

Negotiating Group on Rules

**DRAFT CONSOLIDATED CHAIR TEXTS OF THE
AD AND SCM AGREEMENTS**

The background

Six years ago, in Doha, Members agreed to negotiations aimed at clarifying and improving disciplines under the AD and SCM Agreements, while preserving the basic concepts, principles and effectiveness of those Agreements. They also agreed to negotiations to clarify and improve disciplines on fisheries subsidies. Four years later, at Hong Kong, Ministers gave more precision to that objective, directed the Negotiating Group on Rules to intensify its work, and mandated me, as Chairman, to prepare consolidated texts of the AD and SCM Agreements. At the time, Ministers expected the Round to be completed in 2006, and I myself had hoped to circulate consolidated texts in July of that year.

That did not happen but we nevertheless made good use of the extra time available to us. In fact, at all times, we were jointly able to keep the pace and direction of the negotiations. With that purpose in mind we concentrated on detailed and text-based proposals. All that collective effort was positive and indeed helped me in moving the process forward. I am particularly thankful for those Participants who were able to clearly identify their priorities and were capable of putting them in legal language in effective time. Likewise, I am thankful to those who, being in a defensive position, nevertheless helped the process by seriously engaging in the discussions.

A new challenge

However, we have now reached a point of diminishing returns in our Negotiating Group and more importantly, we now face the challenge of starting a new phase. The overall negotiating process demands us to enter this new realm. With the prospect of concluding the Doha Round soon, we are now required not only to identify clearly our interests and the language we prefer to foster those national objectives, but rather to find also the way to accommodate others' concerns and interests. It is time to start seeking balance and to help the rest of the multilateral negotiations move forward too. With this perspective in mind I decided not to seek the safety of "waiting and seeing", but rather to assume fully my responsibilities and encourage you to start soon this much needed new stage of negotiations. I am therefore pleased to present the Group with draft consolidated texts as requested by Ministers.

The architecture, aim and objectives of these texts

I am putting these draft legal texts before the Group with the objective of stimulating serious reflection by Participants on the broad parameters of possible outcomes to the negotiations with respect to the mandate in paragraph 28 of the Doha Declaration. There are no brackets and no blanks, not because I expect or ask Participants to agree to the texts at this stage, but indeed because I consider that they are bracketed in their entirety. I thus ask Participants to treat the texts as documents for intensive technical and detailed work in the Group. In order to ensure such a specific and focused discussion, these draft texts are presented in the form of proposed revisions to the existing Agreements on Anti-Dumping and Subsidies and Countervailing Measures, as manifested in specific legal language.

ANNEX VIII

FISHERIES SUBSIDIES

Article I

Prohibition of Certain Fisheries Subsidies

I.1 Except as provided for in Articles II and III, or in the exceptional case of natural disaster relief⁷⁷, the following subsidies within the meaning of paragraph 1 of Article 1, to the extent they are specific within the meaning of paragraph 2 of Article 1, shall be prohibited:

- (a) Subsidies the benefits of which are conferred on the acquisition, construction, repair, renewal, renovation, modernization, or any other modification of fishing vessels⁷⁸ or service vessels⁷⁹, including subsidies to boat building or shipbuilding facilities for these purposes.
- (b) Subsidies the benefits of which are conferred on transfer of fishing or service vessels to third countries, including through the creation of joint enterprises with third country partners.
- (c) Subsidies the benefits of which are conferred on operating costs of fishing or service vessels (including licence fees or similar charges, fuel, ice, bait, personnel, social charges, insurance, gear, and at-sea support); or of landing, handling or in- or near-port processing activities for products of marine wild capture fishing; or subsidies to cover operating losses of such vessels or activities.
- (d) Subsidies in respect of, or in the form of, port infrastructure or other physical port facilities exclusively or predominantly for activities related to marine wild capture fishing (for example, fish landing facilities, fish storage facilities, and in- or near-port fish processing facilities).
- (e) Income support for natural or legal persons engaged in marine wild capture fishing.
- (f) Price support for products of marine wild capture fishing.
- (g) Subsidies arising from the further transfer, by a payer Member government, of access rights that it has acquired from another Member government to fisheries within the jurisdiction of such other Member.⁸⁰

⁷⁷ Subsidies referred to in this provision shall not be prohibited when limited to the relief of a particular natural disaster, provided that the subsidies are directly related to the effects of that disaster, are limited to the affected geographic area, are time-limited, and in the case of reconstruction subsidies, only restore the affected area, the affected fishery, and/or the affected fleet to its pre-disaster state, up to a sustainable level of fishing capacity as established through a science-based assessment of the post-disaster status of the fishery. Any such subsidies are subject to the provisions of Article VI.

⁷⁸ For the purposes of this Agreement, the term "fishing vessels" refers to vessels used for marine wild capture fishing and/or on-board processing of the products thereof.

⁷⁹ For the purposes of this Agreement, the term "service vessels" refers to vessels used to tranship the products of marine wild capture fishing from fishing vessels to on-shore facilities; and vessels used for at-sea refuelling, provisioning and other servicing of fishing vessels.

⁸⁰ Government-to-government payments for access to marine fisheries shall not be deemed to be subsidies within the meaning of this Agreement.

(h) Subsidies the benefits of which are conferred on any vessel engaged in illegal, unreported or unregulated fishing.⁸¹

I.2 In addition to the prohibitions listed in paragraph 1, any subsidy referred to in paragraphs 1 and 2 of Article 1 the benefits of which are conferred on any fishing vessel or fishing activity affecting fish stocks that are in an unequivocally overfished condition shall be prohibited.

Article II

General Exceptions

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

(a) For the purposes of Article I.1(a), subsidies exclusively for improving fishing or service vessel and crew safety shall not be prohibited, provided that:

(1) such subsidies do not involve new vessel construction or vessel acquisition;

(2) such subsidies do not give rise to any increase in marine wild capture fishing capacity of any fishing or service vessel, on the basis of gross tonnage, volume of fish hold, engine power, or on any other basis, and do not have the effect of maintaining in operation any such vessel that otherwise would be withdrawn; and

(3) the improvements are undertaken to comply with safety standards.

(b) For the purposes of Articles I.1(a) and I.1(c) the following subsidies shall not be prohibited:

subsidies exclusively for: (1) the adoption of gear for selective fishing techniques; (2) the adoption of other techniques aimed at reducing the environmental impact of marine wild capture fishing; (3) compliance with fisheries management regimes aimed at sustainable use and conservation (e.g., devices for Vessel Monitoring Systems); provided that the subsidies do not give rise to any increase in the marine wild capture fishing capacity of any fishing or service vessel, on the basis of gross tonnage, volume of fish hold, engine power, or on any other basis, and do not have the effect of maintaining in operation any such vessel that otherwise would be withdrawn.

(c) For the purposes of Article I.1(c), subsidies to cover personnel costs shall not be interpreted as including:

(1) subsidies exclusively for re-education, retraining or redeployment of fishworkers⁸² into occupations unrelated to marine wild capture fishing or directly associated activities; and

⁸¹ The terms "illegal fishing", "unreported fishing" and "unregulated fishing" shall have the same meaning as in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing of the United Nations Food and Agricultural Organization.

⁸² For the purpose of this Agreement, the term "fishworker" shall refer to an individual employed in marine wild capture fishing and/or directly associated activities.

(2) subsidies exclusively for early retirement or permanent cessation of employment of fishworkers as a result of government policies to reduce marine wild capture fishing capacity or effort.

(d) Nothing in Article I shall prevent subsidies for vessel decommissioning or capacity reduction programmes, provided that:

(1) the vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;

(2) the fish harvesting rights associated with such vessels, whether they are permits, licences, fish quotas or any other form of harvesting rights, are permanently revoked and may not be reassigned;

(3) the owners of such vessels, and the holders of such fish harvesting rights, are required to relinquish any claim associated with such vessels and harvesting rights that could qualify such owners and holders for any present or future harvesting rights in such fisheries; and

(4) the fisheries management system in place includes management control measures and enforcement mechanisms designed to prevent overfishing in the targeted fishery. Such fishery-specific measures may include limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels, individuals and/or groups, such as individual transferable quotas.

(e) Nothing in Article I shall prevent governments from making user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programmes.

Article III

Special and Differential Treatment of Developing Country Members

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

III.2 For developing country Members other than LDC Members:

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

(b) In addition, subject to the provisions of Article V:

- (1) Subsidies referred to in Articles I.1(d), I.1(e) and I.1(f) shall not be prohibited.
- (2) Subsidies referred to in Article I.1(a) and I.1(c) shall not be prohibited provided that they are used exclusively for marine wild capture fishing employing decked vessels not greater than 10 meters or 34 feet in length overall, or undecked vessels of any length.
- (3) For fishing and service vessels of such Members other than the vessels referred to in paragraph (b)(2), subsidies referred to in Article I.1(a) shall not be prohibited provided that (i) the vessels are used exclusively for marine wild capture fishing activities of such Members in respect of particular, identified target stocks within their Exclusive Economic Zones ("EEZ"); (ii) those stocks have been subject to prior scientific status assessment conducted in accordance with relevant international standards, aimed at ensuring that the resulting capacity does not exceed a sustainable level; and (iii) that assessment has been subject to peer review in the relevant body of the United Nations Food and Agriculture Organization ("FAO")⁸³.

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

III.4 Members shall give due regard to the needs of developing country Members in complying with the requirements of this Annex, including the conditions and criteria set forth in this Article and in Article V, and shall establish mechanisms for, and facilitate, the provision of technical assistance in this regard, bilaterally and/or through the appropriate international organizations.

⁸³ If the Member in question is not a member of the FAO, the peer review shall take place in another recognized and competent international organization.

Article IV

General Discipline on the Use of Subsidies

IV.1 No Member shall cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, depletion of or harm to, or creation of overcapacity in respect of, (a) straddling or highly migratory fish stocks whose range extends into the EEZ of another Member; or (b) stocks in which another Member has identifiable fishing interests, including through user-specific quota allocations to individuals and groups under limited access privileges and other exclusive quota programmes. The existence of such situations shall be determined taking into account available pertinent information, including from other relevant international organizations. Such information shall include the status of the subsidizing Member's implementation of internationally-recognized best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at the sustainable use and conservation of marine species, such as, *inter alia*, the *Fish Stocks Agreement*, the *Code of Conduct*, the *Compliance Agreement*, and technical guidelines and plans of action (including criteria and precautionary reference points) for the implementation of these instruments, or other related or successor instruments.

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

Article V

Fisheries Management⁸⁴

V.1 Any Member granting or maintaining any subsidy as referred to in Article II or Article III.2(b) shall operate a fisheries management system regulating marine wild capture fishing within its jurisdiction, designed to prevent overfishing. Such management system shall be based on internationally-recognized best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at ensuring the sustainable use and conservation of marine species, such as, *inter alia*, the *Fish Stocks Agreement*, the *Code of Conduct*, the *Compliance Agreement*, technical guidelines and plans of action (including criteria and precautionary reference points) for the implementation of these instruments, or other related or successor instruments. The system shall include regular science-based stock assessment, as well as capacity and effort management measures, including harvesting licences or fees; vessel registries; establishment and allocation of fishing rights, or allocation of exclusive quotas to vessels, individuals and/or groups, and related enforcement mechanisms; species-specific quotas, seasons and other stock management measures; vessel monitoring which could include electronic tracking and on-board observers; systems for reporting in a timely and reliable manner to the competent national authorities and relevant international organizations data on effort, catch and discards in sufficient detail to allow sound analysis; and research and other measures related to conservation and stock maintenance and replenishment. To this end, the Member shall adopt and implement pertinent domestic legislation and administrative or judicial enforcement mechanisms. It is desirable that such fisheries management systems be based on limited access privileges⁸⁵. Information as to the nature and operation of these systems, including the results of the stock assessments performed, shall be notified to the relevant

⁸⁴ Developing country Members shall be free to implement and operate these management requirements on a regional rather than a national basis provided that all of the requirements are fulfilled in respect of and by each Member in the region.

⁸⁵ Limited access privileges could include, as appropriate to a given fishery, community-based rights systems, spatial or territorial rights systems, or individual quota systems, including individual transferable quotas.

body of the FAO, where it shall be subject to peer review prior to the granting of the subsidy⁸⁶. References for such legislation and mechanism, including for any modifications thereto, shall be notified to the Committee on Subsidies and Countervailing Measures ("the Committee") pursuant to the provisions of Article VI.4.

V.2 Each Member shall maintain an enquiry point to answer all reasonable enquiries from other Members and from interested parties in other Members concerning its fisheries management system, including measures in place to address fishing capacity and fishing effort, and the biological status of the fisheries in question. Each Member shall notify to the Committee contact information for this enquiry point.

Article VI

Notifications and Surveillance

VI.1 Each Member shall notify to the Committee in advance of its implementation any measure for which that Member invokes the provisions of Article II or Article III.2; except that any subsidy for natural disaster relief⁸⁷ shall be notified to the Committee without delay⁸⁸. In addition to the information notified pursuant to Article 25, any such notification shall contain sufficiently precise information to enable other Members to evaluate whether or not the conditions and criteria in the applicable provisions of Article II or Article III.2 are met.

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

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

VI.4 Each Member shall include in its notifications to the Committee the references for its applicable domestic legislation and for its notifications made to other organizations, as well as for the documents related to the reviews conducted by those organizations, as referred to in Article V.1.

VI.5 Other Members shall have the right to request information about the notified subsidies, including about individual cases of subsidization, about notified agreements pursuant to which fishing rights are acquired, and about the stock assessments and management systems notified to other organizations pursuant to Article V.1. Each Member so requested shall provide such information in accordance with the provisions of Article 25.9.

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

⁸⁶ If the Member in question is not a member of the FAO, the notification for peer review shall be to another relevant international organization. The specific information to be notified shall be determined by the relevant body of the FAO or such other organization.

⁸⁷ As provided for in Article I.1 and footnote 77.

⁸⁸ For the purposes of this provision, "without delay" shall mean not later than the date of entry into force of the programme, or in the case of an ad hoc subsidy, the date of commitment of the subsidy.

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

Article VII

Transitional Provisions

VII.1 Any subsidy programme which has been established within the territory of any Member before the date of entry into force of the results of the DDA and which is inconsistent with Article 3.1(c) and Article I shall be notified to the Committee not later than 90 days, or in the case of a developing country Member 180 days, after the date of entry into force of the results of the DDA.

VII.2 Provided that a programme has been notified pursuant to paragraph 1, a Member shall have two years, or in the case of a developing country Member four years, from the date of entry into force of the results of the DDA to bring that programme into conformity with Article 3.1(c) and Article I, during which period the programme shall not be subject to those provisions.

VII.3 No Member shall extend the scope of any programme, nor shall a programme be renewed upon its expiry.

Article VIII

Dispute Settlement

VIII.1 Where a measure is the subject of dispute settlement claims pursuant to Article 3.1(c) and Article I, the relevant provisions of Article 4 and of this Article shall apply. Article 30 and the relevant provisions of this Article shall apply to disputes arising under other provisions of this Annex.

VIII.2 Where a subsidy that has not been notified as required by Article VI.1 is the subject of dispute settlement pursuant to the DSU and Article 4, such subsidy shall be presumed to be prohibited pursuant to Article 3.1(c) and Article I. It shall be for the subsidizing Member to demonstrate that the subsidy in question is not prohibited.

VIII.3 Where a further transfer of access rights as referred to in Article I.1(g) is the subject of a dispute arising under this Annex, and the terms of that transfer have not been notified as required by Article VI.3, the transfer shall be presumed to give rise to a subsidy. It shall be for the payer Member to demonstrate that no such subsidy has arisen.

VIII.4 Where a dispute arising under this Annex raises scientific or technical questions related to fisheries, the panel should seek advice from fisheries experts chosen by the panel in consultation with the parties. To this end, the panel may, when it deems it appropriate, establish an advisory technical fisheries expert group, or consult recognized and competent international organizations, at the request of either party to the dispute or on its own initiative.

VIII.5 Nothing in this Annex shall impair the rights of Members to resort to the good offices or dispute settlement mechanisms of other international organizations or under other international agreements.
