

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

Paper from Brazil

The following communication, dated 31 March 2005, is being circulated at the request of the Delegation of Brazil.

I. INTRODUCTION

1. At the Fourth Ministerial Conference in Doha, Ministers agreed to "negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries".

2. Notwithstanding the fact that the issue of development has been particularly emphasized in the IV Ministerial Conference, it has been a long-standing and key trait of the multilateral trading system, of which Part IV of the GATT 1947 and the special and differential provisions resulting from the successive Rounds are the most visible examples. The Doha mandate on Rules is a recent expression of that long-standing concern with the special needs of developing countries. Article 27 of the Agreement on Subsidies and Countervailing Measures (ASCM) is also an expression – and a significant one – of that trait, in so far as it explicitly recognizes that "subsidies may play an important role in economic development programmes of developing country Members".

3. The issues of development and S&D are clearly formulated in Article XXXVI of the GATT 1994: "international trade" is "a means of achieving economic and social advancement". Consistently, the same Article establishes that "the raising of standards of living and the progressive development of all contracting parties" are included in the "basic objectives" of the GATT and that attaining those two goals is "particularly urgent" for developing countries.

4. This notion of urgency underscores a fairly simple but fundamental aspect: the realities in developed and developing countries are **not** the same. The latter group of nations has specific needs that must be taken into account with a sense of priority. The system is, thus, supposed to contribute to the reduction of asymmetries between developed and developing countries, which should be fully reflected in the balance of rights and obligations of Members. That contribution should, moreover, be very concrete: Article XXXVI of the GATT explicitly establishes that developing countries may be allowed to **"use special measures to promote their trade and development"** (emphasis added).

5. These "basic concepts", "principles" and "objectives" of the GATT and the World Trade Organization (WTO) must be firmly upheld if the multilateral trading system is to grow ever more responsive to the needs of developing countries, especially in a round of negotiations that Ministers decided to name the "Doha Development Agenda". Ministers stressed, in that regard, that the "majority of the WTO Members are developing countries" and pledged to "seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration".

6. It follows, therefore, that the developmental aspect of the system should be given practical application. At close examination, however, the manner in which those concepts were translated into actual provisions in the various Agreements show that unfortunately they were not capable of avoiding the introduction of obligations that, when applied indiscriminately to both developed and developing countries, seriously limit the ability of the latter to implement public policies designed to overcome underdevelopment and its social and economic consequences. This is so because, in many instances, those obligations are premised on economic conditions (e.g. intensive capital accumulation, few market failures, high export capacity), that are simply not those prevailing in developing countries. In other words, important economic asymmetries were insufficiently taken into account. Negotiations launched at Doha must not miss the opportunity to correct this situation.

II. FISHERIES SECTOR

7. The comments made above are especially relevant in the discussion on fisheries subsidies. Deprived of the necessary means — especially vessels, storage capacity and processing units — to exploit in a viable, productive and sustainable fashion their fishing resources, many developing countries, some of which are endowed with extensive exclusive economic zones (EEZs), cannot consolidate their capacity to exploit their fisheries resources, to the benefit of their citizens. In some instances, the situation is even worse: in the eventual absence of effective control on the part of developing countries, numerous vessels of different countries fish or even overfish in waters under the jurisdiction of Governments other than their own.

8. Brazil believes that the solution to this problem may require public policies designed to enhance the ability and capacity of fishermen in developing countries to exploit at a sustainable level the fishing resources available in the jurisdiction of their Governments, as well as in their high seas (fishing managerial schemes established under relevant international organizations, such as the International Commission for the Conservation of Atlantic Tunas (ICCAT)).

9. This is a view that is already well established in several international instruments related to fisheries, all of which recognize and protect the right of developing countries to access and develop their fisheries. Among those instruments, a special mention must be made to the United Nations Convention on the Law of the Sea (UNCLOS)¹, the Agreement for the Implementation of the Provisions of the United Nations Convention of the Sea², the Code of Conduct for Responsible Fisheries³ and the International Plan of Action for the Management of Fishing Capacity⁴.

¹ Art. 116 - Right to fish on the high seas

All States have the right for their nationals to engage in fishing on the high seas subject to:

b) *the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67; and*

² Art. 5- General Principles

In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the Convention:

b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, *including the special requirements of developing States*, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub-regional, regional or global;

Art. 24- Recognition of the special requirements of developing States

1. States shall give full recognition to the special requirements of developing States in relation to conservation and management of straddling fish stocks and highly migratory fish stocks and development of fisheries for such stocks. To this end, States shall, either directly or through the United Nations Development Programme, the Food and Agriculture Organization of the United Nations and other specialized agencies, the Global Environment Facility, the Commission on Sustainable Development and other appropriate international and regional organizations and bodies, provide assistance to developing States.

Art. 25- Forms of cooperation with developing States

1. States shall cooperate, either directly or through sub-regional, regional or global organizations:

(a) *to enhance the ability of developing States, in particular the least developed among them and small island developing States, to conserve and manage straddling fish stocks and highly migratory fish stocks and to develop their own fisheries for such stocks;*

(b) *to assist developing States, in particular the least developed among them and small island developing States, to enable them to participate in high seas fisheries for such stocks, including facilitating access to such fisheries subject to articles 5 and 11.*

³ Art. 5- Special requirements of developing countries

5.2. In order to achieve the objectives of this code and to support its effective implementation, countries, relevant international organizations, whether governmental or non-governmental, and financial institutions *should give full recognition to the special circumstances and requirements of developing countries*, including in particular the least developed among them, and small island developing countries. *States, relevant inter-governmental and non-governmental organizations and financial institutions should work for the adoption of measures to address the needs of developing countries*, specially in the areas of financial and technical assistance, technology transfer, training and scientific cooperation *and in enhancing their ability to develop their own fisheries as well as to participate in high seas fisheries, including access to such fisheries.*

⁴ Art. 10 - The application of this International Plan of Action should be based on the Code of Conduct, particularly on Article 5, in relation to *enhance the ability of developing States to develop their own fisheries as well as to participate in high seas fisheries, including access to such fisheries*, according to their legitimate rights and obligations under the international law.

10. There is no doubt, however, that official support and environmental considerations go hand in hand: stocks are exhaustible, and subsidies – regardless of whom they benefit – must not threaten the sustainability of resources that are valuable to individual countries and the international community as a whole. In other words, official support should not undermine existing management and conservation measures adopted at the appropriate organisations. Nor should any flexibility provided to developing countries contribute to distortions in the international fishing market or aggravate the depletion of stocks.

11. In light of the above, Brazil believes that disciplines on fisheries subsidies should take into consideration the economic realities of developing countries, especially those that are late-entrants to fishing activities; provide them with the flexibility to overcome serious constraints in their ability to responsibly explore their fishing resources; develop their fisheries both within their jurisdictional waters (EEZ and territorial sea) as well as in the high seas.

12. It should not be overlooked that the overexploitation of some fisheries resources was the result of an active fishing policy conducted by developed countries with a long fishing tradition, using highly industrialized and mobile fleets, most often heavily subsidized. The situation is completely different in developing countries, as mentioned before. There, the problem is not overcapacity leading to overexploitation, but just the opposite: lack of capacity thwarting development.

13. Developed countries should assume a higher level of responsibility and, consequently, bear the greatest part of the burden resulting from a broader prohibition on fisheries subsidies aimed at restoring stocks or keeping them at a sustainable level of exploitation. On the other hand, nations which have not contributed to the depletion of stocks or which fish below sustainable levels should not be penalized by a prohibition which, if applied equally to countries in completely different situations, could block developing countries from legitimately developing their fisheries sector.

14. Moreover, applying the suggested prohibition to developing nations would also undermine the distributive role of international trade, since such measure would have the effect of freezing the status quo between the haves and have not in fisheries, while maintaining the hegemony of several traditional fishing nations who – one should repeat – have built their fishing fleets with generous subsidies.

15. Therefore, Brazil advocates that special and differential treatment be accorded to those developing countries which have not yet developed their fishing industry in a way compatible with their needs and potentialities, and without losing sight of the shared responsibility of all players in that industry for the conservation of the fishing resources, regardless of scale.

16. Brazil is encouraged by the progress reached so far by the negotiations and is confident that the views and proposals contained in this submission will lead to future fisheries subsidies disciplines that create environmentally-sound and more equitable opportunities of progress for all countries, especially for the developing ones which have not yet fully reaped the benefits of their fishing resources.

III. CONCERNS REGARDING THE FISHERIES SECTOR

17. Some of the concerns expressed so far by Members in this Negotiating Group on Rules are the following:

- (i) The world' stocks of fisheries is rapidly depleting in the recent years. According to FAO⁵, 75 per cent of the major marine fish stocks or species groups for which information is

⁵ State of World Fisheries and Aquaculture 2002, Rome, Part I, p.23.

available are overexploited, fully exploited, significantly depleted or recovering from overexploitation. Such alarming situation seems to be the result of the interaction of different factors, including overcapacity (estimated at 250 per cent⁶), overfishing and inadequate management (including "illegal, unreported or unregulated" (IUU) fishing);

- (ii) Fisheries subsidies vs. overcapacity and overfishing. Fishing subsidies contribute to overcapacity under real-world conditions⁷, since they reduce operating costs of fishing enterprises and, therefore, affect the performance of the industry. It should also be taken into account that, in the fishing sector, subsidies distort not only trade, but production. Lack of transparency and accountability is another characteristic of fishing subsidies;
- (iii) Fisheries management has already been the subject of international attention. Aiming at the conservation and sustainable use of fisheries resources around the world, many nations have agreed to establish certain national, regional and international rules, such as those of UNCLOS, the 1995 United Nations Code of Conduct for Responsible Fisheries, the Food and Agriculture Organization (FAO) International Plan of Action for the Management of Fishing Capacity (IPOA – Capacity), and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA - IUU). Improved disciplines on fisheries subsidies are not expected to replace the need for improved fisheries management. Improved fisheries management, however, should be dealt within appropriate international *fora*, and should be recognized by WTO disciplines only to the extent required to administer the fisheries subsidies in accordance with the rules to be agreed upon.

PROPOSAL

18. Fisheries subsidies are already subject to the disciplines of the ASCM and Article XVI of the GATT. As dictated by the Doha mandate, what needs to be developed and agreed by Members are the specific improved disciplines governing this sector.

19. In this sense, the ASCM already provides that: (i) prohibited subsidies are those subsidies contingent, in law or in fact, whether solely or as one of several conditions, upon export performance or upon the use of domestic over imported goods⁸; and (ii) actionable subsidies are those subsidies which cause adverse effects to the interests of other Members (injury to the domestic industry, serious prejudice to the interest of another Member or nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994).⁹ These subsidies usually cause price suppression, price undercutting, market displacement and increased shares of national and international markets.

20. In our view, fisheries subsidies have even further distortive effects. In addition to the commonly assigned effects of subsidies outlined in the previous paragraphs, fisheries subsidies have a damaging distortion in the access to fisheries resources which are not captured by the existing subsidies disciplines – that is, on the ability of competitors to produce and not merely to sell. The primary economic distortion takes place at the level of production (stock depletion alters costs for all producers, market impacts as well as price effects are difficult to calculate considering the effects of fisheries subsidies on production), since subsidized and non-subsidized fleets have to compete at equal footing for scarce/exhaustible resources.

⁶ Porter, 1998. Estimating Overcapacity in the Global Fishing Fleet. WWF.

⁷ Some have argued that proper fisheries management can prevent subsidies from resulting in overcapacity. The fact that there are no perfect management rules seems to be uncontroversial, which have lead us to the above conclusion.

⁸ Article 3.1 of the ASCM.

⁹ Article 5 of the ASCM.

21. Having said that, the Brazilian proposal consists of the following:

- (i) Definition of Fisheries Subsidies. Except for inland fisheries, all wild-capture¹⁰ fisheries subsidies programmes should be included in the definition of "fisheries subsidies". The definition of fisheries subsidies must include all financial contributions 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. 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) 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.)¹¹.
- (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:
 - (a) subsidies to research activities undertaken to improve fisheries management or environmental protection;
 - (b) subsidies for compliance with safety or sanitary standards;
 - (c) subsidies for the adoption of environmentally preferable gear or techniques.
 - (2) subsidies to small scale fishing¹², provided that such fisheries are not "patently at risk"¹³;
 - (3) subsidies for capacity reduction¹⁴;
 - (4) subsidies aimed at fishermen retraining, to facilitate movement of labor out of the fishery sector and early retirement schemes.

¹⁰ Since the disciplines required to address subsidies to aquaculture would differ in important aspects from those proposed for wild-capture fisheries, they are not part of this proposal.

¹¹ 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.

¹² Subsidies granted to non-automatic net-retriever fisheries activities developed in a small scale, usually encompassing artisanal fishing and family fishing. Brazil deems it important that a clear-cut concept of "small scale fishing" be worked out.

¹³ For example, a fishery could be considered "patently at risk" if it has been determined "overexploited", "depleted", or "recovering" by the FAO. Brazil is willing to discuss and to further elaborate on this concept.

¹⁴ Brazil is ready to engage in technical discussions which may be needed to ensure that those subsidies would not unduly benefit recipients.

- (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) "illegal, unreported or unregulated" (IUU) fishing; 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 to fishermen suffering significant loss of income as a result of reductions in fishing caused by conservation measures or unforeseeable natural disasters: (a) in case of unforeseeable natural disasters and; (b) to small scale fishermen suffering significant loss of income as a result of reductions in fishing caused by conservation measures.

22. 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.

23. Many Members have expressed their concern on the very low number and quality of notifications on fisheries subsidies. Members should pursue an enhanced mechanism of transparency that enables the surveillance of the existing rules by all Members (better quality of the information provided in the notifications). In this regard, Articles 8.3 and 8.4, as applied from 1995 to 1999, could be taken as the basis for a new provision on this matter¹⁵.

- Special and differential treatment for developing country Members

24. The provisions of Article 27 of the ASCM should fully apply to fisheries subsidies.¹⁶ 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 ASCM¹⁷:
- (1) Subsidies which increase fishing capacity or effort. Those subsidies cannot be responsible for IUU fishing, nor should they be allowed to enhance capacity beyond the sustainable level of exploitation within the limits of the fishing managerial schemes established under relevant international organizations. 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;
 - (c) fuel subsidies;
 - (d) bait or ice supplied for fishing activities.

¹⁵ For instance, a full and detailed notification could be a pre-requisite for any subsidy that intends to be qualified as non-actionable subsidy. This should not be seen as a sufficient condition for that purpose.

¹⁶ Some of the current provisions of Article 27 may have to be refined in the light of what is being suggested in this proposal.

¹⁷ 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.

- (2) Payments received from other governments for access to the EEZ fisheries resources of the developing country;
 - (3) 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:
- (a) subsidies granted to fisheries that are "patently at risk";
 - (b) subsidies programmes related to the construction, modernization or repair of vessels that result in a subsidized fleet tonnage in excess of 5 per cent of the limits and contingencies of fishing managerial schemes established under relevant international organizations;
 - (c) total *ad valorem* subsidization of a fleet exceeding 5 per cent of the value the production for countries that do not operate under the limits and contingencies of fishing managerial schemes established under relevant international organizations;
 - (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 21.(ii)(b) above should be considered actionable subsidies for a period of 10 (ten) years.

25. 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.
