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Negotiating Group on Rules

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POSSIBLE DISCIPLINES ON FISHERIES SUBSIDIES

Paper from Brazil

Revision

The following communication, dated 1 June 2006, is being circulated at the request of the Delegation of Brazil.

1. Brazil welcomes the broad discussion at the Negotiating Group on Rules (NGR) meeting in May 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.2, so as to incorporate comments made by Members and to further develop some of the suggested ideas put forward in the previous submissions. 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 overfishing 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 country Members;

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 fisheries¹ and to aquaculture², provided that there is no wild capture fisheries involved³.
- 1.3 This Annex covers any subsidy as defined in Article 1 of the Agreement on Subsidies and Countervailing Measures (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 indirectly⁴, to harvesting activities of wild 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.
 - 1.3.1 In case of a government-to-government payment for access by domestic fleets to foreign Economic Exclusive Zone⁵ fisheries or to quotas or any other rights established by any regional fishery management organization ("access rights"), a subsidy shall be deemed to exist if a benefit is conferred in the further transfer of those access rights from the paying government.
 - 1.3.2 "Public services of fisheries resource management" shall not be considered a fishery subsidy⁶.

Article 2 Prohibition

2.1 Any fishery subsidy not falling within the scope of Articles 3 and 4 shall be prohibited.

Article 3
Exceptions

- 3.1 The following fisheries subsidies shall be exempted from the prohibition set out in Article 2:
 - (a) subsidies providing a social safety net for fishermen:
 - i. housing schemes;
 - ii. early retirement schemes;
 - iii. re-education, training or alternative employment assistance;

¹ "Inland fisheries" are fisheries which are carried out in freshwater or estuaries and whose target species are those that spend all or part of their life-cycle therein, as defined by the United Nations Food and Agriculture Organization (FAO).

² "Aquaculture" means the farming of aquatic organisms, including fish, mollusks, crustaceans and aquatic plants, as defined by the FAO.

³ Such as wild capture fisheries used to feed raised fisheries or used for aquaculture.

⁴ 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.

⁵ As defined in Part V of the United Nations Convention of the Law of the Sea.

⁶ "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.

- iv. social security;
- v. life insurance; and/or
- vi. livelihood income support to compensate for unemployment or for the suspension of capture fishery activities.
- (b) subsidies to research activities aimed at improving fisheries management or environmental protection;
- (c) subsidies with environmental objectives:
 - i. fisheries stock enhancement:
 - ii. creation or maintenance of artificial reefs:
 - iii. marine environment protection.
- (d) subsidies for the adoption of or compliance to multilateral standards;
- (e) subsidies to fishing port facilities and processing facilities for fisheries products;
- (f) subsidies in the further transfer of access rights from the paying government; and/or
- (g) subsidies for vessel capacity reduction programmes, provided that:
 - i. the vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;
 - ii. the fish harvesting rights associated with such vessels, whether they are permits, licenses, fish quotas or any other form of harvesting rights, are permanently revoked and may not be reassigned; and
 - iii. 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 any fishery.
- 3.2 In case of natural or environmental disasters, the prohibition of Article 2 shall temporarily not apply, so as to enable governments to provide short-term emergency relief and to implement recovery adjustment programmes. Under no circumstance shall this exceptional provision be used to increase the aggregate gross tonnage, volume of fish hold and/or engine power of the subsidizing Member fishing fleets beyond the *statu quo ante*.
- 3.3 Fishery subsidies falling under Article 3.1 (c) to (g) shall not result in any increase of the gross tonnage, volume of fish hold and/or engine power of the subsidizing Member fishing vessels, at an individual basis and as a fleet basis.

Article 4 Special and Differential Treatment of Developing Country Members

- 4.1 In addition to the list provided for in Article 3.1, developing country Members shall be allowed to maintain or grant fisheries subsidies to:
 - (a) fishing activities related to the subsistence of the fishermen and their families⁷, including the provision of goods and services by a government under the form of infrastructure, other than general infrastructure, benefiting those fishermen and their families;
 - (b) fishing vessel construction, repair or vessel modernization or gear acquisition or improvement; and/or
 - (c) fuel, bait, ice supplied for fishing activities.

⁷ Those activities are performed at an in-shore basis with non-automatic net-retriever devices, provided that (a) the activities are carried out by fishermen, on an individual basis or organized in associations, 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.

- 4.2 Vessels constructed, repaired or modernized under the provisions of item (b) of the previous paragraph shall not receive any subsidies to variable costs (excluding subsidies provided for fuel) and shall not involve fisheries patently at risk⁸.
- 4.3 Members shall ensure that each vessel constructed, repaired or modernized under the provisions of item (b) of paragraph 1 possesses a valid fishing licence and is registered in a national registration system.
- 4.4 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 development⁹ within eligible regions, provided that the region is considered disadvantaged on the basis of neutral and objective criteria, 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.

Article 5 Notification

- 5.1 A fishery subsidy for which the provisions of Article 3.1 and 4.1 are invoked shall be notified in advance of its implementation to the Committee of Subsidies and Countervailling Measures. Any such notification shall be made, *mutatis mutandis*, in accordance with the provisions of Articles 25 of the ASCM.
- 5.2 In addition, Members shall make every effort to notify the Committee about:
 - (a) the conservation status of the fisheries harvested by the subsidised fishing vessels, according to the criteria established by the FAO;
 - (b) whether the fishery in question is under management of a regional fisheries management organization, the nature of the monitoring and the quantitative limits applicable to the Member;
 - (c) national fisheries management systems in place or fisheries management control measures adopted by the Member to prevent overfishing, such as limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels, individuals and/or groups.
- 5.3 Upon request of a Member, any notification submitted to the Committee shall be examined with a view to determining whether the conditions set out in Article 3.3 have been fulfilled. The examination shall be completed at the latest at the first regular meeting of the Committee following the notification of a fishery subsidy, provided that at least 2 (two) months have elapsed between such notification and the regular meeting of the Committee.
- 5.4 The failure by the Committee to reach a conclusion with regard the examination referred to in the previous paragraph 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.

⁸ A fishery is to be considered "patently at risk" if the status of exploitation is considered "overexploited", "depleted", or "recovering" according to the FAO.

⁹ 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.

5.5 By the end of the transitional period provided for in Article 11.2 of this Annex, Members shall have in place a national system of registry of all vessels duly authorized to operate under their flag and shall notify the Committee of the gross tonnage, volume of fish hold and engine power of each fishing vessel duly authorized to operate under their flag. The notification requirement of this paragraph does not apply to Article 4.1(a).

Article 6 Monitoring

6.1 Once a fishery subsidy notified under Article 5.1 is implemented, it shall remain an exception to the prohibition of Article 2 unless its implementation results in a violation of the conditions set out in Articles 3 and 4. Alleged violations of the said conditions shall be demonstrated by any Member that has reasons to believe that this programme has resulted in those violations. In the case alleged violations are from a developed country subsidizing Member, it falls on the government of this developed country Member the burden of demonstrating that the fishery subsidy is not in violation of the said conditions.

Article 7 Dispute Settlement

- 7.1 If the dispute under this Annex involves scientific or technical questions related to fisheries, the panel may seek advice from fisheries experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical fisheries experts group, or consult the FAO or other relevant international organization, at the request of either party to the dispute or on its own initiative.
- 7.2 Nothing in this Annex shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.

Article 8 Prevention of circumvention

8.1 Members shall not have recourse to rules of origin (preferential or non-preferential), the flag of a vessel and access rights, among others, as a means to undermine the objectives set out in the preamble and to circumvent their obligations under this Annex.

Article 9 Review

9.1 The Committee shall review the implementation and operation of this Annex 5 (five) years from the date of the entry into force of this Annex, taking into account the objectives set out in the preamble. In this regard, the Committee shall, as appropriate, request information from persons and organizations with expertise in fisheries management, conservation and stock assessment, such as the FAO and regional fisheries management organizations.

Article 10 Least-Developed country Members

10.1 For least-developed country Members, the prohibitions set out in Article 3 of the ASCM and in Article 2 of this Annex shall not apply 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.

Article 11 Transitional provisions

- 11.1 Any fisheries subsidy which has been established within in the territory of a Member before the date of the entry into force of this Annex shall be notified to the Committee in no latter than 90 days.
- 11.2 From the entry into force of this Annex, there shall be a period of 3 (three) years for developed country Members and a period of 5 (five) years for developing country Members to gradually phase out and eliminate fisheries subsidies that do not fall within Articles 3 and 4. The starting point of the reduction shall be the 2003-2005 average of the fisheries subsides prohibited under Article 2. Members shall not be allowed to adopt new prohibited subsidies or to extend the scope of any existing prohibited subsidy programme.