

**FISHERIES SUBSIDIES: "FISHERIES ADVERSE EFFECTS"
AND "S&D" TREATMENT**

Paper from Brazil

The following communication, dated 29 June 2007, is being circulated at the request of the Delegation of Brazil.

1. Brazil welcomes the debate on fisheries subsidies at the Negotiating Group on Rules (NGR) meetings, in particular regarding special and differential treatment (S&D). In order to contribute to the discussions on the subject, Brazil presents this document in an effort to reaffirm some of our key principles regarding the fisheries negotiations and S&DT for developing countries.

2. This document is an attempt to respond to the call of the Chair of the NGR for "brainstorming" on S&DT issues.

"Fisheries Adverse Effects"

The concept of "fisheries adverse effects" was considered, for the first time, in the last version of the Brazilian proposal on fisheries subsidies (TN/RL/GEN/79/Rev.4). In brief, the discipline sets specific adverse effects to the fishing sector ("fishery adverse effects"), keeping the fundamental principle of the SCM Agreement by which no Member should cause, through the use of any subsidy, adverse effects to the interests of other Members.

In that sense, Brazil proposes that the structure of the new disciplines in fisheries subsidies be based on a broad prohibition, with specific exceptions and provisions for special and differential treatment ("S&D") considered under some parameters of fisheries sustainability ("fisheries adverse effects") – basically, the existence of fisheries management practices and the respect for certain fishery indicators, under the scope of a national fisheries management system.

Based on the Hong Kong Declaration, the premise that guided the proposed legal structure is that the subsidies to be prohibited in the new disciplines should address "over-fishing" and "overcapacity". Since the distortions that justified the negotiating mandate for fisheries subsidies are related to the level of production, the fisheries subsidies that directly distort production should be prohibited, while subsidies with negligible risks of causing adverse effects to the fisheries resources could be granted, subject to regular transparency and control mechanisms (notification and monitoring).

Brazil considers that the concept of "fisheries adverse effects" could be an effective criterion to ensure that the "exception" and S&D subsidies do not cause over-fishing. There is, however, considerable debate regarding the most adequate structure for the "fisheries management systems", in order to guarantee that they are effective. There is no binding multilateral rule that determines such structure nor a general international provision to assess the effectiveness of those systems. Nevertheless, there is enough international experience to help countries structure their fisheries management systems and control the effectiveness of their mechanisms (such as the FAO Code of Conduct for Responsible Fisheries). In that sense, Brazil understands that the new rules should provide for the observance of the best international practices, setting only certain minimum criteria to guide Members. Attempts of establishing a strict and universal standard for such systems within the WTO framework may compromise the legitimacy of the new disciplines and extend them beyond the mandate of the WTO.

As Members have experienced with other WTO Agreements (such as the Agreement on Technical Barriers to Trade), it should not be considered overly intrusive for the WTO to proceed with an analysis of the underlying scientific and technical criteria of national fisheries management system in case of occurrence of a claim of adverse effects to the fisheries resources ("fishery adverse effects"). Brazil understands that each country should structure and make operational their fisheries management systems, based on international practices and the best scientific information available. Upon the initiative of a Member, the Organization would be able to evaluate if the Member in question has fulfilled its obligations, on the basis of scientific and technical criteria provided for in the new disciplines.

In that sense, Brazil considers that the choice of "capacity" as the sole parameter for verifying the occurrence of fisheries adverse effects is controversial and imprecise. Not only does this concept find little consensus among specialists in the matter, but more importantly there is no direct relation between a vessel's physical feature and over-fishing.

The first versions of the Brazilian proposal did mention the fishing capacity of the Members, that should be evaluated jointly with their effective production. These two dimensions sought to capture not only the fishing potential of each fleet ("capacity"), but specially the volume actually

fished ("production"). The capacity of a fleet (physical: aggregate gross tonnage, volume of fish hold, engine power, etc; and productive: autonomy of the vessel, number of times that it leaves to the sea, etc) will always be a static and potential parameter, that can find no direct relation with the sustainability of its activities. Brazil understands that the distortions which justified the negotiating mandate for fisheries subsidies - equally reflected by overcapacity and over-fishing - are not properly captured by the concept of "capacity" alone.

Moreover, criteria based on the capacity bring implicit "ex ante" considerations. Based on our own experience in discussing the matter, Brazil believes that such an "ex ante" approach threatens the workability of the new rules. The concept of "fishery adverse effect" implies an "ex post" verification – a more "WTO like" practice that considers the real impacts of the subsidization. In that sense, the strength of the notification and monitoring provisions that accompany proposals based in fishery adverse effects should be ensured.

Special and Differential Treatment ("S&D")

Since the beginning of fisheries subsidies negotiations, Brazil has defended that the provisions on special and differential treatment (S&D) should envisage substantive flexibility to the general prohibition, bearing in mind certain parameters. To Brazil, new disciplines in fisheries subsidies without substantial concession on "policy space" in S&D are not acceptable. On the one hand, such concession should be followed by precise conditionalities, so that it is not characterized as a "blank check". On the other hand, Brazil considers it essential to guarantee that developing countries will have the right for constructing or modernizing their domestic fleet (a sector that, oftentimes, is still incipient in those countries). Therefore, effective S&D should go beyond temporary concessions, such as extensions of the period for implementation of the new rules or technical support provisions.

The nature of the conditionalities applied to special and differential treatment should be a core issue in the architecture of the future rules that will apply to developing countries. Criteria based on static parameters (for example the size of the vessel) do not seem to be the answer for determining the scope of the S&D provisions. They also could turn out to be inconsistent, due to vessels' growing efficiency. In that sense, Brazil, as well as Argentina, presented proposals that consider subsidies given to enhance the fisheries' capacity in developing countries upon parameters linked to both overcapacity and over-fishing.

As previously mentioned, Brazil favors the fisheries managing systems approach in dealing with limits for S&D. Brazil does not believe that "capacity" alone would be an effective parameter since it does not capture entirely the distortions in production, which is intended to be addressed by the new disciplines.

With regards to the question of the burden to developing countries of the information and notification requirements, it is worth mentioning that only those countries availing themselves of the "exceptions" or the "S&D" treatment provisions would be subject to full transparency clauses. The core principle for any exception to the broad prohibition, horizontal or S&D, is that such exceptions represent negligible risks of causing fisheries adverse effects. Moreover, Brazil would be prepared to consider a "de minimis" clause, providing for a waiver for countries with recognized low incidence on overcapacity and over-fishing.

In this regard, the premise behind the idea of allowing flexibility for developing countries to grant generally prohibited subsidies is that the program will not cause fisheries adverse effects. Such flexibility shall, hence, be based on a sustainable exploration of the fisheries resources, under the scope of a national fisheries management system. Regardless of the particular structure of the a

national fisheries management system, it shall be based on statistic data and a minimum scientific evaluation. In that sense, any developing country that implements fishery subsidy programs must already have a fisheries managing system in place and, therefore, be able to provide information gathered to implement the "exception" program.

"Artisanal"/"Small-Scale" Fisheries

The concepts of "artisanal" and "small-scale" have been continuously discussed in the context of the NGR fisheries subsidies negotiations, particularly given the difficulty in finding a common ground for the definition of such activities. Even specialized international organizations diverge on artisanal and small-scale fisheries definitions and do not provide the WTO negotiators with a satisfactory solution.

There appears to be some convergence, however, about the nature of those activities, relating to the subsistence and livelihood of the fishermen and/or their families. Nonetheless, the most appropriate criteria to characterize "subsistence" and "livelihood" do not seem to be entirely clear to Members.

Brazil considers that such criteria should be essentially related to the nature and of the activities and how they are performed: in-shore based fishery; with non-automatic net-retriever devices; carried out by fishermen (on an individual basis or organized in associations) and/or their families; encompassing both family livelihood and small profit trade; with no major employee-employer relationship on the activities carried out.

In the last version of its proposal, Brazil abandoned direct reference to the terms "artisanal" and "small-scale", seeking to avoid misunderstandings over the different existing definitions for each of the concepts in Member countries. When tackling the possibility of developing countries (S&D clause) to subsidize such activities, the Brazilian proposal lays down the above-mentioned criteria, determining the nature of the activities subject to receive governmental aid.

The proposed criteria intend to avoid static parameters, such as the size of the vessels. Although Brazil is not opposed to the idea of relying on physical characteristics of vessels, the use of such criteria alone may give rise to unwarranted consequences due to the multiplicity of standards found in the legislation and practices of the Members. Moreover such approach risks falling into an excessively broad common ground that would most likely embrace small-scale commercial fisheries. A definition based on the nature of the activity seems to be more comprehensive and adjustable to Members' different legal structures. Moreover, as already stated, there is no direct and necessary link between a vessel's physical feature, on the one hand, and overfishing, on the other.

In that sense, it is important to consider some key physical features, such as net-retriever devices, to complement the definition. Brazil understands that non-mechanized fishery should be one of the main criteria to characterize the nature of the activities subject to receive this kind of S&D subsidies.

Due to the difficulties faced by all countries to control and monitor their artisanal or small-scale fisheries, the exceptions to the broad prohibition cannot include activities with significant risk of causing fisheries adverse effects - "over-fishing" and "overcapacity". In other words, non-mechanized artisanal or small-scale fisheries are less likely to harm the sustainability of the fisheries resources and, therefore, could be considered as an exception to the general rule. The same reasoning may not apply to mechanized fisheries. The inclusion of such fisheries in the definition of "small-scale" could not be considered as a broad exception to the prohibition and would require certain conditionalities and transparency mechanisms.

The premise of negligible risk of "fisheries adverse effects", which forms the basis of the permission to subsidize non-mechanized artisanal and small-scale fisheries, could set the ground for a horizontal exception, applied to all Members, developed and developing ones.

An analysis of the scope and nature of such an exception brings the issue of mechanized fishery to the centre of the debate. Brazil considers that there is a "trade-off" between the breadth of the activities covered by the "artisanal" and "small-scale" definition and the range of Members eligible for a "carve-out" from disciplines for subsidies to such fisheries, as well as the degree of conditionally to be attached to the "carve-out".

Under a wider definition, that includes mechanized small-scale fishery in the exception to the prohibition (as part of the characterization of "small-scale"), the activity would need to be subjected to strict limits and parameters, attached to transparency and monitoring mechanisms (notification). Such conditionalities, however, would most likely hinder many developing countries' capacity to provide support to artisanal and small-scale activities.
