

**FURTHER CONTRIBUTION TO THE DISCUSSION ON THE
FRAMEWORK FOR DISCIPLINES ON FISHERIES SUBSIDIES**

Paper from Brazil

The following communication, dated 15 November 2005, 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), also be circulated as a formal document.

1. Brazil welcomes the broad discussion at the Negotiating Group on Rules (NGR) meeting in July 2005 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/56, so as to incorporate comments made by Members and to further develop some of the suggested ideas put forward in the previous submission. In order to help focus the debates, the ideas put forward in the first part of the paper were tentatively translated into legal draft and attached as an Annex. This legal draft is a first attempt to develop possible legal language for the future disciplines and does not constitute Brazil's final position on the matter.

2. We recall that in this proposal it is suggested an approach on how the special and differential treatment for developing countries could be properly captured under the future disciplines on fisheries subsidies. The revisited Brazilian proposal consists of the following:

- (i) Definition of Fisheries Subsidies. Except for inland fisheries¹, all capture fisheries² subsidies programmes should be included in the definition of "fisheries subsidies".

¹ In this proposal, inland fisheries refer to fisheries in internal waters of any country. That is to say, all waters, other than lawfully claimed archipelagic waters, landward of the baseline from which the territorial sea is measured.

² Since the disciplines required to address subsidies to aquaculture would differ in important aspects from those proposed for capture fisheries, they are not part of this proposal, as long as there is no capture fisheries involved. In this proposal, aquaculture refers to the business of raising marine or freshwater fish or shellfish under controlled conditions

The definition of fisheries subsidies must include any financial contribution or income or price support by a government — as defined in Article 1 of the ASCM — that are given to or on behalf of fishing interests.³

Any such governmental payment given to or on behalf of fishing interests shall be considered "specific" within the meaning of Article 2 of the ASCM.

Moreover, subsidies granted for the purchase of foreign access rights (government-to-government payments for access by their domestic fleets to foreign EEZ fisheries or to quotas or any other rights established by an RFMO) should also be covered by the definition of fisheries subsidies. Public service of fisheries management should not, in principle, be defined as fisheries subsidy (stock assessments, regulatory enforcement, licensing, etc.).⁴

(ii) Classification of Fisheries Subsidies. Brazil favours the approach of classifying fisheries subsidies based both on their design and effects, according to the context in which they are provided:

(a) "Green Box" (non-actionable subsidies) — There should be an exhaustive list of non-actionable fisheries subsidies, provided that they do not have trade-distorting or production-distorting effects through enhancing capacity and overfishing. Subsidies that do not meet those conditions or do not fall within the exhaustive list should be considered prohibited subsidies.

In this regard, Members may wish to discuss the following non-exhaustive list of examples of subsidies that could be considered non-actionable:

- (1) subsidies that are aimed at improving conservation and the sustainable use of fisheries resources.⁵
 - (a) subsidies to research activities undertaken to improve fisheries management or environmental protection;
 - (b) subsidies for compliance with international safety or sanitary standards;
 - (c) subsidies for the adoption of environmentally preferable gear or techniques.

³ Regarding subsidies to fisheries infrastructure, Brazil welcomes New Zealand's valuable contribution (TN/RL/GEN/70). Brazil is flexible regarding the best way to tackle the issue in the future disciplines on fisheries subsidies. Nonetheless, we see merit in evaluating the possibility that categories (i) and (iii) of New Zealand's proposal be considered "green subsidies". Assuming that the new rules will make it mandatory to notify all kinds of fisheries subsidies, those infrastructure subsidies could be considered "green" under the assumption that they are not trade-distorting or production-distorting. If those conditions are not fulfilled, the subsidy will fall under the prohibited category.

⁴ In document TN/RL/GEN/36, New Zealand suggests "that subsidies to management services should not be prohibited under new disciplines on fish subsidies". Brazil is willing to discuss the scope of the concept of "public service of fisheries management", as well as whether subsidies under that concept should be considered "green" subsidies.

⁵ This point was tackled by New Zealand in document TN/RL/GEN/70 under the heading "Subsidies to "conservation" and to "research and development"".

- (2) subsidies to small scale fishing⁶ and to artisanal fishing⁷, provided that such fisheries are not "patently at risk"⁸;
- (3) subsidies for capacity reduction⁹;
- (4) subsidies aimed at fishermen retraining, to facilitate movement of labor out of the fishery sector, to compensate for suspension of fishing activity and early retirement schemes.

Whenever any vessel and/or company of a Member is found to be engaged in IUU fishing according to any RFMO, the Member will dispose of a period of six (6) months to demonstrate that it took all necessary steps to withdraw the licence of that vessel and/or company and that the vessel and its engine are definitively scrapped.

⁶ Subsidies to small-scale fishing are to be considered non-actionable if:

(a) the share of the fishery sector of the country granting the subsidies represents more than [X%] of its GDP, in accordance with the most recent data from the World Bank; or

(b) granted to activities carried out by vessels with total length not exceeding 24 meters. All vessels with total length not exceeding 24 meters that are used for catching a specific specie shall be considered part of the small-scale fleet for that specific specie. In addition:

(i) if the fishery is under the management of a RFMO:

(i.1) and if a country limit is set to a specific specie, the total catch of the country small-scale fleet for that specific specie shall not exceed 10% of the limit set to the country for that specific specie by that RFMO; or

(i.2) and if no country limit is set to a specific specie, the total catch of the country small-scale fleet for the specific species that have no individual limits shall not exceed 5% of the limit set to the country by that RFMO for those specific species that have no individual limits; or

(i.3) and if a global limit is set to a specific specie, the total catch of the country small-scale fleet for that specific specie shall not exceed 0,5% of the global limit set to that specie by that RFMO; or

(ii) if the fishery is not under the management of a RFMO, the annual increase of the volume catch by the country small-scale fleet for that specific specie shall not exceed 3% of the most recent volume catch data reported to a competent international organization.

Whenever the above-mentioned conditions (a) or (b) are not met, the entirety of the subsidies granted to the activities described in the first paragraph of this footnote is to be considered prohibited subsidies

⁷ Subsidies to artisanal fishing are to be considered non-actionable if:

I) granted to fisheries activities 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);

(c) the basic scope of the activities encompasses both family livelihood and a small profit trade; and

(d) there is no employer-employee relationship on the activities carried out; or

Subsidies granted to fishermen associations shall fulfil the same conditions of this item in order to be considered non-actionable subsidies.

II) granted to the maintenance of traditional fishing communities

⁸ For example, a fishery could be considered "patently at risk" if any of the following conditions apply:

- the status of exploitation is "not known or uncertain" or is "overexploited," "depleted," or "recovering" according to the FAO; or
- the status of exploitation or of the target species is deemed equivalent to the foregoing by a competent regional or international authority having jurisdiction over the fishery.

⁹ In document TN/RL/GEN/41, the US suggested that "buyback and similar programmes designed to permanently remove overcapacity from fisheries are strong candidates for an exception to an expanded prohibition of fisheries subsidies in the WTO, provided that appropriate programme conditions are attached". In document TN/RL/GEN/47, Japan suggested that vessels "subject to the decommissioning programme must be scrapped including its engine and equipment in order to avoid the leakage of vessels and gears to other fisheries. In addition, the fishing licenses associated with the decommissioned vessels have to be withdrawn". Brazil shares those views and is willing to discuss examples of subsidies programmes designed to reduce capacity as well as the appropriate conditions attached to those programmes aimed at avoiding the return of removed overcapacity or an increase in capacity.

Additionally, the Member will dispose of a period of twelve (12) months to demonstrate that it had taken all necessary steps to improve its management schemes in relation to IUU fishing. If any of the two conditions are not fulfilled, serious prejudice, in the sense of paragraph (c) of Article 5 of the ASCM, shall be deemed to exist regarding all non-actionable subsidies granted by that Member.

- (b) "Red Box" (prohibited subsidies) – All remaining subsidies that do not fall within the "green box" shall be considered as prohibited subsidies, together with those subsidies that are already prohibited under the current disciplines in Article 3 of the ASCM. In other words, there would be a prohibition on fisheries subsidies that, by reason both of their design and effects, cause, for example: (1) the increase of fishing capacity or effort; (2) IUU fishing¹⁰; (3) the increase of the domestic supply of fish, threatening the sustainability of the fishing resource. One exception could be envisaged: short-term emergency relief and adjustment in case of natural disasters. Payments made by developed country governments for access to the EEZ fisheries resources of developing countries could be permitted, subject to specific conditions.

3. For the purpose of determining the country to which the fisheries subsidy is considered to exist, the following rules shall apply:

¹⁰ In document TN/RL/GEN/47, Japan notes that “overseas transfers of fishing vessels to non-CPCs of RFMOs could directly result in IUU fisheries and therefore subsidies for those activities should be prohibited. Furthermore, the re-transfer to non-CPCs through CPCs of RFMOs is also problematic. Such a case can be prevented by establishing an appropriate bilateral arrangement between exporting and importing countries. Subsidies for overseas transfers of fishing vessels to CPCs of RFMOs might also be among the prohibited subsidies, unless such a bilateral arrangement exists”. In order to stimulate discussions, Members could consider the basic definitions of “illegal,” “unreported,” and “unregulated” fishing set out by the International Plan of Action (IPOA):

3.1 Illegal fishing refers to activities:

3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

3.2 Unreported fishing refers to fishing activities:

3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or

3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

3.3 Unregulated fishing refers to fishing activities:

3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

3.4 Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the International Plan of Action (IPOA).

(I) for fisheries that are subject to an RFMO:

- (a) the country to which are counted against the quota established by the RFMO shall be the country responsible for the fisheries subsidy that has caused trade- or production-distorting effects;
 - (a.1) in the case of government-to-government payments, the country that has disbursed those payments shall be the country responsible for the fisheries subsidy that has caused trade- or production-distorting effects

(II) for fisheries that are not subject to a RFMO:

- (a) if the vessel is registered and flying the flag of the country which the company is based at, and that company is in charge of the activities conducted by the vessel, the country of the flag of the vessel shall be the country under investigation; or
- (b) if the vessel is chartered by a company based in a country other than the vessel flag country and it is duly authorized to operate, the country which the charterer company is based at shall be the country under investigation.

(III) in the case of IUU fishing:

- (a) the country found to be engaged in IUU fishing according to any RFMO shall be the country responsible for the fisheries subsidy that has caused trade- or production-distorting effects;
- (b) and if the vessel is chartered by a company based on a country other than the vessel's flag country, the country which the charterer company is based at shall be the country responsible for the fisheries subsidy that has caused trade- or production-distorting effects;
- (c) and if the vessel is flying a flag of a non-compliance country, the country that has previously registered that vessel or the country on which the company who has asked for the registration in this non-compliance country is based shall be the country responsible for the fisheries subsidy that has caused trade- or production-distorting effects. "Non-compliance country" is a country that does not comply with its obligations regarding jurisdiction and control, according to international law, in respect of fishing vessels entitled to fly their flag.

4. There shall be a period of 3 (three) years for Members to phase out and eliminate their subsidies programmes that will fall within the prohibited subsidies category, from a level to be agreed. From the entry into force of these rules, Members will not be permitted to create new prohibited subsidies.

5. Notification requirements applicable to all fishing subsidies should require detailed reporting about the actual uses of the subsidies, necessarily including information:

- regarding the identification of fisheries in which subsidized fishing takes place under a given subsidy programme or disbursement;
- about the status of the fisheries in question;
- about subsidy amounts on a per vessel, per fleet, and per fishery basis;
- and specific description of how subsidies are actually applied;
- whether the fishery is under management by a RFMO, the nature of the monitoring, the quantitative limits applicable to the Member and the RFMO website; and
- identification of specific enterprises receiving subsidies.

It should also be required that notifications include information about steps taken to ensure that the notified subsidy does not contribute to IUU fishing activities. Any subsidy at a national level which is not notified, or reported on, would be presumed prohibited.¹¹

Articles 8.3, 8.4 and 8.5 of the ASCM, amended as necessary, could be used in the future disciplines on transparency and notification.

Special and differential treatment for developing country Members (“S&D Box”)

6. The provisions of Article 27 of the ASCM should fully apply to fisheries subsidies.¹² Since those provisions are not entirely appropriate to address the specific needs of developing country and least developed country Members in the fishing sector and taking into account social and environmental criteria, Brazil proposes that:

- (i) The following fisheries subsidies should be permitted to developing country Members, according to Articles 5, 6 (except paragraph 1) and 7 of the ASCM¹³ (“Amber Box”):
 - (1) Subsidies which increase fishing capacity or effort of Members that are part of a RFMO. Those subsidies should not allow the enhancement of the Member’s fishing capacity beyond the sustainable level of exploitation defined by the limits established under the RFMO. Specifically, those subsidies must fall within one or more of the following exhaustive list:
 - (a) subsidies to fishing vessel construction or repair;
 - (b) subsidies to vessel modernization or gear acquisition or improvement.
 - (2) Fuel, bait or ice supplied for fishing activities.¹⁴
 - (3) Payments received from other developing country governments for access to the EEZ fisheries resources of the developing country¹⁵;
 - (4) Assistance to disadvantaged regions within the territory of a Member pursuant to a general framework of regional development in the sense of Article 8.2 (b) of the ASCM.
- (ii) Serious prejudice in the sense of paragraph (c) of Article 5 of the ASCM shall be deemed to exist in the case of (“Dark Amber box”):

¹¹ Brazil shares EC’s view expressed in document TN/RL/GEN/39 that any subsidy which is not notified would be presumed prohibited.

¹² Some of the current provisions of Article 27 may have to be refined in the light of what is being suggested in this proposal.

¹³ Brazil is open to discuss any possible amendment that may be needed in those articles, in order to cope with the specificities of the fishing sector. For instance, the current definition of “adverse effects” may have to be clarified, in order to capture the impacts of a subsidy programme on production. The same point was raised by the United States in document TN/RL/W/169.

¹⁴ This point was tackled by New Zealand in document TN/RL/GEN/70 under the heading “Subsidies to “operational infrastructure””.

¹⁵ The same issue was raised by Antigua and Barbuda, Belize, Fiji Islands, Guyana, the Maldives, Papua New Guinea, Solomon Islands, St Kitts and Nevis under the item “revenue generation from access fees” (TN/RL/W/136) and by Antigua and Barbuda; Barbados; Dominican Republic; Fiji; Grenada; Guyana; Jamaica; Papua New Guinea; St. Kitts and Nevis; St. Lucia; Solomon Islands; and Trinidad and Tobago under the item “Special and differential treatment for developing countries” (TN/RL/GEN/57).

- (a) subsidies benefiting any vessel and/or company not operating under the rules and/or limits established by a RFMO to a Member;
 - (b) any vessel and/or company is found to be engaged in IUU fishing according to any RFMO. In this situation, the Member will dispose of a period of six (6) months to demonstrate that it took all necessary steps to withdraw the licence of that vessel and/or company and that the vessel and its engine are definitively scrapped. Additionally, the Member will dispose of a period of twelve (12) months to demonstrate that it had taken all necessary steps to improve its management schemes in relation to IUU fishing. If any of the two conditions are not fulfilled, serious prejudice, in the sense of paragraph (c) of Article 5 of the ASCM, shall be deemed to exist regarding all non-actionable subsidies granted by that Member;
 - (c) subsidies granted to any vessel and/or company involved with the exploitation of fisheries "patently at risk";
 - (d) subsidies granted to a fleet or an enterprise to cover operating losses.
- (iii) the following special and differential treatment should be accorded to least-developed country Members:
- (1) "red box" subsidies that are prohibited under Article 3 of the ASCM and those listed in paragraph 2(ii)(b) above should be considered actionable subsidies for a period of 10 (ten) years.

7. There shall be a period of 5 (five) years for developing country Members to phase out and eliminate their subsidies programmes that will fall within the prohibited subsidies category, from a level to be agreed.

ANNEX VIII TO THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

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 covers any subsidy — as defined in Article 1.1 of the ASCM — given to or on behalf, directly or indirectly, 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 to fisheries activities. Any such fishery subsidy that is not generally available shall be deemed to be specific in the sense of Article 2 of the ASCM.

1.2.1 Any government-to-government payment for access by domestic fleets to foreign Economic Exclusive Zone (“EEZ”) fisheries (“foreign access rights”) or to quotas or any other rights established by any Regional Fishery Management Organization (RFMO) are specifically covered by the definition of fisheries subsidies provided for in paragraph 1.2 above.

1.2.2 “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 expenditures or revenue foregone in relation to programmes which provide services or benefits to fishing interests or fishing communities.

1.2.3 Notwithstanding Article 1.1 (iii) of the ASCM, the provision of goods and services by a government under the form of general infrastructure shall be regarded as specific fisheries subsidies, and shall therefore be subject to the provisions of this Annex, if it is demonstrated that such subsidies have trade- and/or production-distorting effects.

1.3 For the purpose of this Annex, “production-distorting effects” include any negative effect a fishery subsidy may have on the sustainability of fishing resources. For fisheries that are subject to RFMOs, a “negative effect to the sustainability of fishing resources” means any violation of the quotas or other rights established by those RFMOs. For fisheries that are not subject to RFMOs, a “negative effect to the sustainability of fishing resources” means an annual increase of the volume catch for a specific specie exceeding 3% of the most recent volume catch data published by a competent international organization (an RFMO or a multilateral organization).

1.4 This Annex shall not apply to inland fisheries, understood as any fishery in the internal waters of a Member. “Internal waters” mean all waters, other than lawfully claimed archipelagic waters, landward of the baseline from which the territorial sea is measured.

1.5 This Annex shall not apply to aquaculture, provided that there is no capture fisheries involved. “Aquaculture” means the business of raising marine or freshwater fish or shellfish under controlled conditions. If capture fisheries are involved in aquaculture, any governmental actions involved with capture fisheries are subject to the disciplines of this Annex.

1.6 For the purpose of this Annex, fisheries subsidies shall encompass any subsidy programme and/or the disbursements made under such programme.

Article 2
Non-Actionable Subsidies

2.1 The following subsidies shall be considered as non-actionable, provided that they have no trade-distorting or production-distorting effects:

- (a) subsidies that are designed to improve conservation and the sustainable use of fisheries resources. The following subsidies shall be considered to fall within the scope of this sub-paragraph:
 - i. subsidies to research activities undertaken to improve fisheries management or environmental protection;
 - ii. subsidies for compliance with international safety or sanitary standards; or
 - iii. subsidies for the adoption of environmentally preferable gear or techniques according to multilateral standards.

- (b) subsidies to small scale fishing¹⁶ and to artisanal fishing¹⁷, provided that such fisheries are not "patently at risk"¹⁸;
- (c) subsidies for capacity reduction (buyback, decommissioning among others), provided that, in addition to the conditions set out in the *caput* of this paragraph, such subsidies require and ensure that engines and equipments are not re-employed in the fishing activity. Moreover, fishing licenses associated with the decommissioned vessels have to be withdrawn;
- (d) subsidies aimed at fishermen retraining;
- (e) subsidies to facilitate movement of labor out of the fishery sector;
- (f) subsidies to compensate for suspension of fishing activity; and
- (g) subsidies to early retirement schemes.

2.2 Whenever any vessel and/or company of a Member is found to be engaged in "illegal, unreported and unregulated fishing" ("IUU fishing"¹⁹) according to any RFMO, such Member shall demonstrate, within a period of 3 (three) months from the release of the report by any such RFMO, that: (a) it took all necessary steps to withdraw the license of that vessel and that the vessel and its engine are definitively scrapped or otherwise dismantled; and/or (b) in the case of a company found to be engaged in IUU fishing, it took all necessary steps to withdraw the licence(s) of that company and that the vessel(s) and its(their) engine of that company are definitively scrapped or otherwise

¹⁶ Subsidies to small-scale fishing are to be considered non-actionable if:

(a) the share of the fishery sector of the country granting the subsidies represents more than [X%] of its GDP, in accordance with the most recent data from the World Bank; or

(b) granted to activities carried out by vessels with total length not exceeding 24 meters. All vessels with total length not exceeding 24 meters that are used for catching a specific specie shall be considered part of the small-scale fleet for that specific specie. In addition:

(i) if the fishery is under the management of a RFMO:

(i.1) and if a country limit is set to a specific specie, the total catch of the country small-scale fleet for that specific specie shall not exceed 10% of the limit set to the country for that specific specie by that RFMO; or

(i.2) and if no country limit is set to a specific specie, the total catch of the country small-scale fleet for the specific species that have no individual limits shall not exceed 5% of the limit set to the country by that RFMO for those specific species that have no individual limits; or

(i.3) and if a global limit is set to a specific specie, the total catch of the country small-scale fleet for that specific specie shall not exceed 0,5% of the global limit set to that specie by that RFMO; or

(ii) if the fishery is not under the management of a RFMO, the annual increase of the volume catch by the country small-scale fleet for that specific specie shall not exceed 3% of the most recent volume catch data reported to a competent international organization.

Whenever the above-mentioned conditions (a) or (b) are not met, the entirety of the subsidies granted to the activities described in the first paragraph of this footnote is to be considered prohibited subsidies.

¹⁷ Subsidies to artisanal fishing are to be considered non-actionable if:

(I) granted to fisheries activities 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 basic scope of the activities encompasses both family livelihood and a small profit trade; and

(c) there is no employer-employee relationship on the activities carried out; or

Subsidies granted to fishermen associations shall fulfil the same conditions of this item in order to be considered non-actionable subsidies.

(II) granted to the maintenance of traditional fishing communities.

¹⁸ A fishery is to be considered "patently at risk" if any of the following conditions apply:

- the status of exploitation is considered "not known or uncertain", "overexploited", "depleted", or "recovering" according to the Food and Agriculture Organization (FAO); or
- the status of exploitation or of the target species is deemed equivalent to the foregoing by a competent regional or international authority having jurisdiction over the fishery.

¹⁹ According to the definition set out by the International Plan of Action (IPOA) of the FAO.

dismantled. Additionally, the Member shall demonstrate, within a period of 6 (six) months from the release of the report by any such RFMO, that it had taken all necessary steps to improve its management schemes in relation to IUU fishing. If any of the two conditions is not fulfilled, serious prejudice, in the sense of Article 6 of the ASCM, shall be deemed to exist regarding all non-actionable fishery subsidies granted and maintained by that Member.

Article 3
Prohibited subsidies

3.1 In addition to those subsidies already prohibited under Article 3 of the ASCM, any fishery subsidy not falling within the scope of Articles 2 and 5 of this Annex shall be considered as a prohibited subsidy.

3.2 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 justify increased fishing capacity beyond the existing fishing capacity before the natural disaster occurred.

3.3 Payments made by governments of developed country Members to governments of developing country Members for buying access to EEZ fisheries resources of such developing country Member or to the quotas or any other rights established by any RFMO to such developing country Member shall not fall under the prohibition of paragraph 1 above. In such cases, and subject to the disciplines of Article 4 of this Annex, serious prejudice in the sense of Article 6 of the ASCM shall be deemed to exist.

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

Article 4
Prevention of circumvention

4.1 Rules of origin (preferential or non-preferential), the flag of a vessel and government-to-government payments (as defined in Article 1.2.1 of this Annex), among others, shall not be used as a means to circumvent Members obligations and responsibilities under the provisions of this Annex. For this purpose, and subject to the provisions of this Annex, the following rules shall apply with regard to the identification of the country Member responsible for the fisheries subsidy that has caused trade- or production-distorting effects:

- (a) for fisheries that are subject to an RFMO:
 - i. the country to which are counted against the quota established by the RFMO shall be the country responsible for the fisheries subsidy that has caused trade- or production-distorting effects;
 - i.1 in the case of government-to-government payments (as defined in Article 1.2.1 of this Annex), the country that has disbursed those payments shall be the country responsible for the fisheries subsidy that has caused trade- or production-distorting effects;

- (b) for fisheries that are not subject to an RFMO:
 - i. if the vessel is registered in and flying the flag of the country on which the company is based, and that company is in charge of the activities conducted by the vessel, the country of the flag of the vessel shall be the country responsible for the fisheries subsidy that has caused trade- or production-distorting effects; or
 - ii. if the vessel is chartered by a company based in a country other than the vessel flag country and it is duly authorized to operate, the country which the charterer company is based at shall be the country responsible for the fisheries subsidy that has caused trade- or production-distorting effects.
- (c) in the case of IUU fishing:
 - i. the country found to be engaged in IUU fishing according to any RFMO shall be the country responsible for the fisheries subsidy that has caused trade- or production-distorting effects;
 - ii. and if the vessel is chartered by a company based on a country other than the vessel's flag country, the country which the charterer company is based at shall be the country responsible for the fisheries subsidy that has caused trade- or production-distorting effects;
 - iii. and if the vessel is flying a flag of a non-compliance country, the country that has previously registered that vessel or the country on which the company who has asked for the registration in this non-compliance country is based shall be the country responsible for the fisheries subsidy that has caused trade- or production-distorting effects. "Non-compliance country" is a country that does not comply with its obligations regarding jurisdiction and control, according to international law, in respect of fishing vessels entitled to fly their flag.

A company is based on one country if it has legal domicile in that country and if the company is duly authorized to operate in that country.

Article 5
Special and Differential Treatment of Developing Country Members

5.1 Developing country Members shall be allowed to maintain or grant the following fisheries subsidies, to the extent that such subsidies are subject to the disciplines with Articles 5 and 6 of the ASCM:

- (a) Subsidies which increase fishing capacity or effort of Members that are part of a RFMO. Those subsidies should not allow the enhancement of the Member's fishing capacity beyond the sustainable level of exploitation defined by the limits established under the RFMO. Specifically, those subsidies must fall within one or more of the following exhaustive list:
 - i. subsidies to fishing vessel construction or repair; and
 - ii. subsidies to vessel modernization or gear acquisition or improvement.
- (b) Fuel, bait or ice supplied for fishing activities;
- (c) Payments made by developing country Members to the government of an other developing country Member for access to its EEZ fisheries resources or to its quotas or any other quantitative limits established by any RFMO, subject to the disciplines of Article 4 of this Annex;

- (d) Assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development²⁰ 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 criteria²¹, 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.

5.2 Serious prejudice in the sense of Article 6 of the ASCM shall be deemed to exist in the case of:

- (a) subsidies benefiting any vessel and/or company not operating under the limits and/or quotas established by a RFMO to a Member;
- (b) any vessel and/or company is found to be engaged in IUU fishing according to any RFMO. In this situation, the Member shall demonstrate, within a period of 6 (six) months from the release of the report by any such RFMO, that: a) it took all necessary steps to withdraw the license of that vessel and that the vessel and its engine are definitively scrapped or otherwise dismantled; and/or b) in the case of a company found to be engaged in IUU fishing, it took all necessary steps to withdraw the license(s) of that company and that the vessel(s) and its(their) engine of that company are definitively scrapped or otherwise dismantled. Additionally, the Member shall demonstrate, within a period of 12 (twelve) months from the release of the report by any such RFMO, that it had taken all necessary steps to improve its management schemes in relation to IUU fishing. If any of the two conditions is not fulfilled, serious prejudice, in the sense of Article 6 of the ASCM, shall be deemed to exist regarding all non-actionable fishery subsidies granted and maintained by that developing country Member;
- (c) subsidies granted to any vessel and/or company involved with the exploitation of fisheries "patently at risk"; or
- (d) subsidies granted to a fleet or a company to cover operating losses.

²⁰ 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.

²¹ "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.

5.3 Notwithstanding the provisions of paragraph 2, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in Article 6 of the ASCM.

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

Article 6
Notification

6.1 Any fishery subsidy shall be notified. Any subsidy at a national level which is not notified, or reported on, shall be presumed prohibited in the sense of Article 3 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) subsidy amounts on a per vessel, per fleet, and per fishery basis;
- (d) specific description of how subsidies are actually applied;
- (e) whether the fishery is under management by a RFMO, the nature of the monitoring, the quantitative limits applicable to the Member and the RFMO website; and
- (f) identification of specific companies receiving subsidies.

6.3 Notifications shall include information about steps taken to ensure that the notified subsidy does not contribute to IUU fishing activities.

6.4 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.²²

6.5 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 4 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 2 and 5 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.

6.6 Upon the request of a Member, the determination by the Committee referred to in paragraph 5, 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

²² It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

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.

Article 7
Transitional provisions

7.1 From the entry into force of this Annex, there shall be a period of 3 (three) years for Members to phase out and eliminate fisheries subsidies that fall within the meaning of Article 3 of this Annex and that are not currently prohibited according to Article 3 of the ASCM, from a level to be agreed. 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 3 of this Annex.

7.2 From the entry into force of this Annex, there shall be a period of 5 (five) years for developing country Members to phase out and eliminate fisheries subsidies that fall within the meaning of Article 3 of this Annex and that are not currently prohibited according to Article 3 of the ASCM, from a level to be agreed. 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 3 of this Annex.

7.3 For least-developed country Members, fisheries subsidies that are prohibited under Article 3 of the ASCM and those referred to in Article 3 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 developing 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.
