

FISHERIES SUBSIDIES: PROPOSED NEW DISCIPLINES

Proposal from the United States

The following communication, dated 21 March 2007, is being circulated at the request of the Delegation of the United States.

Introduction

1. Worldwide fishing capacity is substantially above sustainable levels, and many commercially significant fish populations face overexploitation or depletion. A number of Members have experienced first-hand the social and economic consequences that result when the level of exploitation tips over into overexploitation and leads to the collapse of particular fisheries stocks. The Rules Negotiating Group has therefore been given a mandate to clarify and improve the disciplines on subsidies that contribute to overcapacity and overfishing. Only an ambitious outcome pursuant to this mandate will deliver an outcome that is a win for trade, a win for development and a win for the environment.

2. As we have stated previously (TN/RL/W/196), the United States believes that a broad prohibition addressing all elements that contribute most directly to overcapacity and overfishing would be the most effective means to fulfil our mandate. Both New Zealand (TN/RL/GEN/100 and TN/RL/GEN/141) and Brazil (TN/RL/GEN/79/Rev.3) have offered legal text for framework proposals based on such an approach. In contrast, the alternative proposals from Japan, Korea and Chinese Taipei (TN/RL/GEN/114/Rev.1), the European Communities (TN/RL/GEN/134) and Norway (TN/RL/GEN/144) would fall short of that result. We note that much of the technical work in the Group over the last year, including the identification of appropriate exceptions and the discussions of Argentina's proposal for special and differential treatment for developing countries (TN/RL/GEN/138/Rev.1), has been premised on a broad prohibition as the backbone of new disciplines.

3. Now that negotiations have resumed, the United States offers a framework proposal that we believe would achieve an ambitious, pragmatic result sufficiently flexible to address the concerns we have heard from other Members. While remaining sensitive to the unique challenges of fisheries, we have sought to draft text that is grounded in familiar WTO rules and concepts to the maximum extent possible. The proposed text is attached to this paper. For ease of review, we have also attached an annotated version of the text as an annex to this proposal.

Explanation of the Proposal

4. ***A broad prohibition on subsidies to the harvesting of marine wild capture fisheries.*** There is broad agreement that the focus of improved rules should be on subsidies to the harvesting sector of marine wild capture fisheries. For these purposes, subsidies would be those included within the meaning of Article 1 of the existing Agreement on Subsidies and Countervailing Measures (ASCM), and that meet the criteria for specificity set out in the existing Article 2 of the ASCM.¹

5. ***Effective disciplines for programmes that are not included in the prohibition.*** The United States and others have contributed to identification of programmes that do not normally promote overcapacity and overfishing, and are therefore appropriate exceptions to a prohibition. The proposals by New Zealand (TN/RL/GEN/141) and Brazil (TN/RL/GEN/79/Rev.3) show substantial convergence on the scope of these exceptions. We have drawn upon these proposals in developing our exceptions text.² In addition, we have expanded upon the appropriate treatment of arrangements under which a Member acquires fishing rights for its distant water fleet to fisheries resources in the exclusive economic zone of another country. We recognize the sensitivity of this issue to developing countries and look forward to a further discussion.

6. To avoid loopholes, and to retain Members' rights under the existing ASCM, exceptions to the prohibition should remain actionable. As Members have recognized, however, the current rules on serious prejudice (Article 6 of the ASCM) have not been fully effective in the fisheries context. New rules should include some appropriate customization of the serious prejudice criteria to make those rules more operational. We have proposed two such customized criteria. In addition to the current Article 6.3, serious prejudice would arise if a Member could show that the effect of the subsidy is either: (i) to increase the capacity of the subsidizing Member to produce the like product; or (ii) to increase the subsidizing Member's relative share of the like product as compared to non-subsidized production over a representative period (cf. ASCM article 6.4). We look forward to further discussion of this issue in the Group.³

7. ***Some elements of flexibility for small programmes.*** Additionally, Members may have small programmes that, by virtue of the small benefits conferred, do not contribute to overcapacity or overfishing, but might nevertheless be inconsistent with a prohibition. In our view, this consideration should not prevent adoption of a high level of ambition for the core discipline. Therefore, Members should consider flexibility to address such programmes, bearing in mind that developing such a

¹ Aquaculture would be treated along the lines suggested in the Brazil and New Zealand proposals, i.e., subsidies to aquaculture would remain under the existing ASCM disciplines because these disciplines are generally adequate to address them; however, subsidies to associated wild capture activities (e.g., the harvesting of juveniles to raise in pens or farms, or the harvesting of wild stocks to use as feed) would be covered by the prohibition. Similarly, subsidies to non-marine (inland) fisheries activities would not be included in the prohibition, as in Brazil's proposal (TN/RL/GEN/79/Rev.3); however, species that spend part of their life cycle in the marine environment would be considered "marine" for purposes of the prohibition.

² We have also clarified that there should be an exception for government assistance to establish "rights-based" management systems, such as individual or group limited access privileges or other exclusive quotas. As explained in the United States' earlier paper (TN/RL/GEN/41), such systems are a promising approach to addressing the fundamental problem of the "race for fish," because they allow fishermen to fish at their own pace instead of racing to harvest the fish before someone else does. Several Members already have such systems in place and others (including the United States) are actively developing them.

³ We are also interested in exploring further the possibility of additional new disciplines on subsidies to on-shore processing, in light of suggestions that overcapacity in the processing sector may have some link to overcapacity in the harvesting sector. One possibility would be to consider a "dark amber" category for such subsidies, modelled on the expired ASCM Article 6.1; however, we have not proposed text for such a provision at this time. We note that proposals have been made to the Group concerning reinstatement of Article 6.1 as part of the general subsidies disciplines.

provision raises technical issues that will need to be addressed and that such flexibility must not create a loophole that could undermine the core discipline. Any exception for small programmes should be subject to the serious prejudice and notification requirements. We have not proposed text for such a provision, but are interested in exploring it with the Group. Further technical work also needs to be done on artisanal subsidies.

8. ***Notifications and transparency.*** We share the views of others that transparency and notification procedures in the fisheries sector need to be strengthened while remaining workable and not unduly burdensome. We have sought to make the notifications more useful in light of the objectives of new fisheries disciplines (requiring information concerning the fisheries benefiting from the subsidy, as well as information concerning how any conditions specified for the applicable exceptions have been or will be met). To further promote transparency, we also propose that each Member establish an inquiry point to respond to reasonable enquiries from other Members and interested parties in other Members concerning its fisheries management system, including measures in place to address fishing capacity and fishing effort and the biological status of managed stocks. This kind of mechanism has worked well in the Agreement on Technical Barriers to Trade (see TBT Agreement, Article 10.1). It would be one way of ensuring that Members receive relevant fisheries management-related information of particular interest, while avoiding the burden of requiring lengthy submissions of information in the notifications that may or may not be useful. In addition, we have been carefully considering proposing additional incentives to notify, but note that there are some practical considerations to be accounted for in implementing such an approach. We therefore have not made a proposal on this issue, but would like to explore it further.

9. ***Special and differential treatment.*** Special and differential treatment should address the practical problems developing countries may face in implementing stronger rules while not undermining the objectives of the negotiations. Further work needs to be done in this area to assure this balance. We continue to be interested in developing Argentina's proposal (TN/RL/GEN/138/Rev.1), and we have already had some valuable discussions concerning how to make the sustainability and fisheries management criteria referred to in the proposal workable within the structure of WTO rules. We also believe that some aspects concerning the limits of special and differential treatment need to be more explicitly spelled out. For example, given that fishing vessels are a mobile capital asset with a useful life of thirty years or more, we have questions about how such vessels would be treated once the capacity of the fishery builds up to the level to exploit maximum sustainable yield.

10. ***Other provisions.*** Our proposal also contains provisions on anti-circumvention (similar to that proposed by Brazil), review, fisheries expertise and transitional arrangements. The provisions on review and expertise reflect some minor revisions to our initial proposal (TN/RL/GEN/127) in light of the discussion in the Group. Concerning transition periods, Members might also consider provision for negotiating individualized country phase-out schedules for specified programmes. This could provide an additional element of flexibility to the transition to stronger rules, as well as a further element of transparency. While we have not provided explicit text, we are interested in exploring this concept further.

Attachment

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

Preamble

[to be developed]

Article 1 - Prohibition

Except as otherwise provided in this Annex, a subsidy¹ that confers a benefit on enterprises engaged in the harvesting of marine wild capture fisheries shall be prohibited.²

Article 2 - Exceptions to the Prohibition

1. Nothing in Article 1 of this Annex shall prevent government assistance for:
 - (a) vessel decommissioning programmes, provided that:
 - (i) the vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;
 - (ii) the fish harvesting rights associated with such vessels are permanently revoked and may not be reassigned;
 - (iii) the owners of such vessels are required to relinquish any claim associated with such vessels that could qualify such owners for any present or future harvesting rights in any fishery; and
 - (iv) there are in place fisheries management control measures 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.
 - (b) assistance and user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programmes;
 - (c) research to inform fisheries management decision makers, including data collection, surveys, data analysis and stock monitoring, sampling and assessment;

¹ "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 within the meaning of Article 2 of the ASCM.

² "Harvesting" includes the on-vessel processing of fish and transport of fish from one vessel to another or from a vessel to shore.

- (d) measures that enhance marine resources rather than capacity to harvest those resources, such as fisheries stock enhancement, marine conservation and marine protection, including marine environment restoration, hatcheries for breeding, artificial reefs and by-catch mitigation devices;
- (e) the construction and maintenance of infrastructure for fishing communities, such as the provision of housing, roadways and water and sanitary waste systems;
- (f) unemployment relief, early retirement, worker retraining or re-education, life insurance, support for the temporary suspension of fishing activities and alternative employment assistance for fishermen;
- (g) the replacement of fishing capacity following a natural disaster where fleet capacity has been reduced, provided that capacity is not restored beyond its pre-disaster state; and
- (h) the improvement of vessel and crew safety³, provided that:
 - (i) there is no increase to fishing capacity, such as the volume of fish hold or engine power of a vessel subject to such programme; and
 - (ii) the improvement is undertaken to comply with international or domestic standards.

2. 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 exclusive economic zone of another country. The further transfer of those access rights to the Member's fishing fleet is covered by this Annex but is not prohibited under Article 1, provided that:

- (i) the Member's fishing fleet pays compensation comparable to the cost the fleet would otherwise have to pay for access to the fisheries resources;
- (ii) the terms and conditions of access, including the compensation paid by the fishing fleet, are published; and
- (iii) the access arrangement provides for a science-based assessment and monitoring of the status of the fisheries resources in question and for compliance with applicable fishery management systems.

3. Government funding of services directly related to fisheries management, including data collection and analysis for fisheries science, management and enforcement, the protection and restoration of marine habitats, the development and implementation of fisheries management measures, and the monitoring and enforcement of fishery regulations are not covered by this Annex.⁴

³ Programme or activities aimed primarily at vessel modernization or repair do not fall within this sub-paragraph. The construction of vessels is not permitted under this sub-paragraph.

⁴ Fisheries management includes the establishment and administration of management systems (including allocating and monitoring fishing licences, permits, quota, vessel numbers and catch returns); adjusting management settings within an existing management system; and developing amendments or additions to the existing management system.

Article 3 - Serious Prejudice

In addition to the circumstances provided for in Article 6.3 of the ASCM, serious prejudice may arise in the case of subsidies that qualify for the exceptions in Article 2.1 [and Article 4] of this Annex, where the effect of the subsidy is:

- (a) an increase in the subsidizing Member's capacity to produce the like product; 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.

Article 4 – Small Programmes

[to be developed]

Article 5 – Developing Country Members

Article 6 – Anti-Circumvention

For purposes of this Annex, a prohibited subsidy is attributable to the Member conferring the subsidy, regardless of the flag of the vessel harvesting the fish or the application of rules of origin to such fish.

Article 7 – Notifications and Enquiry Point

1. Members asserting that a subsidy covered by this Annex qualifies for an exception pursuant to Articles 2.1-2.2 [4 and 5] shall include in its notification under Article 25 of the ASCM information concerning the fisheries benefiting from the subsidy, including whether the subsidy is widely available to many fisheries or targeted to specific fisheries, allowing for an assessment of how any conditions set forth in Articles 2.1-2.2 [4 and 5] for that exception have been or are expected to be fulfilled.

2. 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 system, including measures in place to address fishing capacity and fishing effort and the biological status of managed stocks.

Article 8 – Review

The Committee on Subsidies and Countervailing Measures shall review the implementation and operation of this Annex every __ years, taking into account the objectives thereof. In this regard, the Committee shall, as appropriate, request information from persons and organizations with expertise in fisheries management, conservation and stock assessment, such as the United Nations Food and Agriculture Organization and regional fisheries management organizations.

Article 9 – Transitional Arrangements

1. Subsidy programmes that have been established within the territory of any Member before the date of entry into force of this Annex and that are inconsistent with the provisions of this Annex shall be:

- (a) notified to the Committee not later than __ days after the date of entry into force of this Annex; and

- (b) brought into conformity with the provisions of this Annex within __ years of the date of entry into force of this Annex.

2. No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

Article 10 - Consultations and Dispute Settlement

In a dispute under this Annex involving scientific or technical questions related to fisheries, a panel should seek advice from fisheries experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical fisheries experts group, or seek the assistance of the United Nations Food and Agriculture Organization or other relevant international organization in identifying appropriate fisheries experts, at the request of either party to the dispute or on its own initiative.

Annex – Annotated Proposal

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

Preamble

[to be developed]

Article 1 - Prohibition

Except as otherwise provided in this Annex, a subsidy¹ that confers a benefit on enterprises engaged in the harvesting of marine wild capture fisheries shall be prohibited.²

Subsidies to aquaculture would not be covered by the Annex, because there appears to be consensus that the disciplines in the existing ASCM are currently adequate to address them. However, to the extent that wild harvest activities occur in connection with aquaculture (*e.g.*, the harvesting of juvenile fish for farming, or the harvesting of wild fish for use as feed stock), those activities would be included in the prohibition.

The term "marine" is equivalent to the exclusion of "inland fisheries," as in Brazil's proposal (TN/RL/GEN/79/Rev.3). We understand that the term "marine" includes both anadromous (*e.g.*, salmon) and catadromous (*e.g.*, eels) species that spend a significant part of their life cycle in saltwater.

Article 2 - Exceptions to the Prohibition

1. Nothing in Article 1 of this Annex shall prevent government assistance for:
 - (a) vessel decommissioning programmes, provided that:
 - (i) the vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;
 - (ii) the fish harvesting rights associated with such vessels are permanently revoked and may not be reassigned;
 - (iii) the owners of such vessels are required to relinquish any claim associated with such vessels that could qualify such owners for any present or future harvesting rights in any fishery; and

¹ "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 within the meaning of Article 2 of the ASCM.

² "Harvesting" includes the on-vessel processing of fish and transport of fish from one vessel to another or from a vessel to shore.

- (iv) there are in place fisheries management control measures 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.
- (b) assistance and user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programmes;
- (c) research to inform fisheries management decision makers, including data collection, surveys, data analysis and stock monitoring, sampling and assessment;
- (d) measures that enhance marine resources rather than capacity to harvest those resources, such as fisheries stock enhancement, marine conservation and marine protection, including marine environment restoration, hatcheries for breeding, artificial reefs and by-catch mitigation devices;
- (e) the construction and maintenance of infrastructure for fishing communities, such as the provision of housing, roadways and water and sanitary waste systems;
- (f) unemployment relief, early retirement, worker retraining or re-education, life insurance, support for the temporary suspension of fishing activities and alternative employment assistance for fishermen;
- (g) the replacement of fishing capacity following a natural disaster where fleet capacity has been reduced, provided that capacity is not restored beyond its pre-disaster state; and
- (h) the improvement of vessel and crew safety³, provided that:
 - (i) there is no increase to fishing capacity, such as the volume of fish hold or engine power of a vessel subject to such programme; and
 - (ii) the improvement is undertaken to comply with international or domestic standards.

2. 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 exclusive economic zone of another country. The further transfer of those access rights to the Member's fishing fleet is covered by this Annex but is not prohibited under Article 1, provided that:

- (i) the Member's fishing fleet pays compensation comparable to the cost the fleet would otherwise have to pay for access to the fisheries resources;
- (ii) the terms and conditions of access, including the compensation paid by the fishing fleet, are published; and
- (iii) the access arrangement provides for a science-based assessment and monitoring of the status of the fisheries resources in question and for compliance with applicable fishery management systems.

³ Programme or activities aimed primarily at vessel modernization or repair do not fall within this sub-paragraph. The construction of vessels is not permitted under this sub-paragraph.

3. Government funding of services directly related to fisheries management, including data collection and analysis for fisheries science, management and enforcement, the protection and restoration of marine habitats, the development and implementation of fisheries management measures, and the monitoring and enforcement of fishery regulations are not covered by this Annex.⁴

The text builds on proposals made by New Zealand (TN/RL/GEN/141) and Brazil (TN/RL/GEN/79/Rev.3).

Article 3 - Serious Prejudice

In addition to the circumstances provided for in Article 6.3 of the ASCM, serious prejudice may arise in the case of subsidies that qualify for the exceptions in Article 2.1 [and Article 4] of this Annex, where the effect of the subsidy is:

- (a) an increase in the subsidizing Member's capacity to produce the like product; 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.

The current rules on serious prejudice (Article 6.3 of the ASCM) have not been fully effective in the fisheries context because they relate primarily to certain types of trade effects in specific end markets, rather than to potential trade distortions occurring at the point of production (harvesting). The proposed additional criteria are intended to address that concern. They may most clearly be needed in the case of those exceptions that provide the greatest possibility of circumvention, either because large amounts of government funds are typically involved or because the conditions on the subsidies do not lend themselves to precise definition (*e.g.*, decommissioning subsidies, infrastructure, disaster relief, vessel and worker health and safety).

For example, assume a Member under a decommissioning programme pays its fishermen to retire their vessels from a fishery that produces crab (and those vessels are permanently removed in accordance with the conditions in Article 2.1(a)). Those fishermen then use the funds to purchase vessels that produce groundfish. If the effect of the subsidy is to increase the Member's capacity to produce groundfish, there could be serious prejudice to another Member that also produces groundfish (the "like product").

Article 3(b) is analogous to the current ASCM Article 6.4.

Article 4 – Small Programmes

To be developed. The United States believes that there should be consideration of a provision giving flexibility to address programmes that provide a small benefit but that would otherwise be inconsistent with the prohibition, bearing in mind that developing such a provision raises technical issues that will need to be addressed and that such flexibility must not create a loophole. Any exception for small programmes would be subject to the serious prejudice provisions in existing Article 6.3 of the ASCM and Article 3 of this Annex and to the notification provisions in Article 7.

⁴ Fisheries management includes the establishment and administration of management systems (including allocating and monitoring fishing licences, permits, quota, vessel numbers and catch returns); adjusting management settings within an existing management system; and developing amendments or additions to the existing management system.

Article 5 – Developing Country Members

The United States is interested in the further development of Argentina's proposal (TN/RL/GEN/138 Rev.1), noting the need for further clarification of the limits of any proposed special and differential treatment.

Article 6 – Anti-Circumvention

For purposes of this Annex, a prohibited subsidy is attributable to the Member conferring the subsidy, regardless of the flag of the vessel harvesting the fish or the application of rules of origin to such fish.

Article 7 – Notifications and Enquiry Point

1. Members asserting that a subsidy covered by this Annex qualifies for an exception pursuant to Articles 2.1-2.2 [4 and 5] shall include in its notification under Article 25 of the ASCM information concerning the fisheries benefiting from the subsidy, including whether the subsidy is widely available to many fisheries or targeted to specific fisheries, allowing for an assessment of how any conditions set forth in Articles 2.1-2.2 [4 and 5] for that exception have been or are expected to be fulfilled.

Any conditions placed upon subsidies pursuant to Articles 4 [Small Programmes] and 5 [Special and Differential Treatment] would also be subject to the notification requirements in Article 7.1; however, since we have not proposed text for those Articles, we have left the references in brackets. In addition, the United States recognizes the value of strengthening the notification requirements and is carefully considering proposing additional incentives to notify, noting that there are some practical considerations to be accounted for in implementing such an approach.

2. 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 system, including measures in place to address fishing capacity and fishing effort and the biological status of managed stocks.

Cf. Article 10, Agreement on Technical Barriers to Trade

Article 8 – Review

The Committee on Subsidies and Countervailing Measures shall review the implementation and operation of this Annex every __ years, taking into account the objectives thereof. In this regard, the Committee shall, as appropriate, request information from persons and organizations with expertise in fisheries management, conservation and stock assessment, such as the United Nations Food and Agriculture Organization and regional fisheries management organizations.

Article 9 – Transitional Arrangements

1. Subsidy programmes that have been established within the territory of any Member before the date of entry into force of this Annex and that are inconsistent with the provisions of this Annex shall be:

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2. No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

Article 10 - Consultations and Dispute Settlement

In a dispute under this Annex involving scientific or technical questions related to fisheries, a panel should seek advice from fisheries experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical fisheries experts group, or seek the assistance of the United Nations Food and Agriculture Organization or other relevant international organization in identifying appropriate fisheries experts, at the request of either party to the dispute or on its own initiative.

It is assumed that the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding (DSU), shall apply to consultations and settlement related to new rules covered by this annex. Depending on the final shape of those rules, the existing provision on expertise in Article 13 of the DSU may be adequate, or Members may determine there is need for an explicit provision such as that proposed above. In light of the Rules Group's technical discussions with the FAO, the United States' initial proposal is modified to clarify that the FAO and other international organizations would not themselves, as organizations, provide expert opinions but could instead be called upon to provide assistance in identifying the appropriate experts.
