

**POSSIBLE DISCIPLINES ON FISHERIES SUBSIDIES**

Paper from Brazil

Revision

The following communication, dated 20 February 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.1), also be circulated as a formal document.

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1. Brazil welcomes the broad discussion at the Negotiating Group on Rules (NGR) meeting in November 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/79, 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**

*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, other than lawfully claimed archipelagic waters, landward of the baseline from which the territorial sea is measured.

1.3 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.

1.4 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 capture 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.

1.4.1 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) is specifically covered by the definition of fisheries subsidies provided for in paragraph 1.4 above.

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

1.5 For the purpose of this Annex, “production-distorting effects” include any negative effect a fishery subsidy may have on the sustainability of fishing resources on a country basis. For fisheries that are subject to RFMOs, a “negative effect to the sustainability of fishing resources” occurs when the quotas or other rights established by those RFMOs are exceeded in 5% or more. For fisheries that are not subject to RFMOs, a “negative effect to the sustainability of fishing resources” means an annual volume catch for a specific specie that exceeds 3% of the average of the most recent volume catch data covering three years made available by a competent international organization (an RFMO or a multilateral organization).

1.6 For the purpose of this Annex, RFMOs are international organizations or conventions which:

- (a) are the only international fishery entity that can carry out managerial activities over specific fisheries in a determined area;
- (b) have a working relationship with the Food and Agriculture Organization (FAO);
- (c) are open to new entrants;
- (d) publish a list of all conservation measures in force;
- (e) have specific procedures to deal with illegal, unreported and unregulated fishing (“IUU fishing”<sup>1</sup>);
- (f) have a decision-making process in accordance with an agreement, convention or procedure;
- (g) have been functioning for at least 3 (three) years.

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

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<sup>1</sup> According to the definition set out by the International Plan of Action (IPOA) of the FAO.

*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 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;
- (c) subsidies aimed at fishermen retraining;
- (d) subsidies to facilitate movement of labor out of the fishery sector;
- (e) subsidies to compensate for suspension of fishing activity; and
- (f) subsidies to early retirement schemes.

The following subsidies shall be considered as non-actionable, provided that, in addition to the conditions set out in the *caput* of this paragraph, they do not involve fisheries that are “patently at risk”<sup>2</sup>:

- (a) subsidies to small scale fishing<sup>3</sup> and to artisanal fishing<sup>4</sup>;
- (b) subsidies to fishing port facilities; and
- (c) subsidies to processing facilities for fisheries products.

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

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<sup>2</sup> A fishery is to be considered "patently at risk" if any of the following conditions apply:

- the status of exploitation is considered “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.

<sup>3</sup> Small-scale fishing encompasses activities carried out by vessels with total length not exceeding 24 meters.

<sup>4</sup> Artisanal fishing encompasses:

- I) fishing 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) traditional fishing communities.

*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 *statu quo ante*.

3.3 Subject to the provisions of Article 5.4 of this Annex, payments made 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.

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 1.4.1 of this Annex), among others, shall not be used as a means to circumvent Members obligations and responsibilities under the provisions of this Annex.

*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 of Articles 5 and 6 of the ASCM and of Article 1.5 of this Annex:

- (a) Subsidies which increase fishing capacity or effort of Members that are part of a 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) Assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development<sup>5</sup> within eligible regions provided that:
  - (i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

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<sup>5</sup> 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.

- (ii) the region is considered as disadvantaged on the basis of neutral and objective criteria<sup>6</sup>, 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) Violation of the provision of Article 1.5 of this Annex;
- (b) subsidies granted to any vessel and/or company involved with the exploitation of fisheries "patently at risk"; or
- (c) subsidies granted to a fleet or a company to cover operating losses.

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 and in any of the situations enumerated in Article 5.2 of this Annex.

5.4 In case of payments received by the government of the developing country Member for access to its EEZ fisheries resources or to its quotas or any other quantitative limits established by any RFMO, the government of the country Member buying the access shall abide by the provisions of Articles 1.5 and 4 of this Annex;

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

#### *Article 6* *Illegal, unreported and unregulated fishing*

6.1 Whenever any vessel and/or company of a Member is found to be engaged in IUU fishing according to any RFMO, the Member shall demonstrate, within a period of 2 (two) months from the release of the report by any such RFMO, that it took all necessary steps to withdraw the licence of that vessel and/or company. 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 steps to improve its management

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<sup>6</sup> "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.

schemes in relation to IUU fishing. If any of the two conditions is not fulfilled, serious prejudice, as defined in Article 5.2 of this Annex, shall be deemed to exist regarding all actionable and non-actionable fishery subsidies granted and maintained by that Member.

*Article 7*  
*Notification*

7.1 All fishery subsidies 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.

7.2 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) whether the fishery is under management by a RFMO, the nature of the monitoring and the quantitative limits applicable to the Member.

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

7.4 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.<sup>7</sup>

7.5 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.

7.6 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 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.

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<sup>7</sup> It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

7.7 Members shall notify the Secretariat with regard to any RFMO falling under the conditions established under Article 1.6 of this Annex. The Secretariat shall maintain an updated database with all available information concerning notified RFMOs.

*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 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. The starting point of the reduction shall be the 2003-2005 average of the fisheries subsidies prohibited under Article 3 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 3 of this Annex.

8.2 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. The starting point of the reduction shall be the 2003-2005 average of the fisheries subsidies prohibited under Article 3 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 3 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 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 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.

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