waters, Members shall use the available scientific data to identify trends.

- (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.

This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.<sup>19</sup>

7.3 Without prejudice of Article 6 of the ASCM, serious prejudice to a fishery resource in the sense of paragraph (c) of Article 7.1 of this Annex shall be presumed to arise when:

- (a) there is an increase in the subsidizing Member's capacity to produce a fishery product due to the subsidy; or
- (b) an increase in the subsidizing Member's relative share of production of a fishery product, as compared to non-subsidized production, over a representative period sufficient to demonstrate clear trends in production.

7.4 For purposes of assessment of adverse effects pursuant to Articles 7 and 8 of this Annex, the period of data collection normally should be at least three years, and should include the entirety of the period of data collection for the subsidy investigation.

#### **Article 8**

##### ***Countervailing Measures: Determination of Injury to a Fishery Resource***

8.1. Members taking any countervailing duty measures under Part V of the ASCM shall do so only in accordance with the provisions thereof, except that where they avail themselves of the injury test in this Article of this Annex, they shall utilize any provisions specified in this Article of this Annex.<sup>20</sup> In particular, the following provisions shall apply to any investigations involving allegations of injury to a fishery resource:

- (a) With reference to Article 11.1, 11.4 and 11.6 of the ASCM, Members shall grant recognized consumer, industry and advocacy groups standing to submit a written application, and the authorities may decide to initiate an investigation without having received a written application by or on behalf of a domestic industry without needing to show that special circumstances exist for taking such action, it being recognized that injury to that Member's fishery resource may or may not be drawn to the attention of the Member by a domestic industry;

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<sup>19</sup> This provision parallels ASCM Article 15.4, using the factors contained in Indonesia's July 2, 2007 Proposal.

<sup>20</sup> This provision parallels ASCM Article 10.

- (b) With reference to Article 11.2 of the ASCM, an application may refer the criteria in Article 11.2(iv) of the ASCM or the injury factors referred to in this Article of the Annex relating to injury to a fishery resource;
- (c) [Consider whether the definition of "interested parties" under Article 12.9 of the ASCM needs to broaden the parties included, and in particular to grant standing to recognized consumer, industry and advocacy groups as interested parties as well as applicants, with a possible amendment to Article 16 of the ASCM];
- (d) With reference to calculation of the amount of a subsidy in terms of benefit to the recipient, in addition to the guidelines of Article 14 of the ASCM, Members may use a method consistent with the following:
- ....
- (e) With reference to determination of the amount of any countervailing duty pursuant to Article 19.4 of the ASCM, subsidization per unit of the subsidized and exported product, the amount of the subsidy may include all subsidies found to exist in relation to the harvesting and production of such a product, including subsidies to any vessels used in such harvesting ... [give any other necessary examples].
- (f) .... [identify any other provisions that should be specific to a countervailing duty investigation involving allegations of injury to a fishery resource.]

8.2 A determination of injury to a fishery resource in the sense of paragraph (a) of Article 7.1 of this Annex in a countervailing duty investigation shall be based on positive evidence and involve an objective examination of the volume of the fishery activity and its effect on the Member's fishery stocks, and the effect of the fishery activity on the fishery resource.<sup>21</sup>

8.3 The examination of the injury to a fishery resource from fishery activity shall include an evaluation of the volume of the fishery activity, in particular whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or catch related to the product in the Member's waters. With regard to the effect on Member's fishery stocks, the investigatory authorities shall consider whether there has been a significant decrease in their fish stocks, or whether the effect of the fishery activity is to reduce stocks of migratory fisheries, reduce traditional hatching in the Member's fishing territories, or otherwise impair production or catch in the Member's waters. No one or several of these factors can necessarily give decisive guidance.<sup>22</sup>

8.4. The examination of the injury to a fishery resource from fishery activity shall include an evaluation of the effect of the fishery activity on 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;<sup>23</sup>
- (b) the criteria and scientific information used to set the status of the fishery;

<sup>21</sup> This provision parallels ASCM Article 15.1.

<sup>22</sup> This provision parallels ASCM Article 15.2.

<sup>23</sup> For evaluation of stocks involving multi-species, for example in tropical waters, Members shall use the available scientific data to identify trends.

- (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.

This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.<sup>24</sup>

8.5 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 volume of imports from the fishery activity of each country is not negligible.<sup>25</sup>

8.6 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.<sup>26</sup>

8.7 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.<sup>27</sup>

8.8 For purposes of a countervailing duty proceeding under ASCM Part V, injury shall include the provisions of Articles 7 and 8 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.<sup>28</sup>

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<sup>24</sup> This provision parallels ASCM Article 15.4, using the factors contained in Indonesia's July 2, 2007 Proposal.

<sup>25</sup> This provision parallels ASCM Article 15.3 on the issue of multiple countries being investigated in a countervailing duty proceeding.

<sup>26</sup> This provision parallels ASCM Article 15.5 on the need for proof of causation.

<sup>27</sup> 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.

<sup>28</sup> 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 9**

***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 10**

***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 11**

***Transitional provisions***

11.1 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.

11.2 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.

11.3 Any least-developed country Member shall phase out its fisheries subsidies within an eight-year period, preferably in a progressive manner, from the date of entry into force of this Annex. If such least-developed country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the Member in question. If the Committee determines that the extension is justified, the Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the least-developed country Member shall phase out those fisheries subsidies within 3 (three) years from the end of the last authorized period.

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