

POSSIBLE DISCIPLINES ON FISHERIES SUBSIDIES

Paper from Brazil

Revision

The following communication, dated 20 April 2006, is being circulated at the request of the Delegation of Brazil.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/281/Rev.2), also be circulated as a formal document.

1. Brazil welcomes the broad discussion at the Negotiating Group on Rules (NGR) meeting in March 2006 on the Brazilian contribution to the discussion on the framework for disciplines on fisheries subsidies. This submission constitutes an improved version of Document TN/RL/GEN/79/Rev.1, so as to incorporate comments made by Members and to further develop some of the suggested ideas put forward in the previous submissions. In order to help focus the debate, this proposal contains only suggested legal draft. This legal draft is a work in progress and does not constitute Brazil's final position on the matter.

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

Preamble

Members,

Recalling the commitment at Doha to enhance the mutual supportiveness of trade and environment;

Noting the necessity to strengthen disciplines on subsidies in the fisheries sector;

Conscious of the negative effects of overcapacity and over-fishing on the fisheries resources;

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

Determined to strengthen all S&D treatment provisions with a view to making them more precise, effective and operational;

Considering the social and economic importance of the fisheries sector to developing countries;

Hereby *agree* as follows:

Article 1
Definitions and coverage

1.1 For the purpose of fisheries subsidies, the provisions of the Agreement on Subsidies and Countervailing Measures (ASCM) shall apply subject to the provisions of this Annex.

1.2 This Annex shall not apply to inland fisheries, understood as any fishery in the internal waters of a Member. "Internal waters" mean all waters on the landward side of the baseline of the territorial sea, as defined by Articles 8 and 50 of the United Nations Convention on the Law of the Sea (UNCLOS), including rivers and lakes.

1.3 This Annex shall not apply to aquaculture, provided that there is no capture fisheries involved¹. "Aquaculture" means the business of raising marine or freshwater fish or shellfish under controlled conditions.

1.4 This Annex covers any subsidy — as defined in Article 1 of the ASCM — given to or on behalf of fishing interests (referred to as "fisheries subsidies"). For the purpose of this Annex, "fishing interests" are the interests of any company and/or person linked in fact or in law, directly or indirectly², to harvesting activities of capture fisheries. Fisheries subsidies shall encompass any subsidy programme and/or the disbursement made under such programme. Any such fishery subsidy that is not generally available shall be deemed to be specific in the sense of Article 2 of the ASCM.

1.4.1 Any government-to-government payment for access by domestic fleets to foreign Economic Exclusive Zone (as defined in Part V of UNCLOS) fisheries ("foreign access rights") or to quotas or any other rights established by any regional fishery management organization is specifically covered by the definition of fisheries subsidies provided for in paragraph 1.4 above.

1.4.2 The provision of goods and services by a government under the form of infrastructure, other than general infrastructure, benefiting fishing interests shall be subject to the provisions of this Annex.

1.4.3 "Public services of fisheries resource management" shall not be considered a fishery subsidy. "Public services" are all services supplied in the exercise of governmental authority. A "service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis nor in competition with other services suppliers. "Public services of fisheries resource management" are any governmental public service supplied with the objective of improving the management of fisheries resources, provided that those public services do not involve financial contributions in relation to programmes which provide services or benefits to fishing interests or fishing communities.

¹ Such as capture fisheries used to feed raised fisheries or any captured fry or larvae (immature fish or shellfish at a post-larval stage, including fingerlings, parr, smolts and elvers).

² 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.

Article 2
Prohibited subsidies

2.1 In addition to those subsidies already prohibited under Article 3 of the ASCM, any fishery subsidy not falling within the scope of Articles 3, 4 and 7 of this Annex shall be considered a prohibited subsidy.

2.2 In case of natural disasters, the prohibition of paragraph 1 above could be temporarily suspended, so as to enable governments to provide short-term emergency relief and to implement recovery adjustment programmes. Under no circumstance shall this exceptional suspension of the prohibition be used to increase the aggregate gross tonnage, volume of fish hold and/or engine power of fishing vessels beyond the *statu quo ante*.

2.3 The same remedies provided for in Article 4 of the ASCM shall apply to subsidies falling under this Article.

Article 3
Non-Actionable Subsidies

3.1 The following fisheries subsidies shall be considered as non-actionable:

- (a) subsidies to early retirement schemes or unemployment relief;
- (b) subsidies for fishermen re-education, training or alternative employment assistance;
- (c) subsidies to research activities aimed at improving fisheries management or environmental protection;
- (d) subsidies for buyback and decommissioning of fishing vessels, provided that such subsidies require and ensure that engines and equipments are not re-employed in the fishing activities. Moreover, fishing licenses associated with such vessels have to be withdrawn;
- (e) subsidies to artisanal fishing³, including the provision of goods and services by a government under the form of infrastructure, other than general infrastructure, benefiting artisanal fishing.

3.2 The same remedies provided for in Article 9 of the ASCM shall apply to subsidies falling under this Article.

Article 4
Actionable Subsidies

4.1 No Member should cause, through the use of any fishery subsidy referred to in paragraphs 3 and 4 below, adverse effects to the interests of other Members.

4.2 For the purpose of this Annex, any fishery subsidy shall not cause the adverse effects (a), (b) or (c) set out in Article 5 of the ASCM nor shall it result in (d) any increase in the gross tonnage, volume of fish hold and/or engine power of fishing vessels.

³ Artisanal fishing shall be defined as the fishing activities related to the subsistence of the fisherman and his family. Those activities are performed at an in-shore basis with non-automatic net-retriever devices, provided that (a) the activities are carried out on an individual basis, including, but not necessarily, the family members; (b) the basis scope of the activities encompasses both family livelihood and a small profit trade; and (c) there is no major employer-employee relationship on the activities carried out. Artisanal fishing shall also include fishing activities related to traditional fishing communities.

4.3 Adverse effects in the sense of item (d) of the previous paragraph shall be deemed to exist in the case of fisheries subsidies granted:

- (a) for the adoption of multilateral standards, gears or techniques;
- (b) to improve safety or working conditions of the crew, according to multilateral standards;
- (c) to compensate for suspension of capture fishing activities;
- (d) to fishing port facilities;
- (e) to processing facilities for fisheries products;
- (f) to small-scale fishing⁴ that do not involve fisheries “patently at risk”⁵.

4.4 In the case of government-to-government payments for access to foreign EEZ fisheries resources or to foreign quotas or any other rights established by any regional fisheries management organisation, the Member buying the access shall be responsible for not causing adverse effects in the sense of Article 4.2 above and shall not use those payments to circumvent its obligations under this Annex, according to Article 5 below.

4.5 The same remedies provided for in Article 7 of the ASCM shall apply to subsidies falling under this Article.

Article 5 *Prevention of circumvention*

5.1 Members shall not have recourse to rules of origin (preferential or non-preferential), the flag of a vessel and government-to-government payments (as defined in Article 1.4.1 of this Annex), among others, to undermine the objectives set out in the preamble and to circumvent their obligations under this Annex.

Article 6 *Notification and monitoring*

6.1 All fishery subsidies shall be notified. Any subsidy at a national level which is not notified, or reported on, shall be rebuttably presumed prohibited in the sense of Article 2 of this Annex. It is recognized that notification shall not prevent any Member from challenging any fishery subsidies in accordance with the provisions of the Dispute Settlement Understanding (DSU) and other covered Agreements.

6.2 Members shall ensure that their notifications contain at least the following information:

- (a) identification of fisheries in which subsidized fishing takes place under a given subsidy programme or disbursement;
- (b) the status of the fisheries in question;
- (c) the subsidy amounts;
- (d) whether the fishery is under management by a regional fisheries management organization, the nature of the monitoring and the quantitative limits applicable to the Member.

⁴ Small-scale fishing shall be defined as the fishing activities carried out on a commercial basis and encompasses activities carried out by vessels with engine power up to 10bhp or volume of fish hold below X tons.

⁵ A fishery is to be considered "patently at risk" if the status of exploitation is considered “overexploited”, “depleted”, or “recovering” according to the Food and Agriculture Organization of the United Nations (FAO).

6.3 Members shall also provide the Committee of Subsidies and Countervailing Measures with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.⁶

6.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 2 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in Articles 3, 4 and 7 of this Annex have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least 2 (two) months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates.

6.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. The DSU shall apply to arbitrations conducted under this paragraph.

6.6 By the end of the transitional period provided for in Article 8 of this Annex, all Members shall have in place a national system of registry of all vessels duly authorized to operate under their flag and shall notify the Secretariat of the gross tonnage, volume of fish hold and engine power of all fishing vessels duly authorized to operate under their flag.

Article 7 *Special and Differential Treatment of Developing Country Members*

7.1 Notwithstanding the provisions of Article 2 of this Annex and in addition to the provisions of Article 4 of this Annex, developing country Members shall be allowed:

- (i) to maintain or grant fisheries subsidies to:
 - (a) fishing vessel construction or repair; and/or
 - (b) vessel modernization or gear acquisition or improvement; and/or
 - (c) fuel, bait or ice supplied for fishing activities; and/or
 - (d) assist disadvantaged regions within the territory of a Member.
- (ii) to receive government-to-government payments for access to its EEZ fisheries resources or to its quotas or any other rights established by any regional fisheries management organisation, as defined in Article 4.4 of this Annex.

7.2 Subsidies provided for in items (a), (b) and/or (c) of the previous paragraph shall not involve fisheries patently at risk.

7.3 In connection with the subsidies provided for in items (a) and/or (b):

- (i) they shall not be actionable by reason of item (d) of Article 4.2 of this Annex; and
- (ii) the country Member shall ensure that each vessel constructed or modernized possess a valid fishing licence and is registered in a national registration system.

⁶ It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

7.4 In the case of (d) in paragraph 1, developing country Members shall be allowed to maintain or grant fisheries subsidies designed to assist disadvantaged regions within their respective territory pursuant to a general framework of regional development⁷ within eligible regions provided that:

- (i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;
- (ii) the region is considered as disadvantaged on the basis of neutral and objective criteria⁸, indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;
- (iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:
 - i.1 one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;
 - ii.1 unemployment rate, which must be at least 110 per cent of the average for the territory concerned;as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

7.5 There shall be no presumption of adverse effects for fishery subsidies granted by developing country Members under Article 4.3 of this Annex.

7.6 Developing country Members shall update the Committee of Subsidies and Countervailing Measures with its notifications every 2 (two) years. Least-developed country Members shall update the Committee of Subsidies and Countervailing Measures with its notifications every 5 (five) years.

7.7 The same remedies provided for in Article 7 of the ASCM shall apply to subsidies falling under this Article.

Article 8 *Transitional provisions*

8.1 From the entry into force of this Annex, there shall be a period of 3 (three) years for Members to gradually phase out and eliminate fisheries subsidies that fall within Article 2 of this Annex and that are not currently prohibited according to Article 3 of the ASCM. The starting point of the reduction shall be the 2003-2005 average of the fisheries subsidies prohibited under Article 2 of this Annex. Members shall not be allowed to adopt new prohibited subsidies or to extend the scope of any existing prohibited subsidy programme, in accordance to Article 2 of this Annex.

⁷ A "general framework of regional development" means that regional subsidy programmes are part of an internally consistent and generally applicable regional development policy and that regional development subsidies are not granted in isolated geographical points having no, or virtually no, influence on the development of a region.

⁸ "Neutral and objective criteria" means criteria which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy. In this regard, regional subsidy programmes shall include ceilings on the amount of assistance which can be granted to each subsidized project. Such ceilings must be differentiated according to the different levels of development of assisted regions and must be expressed in terms of investment costs or cost of job creation. Within such ceilings, the distribution of assistance shall be sufficiently broad and even to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises.

8.2 From the entry into force of this Annex, there shall be a period of 5 (five) years for developing country Members to gradually phase out and eliminate fisheries subsidies that fall within Article 2 of this Annex and that are not currently prohibited according to Article 3 of the ASCM. The starting point of the reduction shall be the 2003-2005 average of the fisheries subsidies prohibited under Article 2 of this Annex. Members shall not be allowed to adopt new prohibited subsidies or to extend the scope of any existing prohibited subsidy programme, in accordance to Article 2 of this Annex.

8.3 For least-developed country Members, fisheries subsidies that are prohibited under Article 3 of the ASCM and those referred to in Article 2 of this Annex shall be considered actionable fisheries subsidies for a period of 10 (ten) years. If a least-developed country Member deems it necessary to apply such subsidies beyond the 10-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 least-developed country Member in question. If the Committee determines that the extension is justified, the least-developed country 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.
