

Fisheries Subsidies Disciplines at the WTO: Legal Architecture

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The WTO Ministerial Conference held in Hong Kong in December 2005 produced a text¹ which recalled and reaffirmed the mandates on rules negotiations outlined in the Doha Ministerial Declaration and articulated, in a separate annex, Ministers' commitments to strengthening the disciplines on fisheries subsidies². As articulated in my earlier paper,³ the elevation of trade and environment linkages in the Hong Kong Ministerial Declaration, as it pertains to the rules negotiations on fisheries subsidies, will have profound implications on the fishery of WTO small vulnerable coastal states. An outright prohibition of certain forms of fisheries subsidies on the basis of 'overcapacity' and 'over-fishing', in particular, excludes a trade effect analysis from the equation and allows for potential trade sanctions at the WTO DSB on environment sustainability grounds; which goes beyond the technical and administrative capacity of the WTO.

This paper will analyse the textual proposals for fisheries subsidies disciplines by Brazil⁴ and New Zealand⁵ and discusses its possible implications for Small Vulnerable Economies⁶ (SVEs).

¹ WT/MIN(05)/DEC dated 22nd December 2005.

² Hong Kong Ministerial Text mandate on Fisheries Subsidies Disciplines:

Rules negotiations

28. We recall the mandates in paragraphs 28 and 29 of the Doha Ministerial Declaration and reaffirm our commitment to the negotiations on rules, as we set forth in Annex D to this document

Annex D to the WTO Ministerial Declaration

9. recall our commitment at Doha to enhancing the mutual supportiveness of trade and environment, note that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing, and call on Participants promptly to undertake further detailed work to, inter alia, establish the nature and extent of those disciplines, including transparency and enforceability. Appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns;

³ Qalo.V. 2005. 'Fisheries Subsidies at the WTO'.

⁴ TN/RL/GEN/79/Rev.1 dated 21 February 2006.

⁵ TN/RL/GEN/100 dated 3 March 2006.

⁶ For the purpose of this paper, Small Vulnerable Economies includes proponents of the Fisheries Subsidies Proposal contained in WTO document TN/RL/W/136, TN/RL/GEN/57Rev.1 & Rev.2(JOB(05)143Rev.2): Antigua and Barbuda, Barbados, Belize, Dominican Republic, Fiji, Grenada, Guyana, Jamaica, the Maldives, Papua New Guinea, Solomon Islands, St. Kitts and Nevis, St. Lucia, Solomon Islands and Trinidad & Tobago.

The Legal Architecture

The Agreement on Subsidies and Countervailing Measures (ASCM) currently covers two types of subsidies which are relevant to fisheries – prohibited and actionable subsidies. Whether or not these rules sufficiently cover the fisheries sector is questionable and is evident from closer scrutiny of the ASCM, particularly the limited coverage of the definition of subsidies and the provisions on prohibited and actionable subsidies⁷. The heterogeneity of fish stocks, in particular, was argued by New Zealand as an issue which could create potential problems in the application of the rules. The proposal for a legal architecture which accommodates the shortcomings, in the area of fisheries, under the current ASCM rules is currently being negotiated in Geneva.

Brazil’s textual proposal is based on the traffic light approach as follows:

Table 1: Brazil’s proposed legal architecture

Subsidies		
‘Green Box’	‘Non-Actionable Subsidies’	<p>Fisheries Subsidies which do not have trade-distorting or production-distorting effects through enhancing capacity and over-fishing.</p> <p>The applicable remedies are those outlined in Article 9 of the ASCM.</p>
‘Red Box’	‘Prohibited Subsidies’	<p>In addition to subsidies prohibited under Article 3 of the ASCM, all other fisheries subsidies which fall outside ‘Green Box’ above and the SDT provision below <i>would be prohibited</i>. Certain Exceptions apply including certain <u>access fees</u> paid to developing countries. Governments buying such access are required to ensure that such access do not have any trade-distorting or production-distorting effect on the fisheries resources of the country providing the access. Governments are not to use ROO, flag of a vessel or govt-govt payments to circumvent its obligations under the legal framework.</p> <p>The applicable remedies are those outlined in Article 4 of the ASCM.</p>
‘Amber Box’	‘Special and Differential Treatment’ for Developing Countries	<p>Developing Countries are allowed to maintain or grant certain fisheries subsidies which are also subjected to the Actionable Subsidies Provision of the ASCM. In other words, developing countries are allowed to maintain certain types of fisheries subsidies listed in Article 5 of the proposed new Annex VIII provided that these do not have any production-distorting effects or cause ‘adverse effect’ on the interest of other members. Brazil proposes the re-introduction of the ASCM Article 6.1 which currently offers, amongst others, a quantitative measure of serious prejudice as <u>‘the total <i>ad valorem</i> subsidization of a product exceeding 5% - a definition which, if applied to the fisheries sector, may totally be in error</u>. This quantitative limit has been proposed by Brazil because it is high enough to enable it to benefit from such SDT provision.</p> <p>The applicable remedies are those outlined in Article 7 of the ASCM.</p>

All fishery subsidies, including those articulated above, are to be notified to the WTO. Subsidies not notified and maintained at the national level would automatically be presumed prohibited until rebutted otherwise.

⁷ *WTO Fisheries Subsidies Negotiations: Implications for ACP Fisheries Access Arrangements and Sustainable Management at pgs 3 - 5.*

New Zealand’s textual proposals depart slightly from the Brazil approach and are summarised in table 2 below:

Table 2: New Zealand’s proposed legal architecture

Subsidies		
‘Red Box’	‘Prohibited Subsidies’	In addition to subsidies prohibited under Article 3 of the ASCM, all other fisheries subsidies ⁸ which confer a benefit directly or indirectly on any natural or legal person engaged in the harvesting, processing, transport, marketing or sale of the fish and fisheries product listed in Annex IX of this agreement shall be prohibited. Fisheries Subsidies covered under the SDT and Exhaustive List of non-prohibited fisheries subsidies provision are excluded. The applicable remedies are those outlined in Article 4 of the ASCM.
	‘Non-Prohibited Fisheries Subsidies’	New Zealand provides a non-exhaustive list of non-prohibited fisheries subsidies which countries are allowed to adopt or maintain provided that certain notification requirements are met.
	‘Special and Differential Treatment’ for Developing Countries	Fisheries Subsidies provided by a developing country Member which does not exceed the de minimis level for that Member shall not be prohibited.

Fisheries Subsidies established within the territory of a member before this proposed legal framework enters into force and which are inconsistent with the newly proposed Prohibited Subsidies provision are to be notified to the Committee no later than one year after the framework enters into force. 3 years after the entry into force of such a framework, members are required to bring it into conformity with the newly proposed ‘Prohibited Fisheries Subsidies’ provision. The transitional period commences from the entry into force of the new framework and ends 3 years thereafter.

Table 3, below, compares the proposed legal architecture for new fisheries subsidies disciplines by Brazil and New Zealand. A commentary column in the table analyses the implications of these proposals on the fishery of Small Vulnerable Coastal States⁹.

Table 3: Analysis of Brazil & New Zealand Textual Proposals

Brazil (TN/RL/GEN/79Rev.1)	New Zealand (TN/RL/GEN/100)	Commentaries
Proposed Legal Architecture		
Brazil proposes a separate fisheries subsidies disciplines <i>Annex VIII</i> appended to the ASCM. The application of the ASCM provisions are however, subjected to the newly proposed <i>Annex VIII</i> which covers definition of fisheries subsidies, Non-Actionable Fisheries Subsidies, Prohibited Fisheries Subsidies, Prevention	New Zealand proposes insertion of the following additional provisions, on fisheries subsidies disciplines, within the existing ASCM rules: <i>Article 3 bis</i> under the existing Prohibited Subsidies Provision of the ASCM which cross references	Both Brazil and New Zealand are proponents of a ‘top-down’ approach. New Zealand, in particular favors a broad ban on fisheries subsidies with narrowly defined exceptions. SVE’s are however proponents of a ‘bottom-up’ approach.

⁸ The definition of ‘subsidy’ used is Article 1 of the ASCM.

⁹ **TN/RL/W/136** – Communication from the delegations of Antigua and Barbuda, Belize, Fiji Islands, Guyana, the Maldives, Papua New Guinea, Solomon Islands, St Kitts and Nevis dated 14th July 2003; **TN/RL/GEN/57 (JOB(05)/143)**, **TN/RL/GEN/57Rev.1 (JOB(05)/143Rev.1)**, **TN/RL/GEN57Rev.2 (JOB(05)/143Rev.2** – Communication from 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 dated 7th July, 4th August and 13th September 2005 respectively.

or Circumvention, SDT for Developing Countries, Notification and Transitional Provisions.

the newly proposed *Article 27bis* (Special and Differential Treatment) and *Annex VIII* (Exhaustive List of Non-Prohibited Fisheries Subsidies).

Both **Brazil** and **New Zealand** however have differing legal architecture approaches as evident in Table 1 & 2 above.

Article 28 bis Notification Provision which requires WTO members to notify existing inconsistent fisheries subsidies programs established prior to entry into force of this new legal framework. It should also be brought into conformity within the requirements of the provisions, 3 years after the framework enters into force.

Brazil proposes a separate Annex to the ASCM whilst NZ, an amendment to the existing rules.

Definition of and Coverage

Brazil follows the definition of subsidies in Article 1.1 of the ASCM as given to or on behalf, directly or indirectly, of interests of company and/or person linked in fact or law to fisheries activities.

The definition also includes any government-to-government payment for access by domestic fleets to foreign EEZ fisheries (“foreign access rights”) or to quotas or any other rights established by any Regional Fishery management Organisation (RFMO).

Public services of fisheries resource management, inland fisheries and aquaculture should be excluded from the definition.

The provision of general infrastructure by a government shall be regarded as specific fisheries subsidies if it can be demonstrated that such subsidies have trade and/or production-distorting effects.

New Zealand proposes utilization of subsidies definition in Article 1 of the ASCM which confers a benefit directly or indirectly on any natural or legal person engaged in the harvesting, processing, transport, marketing or sale of the fish and fisheries product listed in Annex IX of the agreement.

Brazil’s proposes the widening of the existing ‘subsidies’ definition. It proposes disciplines on fisheries subsidies which are both **specific** and **general**. It also proposes the inclusion of ‘foreign access rights’. It however excludes from prohibition certain access fees paid to developing countries – which are in SVE’s interest.

NZ’s proposal for an outright prohibition of subsidies as it so defines and for what may seemingly be for all fish and fisheries product in the HS list has to be closely scrutinized by SVEs. HS1604, in particular is explained below.

Non-Actionable/Non-Prohibited Fisheries Subsidies

Brazil proposes the utilization of a ‘traffic light’ approach i.e. **‘GREEN BOX’** consisting of non-exhaustive list of fisheries subsidies which do not have **trade-distorting** or **production-distorting effects through enhancing capacity and over fishing**. These include subsidies to small scale fishing and to artisanal fishing that are not ‘patently at risk’, subsidies for capacity reduction and those aimed at fishermen retraining.

New Zealand provides a non-exhaustive list of non-prohibited fisheries subsidies which includes **access payments**, certain infrastructure, certain social insurance programmes, natural disaster relief, subsidies to aquaculture activities etc. It also proposes the exclusion from fisheries subsidies government expenditures associated with fisheries management systems and enforcement of fisheries management rules.

Brazil proposes the re-introduction of a Non-Actionable Subsidies Provision specifically for fisheries subsidies disciplines. **New Zealand**, on the other hand, proposes a non-prohibited fisheries subsidies list applicable to all WTO members. The two approaches differ in that **Brazil’s** proposal would deem fisheries subsidies in its list actionable if a member is able to prove that it has trade-distorting or production-distorting effects. **NZ’s** proposal is an outright

prohibition of the fisheries subsidies listed in Annex VIII.

Both **NZ** and **Brazil** each include one aspect of fisheries subsidies which SVEs have proposed to be excluded from the disciplines altogether – highlighted in red.

NZ has however qualified its proposed non-exhaustive non-prohibited subsidies list to further consideration of transparency issues which SVEs should closely monitor.

Brazil's proposal to exclude fisheries subsidies to small scale fishing and artisanal fishing is qualified. **SVEs** need to consider the definition of 'artisanal and small scale fishing' proposed in the footnote to its proposal and determine whether or not it has any adverse effects on their fishery sector.

Prohibited Fisheries Subsidies

In addition to subsidies prohibited under Article 3 of the ASCM, all other fisheries subsidies which fall outside 'Green Box' above and the SDT provision below *would be prohibited* or placed in the '**RED BOX**'. Exceptions apply to short term emergency relief and adjustment in case of natural disasters and certain access fees paid by developed countries to EEZ fisheries resources of developing countries.

Any subsidies within the meaning of Article 1 of the ASCM that confers a benefit (ASCM Art.1.1 (b)) directly or indirectly on any natural or legal person engaged in the harvesting, processing, transport, marketing or sale of the fish and fisheries products as listed in the newly proposed Annex IX. Exceptions apply for fisheries subsidies covered under the S&D provision and those in the non-prohibited list in the newly proposed Annex VIII.

It subjects subsidies defined under Article 1 of the ASCM to the provisions on Prohibited Subsidies if it is specific (as in Article 2 of the ASCM) and possibly *non-specific or general* (e.g. subsidies which contributes to 'overcapacity and over fishing'). Specific textual options for non-specific fisheries subsidies which contribute to overcapacity and over-fishing will be developed by NZ and may appear in its next proposal.

New Zealand, in Annex IX, lists the following product coverage for fisheries subsidies disciplines which should be prohibited:

NZ proposes the prohibition of subsidies which confers a benefit on any person/firms engaged in the processing of 'prepared or preserved fish' i.e. canneries (HS 1604).

SVEs should reject the NZ's proposal for the inclusion of HS1604 in its Annex IX given that an outright prohibition of subsidies provided to its canneries may drastically affect its efforts to develop domestic capacity to use their own marine resources for development purposes, particularly for Small Vulnerable Coastal States that do not offer access to DWFN. SVEs are currently offering incentives to local and foreign fishers to supply domestic processing facilities which are vital if they are to develop their fisheries sector.

<p>HS 0509</p> <p>HS 0511.91</p> <p>HS 03</p> <p>HS 1504.10</p> <p>HS 1504.20</p> <p>ex HS 1603</p> <p>HS 1604</p> <p>HS 1605</p> <p>HS 1605</p> <p>HS 2301.20</p>	<p><i>Natural Sponges of animal origin</i></p> <p><i>Product of fish or crustaceans, mollusks or other aquatic invertebrates; dead animals of chapter 3.....</i></p> <p><i>Fish and Fish Products</i></p> <p><i>Fish Liver Oil and their Fractions</i></p> <p><i>Fats and Oils and their fractions, of fish, other than liver oils</i></p> <p><i>Extracts and juices of meat, fish or crustaceans, mollusks</i></p> <p><i>Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs</i></p> <p><i>Crustaceans, mollusks and other aquatic invertebrates, prepared or preserved</i></p> <p><i>Crustaceans, mollusks and other aquatic invertebrates, prepared or preserved</i></p> <p><i>Flours, meals and pellets, of fish or of crustaceans, mollusks or other aquatic invertebrates</i></p>	<p>An alternatively approach could be for SVEs to negotiate appropriate <i>de minimis threshold</i> to be included in NZ's proposed SDT provision.</p>
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Notification

Requires all fisheries subsidies to be notified to the WTO. Those not notified at the national level would be presumed to be prohibited but this would be a rebuttable presumption.

It also subjects violation to a binding arbitration process.

3 years from entry into force of new legal framework on fisheries subsidies disciplines, members would be required to phase out/eliminate such subsidies based on the 2003-2005 fisheries subsidies average. No new subsidies may thereafter be introduced.

Developing countries have a 5 year phasing out period for subsidies falling within the meaning of Article 3 to the Annex.

LDCs have a 10 year phase-out/elimination period based on the 2003-2005 fisheries subsidies average data and may be subject to extension.

It stipulates that procedures for notification requirements for non-prohibited fisheries subsidies (Annex VIII) will be developed.

All fisheries subsidies in force before the entry into force of the proposed legal framework and inconsistent with such disciplines will be notified to the Committee no later than one year after such framework enters into force. 3 years after entry into force of the proposed legal framework, members are required to bring all such subsidies into conformity with *Article 3bis* and until then these would not be subject to the Prohibited Subsidies Provision of the ASCM.

Brazil's proposal for notification would be costly and administratively burdensome for SVEs.

It is highly likely that the proposed phasing out/elimination time-period proposed by both countries would not go down well with the EU which politically opposed the inclusion of fisheries under the reduction commitment disciplines of the Agreement on Agriculture during the Uruguay Round. A closer consideration of the EU's CFP may need to be considered in this regard.

Special and Differential Treatment

- List of fisheries subsidies provided which developing countries would be

Fisheries Subsidies which shall not be prohibited are those which developing country Members apply; only where

De Minimis threshold should be developed which safeguards the interests of SVE coastal states.

allowed to maintain as per Part III of ASCM ('AMBER BOX'/Actionable Subsidies). It however proposes a definition of 'serious prejudice' which would deem a subsidy actionable for developing countries including subsidies that have a 'trade-distorting effect' on fisheries resources of a developing country.

- Payments received by the government of the developing country Member for access to its fisheries resources or to its quota or any other quantitative limits established by the RFMO. The government of the country buying such access is required to abide by Article 1.5 and 4 of Annex VIII. Article 4 states that ROO (preferential and non-preferential), the flag of a vessel and government-government payments shall not be used to circumvent Member's obligations and responsibilities under the Annex. Article 1.5 Countries buying access to fisheries resources or quota of developing country member government are required to ensure that it does not have any 'production-distorting effects' in the manner in which it is defined in the Annex.

such subsidies do not exceed the *de minimis* level for that Member.

Other possible flexibilities currently being developed for LDCs.

This is critical if SVEs are to clearly defend and articulate their views on appropriate SDT provisions.

SVE's should have dialogue with NZ and Brazil on the proposed re-introduction of Article 6.1 which establishes a *de minimis* threshold that may be erroneous if applied to the fisheries sector.

Conclusions

Based on the legal architecture proposed by both Brazil and New Zealand, SVEs may be in a position to engage the latter with a view to negotiating the inclusion of all its concerns either under the non-prohibition provision or the SDT provision of its proposal. In addition, SVEs should negotiate the removal from NZ's Annex IX, any reference to HS1604 and closely monitor future textual developments on 'non-specific' fisheries subsidies. SVEs should also closely consider its position on appropriate definition of 'artisanal' and 'small-scale' fishing and further develop work on appropriate '*de minis*' thresholds.

SVEs should also continue to monitor the developments on 'trade and environment' linkages articulated in proposals tabled to ensure that trade sanctions by the WTO's DSB based purely on environment sustainability grounds do not occur.