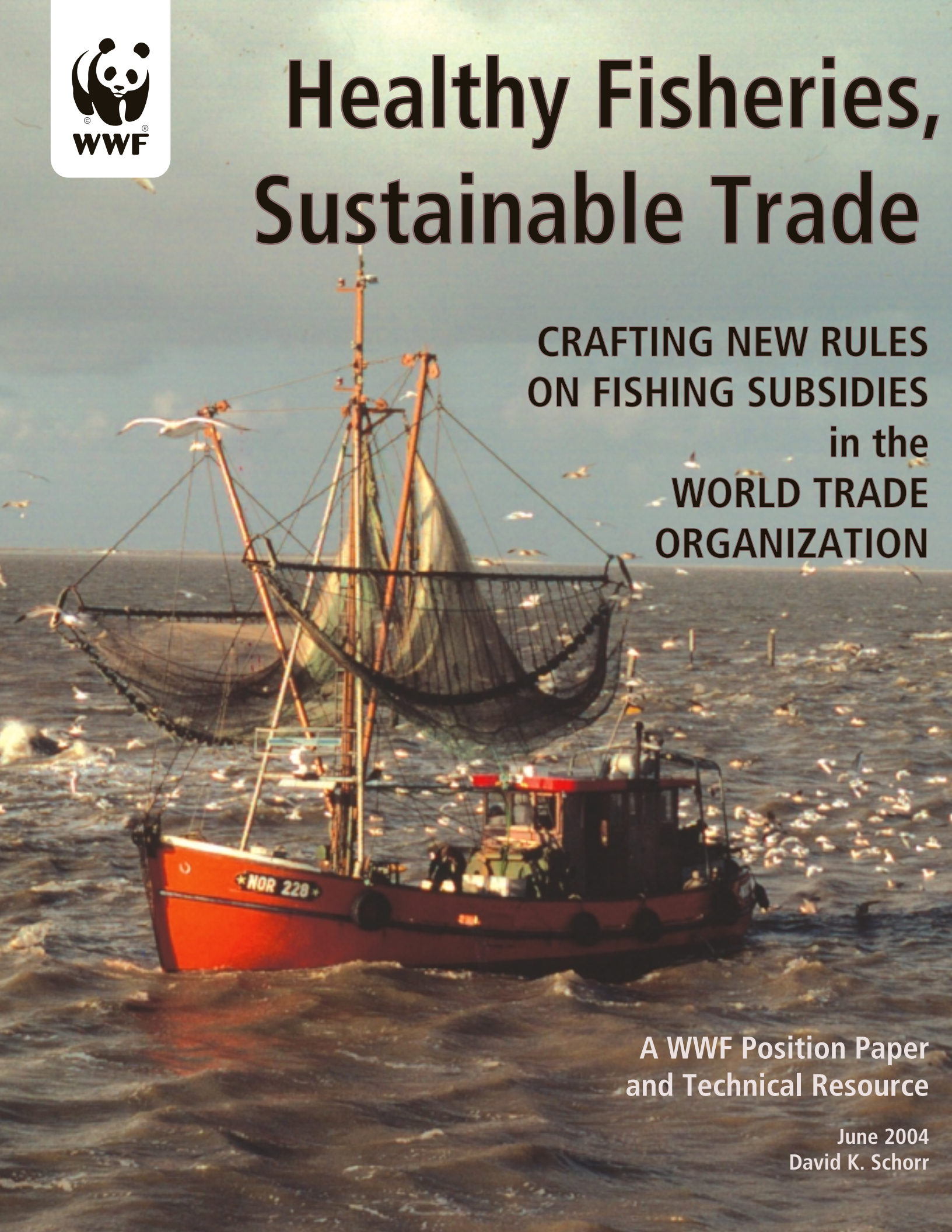
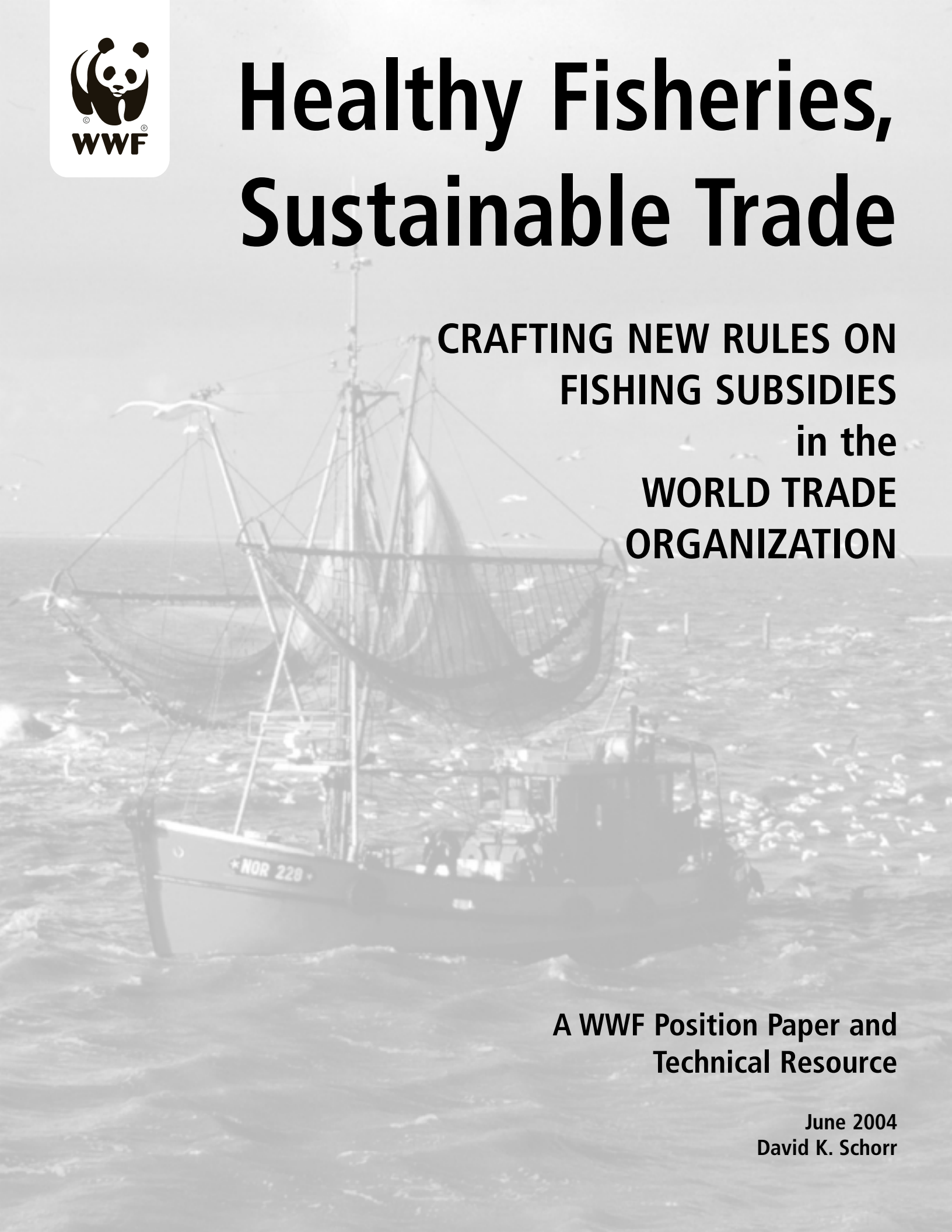


Healthy Fisheries, Sustainable Trade

CRAFTING NEW RULES ON FISHING SUBSIDIES in the WORLD TRADE ORGANIZATION

A WWF Position Paper and Technical Resource

June 2004
David K. Schorr



Healthy Fisheries, Sustainable Trade

CRAFTING NEW RULES ON FISHING SUBSIDIES in the WORLD TRADE ORGANIZATION

A WWF Position Paper and Technical Resource

June 2004

David K. Schorr

Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization was written by World Wildlife Fund (WWF) Senior Fellow David Schorr, and edited under the supervision of Claudia Saladin and with the active participation of Aimée Gonzales.

This paper has benefited greatly from multiple interactions with experts from governments, academia, nongovernmental organizations and intergovernmental organizations over the course of 2002–04. Special thanks for their extensive and interactive commentary on earlier drafts of this paper are due to Clare Coffey, Raul Garcia, Charlotte Mogensen, and Ronald Steenblik. We would also like to thank Anthony Cox, Simon Cripps, David Evans, Mark Linscott, Roy Malmrose, Sebastian Mathew, Alice Mattice, Ana Novik, Gareth Porter, Tobias Reichert, Greg Schneider, Katherine Short, Mark Sinclair, and John Ward for their helpful comments. The author wishes to thank Norman Shore (the only person known to have read substantial portions of this paper without the professional obligation to do so) for his moral support and constructive kibitzing.

Notwithstanding the foregoing, the views and opinions expressed in this paper, as well as any factual errors it may contain, are those of the author and WWF alone, and do not in any way reflect the opinions or viewpoints of any other individual, institution, or government.

Related WWF publications:

Towards rational disciplines on subsidies to the fishery sector: A call for new international rules and mechanisms, September 1998.

Underwriting overfishing (Issue Summary), September 1999.

Fishing in the dark (Issue Summary), November 2000.

Fishing in the dark: Symposium proceedings, January 2001.

Hard facts, hidden problems: A review of current data on fishing subsidies, October 2001.

Turning the tide on fishing subsidies: Can the World Trade Organization play a positive role? October 2002.

David Schorr can be contacted in Washington, D.C., at dkschorr@verizon.net.

Summary Table of Contents

Preface

Few things more dramatically illustrate the interdependent nature of life on Earth than the biological, economic, and social crisis now facing the world's marine fisheries. Once viewed as boundless and inexhaustible, global fisheries today are straining under an unprecedented combination of human activities and natural limits. As stocks decline and fishing communities suffer, governments have turned increasingly to untangling the maze of factors behind the problem—imperfect management, outsized fleets, scientific uncertainty, cultural and commercial pressures, rising demand, improved technology, and worsening pollution and global warming, just to name a few.

Among the least considered factors underlying the worldwide fisheries crisis, but not least important, is the perverse international economics of the fishing industry. In particular, government subsidies applied in often under-regulated fisheries have contributed to overcapacity, competitive distortions, and strong incentives to overfish.

Fortunately, the problem of harmful fishing subsidies has gained international attention in recent years, and manageable and concrete solutions may soon be at hand. A recent decision by the world community to pursue binding international disciplines on fishing subsidies represents an especially important opportunity to get the economics of marine fisheries onto a more even keel.

The fishing subsidies issue also presents a unique opportunity for the World Trade Organization (WTO), where the negotiations toward new disciplines are now under way. Having been the subject of controversies since its inception, the WTO continues to seek its way between the primacy of its trade-oriented mandate and its broader responsibilities as a leading organ of global economic governance. The issue of fishing subsidies presents the first instance of a WTO negotiation centered explicitly at the nexus of trade policy, natural resource economics, and environmental conservation. It is also the first time in the history of modern trade diplomacy that a major negotiating topic has been placed on the multilateral table in response to not-for-profit voices within civil society. In short, the issue poses a fundamental test of the WTO's ability to regulate trade in the broadest public interest, and in cooperation with other relevant intergovernmental bodies.

But complex, interdisciplinary problems require nuanced, interdisciplinary solutions. If the WTO fishing subsidies talks are to produce a real "win-win-win" outcome for trade, environment, and human development, it will require imagination, rigor, and a solid measure of political will. By publishing *Healthy Fisheries, Sustainable Trade*, WWF brings forward an unusual "position paper and technical resource" that itself hopes to be both imaginative and rigorous. Developed over the course of multiple consultations with governments, intergovernmental bodies, academics, and other stakeholders, this paper represents a substantial effort to grapple seriously with the technical, institutional, and political realities surrounding the fishing subsidies negotiations, without sacrificing WWF's commitment to helping achieve an ambitious result.

Governments and international institutions have so far shown a remarkable convergence around the problem of harmful fishing subsidies. But there is still a long way to go to find a lasting consensus on a binding and effective solution. WWF is convinced that such a solution is within grasp—if negotiators and their governments can match actions to their words.

Dr. Claude Martin
Director General, WWF
June 2004

Detailed Table of Contents and Outline of Analysis

Executive Summary*

The inclusion of fishing subsidies on the WTO negotiating agenda adopted by trade ministers in Doha, Qatar, in November 2001, responds to the need for urgent action to confront an unprecedented crisis of depletion now facing the world's fisheries. With a billion people directly dependent on fish for food, with hundreds of millions dependent on fishing for their livelihoods, and with demand for fish projected to rise sharply for decades to come, the sobering reality is that the great majority of the world's most important fisheries have been fished to—and in many cases well past—their biological limits. The costs of this crisis are evident in a steady parade of collapsed fisheries, unprofitable fishing enterprises, and economically troubled coastal communities. Developing countries hoping to increase the productivity of their fishing sectors often stand the most to lose.

While the failure of governments to establish effective, science-based fisheries management regimes is the most fundamental issue confronting the world's fisheries, harmful fishing subsidies are now widely understood to be a significant part of the problem in their own right. It could scarcely be otherwise in a world where subsidies represent nearly 20 percent of fishing industry revenue, and flow to fleets whose aggregate size and power is already as much as 250 percent over capacity. The problem, as has been so often said, is one of "too many boats chasing too few fish."

Harmful fishing subsidies simultaneously interfere with sustainable resource management and disturb international competitive relationships. For this reason the fishing subsidies issue provides a clear opportunity for the WTO to live up to the promises set forth in its charter to pursue trade liberalization while fostering protection of the Earth's environment and sustainable development. The importance of the WTO fishing subsidies talks has been highlighted by the United Nations General Assembly, the Organisation for Economic Co-operation and Development (OECD), the G-8 leaders of major industrialized nations, and scores of heads of state gathered at the World Summit for Sustainable Development (Johannesburg, 2002). Achieving a true "win-win-win" result, however, will require both political will and technical finesse.

Many delegations and other stakeholders have questioned how the WTO can play a positive role on the fishing subsidies issue without overstepping the bounds of its trade-related mandate—a boundary that WWF has dubbed "the thin green line." As one of the leading nongovernmental voices calling for WTO action on fishing subsidies, WWF has worked in dialogue with governmental and nongovernmental experts to bring forward this detailed technical description of how the challenge on fishing subsidies might be met in an effective and suitable manner.

The basic need for improved and clarified WTO rules on fishing subsidies

How do the provisions of the WTO Agreement on Subsidies and Countervailing measures (SCM) currently fall short on disciplining fishing subsidies? Why is it necessary for new rules to focus on

* This executive summary provides a narrative overview of WWF's approach to fishing subsidies, as explored in depth in the main body of this publication. A more detailed summary of WWF's technical proposals is included in outline form as Appendix 1.

issues such as the overcapacity of fleets or increased fishing effort? If fishing subsidies cause both trade distortions and environmental damage, why not just focus on the trade distortions and let the benefits to the environment simply follow?

Put simply, the answer is this: despite the much broader terms of its charter, the WTO has traditionally defined "trade distortion" almost exclusively in terms of the distortion of export markets—a narrow focus that has failed to capture many of the international economic distortions at the heart of the fishing subsidies problem.

Specifically, fishing subsidies distort patterns of production more directly than they distort patterns of international trade. The fishing industry is not simply involved in a competition for markets; it is also engaged in a race for resources. Subsidies have a less direct impact on the ability of unsubsidized competitors to export than on their ability to produce in the first place. In some cases, this impact may be to raise the costs of production for the competitor, who must expend greater effort to harvest a catch from dwindling stocks. In more extreme cases, the unsubsidized competitor may be unable to produce at all—either because a stock has become "commercially extinct" or because government authorities intervene to close a fishery.

When compounded by other factors—such as data limitations and problems of "causality" that are particularly severe with regard to fishing subsidies—the WTO's traditional focus on export markets has sharply limited its ability to discipline even the most harmful fishing subsidies.

How WWF has dealt with the "thin green line"

The central challenge in addressing fishing subsidies at the WTO is to do so effectively without overstepping the boundary between the WTO's legitimate competence and its counterproductive entanglement in questions of fisheries policy. Such problems of the "thin green line" arise wherever trade issues and environmental issues overlap—that is, under the very same circumstances that create important "win-win-win" opportunities. In the case at hand, delivering true "win-win-win" results will require dealing directly with issues at the intersection of commercial economic activity and fisheries management. It is an irreducibly interdisciplinary question.

WWF shares with many others a strong desire to help the WTO avoid trespassing across the thin green line. To accomplish this, WWF has offered proposals that avoid this line to the greatest possible extent. For example:

- Wherever possible, WWF has proposed rules using terms and tests similar to the familiar economic vocabulary of the WTO. The basic concept of a "capacity- or effort-enhancing" subsidy, for example, raises questions that are standard fare for the SCM (such as whether a subsidy is of a kind that tends to lower production costs, or to increase productivity).
- Where technical concepts of fisheries economics are used, WWF has proposed definitions that are sufficiently broad and noncontroversial to avoid the WTO's entanglement in specialized debate.
- By subjecting the most harmful fishing subsidies to an *ex ante* prohibition based largely on considerations of program design (see the next section of this summary), WWF's proposals sharply reduce the number of cases in which WTO decision makers (such as dispute panels) would have to judge the actual impacts of a subsidy on a given fishery. Where fishery impacts may be relevant, WWF has wholly avoided tests that would require judgments about the health of fish stocks or the effectiveness of particular management regimes.

By applying these approaches, much of the danger of the thin green line has been successfully avoided in WWF's proposed rules. Unfortunately it has not been possible to avoid the proximity of the thin green line completely, simply because in some significant cases a subsidy may be harmful or benign depending in part on the "fisheries context"—*i.e.*, the biological, industrial, and regulatory context—in which it is applied.

The intermittent relevance of the fisheries context has been stretched by some WTO members into the theory that the fishing subsidies problem is entirely a question of fisheries management, and thus should be addressed only in fora other than the WTO. This argument is false in several ways. First, fishing subsidies can cause dangerous overcapacity in fisheries subject to all but the most idealized management controls. Second, even management that successfully avoids the depletion of a fishery cannot offset many of the negative effects of fishing subsidies, such as distorted catch shares or sales prices. And third, inappropriate subsidies themselves can create significant political impediments to improving or even maintaining good fisheries management.

Nevertheless, it is true that the potential relevance of the fisheries context raises the risk of the thin green line. WWF confronts and contains that risk in several ways. First, and most fundamentally, WWF proposes that the fisheries context be relevant to legal outcomes only where the condition of the fishery is both obvious and extreme. That is, WWF proposes rules that avoid questions such as "How healthy is the fishery?" or "How good is the management of the fishery?" Instead, the legal outcome would only depend on whether a fishery was failing even the most basic tests of its condition.

In particular, WWF has proposed the concept of a "patently at risk" fishery. By definition, a fishery is considered patently at risk if the perilous condition of its stocks, overcapacity of its fleets, or insufficiency of its management can be recognized easily on the basis of clear, simple, and objective criteria. In particular, such criteria can focus on obvious legal facts (such as whether the subsidizing government has published a capacity management plan in accordance with a formal UN Food and Agriculture Organization (FAO) International Plan of Action) or on the preexisting judgments of competent international authorities (such as whether the stock in question is considered "overexploited," "depleted," or "recovering" by the FAO). Determinations of this kind would not require judgments beyond the competence of the WTO.

Unfortunately, given some significant gaps in the existing international system governing fisheries, the foregoing definition of a "patently at risk" fishery fails to cover many fisheries whose condition would render certain classes of subsidies harmful. In order to capture some of these fisheries, WWF proposes the concept of a "patently undermanaged" fishery. A "patently undermanaged" fishery is one that is missing one or more "objective indicia of minimum adequate management," such as whether a fishery has any catch limits or other effort controls in place, or whether a fishery involving a straddling or migratory stock exploited by two or more states is subject to cooperative management. This definition does not, however, reach into whether management is *effective* in a given fishery.

While the concept of a patently undermanaged fishery would call only for judgments about extreme cases based on relatively simple and objective evidence, its application by the WTO alone might nevertheless run too great a risk of crossing the thin green line. Accordingly, WWF proposes that determinations about the "patently undermanaged" status of a fishery be made through new authority-sharing mechanisms designed to involve appropriate fisheries management and marine conservation experts and authorities (see the next section of this summary).

The suggestions summarized up to this point are obviously not a recipe for nuanced or perfect outcomes. They constitute, however, a workable solution to the problem of the thin green line that would allow the creation of meaningful and effective WTO fishing subsidies rules.

WWF's definition of "success" for the fishing subsidies negotiations

With the foregoing in mind, the main body of this publication proposes six specific criteria for judging the success of the fishing subsidies negotiations. WWF believes that new WTO fishing subsidies disciplines must include the following characteristics:

1. **Covering all significant fishing subsidy programs.** In geographic terms, this means that all wild-capture fisheries, whether high-seas, exclusive economic zone (EEZ), littoral, or inland should be covered. In categorical terms, this means that all significant types of subsidy programs need to be covered, including government payments for access by national fleets to fisheries in foreign EEZs. WWF does not support treating the public service of fisheries management as a subsidy.

   With regard to subsidies granted for the purchase of foreign access rights, WWF recognizes both the important role access agreements play in the development strategies of many developing countries, and the status given to access agreements by the United Nations Convention on the Law of the Sea (UNCLOS). WWF does not propose banning government-funded access payments, but rather proposes subjecting them to certain disciplines and limiting the circumstances under which they may be granted.

   Note also that WWF has not addressed subsidies to aquaculture in its definition of "fishing subsidies." While WWF remains concerned with aquaculture subsidies, including with their direct and indirect impacts on fisheries, the disciplines required to address them would differ in important respects from those WWF proposes for fishing subsidies.

2. **Forbidding harmful fishing subsidies while accommodating beneficial ones.** WWF seeks rules that are as strict and effective as possible with regard to the most harmful types of fishing subsidies, while seeking to preserve the right of governments to make use of fishing subsidies in those relatively few cases where they promote clear environmental benefits.

   With regard to the most harmful fishing subsidies, WWF focuses on three broad classes that have the most direct impact on fisheries production and productivity:

   i. Subsidies of a kind that tend to increase fishing capacity or effort;

   ii. Subsidies that contribute to "illegal, unreported, or unregulated" (IUU) fishing; and

   iii. Subsidies pursuant to policies of encouraging a domestic supply of fish.

   The focus on capacity and effort is nearly self-explanatory. These are subsidies directly to the elements of production. Subsidies that enlarge already oversized fleets or that encourage fishing effort in an overfished world obviously have a negative impact on competing producers and on resources alike. Subsidies that contribute to IUU fishing—apart from their illegitimacy—can also have dramatic impacts at the level of production, whether by causing rapid resource depletion or by allowing pirate competitors an absolute escape from the costs of regulation. Finally, subsidies to domestic fish supply can be a direct incentive to increase or maintain domestic production, and also obviously have strong trade-distorting tendencies.

   With regard to these three most harmful categories of fishing subsidies, WWF is proposing that they be banned by an *ex ante* prohibition similar to the SCM's current "red light" on export- and import-preventing subsidies. WWF notes that there is already substantial support among some WTO members for such a red light.

   Given the breadth of such a ban, WWF is also proposing a few narrow exceptions to its red light rule. In particular, WWF proposes exceptions for short-term emergency relief and adjustment

support, for payments associated with access agreements, and for certain subsidies to artisanal fishing. In each case, these exceptions would be narrowly defined, and subject to conditions, some of which are discussed later in this summary.

Beyond these exceptions to its proposed red light, WWF also proposes creating a nonactionable "green light" category for subsidies to certain research activities undertaken to improve fisheries management or environmental protection, for the adoption of environmentally preferable gear or techniques, for compliance with safety or sanitary standards, and for capacity reduction. Here again, WWF recognizes the need for narrow and strictly conditioned rules (some discussed below). Subsidies intended to promote the reduction of fishing capacity are seen as both particularly important and particularly fraught with risk. Accordingly, WWF proposes special disciplines on such subsidies, including time limits on them.

In addition to the foregoing red light and green light proposals, WWF also proposes strengthening the SCM's amber light (or "actionable") category to allow more effective challenges to fishing subsidies that have negative impacts but that are not captured by the red light prohibitions. This is accomplished principally by (i) broadening the current definition of "adverse effects" to move beyond export market distortions to allow attention to production-level impacts within fisheries, and (ii) reinstating a burden-shifting device ("dark amber") that, under certain circumstances, raises a rebuttable presumption that a particular subsidy has caused an adverse effect. WWF also proposes that fishing subsidies found to cause adverse effects be required to be withdrawn, and not simply modified to remove those effects.

3. **Taking account of the special needs of developing countries.** Neither WWF's mission nor its expertise allows WWF to propose definitive answers on how the interests of developing countries should best be met in the context of WTO rules. Nevertheless, WWF fully supports the Doha Declaration's mandate to take into account the importance of the fisheries sector to developing countries. WWF recognizes the fact that the heaviest dependence on fisheries is in developing countries. WWF further appreciates that many developing countries have not yet developed their fishing industries to be able to take maximum advantage of the resources lying within their own EEZs. Accordingly, WWF offers some preliminary thoughts on how "special and differential treatment" for developing countries could be implemented in the context of disciplines on fishing subsidies. These ideas are offered with the intention of contributing to the ongoing dialogue, rather than of articulating a particular position.

   Two caveats should be noted, however:

   First, WWF proposes that China be treated in accordance with its status as a major fishing power, and not as a developing country for the purposes of new fishing subsidies. It is possible that other developing countries that are "major fishing powers" should be similarly treated.

   Second, WWF has purposefully dealt with the topic of "artisanal fishing" separately from the question of "special and differential treatment." WWF does not endorse a blanket exception for subsidies to "artisanal" fishing, because experience has shown that under the wrong circumstances subsidies to artisanal fishing can have very negative economic and environmental consequences. Accordingly, in addition to being restricted to developing countries, artisanal fishing is treated along with other exceptions to the red light, and subject to the same limits and conditions.

4. **Promoting the administration of fishing subsidies on a fisheries-specific basis.** Given the unavoidable relevance of the fisheries context in some cases, it is important for the reform of

fishing subsidies that governments move effectively toward management of their fishing subsidies programs on a fishery-specific basis. WWF acknowledges that this may at times present significant hurdles from an administrative perspective. Nevertheless, this is a challenge that must be substantially met if fishing subsidies are to be designed and implemented in a more rational and economically healthy way.

5. **Including mechanisms to improve transparency and accountability.** One of the major failings of the current SCM is the very poor track record of WTO members in their compliance with SCM subsidy notification rules (SCM Article 25). Given the particular need for improved transparency of fishing subsidies, WWF proposes several approaches to strengthening subsidy notifications in the fisheries sector, including (i) requiring much more detailed information about fishing subsidies in future notifications; (ii) allowing punitive consequences (*e.g.*, fines or loss of certain legal advantages) when governments fail to comply with reporting requirements; and (iii) using certain proactive surveillance and monitoring mechanisms to review the operation of new fishing subsidies disciplines. In addition, WWF proposes that WTO members consider creating an independent mechanism within the WTO secretariat to collect, analyze, and report data on subsidies being maintained by WTO members.

6. **Being administered in effective coordination with international fisheries bodies.** Given the interdisciplinary nature of the fishing subsidies issue, and in light of the questions surrounding the thin green line (discussed in the first section of this summary), WWF proposes that new fishing subsidies rules be accompanied by improvements in WTO institutional mechanisms. WWF divides its proposal for improved mechanisms into two parts.

   First, WWF suggests strengthening and institutionalizing certain existing mechanisms for obtaining expert input into questions related to fishing subsidies, such as the inclusion of individuals with relevant expertise on dispute panels and the proactive solicitation by panels of expert advice.

   Second, WWF proposes the creation of limited authority-sharing mechanisms, as discussed earlier in this summary. Such mechanisms are not new to the WTO system, although in the past they have been restricted to linkages with international entities having a more trade-oriented mission. WWF proposes that the mechanisms for fishing subsidies include a formal means by which dispute panels could solicit authoritative opinions from relevant fisheries management bodies. WWF also proposes the creation of a standing group of experts who could assist panels when no other international authorities are adequately placed to do so.

   Finally, WWF calls on the WTO to increase substantially the public transparency of its own proceedings, both generally and with regard to fishing subsidies in particular, including by opening its dispute resolution process to public observation.

Status of this publication

This publication is the product of substantial consideration and dialogue. The "tests of success" presented by WWF represent a firm view of what the fishing subsidies negotiations ought to produce. However, the technical details of WWF's proposals may be subject to revision as the negotiation process continues.

Introduction and Overview

In November 2001, trade ministers from around the world met in Doha, Qatar, to launch a new round of multilateral trade talks. The mandate they ultimately issued included a commitment to negotiate new WTO disciplines on fishing subsidies. This commitment has created an unprecedented opportunity for governments to improve the economic and environmental health of the world's oceans, while simultaneously presenting WTO members with a crucial test of their willingness to adopt trade policies that deliver "win-win-win" outcomes for trade, environmental conservation, and sustainable development. The success of the WTO fishing subsidies negotiations is therefore critical for those who would help ensure the vitality of the Earth's marine resources as well as for those who would see the WTO live up to the balanced promises of its charter. But achieving this success will require governments to overcome significant technical and political challenges—some familiar, others quite new.

This paper is intended as a resource to governments and other stakeholders actively involved in the WTO fishing subsidies negotiations. It seeks to analyze a range of technical issues confronting negotiators, while proposing an approach to new disciplines that would meet WWF's vision of a successful result. While the proposals in this paper can be taken as an indication of WWF's current position on the talks, the objective here is to stimulate rather than limit creative thinking toward robust solutions. And, of course, WWF reserves the right to develop its thinking on these complex issues as the negotiations progress.

WWF is an organization dedicated to helping conserve the Earth's living resources. In pursuit of this mission, and as the largest privately funded environmental group in the world, WWF works in hundreds of communities around the globe to achieve a sustainable balance between human activities and the natural environment.[1] For nearly 15 years, WWF has also been an active participant in the dialogue surrounding the multilateral trade system. WWF's early involvement in the "trade and environment" policy arena grew out of a conviction that economic integration and environmental cooperation cannot be treated as entirely separate spheres of governance.

With the majority of its field-based activities located in developing countries, WWF has long understood that sustainable economic activity and human development are essential to effective conservation. International trade can play a vital role in helping achieve these goals. At the same time, WWF is deeply concerned by the tendencies of many governments to overlook the human and environmental dimensions of globalization. Accordingly, WWF has consistently worked toward improving global trade policies and the operation of the WTO, with an eye to achieving real world solutions to the many challenges these issues present.

As developed in Part II of this paper, the goal of the fishing subsidies negotiations should be to achieve the first meaningful "win-win-win" outcome at the WTO. This will require crafting disciplines that assign high priority to environmental and developmental concerns alongside efforts

1. Further information about WWF's worldwide activities can be obtained at http://www.panda.org, or by contacting WWF's communications department at WWF's headquarters in Gland, Switzerland (tel. +41 22 364 9111).

delegations regarding the introduction of "nontrade" issues into the WTO. This paper seeks to address and accommodate those concerns head-on, in technical rather than rhetorical terms.

Obviously, WWF's expertise and mission fall mainly on the "environment" side of the "win-win-win" triangle. Nevertheless, this paper gives some attention to the other two legs, and particularly to development issues. Any insufficiencies in WWF's approach to developing-country concerns should be regarded as an invitation to dialogue rather than as an effort to promote specific "trade and development" policies.

This paper covers a lot of technical, theoretical, and historical ground. It is aimed principally at readers with substantial technical knowledge, although Part IV offers some explanatory material for readers unfamiliar with WTO rules, while footnotes throughout provide additional explanatory material and references to additional technical resources.

The paper uses an elaborated outline format to facilitate skimming and easy reference to specific points. The executive summary provides a narrative overview of WWF's approach, including the basic policy considerations that guided WWF's effort to avoid entangling the WTO in questions beyond its trade-related mandate. The detailed table of contents on p. vii also serves as an analytic synopsis, while Appendix 1 contains a summary of WWF's technical proposals. For those reading this document in electronic format, the table of contents, all cross-references, and citations to Internet resources contain hyperlinks for easy navigation through the materials.

The basic order of argument is as follows:

Part I—Background and General Context opens with a brief discussion of the context surrounding the fishing subsidies negotiations: the fisheries crisis now confronting global policy makers; the contribution of fishing subsidies to that crisis; the development of the fishing subsidies issue outside of the WTO; the potential relevance of WTO rules; and the history of the issue at the WTO, culminating with the inclusion of fishing subsidies within the Doha mandate.

Part II—WWF's Definition of Success sets out WWF's basic hopes and concerns regarding the outcome of the WTO fishing subsidies negotiations. The section articulates six specific tests and two general criteria by which WWF believes the eventual outcome of the negotiations should be judged. Also prominent is a frank discussion of the challenges to finding an outcome that makes a real contribution to sustainable resource management without causing the WTO to overstep the boundaries of its proper mandate and competence (a challenge WWF has called the problem of the "thin green line" between a proper and an improper expansion of WTO activities).

Part III—Approaches to Classifying Fishing Subsidies provides a brief theoretical discussion of approaches to classifying fishing subsidies. This section aims both to elucidate the variety of classification methods already in use and to develop a vocabulary for analyzing the kinds of classifications needed for making legal and normative distinctions among fishing subsidies. Some understanding of this vocabulary may be of use to participants in the fishing subsidies negotiations, particularly as they consider how best to avoid trespassing across the "thin green line."

Part IV—Current WTO Rules: Overview and Gap Analysis reviews the treatment of fishing subsidies under current WTO rules. After giving a brief synopsis of the relevant provisions of the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement), this section summarizes why clarifying and improving the current rules is necessary to strengthen the disciplining of fishing subsidies.

Part V—Clarifying and Improving Fishing Subsidies Disciplines offers a detailed discussion of specific proposals for new WTO fishing subsidies rules. At the heart of these are proposals that build on the "traffic light" approach of the current SCM. Thus, the provisions include a "red light" prohibition on the most harmful fishing subsidies, a "green light" to protect fishing subsidies that contribute to conservation and sustainable development, and an "amber light" to discipline those subsidies that fall between the harmful and beneficial extremes. Following the discussion of these basic disciplines, Part V explores ideas for: improving the monitoring, reporting, and transparency of fishing subsidies; accommodating the interests of developing countries through "special and differential treatment"; and establishing institutional mechanisms to ensure the effective and appropriate implementation of the new fishing subsidies rules. This last section is particularly important, since the willingness of governments to adopt innovative institutional mechanisms has a direct bearing on the location of the "thin green line."

WWF invites questions and comments on this paper, particularly from participants and stakeholders in the fishing subsidies negotiations themselves. Criticisms and inquiries can be directed to Ms. Aimée Gonzales, senior trade policy advisor. WWF will not publish, repeat, or cite any remarks submitted to it without express permission.

Part I
Background and General Context

I.A The world is facing a global fisheries crisis. The need for effective WTO disciplines on fishing subsidies arises in the context of the dangerous predicament now confronting the world's wild-capture fisheries and the communities that depend on them for their livelihoods.

I.A.1 The world's fisheries are seriously depleted. Dramatic improvements in fishing technology, matched with rising demand for fish products and aggressive government efforts to develop fishing industries, has resulted in the deepest and most widespread reduction in fish stocks known to recorded history. This pattern of overfishing now reaches into practically every ocean and sea on the planet. A few statistics suffice to illustrate the severity of this crisis:

- Seventy-five percent of the world's most valuable commercial fisheries are overexploited, fully exploited, significantly depleted, or recovering from overexploitation.[2]
- The amount of fish landed has more than quintupled in the past 50 years.[3]
- Globally, the biomass of large predatory fish (which includes some of the world's most valuable species) has dropped by 90 percent since the onset of industrial fishing, causing significant change and damage to marine ecosystems.[4]
- Industrialized fishing generally reduces the biomass of large predatory fish stocks by 80 percent within 15 years of the start of industrial exploitation.[5]
- Hence, for at least the past 30 years, there has been a steady decline in the "trophic" level of fish landed from commercial fisheries, likely indicating a depletion of fish stocks at the higher end of the food chain.[6]
- While demand for fish protein is projected to continue rising sharply,[7] global fish catches leveled off five years ago, leading a senior OECD official to conclude, "It would seem that the sea's harvest capacity has been reached and will yield no more fish."[8]

2. FAO, *SOFIA 2002*, Part I., p. 23; *see also* NRC (1999, 19–35).
3. Pauly and Watson (2003, 47).
4. *Id.*
5. Myers and Worm (2003, 280-83).
6. Pauly et al. (2002, 689–95). The "trophic level" of a marine species refers to the number of steps up the food chain it is removed from eating algae.
7. In the Asia-Pacific region alone, for example, the demand for fish is predicted to grow by 24 tonnes between 1999 and 2010—a figure that contrasts starkly with total marine fisheries production of around 85 tonnes in the year 2000. *See* Hongskul (1999); FAO, *SOFIA 2002*, Part I, p. 4, Table 1.
8. Schmidt (2002).

I.A.2 The human, ecological, and economic costs are profound, especially for developing countries. Nearly a billion people depend on fish as their primary source of dietary protein, with dependence highest in the developing world.[9] Estimates of the number of people who depend on fishing for all or part of their income range from 120 million to 200 million.[10] As depletion affects fishery after fishery, communities—and particularly poor communities—lose both food and jobs.[11] Developing countries have also at times suffered disproportionate impacts on their domestic fishery resources as a result of fishing by "distant water fleets" from richer nations.[12] Even rising international trade in fish products does not always return benefits to local communities, particularly when international market incentives combine with a lack of adequate resource management to cause the depletion of coastal resources.[13] With demand for fish protein projected to continue rising sharply,[14] the impacts of the fisheries crisis are certain to be ever more keenly felt in the years to come.

I.A.3 Several critical challenges lie at the heart of the fisheries crisis. The sad condition of the world's fisheries results from a number of diverse, complex, and interrelated problems—all of which are the unfortunate consequence of wide and deep failures by governments and intergovernmental bodies to adopt and implement effective policies for managing fisheries resources. Among the leading elements of the current fisheries crisis are the following:

(a) **Fishing effort is far above sustainable levels.** To many observers, the most fundamental cause of overfishing has been the failure of governments to impose effective limits on fishing activity, whether through direct limits on total catch size, limited fishing seasons, individual fishing quotas to establish "property rights," or otherwise. Under-regulated fisheries are often said to present a classic illustration of the "tragedy of the commons," in which every player has a perverse incentive to race ever faster to extract an overused and dwindling resource. Despite universal acknowledgment of the need to limit fishing, many management regimes continue to be characterized by insufficient rules, ineffective enforcement, and catch limits far in excess of what can be biologically sustained. While national and international efforts to improve fisheries management are making slow progress, the challenges to fisheries management are growing at least as quickly, as factors such as pollution and climate change complicate the resource picture.[15] The FAO has concluded that 60 percent of the world's major fish resources are "in urgent need of management action to halt the increase in fishing capacity or to rehabilitate damaged resources."[16]

---

9. FAO, *SOFIA 2002*, p. 33. In some developing countries (including Gambia, Ghana, Equatorial Guinea, Indonesia, Sierra Leone, Togo, Guinea, Bangladesh, the Republic of the Congo, and Cambodia), fish accounts for half or more of the dietary protein consumed by people. *Id. See also* UNEP (2000); McGinn (2002).

10. *See, e.g.*, FAO (2004), which estimates 120 million; McGinn (1998, 40), which estimates 200 million.

11. *See, e.g.*, Weber (1994); Brown (2000); Underhill (2002).

12. *See, e.g.*, de Vries (1996).

13. *See, e.g.*, McGinn (2002, 37–39), noting the increasingly prohibitive cost of domestic fish products in, *e.g.*, the Philippines, and concluding that "[i]n many ways, growth in fish trade is a double-edged sword for developing countries.... trade can also pose serious threat to the growing need for food security."

14. *See* fn. 7.

15. *See* FAO, *SOFIA 2002,* Part 1, p. 46 ("[T]he demands of fisheries management have grown beyond the need to address purely biological issues, and must now address and attempt to resolve an array of social concerns and multiple-use issues. As a result, there is an urgent need to reconsider the use of many of the management approaches that have been used to date.")

16. FAO (1996a, § 3.2).

(b) Fishing capacity is far above sustainable levels. The world's commercial fishing fleets are suffering serious overcapacity[17]—that is, there are "too many boats chasing too few fish." The extent of this overcapacity is not known with precision, although some estimates suggest it may be as high as 250 percent.[18] Whatever the exact figure, there is no meaningful dissent from the view that overcapacity is an important and direct cause of widespread overfishing.[19]

(i) Overcapacity is both a cause and an effect. The capacity problem exists in dynamic relation with the more generalized problem of inadequate fisheries management. On the one hand, poor management can be a strong incentive for overinvestment in fishing capacity. Once it exists, however, overcapacity is itself an independent driver of overfishing.

(ii) Overcapacity can be a problem even in actively managed fisheries. Overcapacity is obviously most problematic in under-regulated fisheries, but even in fisheries with operating management regimes, it can be problematic in several ways:

- Not all management measures are effective disincentives to overinvestment. For example, license limitations, gear restrictions, and total allowable quotas are frequently ineffective in reducing overcapacity.[20]
- The mobility of fishing vessels causes capacity spillover. The reduction of fishing in one fishery (whether as a result of effective management or the biological collapse of a fishery) may cause excess capacity from that fishery to be transferred into other fisheries, often without regard for the consequences. Some governments have in the past made an affirmative policy of "exporting" their overcapacity problems in this manner, often to the waters of developing countries.[21] Thus, until good management is achieved on a more universal basis, overcapacity in a well-regulated fishery can quickly become overcapacity in other waters where regulation is weak or absent.

---

17. For a discussion of the sometimes difficult technical term "capacity", and also of "effort", *see* ¶ V.C.4(a).

18. Porter (1998a). For the lower extreme of current estimates, *see* Gréboval in FAO (1999a, Ch. 4, § 5), defending a figure of 30 percent global overcapacity for "high value" fisheries, but admitting that this figure is subject to several significant caveats, and must be considered "a minimum." Porter has written an as-yet unpublished technical critique of Gréboval's analysis, along with a defense of his 250 percent estimate, available on request from WWF.

19. *See, e.g.,* FAO (2002a, Part III-2), which states:

> Overcapacity is often cited as the primary cause of overfishing, economic waste, and the unsustainable development of living marine resources. Numerous international and domestic fisheries studies indicate that overcapacity and excessive fish harvesting capacity are prevalent in many common property and open access fisheries, regardless of the scale of fishing or the type of fishery. Overcapacity and excessive fish harvesting capacity can also occur in limited access fisheries. Wherever these situations occur, overcapacity contributes to overfishing, economic waste and unsustainable development.
>
> One of the great challenges to achieving sustainable fisheries involves the management of fishing capacity in such a way that avoids or, at least, mitigates the deleterious effects—such as overfishing and/or economic inefficiency—of overcapacity.

20. *Id.,* Part III, § 5.3.

21. Greenpeace (2004a). It should be noted that the EU has recently taken a substantial step toward ending this practice, by adopting proposed reforms of its Common Fisheries Policy that, if fully implemented, will put an end to the subsidized export of capacity by the end of this calendar year. *See* European Communities, Council Regulation (EC) No. 2369/2002 of 20 December 2002, ¶ 8 and Article 1.7(b) (full citation in the National and Local Laws and Regulations section of References); *see also* IEEP (2002a).

- Overcapacity can create strong political pressures on regulators to relax catch limits rather than impose the more immediately painful management measures often needed to ensure healthy fisheries.

In short, the interaction among overcapacity, inadequate management, and resource depletion is complex. Overcapacity and depletion are both symptoms of inadequate management; and while proper management may theoretically protect resources regardless of capacity levels, truly effective management remains rare indeed among commercial fisheries. In the meantime, the radical overcapacity of the world's fishing fleets reinforces both the pressure on fish stocks and the tendency of some shortsighted fishing interests to resist stricter controls.

(iii) **Overcapacity has drawn growing international attention, including at the FAO.** The problem of overcapacity has been the subject of international attention since the 1980s, with concern about the trend toward overcapacity dating back at least to the 1960s.[22] In the late 1990s, the FAO included overcapacity as one of the first issues to be addressed in implementing the 1995 UN *Code of Conduct for Responsible Fisheries.* The result was the adoption in February 1999 of the FAO *International Plan of Action for the Management of Fishing Capacity* (IPOA-Capacity). The IPOA-Capacity is the first (and so far the only) global instrument directly addressing the problem of overcapacity.[23]

(iv) **To date, however, FAO efforts to confront overcapacity have proved weak.** While the IPOA states that overcapacity "contributes substantially to overfishing, the degradation of marine fisheries resources, the decline of food production potential, and significant economic waste,"[24] the plan is purely voluntary, and its implementation is far behind schedule.[25]

(c) **Illegal, unreported, and unregulated (IUU) fishing is widespread.** The generalized weakness of national and international fisheries management regimes is painfully evident in the pervasive problem of IUU fishing. Although the term "IUU" covers a variety of phenomena,[26] it refers in essence to fishing that takes place in contravention of applicable regulations or in fisheries where no meaningful regulation exists. In recent years, IUU fishing has emerged as a specific and high-priority focus of international attention,[27] and has been of particular concern to countries such as Japan[28] and Australia.[29]

22. *See* Newton, in FAO (1999a, Ch. 2, § 1).

23. The core provisions of the IPOA-Capacity call on member countries to assess the state of capacity in their fisheries and to develop national plans for the management of that capacity. The IPOA also contains provisions calling for international cooperation toward management of capacity in high-seas fisheries, and for addressing capacity issues related to the export of vessels from one national fishery to another.

24. IPOA-Capacity, ¶ 1.

25. For example, paragraph 21 of the IPOA calls on member states to publish national capacity management plans by the end of 2002. In February 2003, the FAO Committee on Fisheries reported that only nine members had done so, including the landlocked countries of Malawi and Nepal (presumably with regard to their inland fisheries). The remaining seven were Argentina, Madagascar, Mozambique, Namibia, New Zealand, Spain, and Venezuela. *See* FAO (2003a, ¶ 52 and fn. 58).

26. For a discussion of the technical definition of "IUU fishing", *see* ¶ V.C.5(e) and Appendix 6.

27. *See, e.g.*, FAO (2001a); UN (1999), ¶ 249 (IUU fishing "is considered to be one of the most severe problems currently affecting world fisheries"); WSSD Plan of Implementation, ¶ 31(d).

28. *See, e.g.*, FAO (2003b).

29. *Id.* Australia's leadership on the IUU issue was also evident in its cosponsorship of an FAO expert consultation on the subject in May 2000. *See* FAO (2000a); *see also* Australia (2004) in Other Government Documents in the References section.

(i) **In some fisheries, IUU fishing has devastating consequences.** While obviously not a problem everywhere, IUU activities nevertheless affect many important fisheries. In the most notorious example, Patagonian toothfish (sometimes known as "Chilean sea bass") has been fished nearly to commercial extinction as a result of IUU fishing in the Southern Ocean surrounding Antarctica.[30] In more northerly seas, the nongovernmental organization TRAFFIC has documented Spanish fishing ports where 83 percent of bluefin tuna landed from the Mediterranean and over half landed from the eastern Atlantic were below the minimum size limits set to protect fish stocks, while more than one-third of the swordfish caught in the north Atlantic and more than 80 percent caught in the Mediterranean were smaller than the allowed size minimums.[31] Many other major fisheries face significant IUU problems, often with serious impacts on stocks.[32]

(ii) **IUU fishing is the subject of a recently adopted FAO voluntary code.** In March 2001, members of the FAO adopted an International Plan of Action to confront IUU fishing (IPOA-IUU). The IPOA-IUU provides a series of voluntary steps that national governments and regional fisheries management organizations can take to reduce IUU activities.

For a further discussion of IUU fishing, *see* ¶¶ V.C.3(b) and V.C.5 *et seq.*

(d) **Many traditional tools for sustainable fisheries management are underutilized.** The tools of modern fisheries management are widely known, but less widely applied in a fully effective manner. Such tools include the use of selective fishing gear, by-catch and discard limits; recovery plans; no-take zones; "monitoring, control, and surveillance"; and catch limits. Extending the effective application of these tools remains a high priority of WWF's Endangered Seas Programme.

(e) **Some important new tools for sustainable fisheries management are underutilized.** Although improved fisheries management remains a top priority, many conservation organizations—and some governments—have recently begun to look beyond traditional management policies for additional ways to promote sustainable fishing. Several new approaches hold particular promise, but have yet to realize their potential:

(i) **Better market incentives for sustainable fishing are needed.** WWF has been a strong proponent of the responsible use of certification and ecolabeling to help

30. According to Bray (2000a, App. 2, ¶ 70), the Scientific Committee of CCAMLR (the intergovernmental body charged with conservation of Antarctic marine resources) has reported its "grave concern over the virtual commercial extinction of some stocks of toothfish (Dissostichus spp.) due to IUU fishing," noting that IUU catches of toothfish may be double the level of legal catches. *See also* TRAFFIC (2001).

31. TRAFFIC (1999, 30).

32. For example, according to Bray (2000a, App. 2), the Indian Ocean Tuna Commission estimated that in 1996 approximately 10 percent of all tuna landings in the Indian Ocean were from IUU activities, going on to say that this estimate was "certainly greatly underestimated"; the International Commission for the Conservation of Atlantic Tunas (ICCAT) has called IUU fishing "a major concern for more than ten years," and has reported that the impact of IUU fishing on fish stocks can be "very significant." Serious concern about the level of IUU fishing within their jurisdictions have also been expressed by International Council for the Exploration of the Sea (ICES), the Northwest Atlantic Fisheries Organization (NAFO), and the Commission for Conservation of Southern Bluefin Tuna (CCSBT), among others.

harness the enormous powers of the market to encourage and reward sustainable fishing practices. Efforts like those of the Marine Stewardship Council (MSC) to promulgate independent, scientific certification standards for well-managed fisheries have great potential to alter the incentives that drive overfishing.[33] The MSC has at times engendered controversy, and has even been feared as a potential source of "green protectionism." However, WWF remains convinced that science-based certification and ecolabeling is a way to open markets for communities that invest in responsible fishing practices, and that the MSC remains the most credible and reliable ecolabel for fisheries products.

(ii) **There are far too few marine protected areas.** The proper use of carefully designed marine protected areas (MPAs) can increase fish catches and profitability, including by enhancing the production of offspring to restock fishing grounds and enabling adults and juveniles to spill over into fishing grounds with depleted stock.[34] Unfortunately, the portion of the world's seas currently within MPAs is probably less than 0.5 percent (compared with around 13 percent of the world's terrestrial surface), and most of these are under-resourced and poorly managed.[35] Accordingly, WWF has undertaken a major initiative to encourage the increased use of MPAs as a means of protecting marine biodiversity and increasing the health of global fisheries.[36]

(iii) **Ecosystem-based fisheries management has not yet been widely adopted.** Scientists and policy makers increasingly realize that fisheries must be understood and managed in the context of the ecosystems of which they form a critical part. This requires, among other things, taking more fully into account the special and temporal extent of fisheries, and of the interlinked biology within them.[37]

I.B Harmful fishing subsidies are a real part of the problem. The widespread and severe overcapacity of the fishing industry is in many cases directly supported by huge government payments made to fishing interests. These subsidies often allow fleets to operate where it would otherwise be unprofitable to do so, and can lead directly to overfishing and other unsustainable fishing practices.

I.B.1 Worldwide, fishing subsidies total roughly 20 percent of industry revenue. Detailed information about the true extent of fishing subsidies has often been difficult to obtain (*see* ¶ V.G.2). Over the past decade, there have been several significant efforts to catalogue and estimate fishing subsidies on either a regional or global basis.[38] Based

33. For more information on the MSC, *see* http://www.msc.org.

34. *See, inter alia.*, WWF (2003a); IUCN (2003); Sumaila and Charles (2003); Ward and Hegerl (2003); Beattie, Sumaila, et al., (2002); NCEAS (2001); Ward et al. (2001, p. 133).

35. As discussed below (¶ V.E.4(b)), subsidies can play a positive role in the establishment of MPAs and "no take zones." Unfortunately, however, government investment in this kind of subsidy has been very small. In Spain, for example, in the period 1994–2001 government support for MPAs, artificial reefs, and similar activities amounted to less than 1.2 percent of the subsidies provided to the fishing sector through the principal EU fishing subsidies fund (FIFG). (This figure is based on an as-yet unpublished analysis by WWF-Spain of information provided to WWF by the government of Spain).

36. *See* WWF (2004a).

37. *See* WWF (2002).

38. *See*, especially FAO (1993); Milazzo (1998); OECD (2000a; 2000b); APEC (2000).

on an extensive analysis of information made public by governments in the past few years, WWF currently considers that the total level of fishing subsidies can be reliably estimated to be at least US$15 billion per year. With the total value of fish landed from commercial wild-capture marine fisheries running at approximately US$80 billion per year,[39] this constitutes roughly 20 percent of industry revenue.

I.B.2 Fishing subsidies come in many forms and are justified by a wide variety of purposes. For example, fishing subsidy programs have included

- grants, low-cost loans, loan guarantees, or tax incentives for vessel construction or repair, or acquisition or modernization of fishing gear
- price supports for fish and fish products
- grants, low-cost loans, or other financial benefits to support the transportation or processing of fish or fish products
- income or wage supports, or unemployment or other social benefits for fishers and their families
- export promotion programs
- provision of discounted or free marine insurance
- governmental promises to reimburse vessel owners for fines or impoundments imposed by foreign authorities
- construction or maintenance of port facilities
- construction or maintenance of housing or other community infrastructure specifically for fishers
- provision of fuel or of tax credits or other rebates to offset the cost of fuel
- provision of bait or ice
- payment or subsidization of payments for access to foreign fisheries
- government-funded campaigns to promote consumption of fish and fish products
- grants to support research and development of fishery technology
- government expenditures on fisheries management
- vessel buy-back programs

I.B.3 Subsidies intensify many of the problems at the root of the worldwide fisheries crisis.

(a) Subsidies are a fundamental driver of overcapacity. The expert literature on fishing subsidies is replete with explanations of the relationship between subsidies and overcapacity.[40] There is no significant dissent from the proposition that

39. Based on a total value of worldwide capture fisheries of US$79.439 billion in 2001.

40. *See, e.g.*, Gooday (2002); Cox (2004); Portsmouth Conference Report (1999); Lodge (2002); Milazzo (1998); Howgate (n.d.); Arnason (1999); Pauly et al. (2002); Porter (1998b).

subsidies can contribute to overcapacity under practically all real-world conditions.[41]

(**b**) **Subsidies encourage unsustainable levels of fishing effort.** Subsidies obviously can reduce the operating costs of fishing enterprises. Where depletion of a fishery is causing reduced "yield per unit effort," production costs may quickly exceed revenues and cause fishing to slow or cease (assuming the demand for the fish in question is not highly price inelastic).[42] Subsidies can obviously short-circuit this normal commercial limit.[43]

(**c**) **Subsidies exacerbate IUU fishing.** As discussed in ¶ V.C.3(b)(v), there is little question that substantial government subsidies do currently directly benefit some IUU activities (albeit for the most part inadvertently).[44]

I.B.4 The harmful nature of many fishing subsidies has been widely recognized. Expert analysts from a wide variety of organizations have concluded that fishing subsidies are often counterproductive in economic and environmental terms. A sampling of statements by leading institutions, organizations, and individuals is attached as Appendix 2.

I.B.5 Nearly all fishing subsidies programs lack transparency and accountability. As discussed in ¶ V.G.2, one of the most disturbing aspects of fishing subsidies is how difficult it has been for the public—or even sometimes for decision makers themselves—to know what is really happening with fishing subsidies. Social scientists often decry the tendency of subsidies to be subject to political capture and abuse, and fishing subsidies are no exception to this rule.

I.B.6 The majority of fishing subsidies are granted by a small number of countries. While the total amount of subsidization to the fishing industry is large, its distribution is very uneven. For example, in 1996, seven major industrialized countries accounted for more than 90 percent of all officially reported fishing subsidies.[45] Smaller developing economies are all but excluded from the fishing subsidies game. This

---

41. Some observers have argued that proper fisheries management can prevent subsidies from resulting in overcapacity. *See, e.g.*, WWF (1998b, 45). This argument, however, faces two strong objections. First, if there is any truth in it at all, it would only be under ideal fisheries management conditions. As one group of governmental and nongovernmental experts recently agreed, "Subsidies would not be translated into increased fishing effort only where effort can be effectively and completely constrained by regulation or where property rights are perfectly assigned"; Portsmouth Conference Report (1999). Second, as discussed in ¶ I.B.7, subsidies can cause harmful distortions even within well-managed fisheries.

42. Unfortunately, this "commercial feedback" mechanism sometimes does not operate, or begins to limit effort only long after a stock has been badly overfished.

43. It is interesting to note that the current international debate over fishing subsidies was effectively launched by an FAO publication that noted a very large gap between global fishing costs and revenues. In 1992 FAO calculated this gap on a worldwide basis, and found a "deficit" of US$54 billion. The FAO concluded at the time that "[s]ubsidies are presumed to cover most of this deficit." FAO (1993, 32).

44. It can also be said that subsidies exacerbate the damage caused by "under-regulated" fishing. In addition to depleting fish stocks, poorly regulated fishing activities can lead to wider ecosystem damage from a variety of impacts, including distortion of the marine food chain, by-catch (of fish, birds, mammals, turtles, etc.), damage to the benthic environment (sea floor), "ghost fishing" by lost nets and lines, and pollution from fishing vessels. To the extent such activities are sustained by them, fishing subsidies contribute to these additional harms.

45. The countries were Japan, the EC, the United States, Canada, Russia, Korea, and Chinese Taipei. *See* WWF (2001a, p. 11, Table 1, and p. 16, Table 4: Table 4 shows 90 percent based on per country "officially reported" figures in 1996, taking averages of any ranges, and including EU member states within EU total, in comparison with the midpoint of the total range for 1996 from Table 1).

concentration of fishing subsidies is further exacerbated by an apparent tendency of governments to provide greater support to larger, more industrialized fleets than to smaller, community-based operations. For example, within the European Union, the Spanish fishing industry—dominated by large, industrial enterprises—is much more heavily subsidized than the smaller-scale fishers of Greece.[46]

I.B.7 Subsidies can be damaging and trade distorting even in effectively managed fisheries. Well-managed fisheries are rare. Thus, those who argue that improved management rather than subsidies reform is the answer to the fishing subsidies problem have a heavy burden to show how and when good fisheries management will become the norm. But even in fisheries that are subject to significant management measures, undisciplined fishing subsidies continue to threaten the resource base and distort trade. The threat to the resource base posed by subsidies in these fisheries arises from three factors:

- first, even in a fishery subject to management controls, economic and social factors may allow subsidies to encourage overcapacity or unsustainable levels of resource extraction;[47]
- second, even in a well-managed fishery, subsidies can obviously still cause competitive distortions between subsidized and unsubsidized producers;[48] and
- third, by maintaining artificial levels of ownership and employment in a fishery, subsidies can produce individuals and enterprises with a strong vested interest in continued fishing, sometimes adding significantly to the political pressures against maintaining good science-based limits on effort or on catches.

I.B.8 Fishing subsidies are even more likely to do harm where management is inadequate. Even those delegations and stakeholders who have been most skeptical of the need for new WTO disciplines on fishing subsidies would be unlikely to argue against the proposition that subsidies can exacerbate the negative effects of poor fisheries management. Given the current realities of inadequate fisheries management, the opportunities for fishing subsidies to cause harm are unfortunately widespread.[49]

I.B.9 Developing countries are particularly disadvantaged. The special vulnerability of developing countries to harmful fishing subsidies derives from three facts:

---

46. For example, in 2000 the Spanish fleet received almost four times as much support per tonne of fishing capacity as the Greek fleet. If vessel power is considered, the Spanish fleet received nearly eight times the level of support given to Greek fishers. On a per vessel basis, this disparity rose to just under 20 times the level of subsidization. *See* IEEP (2002b, Table 11) (note that Table 11 as published contains an apparent calculation error in the subsidies per vessel column, where all but the first number appear to reflect the division of the fifth column ("kW") by the seventh column ("vessels") rather than the division of the third column ("Euros") by the seventh).

47. Munro and Sumaila (2002). Note also that whenever subsidies raise fishing effort, there will be an increase in nonresource impacts of fishing (such as marine pollution, damage to the sea floor, by-catch, and greenhouse gas emissions).

48. For example, in a fishery where "maximum economic yield" (*i.e.*, the catch level at which the difference between costs and revenues is greatest) is lower than "maximum sustainable yield" (*i.e.*, the maximum catch level that is biologically sustainable), subsidies may distort production without straining the limits of good biological management.

49. The potential relevance of the adequacy of fisheries management to operation of new WTO fishing subsidies rules raises important technical questions, discussed in ¶ III.C.3. WWF believes that it is generally (but not always) possible to distinguish the most harmful fishing subsidies mainly on the basis of their design, without reference to the surrounding fisheries context.

(a) **Subsidies put developing countries at a competitive disadvantage.** As is the case with agricultural subsidies, countries with fewer resources are heavily outspent by major economies when it comes to fishing subsidies. (For a sense of the unbalanced levels of spending *see* ¶ I.B.6.)[50] As FAO experts have observed, fishing subsidies that reduce costs or increase revenues of producers can be expected to have trade effects, including allowing subsidized producers to achieve increased shares of domestic or international markets.[51]

(b) **Developing-country fisheries are especially subject to depletion by subsidized foreign fleets.** Many of the most heavily subsidized fishing enterprises belong to the "distant water" fleets of major fishing powers. As developed-country fisheries have suffered increasing depletion and overcapacity, these fleets have become increasingly active off the coasts of developing countries. While not always rapacious, such activities often create unsustainable pressures on coastal fisheries, while intensifying competition with smaller-scale native fishing enterprises.[52] Although distant water fleets often operate under the authority of formal "access agreements" (*see* ¶ V.B.2(a)), these agreements have not always proved capable of guaranteeing the sustainable management of the host country fisheries, or of being negotiated on terms that maximize the benefits received by the developing-country host.[53] The immature condition of management regimes in many developing countries has also made them especially prey to "illegal, unreported, and unregulated" (IUU) fishing by foreign fleets (*see* ¶ V.C.3(b)(iv)).

(c) **The food security of many developing countries is particularly threatened by the general depletion of fisheries worldwide.** As discussed in ¶ I.A.2, developing countries are home to the great majority of people who are heavily dependent on fisheries for food and for employment. To the extent that fishing subsidies are contributing to the erosion of global fisheries resources, developing countries will suffer a disproportionate share of the harm.

I.B.10 Nevertheless, not all fishing subsidies are harmful. WWF has never taken an absolute "anti-subsidy" position. On the contrary, as discussed in V.E.2, WWF believes there are times when government support for conservation and the "transition to sustainability" is much needed.

I.C Disciplining subsidies must be part of the solution.

There is no question that the primary energies of fisheries conservationists and policy-makers should remain directed toward improving fisheries management regimes, and it is with good reason that WWF itself dedicates far more of its resources to issues of fisheries management than to its initiative to reduce and reform harmful fishing subsidies. Nevertheless, the massive and usually inappropriate subsidies provided by some governments today are a specific and significant problem that requires a dedicated response. Correcting the distortions caused by these subsidies would be an important complement—and in some cases perhaps a prerequisite—to

50. Of course, this is not to say that all countries classified as "developing" are necessarily excluded from the fishing subsidies game. While access to good data is currently limited, it is very likely that the Chinese fishing fleet—among the most powerful and rapidly expanding in the world—receives significant government financial support. *See* WWF (2001a, 19).
51. FAO (2000b, ¶ 61).
52. *See, e.g.*, BBC News (2001).
53. *See, e.g.*, CFFA (2003); de Vries (1996).

improved fisheries management. As discussed in ¶ I.E, the WTO has an important role to play in this endeavor.

I.D Fishing subsidies have been taken up in a variety of international fora. The need for action to reform fishing subsidies has been widely recognized by governments and intergovernmental bodies. Such bodies (other than the WTO) active on fishing subsidies appear below, along with a summary of their activities:

FAO: The United Nations Food and Agriculture Organization has played a leading role on the fishing subsidies issue in several ways:

- The *1992 State of Food and Agriculture* report—A "special chapter" in the FAO's annual report for 1992 included a finding that the fishing industry viewed on a worldwide basis was operating at a net economic loss of approximately $54 billion per year, going on to conclude that "[s]ubsidies are presumed to cover most of this deficit."[54] Although the $54 billion figure was never presented by the FAO as an estimate of global fishing subsidies (and would now be universally regarded as too high if it were), the report helped launch the current international policy dialogue over fishing subsidies.
- The *International Plan of Action for the Management of Fishing Capacity* (IPOA-Capacity)—Paragraphs 25 and 26 of the IPOA-Capacity treat subsidies as a prime economic factor driving overcapacity, and contain the first multilateral call on governments to eliminate subsidies that contribute to unsustainable fishing. The Plan of Action has led to some modest technical work on fishing subsidies that may be useful to WTO negotiators.[55] For a further discussion of the IPOA-Capacity, *see* ¶ I.A.3(b)(iii).
- *The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (IPOA-IUU)—Paragraph 23 of the IPOA-IUU calls on member states to avoid conferring subsidies on "companies, vessels or persons" involved in IUU fishing, while ¶ 88 commits the FAO Fisheries Department to undertaking data collection and analysis of the "factors and causes contributing to IUU fishing, such as *inter alia*... subsidies that contribute to IUU fishing." For a further discussion of the IPOA-IUU, *see* ¶¶ V.C.3(b) and V.C.5, and Appendix 6.

UNEP: In 1997, the United Nations Environment Program cohosted (with WWF) the first international symposium dedicated to fishing subsidies and their link to the depletion of marine resources.[56] Since then, UNEP has sponsored a set of case studies on the impacts of fishing subsidies in particular countries,[57] as well as an influential theoretical paper.[58] These papers were among the presentations made at a series of UNEP workshops on fishing subsidies that have been well attended by member governments (the fifth and most recent of which took

54. FAO (1993, 32, 50–53).
55. *See, e.g.*, the results of a 2002 consultation on identifying and assessing fishing subsidies (FAO 2002b). For a broader review of implementation of the IPOA-Capacity, *see* the progress reports prepared by the FAO (2001b; 2003a).
56. *See* WWF (1997); Porter (1998b).
57. The studies published so far (by Maria Onestini on Argentina and by Karim Dahou et al. on Senegal) are collected in UNEP (2001). As this paper went to press, additional case studies on experiences with fishing subsidies in Bangladesh and Mauritania were forthcoming.
58. *See* Porter (2002).

place on April 26–27, 2004).[59] At the time of publication of this WWF paper, at least two additional UNEP contributions to the analytic literature on fishing subsidies literature were anticipated.[60]

OECD: The OECD Committee on Fisheries has been intermittently collecting data on government financial support to fisheries since at least 1965. In a major contribution to the available data and analysis, the OECD published in 2000 a detailed review of fishing subsidies in OECD countries.[61] The OECD has continued an annual collection on government financial transfers, the latest of which was published in 2003.[62] Fishing subsidies also were among the topics discussed at a 2002 OECD workshop on environmentally harmful subsidies, and at a follow-up "technical expert meeting" held in November 2003.[63] The OECD Committee for Fisheries is currently undertaking a major project examining the issue of fishing subsidies from a sustainable development perspective as part of its 2003–05 Program of Work.

APEC: The regional trade forum known as the "Asia-Pacific Economic Co-operation" (APEC) formally took up the issue of fishing subsidies in 1997, when APEC leaders included the topic within the rubric of a proposed "Early Voluntary Sectoral Liberalization Initiative" (EVSL) in the fisheries sector.[64] The main thrust of the EVSL was a proposal (spearheaded by the United States) for a "zero-for-zero" tariff deal on fish products. With regard to fishing subsidies, the EVSL was far less ambitious, proposing only that APEC members accelerate the timeline for bringing their fishing subsidies into full conformity with the WTO Agreement on Subsidies and Countervailing Measures. In any case, APEC members were never able to reach consensus in favor of the EVSL initiative, which withered on the vine. The interest of APEC in the fishing subsidies issue did, however, lead to the commissioning of the only other major intergovernmental effort (along with the OECD study referenced in the previous paragraph) to collect and analyze fishing subsidies data.[65]

International Financial Institutions (IFIs): Two leading international development banks have addressed the issue of fishing subsidies:

- **Asian Development Bank (ADB):** In 1997, the ADB published a paper on its policies in the fishery sector.[66] The report was one of the earliest works of an intergovernmental entity to note that fishing subsidies can cause depletion while simultaneously failing to create lasting benefits for the fishing industry.[67]
- **World Bank:** In 1998, the World Bank published one of the first direct global analyses of fishing subsidies.[68] Among the report's main conclusions were the following:
  - total fishing subsidies worldwide were estimated at US$14.5–20.5 billion per year, figures that the author considered likely to "err on the low side, perhaps by a considerable margin";[69]

59. This paper went to press prior to the April 26–27 workshop. For information about prior workshops, *see* UNEP (2002).
60. *See* Porter (2004a; 2004b).
61. *See* OECD (2000a; 2000b). For WWF commentary on the OECD study, *see* WWF (2001a).
62. *See* OECD (2003a).
63. Information on both meetings can be found in OECD (2003b).
64. *See* APEC Ministers (1997) under the International Treaties section of References.
65. *See* APEC (2000); for WWF commentary on this study, *see* WWF (2001a).
66. *See* ADB (1997).
67. *Id.* at p. 11.
68. *See* Milazzo (1998).
69. *Id.*, p. 73.

– only approximately 5 percent of fishing subsidies could be considered to have a positive environmental character;[70]

– the transparency of fishing subsidies is insufficient, and efforts to study fishing subsidies is "seriously encumbered by a woeful lack of up-to-date and reliable information"

The UN Commission on Sustainable Development (CSD)and the World Summit on Sustainable Development (WSSD): At its fourth session (in 1996), the CSD issued a call urging governments "to reduce subsidies to the fishing industry and abolish incentives leading to over-fishing."[71] The General Assembly went the following year at the "Earth Summit +5" meeting to call on governments to consider the impact of fishing subsidies when taking on the "urgent need to eliminate overfishing and excess fishing capacity."[72] In part as a result of this groundwork (including the appearance of the issue on the CSD agenda at several subsequent sessions of the commission), fishing subsidies featured prominently in the action points adopted by heads of state and other world leaders at the recent World Summit on Sustainable Development in Johannesburg in 2002 (*see* ¶ I.F.3).

I.E The WTO also has a significant role to play on fishing subsidies.

I.E.1 The mandate of the WTO calls for "win-win-win" results.

(a) **The "win-win-win" concept is embedded in the WTO charter.** Since its inception, the WTO has been committed (at least formally) to pursuing expanded trade "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so...."[73] In conjunction with other references to both environmental and developmental values within the WTO rules system,[74] this preambular language represents an important acknowledgment of the WTO's responsibility to ensure that the multilateral trade system serves the broadest public good, and not merely the interests of commercial actors.

(b) **However, no significant win-win-win has yet been achieved by the WTO.** Although occasional allegations that the WTO is responsible for the world's environmental and social ills may be dismissed as simplistic exaggerations, the fact remains that the organization is a long way from fulfilling the balanced promises of its charter. As a general matter, the WTO has been primarily focused on promoting the interests of export-oriented industries, particularly in the major industrialized

70. *Id.*, p. 74.
71. UN CSD (1996, ¶ 21(c)).
72. UN (1997).
73. WTO Agreement, Preamble ¶ 1.
74. **Formal references to environmental values** within the WTO system include, e.g., WTO Agreement on Agriculture, Preamble ¶ 6; Decision on Trade and Environment; Decision on Trade in Services and the Environment; GATT Arts. XX(b) and (g); Agreement on Technical Barriers to Trade, Preamble ¶ 6 and Arts. 2.2, 2.10, 5.4, and 5.7; Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 27.2. **Formal references to development** are even more plentiful within WTO texts. *See, e.g.*, WTO Agreement, Preamble ¶ 2; Preferential Tariff Treatment for Least-Developed Countries—Decision on Waiver, WT/L/304 (17 June 1999); *see* also provisions for "special and differential treatment" of developing countries in a variety of WTO legal texts, such as Agreement on Agriculture, Art. 15; Agreement on Technical Barriers to Trade, Art. 12; Agreement on the Application of Sanitary and Phytosanitary Measures, Art. 10; Agreement on Government Procurement, Art. V. *See* also Decision on Measures in Favour of Least-Developed Countries, LT/UR/A-1A/12 (April 15, 1994).

countries. Where win-win-win results have been claimed, they generally amount to little more than assertions of the ancillary benefits achieved through trade liberalization *per se*. While recent developments—such as the progress made on trade in medicines to combat HIV/AIDS (human immunodeficiency virus and acquired immune deficiency syndrome)—illustrate some important evolution in the WTO's orientation, it is not yet possible to identify a significant element of the WTO rule system that reflects the serious interdisciplinary pursuit of a win-win-win outcome. The current fishing subsidies negotiations provide an important opportunity to improve this poor record.

I.E.2 Fishing subsidies fall squarely within the WTO's core competence. A few delegations have suggested that fishing subsidies are not appropriately within the mandate of the WTO. But even if some aspects of fishing subsidies present new challenges to WTO negotiators, the basic character of the issue is very familiar to the multilateral trade system.

(a) The government behavior at issue is a classic target of WTO rulemaking. The WTO system, with the GATT before it, has nearly half a century of history developing and applying tools for disciplining subsidies to commercial interests.[75] Nothing about fishing subsidies is especially unusual in this regard, and (as discussed in ¶ IV.A) most fishing subsidies already fall within the existing disciplines of the SCM. The Doha Declaration confirms that fishing subsidies fall within the WTO's existing mandate, even as it reflects a judgment by ministers that some refinement of existing rules is necessary to address problems specific to this sector.

(b) Fishing subsidies distort international access both to production and to markets. Fishing subsidies have been widely recognized as trade distorting.[76] This should come as no surprise for a sector in which more than a third of the products enter international trade[77] and approximately 20 percent of revenues comes from government supports. Indeed, fishing subsidies cause trade distortions in the narrowest sense of the word by distorting export markets (although current WTO rules make it overly difficult to address the problem—*see* ¶ IV.E.3). An even more widespread and damaging distortion (discussed in ¶ IV.B.4(e)) results from the impact of fishing subsidies on international access to fishery resources—that is, on the ability of competitors to produce and not merely to sell. In short, fishing subsidies can distort competition across this critical economic sector.

I.E.3 Preparatory work has been under way in the WTO since 1997. Formal work on fishing subsidies began in the WTO Committee on Trade and Environment in 1997.[78] Since that time substantial analytic and diplomatic attention has been devoted to the issue—attention that culminated with the inclusion of fishing subsidies as a core element of the Doha negotiating mandate (*see* ¶ I.F).

---

75. The principal WTO instrument for disciplining nonagricultural subsidies is the Agreement on Subsidies and Countervailing Measures (SCM).

76. *See* ¶¶ I.B.7 *et seq.*, and Appendix 2.

77. According to FAO *SOFIA 2002*, p. 39, 37 percent of all fish products entered international trade in 2000. This figure does not include fish caught in foreign waters by vessels flagged in the country of the consuming market, even if the fish were caught in the EEZ of another country. Fish trade has been rising sharply for several decades. *Id.*

78. *See, e.g.*, WT/CTE/51 (United States, May 19, 1997). Fishing subsidies were mentioned in the discussions of the committee preparatory to the CTE as early as 1994. *See* PC/SCTE/M/5, ¶ 6.

I.E.4 WTO disciplines on fishing subsidies are to complement—not replace—improved fisheries management. Despite the emerging consensus in favor of WTO action on fishing subsidies, a few voices have been raised against moving forward on the grounds that inadequate fisheries management rather than subsidies is the "real" problem in need of international attention. This argument is a canard. No governmental or nongovernmental actor promoting WTO disciplines on fishing subsidies has ever suggested that such disciplines should replace (or even be given higher diplomatic priority than) improved fisheries management. What has been proposed is that efforts to improve fisheries management will greatly benefit from (and in some cases may depend on) the reduction and reform of harmful fishing subsidies.

(**a**) **The experience of the European Union (EU) provides a case in point:** In recent years, the EU has undertaken a significant reform of its Common Fisheries Policy (CFP). As it has sought to introduce a variety of new measures to reverse the depletion of many European fisheries and address the overcapacity of its fleets, the EU has clearly determined that reform of its large fishing subsidies programs must be part of the solution. On its face, the reformed CFP aims to phase out direct "capacity enhancing" subsidies, including joint ventures.[79] In addition, the EU's excess fleet capacity is now meant to be tackled through the introduction of recovery and management plans. These are to include significant effort reduction measures. The development of recovery plans and associated decommissioning measures are to be funded under the main basket of EU fishing subsidies (the Financial Instrument for Fisheries Guidance (FIFG)).[80] This treatment of fishing subsidies within the CFP reform likely underlies the EU's recent conversion from opponent to supporter of WTO action on fishing subsidies.[81]

(**b**) **Heads of state agree:** Leaders meeting at the World Summit on Sustainable Development in 2002 made separate and parallel calls for international action to eliminate harmful fishing subsidies and to improve fisheries management. *See* ¶ I.F.3.

I.F The Doha Declaration calls for WTO disciplines that are specific to fishing subsidies and oriented toward win-win-win results.

On November 14, 2001, trade ministers meeting at the Fourth Ministerial Conference of the World Trade Organization, in Doha, Qatar, agreed to include fishing subsidies on the list of issues to be addressed in the context of the current round of global trade talks. Specifically, the "Doha Declaration" commits WTO members to "clarify and improve" WTO disciplines on fishing subsidies. (*See* Appendix 3 for relevant excerpts from the Doha Declaration.)

I.F.1 The mandate calls for specific treatment of fishing subsidies. Although the Doha mandate does not dictate the form that improved disciplines on fishing subsidies should take, it clearly requires specific and explicit attention to fishing subsidies within the WTO rule system.

79. Some observers have commented, however, that even the EU's reformed approach may contribute to increased capacity and effort through continued subsidies for vessel modernization. *See* IEEP (2002a, 4–5).
80. For an analysis of subsidies reform within the CFP, *see* IEEP (2002a). For an excellent series of short papers on the CFP reform generally, *see* IEEP's Web site (www.ieep.org.uk). For information on WWF's work on CFP reform, *see* WWF (2004b).
81. Compare WT/CTE/W/99 (EC, November 6, 1998) with TN/RL/W/82 (EC, April 23, 2003).

I.F.2 The mandate is oriented toward a win-win-win outcome.

(**a**) **The issue has had a win-win-win orientation at the WTO from the start.** The governments that have acted as *demandeurs* on the fishing subsidies issue (known in WTO circles as the "Friends of Fish"[82]) have made plain from the outset that they are seeking a result that directly contributes to the sustainable management of fisheries resources.[83] Similarly, their attention to developing-country concerns has been explicit,[84] not least because several are themselves developing countries.

(**b**) **The Doha declaration clearly calls for achieving the WTO's first true win-win-win outcome.** There is little room to doubt that trade ministers placed fishing subsidies on the Doha agenda with a win-win-win orientation. The "development" leg of the win-win-win triad is evident in ¶ 28's explicit reference to the importance of the fisheries sector to developing countries. The "environment" leg is evident in the unique mutual cross-references in ¶¶ 28 and 31.

I.F.3 World leaders have called on WTO members to deliver a win-win-win result. The importance of delivering a win-win-win at the WTO on fishing subsidies has been broadly recognized by governments and international officials. Most authoritatively:

- **WSSD:** On September 4, 2002, heads of state and other leaders meeting at the World Summit on Sustainable Development in Johannesburg, South Africa, identified eight key actions to achieve sustainable fisheries. One of the eight was to

> Eliminate subsidies that contribute to illegal, unreported and unregulated fishing and to over-capacity, while completing the efforts undertaken at the World Trade Organization to clarify and improve its disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.[85]

  It is worth noting that the WSSD also called (in a separate paragraph) for the urgent implementation of the FAO IPOAs on Capacity and IUU Fishing.[86] This makes quite clear that global leaders did not consider the FAO a more appropriate forum than the WTO to tackle fishing subsidies. Rather, they saw successful completion of the Doha mandate on fishing subsidies as a necessary complement to action in the FAO.

- **UN General Assembly:** In a resolution adopted in February 2003, the UN General Assembly called on states to eliminate subsidies leading to fishing overcapacity and IUU fishing, and to complete the fishing subsidies negotiations in accordance with the Doha mandate.[87]

82. The composition of the informal "Friends of Fish" group has varied somewhat over time, but has always included the following core members: Argentina, Australia, Chile, Iceland, New Zealand, Peru, the Philippines, and the United States.
83. *See, e.g.*, WT/CTE/W/51 (U.S., May 19, 1997); WT/CTE/W/52 (New Zealand, May 21, 1997); WT/CTE/W/103 (Iceland, January 25, 1999); WT/GC/W/303 (Australia, Iceland, New Zealand, Norway, Peru, the Philippines and the United States, August 6, 1999).
84. *see also, e.g.*, TN/RL/W/77 (U.S. March 19, 2003), fn. 1.
85. WSSD Plan ¶ 31(f).
86. *Id.*, ¶ 31(d).
87. UN G.A. Res. No. 57/142 (February 26, 2003), ¶ 20.

- **G-8:** At a summit meeting of G-8 leaders in 2003 in Evian-les-Bains, France, heads of state singled out the Doha mandate on fishing subsidies and reaffirmed their commitment to it.[88]
- **OECD Ministerial Council:** In May 2001, the governing council of the OECD gave priority to the statement that "[f]isheries policies have to address the relation between sustainable management of resources and trade liberalisation, the causes of unsustainable fishing, and the need to avoid those subsidies that are harmful...."[89] The following year, the OECD ministers reaffirmed their commitment to the reduction of environmentally harmful subsidies and to the successful completion of the Doha negotiating agenda, including the strengthening of WTO rules.[90]

88. *See* G-8 Action Plan (2003, ¶ 1.8) in the International Treaties section of References.
89. OECD Ministers (2001, ¶ 40) in the International Treaties section of References.
90. OECD Ministers (2002, ¶¶ 4 and 13) in the International Treaties section of References.

Part II
WWF's Definition of Success

II.A Governments must deliver more than "business as usual." Since the earliest chapters of the debate over globalization, many WTO members have been content to claim that reducing barriers to importation and exportation is inherently supportive of environmental stewardship and sustainable development. According to this rhetoric, the WTO can fulfill the balanced mandate of its charter (*see* ¶ I.E.1(a)) without devising policies that directly incorporate environmental or developmental considerations. But in the case of fishing subsidies—as in every case where environmental and trade policies are inextricably related—significant improvements in international economic governance can only be achieved if the WTO proves able to move beyond the narrow confines of its traditional approach. Fortunately, this can be done without drawing the WTO beyond the proper confines of its competence. But it will require crafting rules that directly address environmental and developmental concerns.

II.B The challenges WTO negotiators must meet.

II.B.1 The outcome must achieve a true "win-win-win" without overstepping the "thin green line." Achieving a win-win-win on fishing subsidies will require disciplines that directly (and not merely indirectly) promote sound management, resource conservation, and sustainable livelihoods. But WWF shares the concern of many WTO delegations and other stakeholders in these negotiations that new disciplines on fishing subsidies should not cause the WTO to overstep the bounds of its proper competence or authority. The fundamental technical challenge is thus to craft disciplines that contribute directly to conservation and sustainable development without stepping across the thin green line that separates a win-win-win from an unwise expansion of the WTO's mandate. The proposals set out in Part V of this paper are dedicated to helping achieve this goal.

II.B.2 New fishing subsidies disciplines must cover all significant fishing subsidy programs. This means, among other things, the following:

(a) All capture fisheries should be covered. In particular, new disciplines must avoid inappropriate distinctions or exclusions, such as more relaxed disciplines for "domestic" fisheries than for "high seas" fisheries.[91]

(i) Many commercially significant fish stocks are either "straddling" or "migratory." More than 20 percent of marine wild-capture fish production

91. Regarding whether **subsidies to aquaculture** should be considered "fishing subsidies" for the purposes of new WTO disciplines, *see* ¶V.B.4 and fn. 196.

comes from stocks that are either "highly migratory" or "straddling"[92]—that is, from stocks that either migrate over large areas of ocean or at a minimum inhabit waters governed by more than one national authority. The United Nations Convention on the Law of the Sea (UNCLOS) requires states with jurisdiction over fish stocks that straddle or migrate across the boundaries of their EEZs to cooperate with other interested states in the management of those fisheries.[93]

(ii) **EEZ fisheries have some attributes of a common resource under international law.** The Law of the Sea also establishes the right of coastal nations to exercise sovereignty over fisheries within their exclusive economic zones subject to significant duties and obligations, and to certain rights enjoyed by other states.[94] Significantly, coastal states bear an obligation to conserve and manage the living resources within their EEZs in order to avoid overexploitation and achieve "maximum sustainable yield."[95] Coastal states are further required to grant foreign access to the fishery resources within their EEZs, to the extent the coastal state is not willing or able to harvest the entire allowable catch.[96] These requirements of UNCLOS, among other elements of international law, clearly reflect and establish a legitimate international interest in the management of fisheries that are located entirely within a single EEZ.

(iii) **Fish stocks and species are often biologically interdependent.** The complexities of the food chain and of marine ecosystems often result in the biological interdependence of fish stocks, including those that are otherwise considered to be located in separate fisheries.[97] This interdependence is explicitly recognized under international law, which imposes on coastal states an obligation to manage their fisheries with the consequences of this interdependence in mind.[98]

(iv) **Markets for fish products are often interdependent.** The increasing globalization of the market for fish products is obviously increasing the variety of competitive relationships among fish products. In commercial terms, many fish products face competition from substitutable products.

(v) **Leading international fisheries agreements cover all capture fisheries.** As concern for the sustainable management of fisheries has risen, a body of international laws and norms has evolved that includes duties of a global nature, affecting all fisheries regardless of location.[99] The nature of the fishing subsidies problem implies the need for a similarly comprehensive response.

92. According to FAO (1996a, § 2.5), roughly 17 million tonnes of fish landed in the mid-1990s was from highly migratory or straddling stocks. This compares with a total annual marine catch of approximately 80–86 tonnes in the same time period. FAO *SOFIA 2002.*
93. UNCLOS Art. 63.
94. UNCLOS Art. 56:2.
95. UNCLOS Art. 61.
96. UNCLOS Art. 62.2.
97. FAO (1998b, § 3.4).
98. *See, e.g.*, UNCLOS Arts. 61.3 and 61.4.
99. *See, e.g.*, U.N. Code of Conduct, Arts. 1.2 and 1.3; FAO IPOA-IUU, ¶ 9.3.

In short, there are few (if any) fisheries that can be considered purely "domestic." Even a fishery entirely within territorial limits, whose products never enter international trade, can affect trade and resource availability elsewhere.

(b) Foreign access payments should be included. The definition of fishing subsidies must include all governmental financial contributions to or on behalf of fishing interests, including, for example, government-to-government payments for access by their domestic fleets to foreign EEZ fisheries (to the extent such payments are not recouped in fees to private enterprises). WWF is mindful of the important role "access payments" play in the economic and social strategies of some developing countries. Nevertheless, these subsidies are also potentially harmful, and in some cases have proved economically and biologically harmful (*see* ¶ V.B.2). Accordingly, they should be included within any new WTO subsidy disciplines, although not necessarily be subject to outright prohibition (*see* ¶ V.D.2(b)).

II.B.3 New fishing subsidies disciplines must forbid harmful subsidies while accommodating beneficial ones. Specifically, the disciplines must

- effectively prohibit the most harmful types of fishing subsidies (*see* ¶ V.C);
- allow and protect environmentally positive fishing subsidies as well as environmentally benign subsidies that foster economic and social development in developing countries (*see* ¶¶ V.E and V.H);[100] and
- subject all nonprohibited fishing subsidies to disciplines effectively requiring them to avoid contributing to overcapacity, overfishing, or destructive fishing practices (*see* ¶ V.F).

II.B.4 New fishing subsidies disciplines must take account of the special needs of developing countries. As noted earlier (¶ I.A.2), hundreds of millions of people in developing countries depend directly on marine fisheries for their livelihoods, while millions more depend on fish as a principal source of dietary protein. And for a number of countries, the modernization and development of their fisheries sector is an essential component of their social and economic development strategy.[101] Accordingly, and as required by the negotiating mandate set forth in the Doha Declaration (*see* ¶ I.F), new fishing subsidies disciplines must take into account the importance of the fisheries sector to developing countries.

II.B.5 New disciplines must effectively promote the administration of fishing subsidies programs on a fisheries-specific basis. The impacts of fishing subsidies are felt first and foremost within fisheries. In some cases, the harmful nature of a subsidy itself derives in substantial part from the fisheries context in which it is implemented.[102] In other cases, how a subsidy is applied at the fisheries level must be

100. Note that the current SCM also makes some accommodation for social subsidies in developed countries through the "specificity test," which is designed in part to allow governments to underwrite regional development policies. Regarding the specificity test, *see* ¶¶ V.B.5 and V.C.7.

101. According to the FAO, developing countries' net exports of fish products now exceed in value their net exports of coffee, bananas, rice, rubber, tea, and meat combined, making trade in fish a major source of hard currency for many. FAO *SOFIA 2002*, Part 1, p. 39 and fig. 30.

102. In particular, the harmful nature of a subsidy may derive from the depleted nature of the effected stocks, the overcapacity of vessels in given fisheries, or the inadequacy of the relevant management regimes. *See* ¶¶ II.C.3 and V.D.3.

considered.[103] It is, in short, not possible to craft international disciplines on fishing subsidies—or to rationalize national subsidy programs—without moving toward the administration of fishing subsidies on a fisheries-specific basis. Unfortunately, however, this poses some significant administrative and logistical challenges. Many significant fishing subsidies programs benefit fleets active in multiple fisheries, or benefit multiple fleets, or both.[104] Nevertheless, the onus must be on national governments to take significant steps toward fisheries-specific administration of their subsidies. At a minimum, where programs cannot easily be designed and implemented strictly on a fisheries-specific basis, new WTO rules should have the effect of requiring or strongly encouraging governments to

- track and analyze the application of their subsidies in order to understand which fisheries are affected by them;
- involve policy makers with responsibility for managing the affected fisheries in decisions about the administration of subsidy programs;
- ensure that all fishing subsidies (including foreign access agreements funded by government payments) are applied in a manner consistent with new WTO rules, including by avoiding the application of a subsidy where, as a result of the fisheries context, the subsidy would be prohibited or would cause adverse effects; and
- maintain records and submit WTO notifications and other reports that allow transparency of fishing subsidies programs on a fisheries-specific basis.

II.B.6 Fishing subsidies disciplines must include mechanisms to improve transparency and accountability. Dramatic improvement in the public availability of information is absolutely essential to the effective reform of fishing subsidies programs and to the operation of new WTO fishing subsidies rules. Specifically, this means the disciplines must subject all nonprohibited fishing subsidies to effective surveillance, including through proactive monitoring and substantially improved WTO notification requirements. (*See* ¶¶ IV.D, IV.E.5, and V.G.)

II.B.7 New fishing subsidies disciplines must be coordinated with the authority of international fisheries bodies. Specifically, new WTO fishing subsidies disciplines must provide dispute resolution and other mechanisms to guarantee that they are administered with the appropriate participation of intergovernmental bodies and experts competent in fisheries management and protection of the marine environment (such as the FAO, the United Nations Environment Programme (UNEP), and others). This coordination is necessary for policy coherence and to ensure that the WTO is not encumbered with responsibilities beyond its proper competence.

II.B.8 Fishing subsidies disciplines require specific textual treatment within the WTO system. The goal for the WTO fishing subsidies negotiations is to craft new disciplines *specific to fishing subsidies*, and not merely to seek adjustments to existing WTO rules that would incidentally contribute to fishing subsidies reforms. This need for separate textual treatment is implicit in the Doha mandate and the positions taken by the *demandeurs*. Still, it may be worth highlighting a few reasons such specific treatment is justified:

103. For example, with regard to subsidies that contribute to IUU fishing. *See* ¶ V.C.5.
104. In addition, the frequent transfer of fishing vessels among owners adds an additional layer of complexity.

(a) **The win-win-win nature of the issue requires disciplines that reflect the specific challenges to sustainability and development within the fisheries sector.** The fisheries sector is not just any other sector; it is one of the only major productive sectors that relies intensively on an internationally shared natural resource. It is also one of the few major productive sectors whose economic viability is currently threatened by gross resource depletion on a global scale.

(b) **The economics of the fisheries sector and of fishing subsidies presents specific technical problems.** The heterogeneity, biological and commercial interdependence, and commonality of many fisheries resources create a series of unique challenges to WTO subsidies disciplines.[105] Moreover, as evident in the detailed proposals in Part V, effective disciplines on fishing subsidies must address the impacts of subsidies on access to production and on fishing capacity or effort. These present issues that are fairly unique to the fisheries sector, and in any case are in some respects quite distinct from other disciplines within the SCM.

(c) **Sector-specific disciplines need not detract from the coherence or strength of other WTO subsidies rules.** Sector-specific rules within the multilateral trading system are viewed with hostility by some delegations, and with caution by all. But in this case, sector-specific treatment does not imply substantial derogation from the existing rules. Usually, sector-specific rules are negotiated where full application of the core SCM rules is politically impossible, and in this sense sector-specific rules are often seen as unfortunate compromises. Here, however, separate treatment is necessary to achieve *greater* discipline than can be achieved under current rules.[106]

(d) **The appropriate form of specific textual treatment for fishing subsidies disciplines remains an open question.** Although the negotiations have not yet reached the stage of formal drafting, their general tenor so far suggests that new fishing subsidies disciplines will likely be located within the existing SCM text (although a separate sectoral agreement has not been definitively ruled out).[107] The degree to which fishing subsidies provisions should be free-standing within the SCM or inserted interstitially into existing articles has also yet to be debated. WWF has not taken a firm position on these issues. For ease of analysis, the technical discussion in Part V presumes that new disciplines will be located within or tightly integrated with the SCM.

II.C The thin green line and the need for new institutional mechanisms:

As noted throughout this paper, it is important for both the success and the legitimacy of new WTO disciplines on fishing subsidies that the WTO avoid entanglement in questions beyond its legitimate competence. This need to avoid stepping over the thin green line results in a critical and necessary link between some of WWF's proposed substantive disciplines and some of WWF's calls for institutional reform.

II.C.1 What is the thin green line?

The thin green line is the line that separates the WTO's legitimate scope of competence from an inappropriate entanglement with environmental matters. It is called "thin" to convey a sense that it is not always easy to

105. For a discussion of some of these issues by Friends of Fish, *see* TN/RL/W/3 (Australia *et al.*, April 24, 2002).
106. The current discussion of an OECD Steel Subsidies Agreement provides another example of a potentially forward-reaching sectoral agreement. For information on the progress of those talks, *see* http://www.oecd.org.
107. In particular, submissions so far have tended to adopt the "traffic light" vocabulary of the SCM. *See* fn. 170.

see, and may at times be easy to cross inadvertently. But at the end of the day, the notion of an actual line is a misnomer. By its essence, a win-win-win issue is hybrid in character. The realms of economics and environmental management cannot be neatly separated; nor can the economics of fisheries be isolated from trade. When the question is close—and where spheres of policy necessarily overlap—the difference between an "environmental" issue and a "trade" issue can be little more than a matter of semantics, or of subjective perspective.

(**a**) **A question of both politics and policy:** Misnomer or not, the thin green line is an imperative political boundary for many stakeholders in the current debate, WWF included. And from the perspective of international governance, it is obviously important to clarify to the greatest extent possible the competencies and jurisdictional limits of various intergovernmental bodies.

(**b**) **Two perspectives:** To an environmentalist, the thin green line means above all that new fishing subsidies rules should not require or allow the WTO to make policy judgments about the condition of natural resources or the best means of conserving or utilizing them. To a trade official, the thin green line means above all that environmental concepts should not be employed to allow derogations from important trade disciplines.

(**c**) **Environmentalists bear the greater risk here:** It may strike some as an environmentalist's complaint, but in the case of fishing subsidies it seems clear that the greater risk is of the WTO meddling in fisheries policy than of fisheries conservation becoming an excuse for trade barriers. With the exception of a few narrow elements of a new "green light" (*see* ¶ V.E), nothing in WWF's proposed rules offers an opportunity to avoid existing trade disciplines. On the other hand, the very real WTO influence over fisheries economics inherent in WWF's proposal is an invitation for the WTO to have an impact on fisheries management. At the peril of some controversy, WWF has pursued these ideas because, as stated above, it believes the WTO has an important role to play in rationalizing the economics of the fisheries sector.

II.C.2 WWF's effort to avoid the thin green line: In crafting the proposals set forth in this paper, WWF has worked hard to avoid overstretching the WTO's competencies. This is accomplished by using several devices. First, wherever possible rules and tests are stated in terms similar to the familiar economic vocabulary of the WTO. Second, where concepts of fisheries management and policy cannot be avoided, tests are designed to require judgments based on relatively simple, objective, and readily available information—that is, to avoid judgments of a specialized nature or that could be considered "policy-making." Most of the provisions proposed in Part V use one or the other of these methods.

II.C.3 The sometimes inevitable relevance of the fisheries context: In the final analysis, however, it has been impossible to craft a truly robust rule system without confronting questions on the far side of the thin green line. The reason for this is simple: In some cases the risk of harm posed by a fishing subsidy depends on the circumstances in which it is applied. For example, a gear modernization program for an artisanal fishery may have beneficial consequences in an underexploited and effectively managed fishery, but may have disastrous consequences (for both the subsidized fleet and its

competitors) in a more heavily exploited fishery or in the absence of effective controls.[108]

II.C.4 Confronting context without overstepping the thin green line—two key concepts: More than any other aspect of the rules proposed below, the occasional relevance of the fisheries context—that is, the biological, industrial, and regulatory conditions of a given fishery—raises the specter of the thin green line.[109] Some participants in the current negotiations may initially doubt whether any consideration at all can be given to questions of fisheries context without trespassing across this boundary. But the relevance of the fisheries context cannot be avoided completely if WTO fishing subsidies disciplines are to be serious and effective. In an effort to resolve this dilemma, WWF has developed two key concepts that are integrated into the proposals set out in Part V. While many of those proposed provisions avoid any reference to a fisheries context, at a few points the nature of the applicable disciplines depends on whether a subsidy is granted within a fishery that is "patently at risk" or "patently undermanaged."[110]

II.C.5 The concept of a "patently at risk" fishery: As defined in ¶ V.D.3, a fishery should be considered "patently at risk" when the perilous condition of its stocks, overcapacity of its fleets, or insufficiency of its management can be recognized easily on the basis of clear, simple, and objective criteria. In particular, such criteria can focus on obvious legal facts or on the preexisting judgments of competent international authorities. For example, a fishery should be considered "patently at risk" if

- it has been determined "overexploited," "depleted," or "recovering" by the FAO;
- its target species has been listed as "vulnerable," "endangered," or "critically endangered" on the World Conservation Union (IUCN) Red List;[111] or
- a government has failed to submitted a capacity management plan for it to the FAO in accordance with the International Plan of Action for the Management of Fishing Capacity.

While a fuller and more technical definition of "patently at risk" is detailed in ¶ V.D.3, these examples illustrate the kind of criteria that WWF believes can be applied by WTO decision makers without exercising expertise or authority beyond their legitimate competence.[112] In other words, a fishery is "patently at risk" when its "at risk" status is so plainly obvious that little or no "environmental" judgment is required to recognize the facts. Where legal tests can be met with evidence of this kind, the risk of crossing the thin green line is small.

108. As discussed in ¶ I.B.7, this does not imply that perfect management (if such a thing could ever be achieved) would render all fishing subsidies harmless.
109. The problem of the thin green line also arises (albeit to a lesser extent) in some other aspects of the proposed disciplines, particularly regarding certain elements of the proposed prohibition on subsidies to IUU fishing (*see* V.C.5(c)(iv) and fn. 230); and the green light for capacity-reducing subsidies (*see* ¶ V.E.6(c)).
110. For a list, *see* fn. 349.
111. Regarding the IUCN Red List, *see* fn. 243.
112. These criteria have in common a dependence on what might be called "**juridical facts.**" That is, they look to preexisting, formal, and publicly recorded actions or judgments of governments or intergovernmental bodies (or the absence of the same).

(a) **The significant underinclusiveness of the "patently at risk" concept:** The term "patently at risk" should not be mistaken for meaning merely "inadequately managed" or "in danger." Many fisheries that are poorly managed or at risk of depletion would not be found "patently at risk" under the tests WWF proposes. Conversely, the fact that a fishery might be found not to be "patently at risk" would not be grounds to consider it healthy. WWF does not propose that the WTO decide when a fishery is healthy. Rather, where a fishery is easily recognized as unhealthy on the basis of simple, objective, and uncontroversial criteria, WTO rules can and should take cognizance of its "patently at risk" condition.

(b) **The need for an additional test:** The underinclusiveness of the "patently at risk" concept derives largely from the still immature condition of both national and international fisheries management regimes. In other words, there is no international body or set of international bodies regularly producing judgments about the condition of fisheries suitable to be relied upon by WTO decision makers without further consideration in every case.[113] These gaps in the international system are sufficiently severe that the term "patently at risk" would not cover many fisheries in which the application of certain classes of subsidies should be prohibited or subject to sharp discipline owing to the nature of the fisheries context. The "patently at risk" test is thus only a partial solution to the "relevance of context/thin green line" dilemma discussed above.

II.C.6 The concept of a "patently undermanaged" fishery: In order to capture at least a sizable portion of those fisheries that would fall outside the definition of "patently at risk" but which, as a matter of sound policy, should be subject to stricter WTO fishing subsidies disciplines, WWF proposes the concept of a "patently undermanaged" fishery.[114] As with the "patently at risk" test, WWF's goal is to maximize the ability of the WTO to take note of a fisheries context without crossing the thin green line. Here, however, it has not been possible to avoid case-by-case fact-finding of a more evaluative nature. Nevertheless, the "patently undermanaged" test proposed in ¶ V.D.3(b) still turns on relatively simple, noncontroversial, and objectively verifiable facts—facts WWF has dubbed "objective indicia of minimum adequate management." These objective indicia could include, for example

- whether a fishery is subject to certain elements of regulation, such as catch limits;
- whether capacity in the fishery has been subject to direct monitoring and evaluation; or

113. Why not use the assessments of national authorities? Many of the world's most important commercial fisheries are located entirely within the exclusive economic zones of individual countries. This raises the question of whether assessments of those fisheries by national authorities should be used as indicators of "patently at risk" status in the context of new WTO fishing subsidies disciplines. National assessments may often provide the best available information about the status of a fishery, and often form the basis of international assessments such as those produced by the FAO. Nevertheless, it has not seemed appropriate to use national assessments as the direct source of specific indicators of fisheries' "patently at risk" status, for two reasons: First, the variability in the kind and quality of national fisheries assessments precludes their consistent use as a decisive indicator; and second, the use of national assessments as a basis for judging "patently at risk" status could add to already existing pressures on governments to overstate the health of fisheries. This obviously does not mean that national assessments would always be treated as irrelevant, however.

114. The technical definition of a "patently undermanaged" fishery is given in ¶ V.D.3(b).

• whether a fishery involving a straddling or migratory stock exploited by two or more states is subject to cooperative management.

It is important to note that the test suggested here would not call for judgments about the quality of regulation or management. Nor would it call for conclusions about the biological health of a given fishery. As with the "patently at risk" concept, the "patently undermanaged" test is purposefully underinclusive. The criteria, which should be based on globally accepted guides to good management (such as the UN Code of Conduct for Responsible Fishing), would look only to whether the basic elements of adequate management were formally present or absent. The underlying policy proposed by this test is thus a fairly crude one: fisheries in which some of the universally recognized basic elements of good management are absent should be subject to stricter subsidy disciplines than those in which there is evidence that efforts at adequate management are at least formally in place. While some conservationists and fisheries managers might correctly object that this would allow many poorly managed fisheries to escape the net, it would nevertheless create a clear normative floor for judging situations in which fishing subsidies should be deemed especially in need of control.

II.C.7 The consequent need for authority-sharing mechanisms: The fact must be squarely confronted, however, that evaluations of even "objective indicia of minimum adequate management" may run a considerable risk of falling beyond the limits of the thin green line. To avoid this while preserving a truly robust win-win-win outcome to the present negotiations will therefore require including new authority-sharing mechanisms to involve appropriate fisheries management and marine conservation experts and authorities in the administration of new WTO fishing subsidies disciplines, and particularly in the adjudication of any disputes thereunder. WWF's particular proposals for such institutional mechanisms are discussed in ¶¶ V.I.4.

(a) Such mechanisms would increase the stability and health of the WTO. The creation of some modest authority-sharing mechanisms would not only allow the most robust solution to the fishing subsidies problem, but would also mark a substantial and healthy development for the WTO. For years, environmentalists and other members of civil society have complained that the WTO is prone to impose trade law on other spheres of social policy. And for years, WTO members have complained that environmentalists and others seek to bring "nontrade" concerns into the deliberations of the WTO. These voices—too often engaged in a dialogue of the deaf—frequently ignore the irreducible fact that trade, environment, and developmental policies can no longer be meaningfully administered in isolation from one another. Where the WTO tries inappropriately to "go it alone," it generally risks both confusing its institutional mission and engendering unnecessary controversy. Shared institutional authority with fisheries management bodies would increase, not decrease, the stability and health of the WTO—and it would signal a long overdue departure from the WTO's tendencies toward isolationism.

(b) Without such authority-sharing mechanisms, new disciplines would need to be blunter and weaker: Were governments to reject authority-sharing mechanisms of the kind discussed in ¶ V.I.4, the alternative would be to forego or substantially alter those elements of the proposed rules that depend on such mechanisms for

their implementation.[115] This would result in disciplines that would be both "overinclusive" and "underinclusive" at their margins. That is, the remaining rules would allow some otherwise beneficial subsidies to be banned, and some otherwise harmful subsidies to survive. While this outcome would be suboptimal, it would nevertheless represent a significant improvement over the status quo. Thus, while WWF considers that a truly successful outcome to these negotiations depends on a combination of normative and institutional improvements, the proposals below do not stand or fall entirely on the acceptability of particular institutional mechanisms.

115. *See* fn. 349. In each case, alternatives that would tend to make the rules "too strict" or "too lax" would both likely be available. For example, if WWF has proposed that an element of special and differential treatment should involve a test requiring an authority-sharing mechanism (*see* ¶¶ V.H.3(a), (b), and (e)), alternatives would include either broadening the provision by removing the condition requiring the shared-authority mechanisms or eliminating or otherwise constraining the special and differential treatment provision at issue.

Part III
Approaches to Classifying Fishing Subsidies

III.A The importance of classification. As noted in ¶ I.B.2, fishing subsidy programs are numerous and varied. Almost every effort to analyze or otherwise treat them requires some approach to classifying or categorizing them. In the context of legal rules, however, classifications become definitions, which in turn can become legal tests. Thus, the approach taken to classifying fishing subsidies can determine the kinds of questions a panel or other WTO body must ask and answer in order to apply the rules. As an aid to negotiators and other stakeholders considering technical options for crafting new fishing subsidies disciplines—and in particular to help in efforts to avoid crossing the "thin green line"—the following theoretical discussion of approaches to classifying fishing subsidies may prove useful.

III.B Approaches to classification

III.B.1 Taxonomic versus normative classification: The classification of fishing subsidies under new WTO rules will ultimately determine how they are disciplined (*e.g.*, which will be "prohibited," etc.). Various approaches to the classification of fishing subsidies have been developed in the relevant literature,[116] including by WWF.[117] However, these approaches are essentially taxonomic—*i.e.*, they illuminate the purposes and mechanisms of fishing subsidies programs. None purports to be a basis for distinguishing beneficial subsidies from harmful ones within a normative rule system.

III.B.2 WWF's proposal effectively creates four normative categories of fishing subsidies. The rule system proposed in Part V effectively groups fishing subsidies into four categories. Note, however, that these categories are not labeled as such on the face of the rules, and are presented here simply as an aid to understanding WWF's approach. The categories are as follows:

(**a**) **Most Harmful**—*i.e.*, those fishing subsidies so closely associated with negative consequences that they should generally be disallowed (*see* discussion of the "red light" in ¶¶ V.C *et seq.*);

(**b**) **Likely to be Harmful**—*i.e.*, those that are often but not always harmful, so that they should be allowed but subject to very strict discipline (*see* discussion of the "dark amber light" in ¶¶ V.F.4 *et seq.*);

116. *See, e.g.*, FAO (2002b, App. E, 34ff.); FAO *SOFIA 2002*, pp. 91–95; APEC (2000, 8ff.); OECD (2000b, 129ff.); Porter (2002, 30ff); Steenblik (2003).
117. WWF (2001a, 8–10).

(c) **Possibly Harmful**—*i.e.*, those that are occasionally harmful, so that they should be allowed and subject to lesser discipline (*see* discussion of the "amber light" in ¶¶ V.E.6(b)(i) *et seq.*); and

(d) **Beneficial**—*i.e.*, those so closely associated with positive consequences that they should generally be protected from WTO challenge (see discussion of the "green light" in ¶¶ V.E *et seq.*).

III.C Technical distinctions among classification methods:

III.C.1 There are three potential methods of normative classification of fishing subsidies:

(a) **Design-based:** Subsidies can be classified according to the character of their legal design. The current SCM red light, for example, prohibits any subsidy that is legally contingent on export performance (*see* ¶ IV.B.1). Most taxonomic approaches to classifying fishing subsidies rely on design-based characteristics.

- The design of a subsidy can refer to the **stated purpose** of the subsidy (*e.g.*, to raise or lower fleet capacity), the **criteria** by which it is granted (*e.g.*, to certain classes of fishers, or upon the doing or refraining from certain fishing activities), or the **mechanism** through which it is granted (*e.g.*, direct payments to fishers, below-market loans, tax breaks).
- The **main advantages** of design-based classifications are that they can focus on the underlying policy purposes of subsidy programs, and can be applied without extensive empirical research or analysis. The **main drawback** is that they are divorced from actual effects, and thus may overlook the fact that subsidies with very similar designs can have very different results in the real world (or even that a single program type can have both desirable and undesirable results).

(b) **Effects-based:** Subsidies can be classified according to their real-world impacts. The current amber light, for example, makes subsidies actionable on the basis of certain kinds of trade impacts (*see* ¶ IV.B.2). Effects-based classification can obviously be very outcome oriented—that is, it can focus directly on the evils or benefits that subsidy disciplines are meant to discourage or promote (*e.g.*, "subsidies that cause overfishing"). But effects-based approaches are heavily data dependent, and in some fishing subsidies cases may lead to questions that stray across the thin green line. This risk, however, may vary according to the kinds of effects a classification requires. For example, a test could focus on production effects (how much production took place? at what costs?), capacity effects (how was capacity affected?), or effort effects (how much productive activity took place?). All of these may be susceptible to indicators of a relatively traditional economic character. However, any test that relied on resource effects (impacts on fish stocks, for example) would step instantly into the realm of fisheries management science.

(c) **Context-based:** A third approach, without direct parallel in the current SCM and in some ways a functional hybrid of the design and effects approaches, is to classify

subsidies according to specific aspects of the context in which a subsidy program operates (*e.g.*, is the subsidy operative in a fishery suffering from overcapacity or stock depletion? is it subject to a limited access regime?). A context-based approach may approximate effects-based classifications, without requiring deep empirical analyses or elusive proofs of direct causality. Also, like a design-based approach, a context-based approach may rest on facts that can be known in advance of the application of a subsidy. In terms of its reliability, a context-based approach essentially assumes that there is a causal relationship between particular contextual facts and kinds of effects (*e.g.*, a subsidy applied in an overcapacity, open-access fishery is likely to be harmful). Note that the contextual criteria applied by a context-based scheme may look to **empirical** facts (*e.g.*, is the subsidy operative in a fishery suffering from overcapacity or stock depletion?), **juridical** facts (*e.g.*, is the subsidy operative in a fishery subject to a limited access regime?), or both (*e.g.*, is the subsidy operative in a fishery subject to *effective* capacity controls?).[118]

III.C.2 Robust fishing subsidies disciplines require more than design-based classifications. The fundamental policy problem posed by fishing subsidies is the difficulty distinguishing the good from the bad. As discussed below, WWF believes that there are several kinds of fishing subsidies that can be classified as "most harmful" on the basis of their design. But a broad and strong "red light" rule will likely require certain exceptions, or risk being overly broad. At least some of the exceptions proposed in ¶ V.D cannot be adequately defined without reference to the fisheries context in which the exceptions might apply. Similarly, amber and dark amber rules by their nature turn on *ex post facto* judgments about the real world effects of a subsidy. In these provisions, WWF has preferred to reach for context-based criteria, wherever possible.

III.C.3 Classification methods and the thin green line: As a general matter, design-based classifications offer the least risk of crossing the thin green line, while effects-based classifications can be the most perilous. Wherever effects-based classifications have seemed necessary, WWF has restricted them to classifications based on familiar economic and market principles.

118. The "matrix" approach combines design-based and context-based methods: One application of a context-based approach to fishing subsidies has been proposed by Gareth Porter in a paper commissioned by UNEP (Porter 2002). This approach combines a set of design-based categories with a set of context-based categories in a matrix that allows consideration of major fishing subsidy types under a variety of circumstances (*e.g.*, a "decommissioning" subsidy in an open access fishery versus in a limited access fishery). Porter's matrix approach is one illustration of how two or more of the three classification approaches outlined above can be applied together.

Part IV
Current WTO Rules: Overview and Gap Analysis

This section offers a brief overview of how current WTO rules treat fishing subsidies, and of why the current rules require improvement and clarification to achieve more effective fishing subsidies disciplines.[119]

IV.A Current rules do cover fishing subsidies:

IV.A.1 General coverage of the SCM: The WTO Agreement on Subsidies and Countervailing Measures (the SCM)[120] places certain constraints on the right of national governments to subsidize their domestic industries. It covers industrial subsidies generally. Only agricultural subsidies are excluded, and are separately treated in the WTO Agreement on Agriculture. Thus, subsidies to the fishery sector fall within the SCM's ambit.

IV.A.2 A broad definition of "subsidy": Article 1 of the SCM defines a subsidy as any "financial contribution" by a government (or by a public or private entity on behalf of a government) that confers a specific "benefit" on a domestic industry. A "financial contribution" may be in the form of a direct payment, the provision of goods or services, a price support, or the foregoing of revenue otherwise due. While the precise technical meaning of these terms can be debated, most if not all significant classes of fishing subsidies appear to fall within the current SCM definition.[121]

IV.A.3 Ambiguities at the margins: Two classes of government activities that may be considered "fishing subsidies" but which hover at the margins of the SCM definition are

(a) Access payments: Government-to-government payments for access to foreign fishing grounds are a major form of government support to fishing fleets. Some observers (and very likely some governments) hold that such access payments do not fall within the scope of SCM Article 1.[122] WWF has previously taken the view that these subsidies do fall within the current definition, but that clarification of SCM Article. 1 in this regard is desirable.[123] *See* ¶ V.B.2.

119. For an earlier discussion of the application of current WTO rules to fishing subsidies (portions of which the discussion here substantially repeats), *see* WWF (1998a, 150–57).
120. *See* Appendix 4 for the text of SCM Articles cited in this paper. The full texts of all WTO agreements, along with many other formal and analytical WTO documents, are available on the WTO's Web site, http://www.wto.org.
121. *See* WWF (1998a, 153, Table 1) and accompanying notes.
122. *See, e.g.*, Porter (1998b, 37); Stone (1997, 525).
123. *See* WWF (1998a, 155–56).

(**b**) **Management services:** Many economists, and perhaps some governments, consider the provision by governments of fisheries management services (including, *e.g.*, stock assessments, regulatory enforcement, licensing, etc.) to be a subsidy unless the full costs of those services are recovered from the industry. This paper argues that management services should not be considered fishing subsidies for the purposes of new WTO disciplines.[124] *See* ¶ V.B.3.

IV.B The SCM's "traffic light" approach: The SCM treats the subsidies within its purview as either "prohibited" or "actionable." Additionally, the SCM also originally treated certain classes of subsidies as "non-actionable" (*i.e.*, protected from challenge), but the relevant SCM language is not currently operative.[125] The jargon of the WTO uses a traffic light metaphor to describe these rules as respectively applying red, amber, and green lights (or sometimes "boxes") to various classes of subsidies.

IV.B.1 The "red light"—prohibiting export and "domestic supply" subsidies: SCM Articles 3 and 4 (*see* Appendix 4 for text) place an outright prohibition on subsidies made contingent on export performance or on the use of domestic over imported goods. The SCM flatly states that WTO members "shall neither grant nor maintain" such subsidies. A member found to be maintaining a subsidy falling into the red light can be required to remove the subsidy.

(**a**) **The core of the red light is an *ex ante*, design-based prohibition.** With one important exception (discussed in the next paragraph), the current red light constitutes a ban on a class of subsidies defined according to their design (*i.e.*, without regard to their actual impacts—*see* ¶ III.C.1(a)). This kind of prohibition is operative prior to the implementation (or even the legal creation) of a given subsidy program.

(**b**) **The "in fact" test brings *ex post facto* and context-based elements into the red light.** SCM Article 3 prohibits subsidies that are contingent on export or domestic supply whether the contingency exists "in law or in fact".[126] The phrase "in fact" was intended—at least by some of the SCM's drafters—to prevent governments from structuring subsidies that implicitly but effectively favor exports or domestic supply. From an analytic perspective, this "in fact" standard introduces a limited but significant departure from the red light's basic *ex ante*, design-based approach.[127] To know whether a subsidy falls within the "in fact" prohibition, it is necessary to look at facts that surround its implementation.

---

124. It also appears highly debatable whether failures to achieve "full cost recovery" for public management of fisheries would be covered by the current SCM definition. *See* the GATT case, *Belgian Family Allowances* (1952) (under Formal WTO Documents/WTO and GATT Cases in References).

125. The language creating a class of "non-actionable" subsidies—SCM Arts. 8 and 9—was originally adopted only on a provisional basis for a period of five years. *See* SCM Art. 31. That five year period expired on December 31, 1999. *See* ¶ V.F.4.

126. Although this phrase appears only in Art. 3.1(a) (export subsidies), the WTO Appellate Body has ruled that Art. 3.1(b) (domestic supply subsidies) implicitly includes the "in fact" standard. *See Canada—Certain Measures Affecting the Automotive Industry*, ¶ 143 (under Formal WTO Documents/WTO and GATT Cases in References).

127. Note, however, that the "in fact" prohibition does have a partly *ex ante*, design-based function. It is *ex ante*, to the extent that it warns governments away from purposeful evasions (or at least from obvious purposeful evasions) of the "in law" standard. It is also partly design-based, to the extent that an "in fact" contingency generally results in part from a subsidy's design.

(i) The "in fact" standard focuses on the relationship between the criteria for granting a subsidy and the structure of the subsidized industry.[128] In this sense, the "in fact" standard is actually a special combination of design-based and context-based classifications.[129]

(ii) These facts may even at times include facts about the actual use of specific subsidy payments, and in this sense may introduce *ex post facto* analysis into red light cases. Nevertheless, it is important to realize that the "in fact" test is not an effects-based standard. In particular, it does not require proving any harmful impact of a given subsidy, or even a subsidy's actual effects on exports or imports.

(iii) The "in fact" provision is in legal flux, and proposals for clarification have been tabled.[130]

(c) The law and procedure of Article 3 emphasize rules enforcement. It is an old observation that WTO disciplines sometimes function as a means to promote accommodation and deal-making, and other times more as legal rules subject to enforcement. With its *ex ante*, design-based, prohibitory character, the red light of Article 3 falls squarely into the latter camp. Even the procedures governing disputes arising under Article 3 have a flavor of "rules enforcement"—the process is subject to an expedited timetable, and a standing group of independent experts is available to make a binding finding regarding the prohibited character of a challenged subsidy.[131] Similarly, the remedies available against violations of Article 3 look more like rules enforcement than relationship mending. The prohibitions of Article 3 are enforceable through an obligation to withdraw any offending subsidy, while failure to withdraw a prohibited subsidy can lead to "appropriate countermeasures" that are punitive in character (*i.e.*, are not limited to the degree of harm suffered by the complaining member).[132] Compare these characteristics with the law and procedure of the amber light, discussed next.

(d) Limited applicability to fishing subsidies: Despite the significance of international trade in fishery products (the FAO estimates that more than one-third of the fish taken in wild-capture marine fisheries (as measured by value) enter international commerce[133]), the current SCM red light prohibitions have little relevance to fishing subsidies.

(i) Fishing subsidies are rarely "export" subsidies: Governments have not often been tempted to make fishing subsidies contingent on export performance.

128. According to the WTO Appellate Body, the existence of an "in fact" contingency "must be *inferred* from the total configuration of the *facts constituting and surrounding the granting of the subsidy.*" *Canada—Measures Affecting the Export of Civilian Aircraft,* ¶ 167; quoted in *Canada—Certain Measures Affecting the Automotive Industry,* ¶ 99 (italics in original, underlining added; *see* under Formal WTO Documents/WTO and GATT Cases in References)).
129. A similar reliance on "structural" contextual facts (rather than facts about the specific impacts of a subsidy) is found in SCM Art. 8.2. *See* ¶ IV.B.5(b)(i)-(ii).
130. *See, e.g.*, TN/RL/W/85 (Australia, April 30, 2003), p. 1.
131. SCM Art. 4.
132. SCM Arts. 4.10 and 4.11, nn. 9 and 10 require that the countermeasures be not "disproportionate in light of the fact that the subsidies dealt with... are prohibited." For one application of this rule, *see United States—Tax Treatment for "Foreign Sales Corporations"* (under Formal WTO Documents/WTO and GATT Cases in References).
133. *See* fn. 77; *see also* fn. 101.

This may be due partly to the relative strength since 1949 of the GATT ban on export subsidies, as well as to the fact that the majority of fishing subsidies are granted by countries that are net importers of fish.

(**ii**) **Subsidies encouraging domestic fish supply fall outside SCM Article 3:** Some fishing subsidies are meant to promote the supply of fish to domestic markets from domestic enterprises.[134] This may often result in the effective displacement or prevention of imports (especially where the subsidized fleet is operating in foreign waters or on straddling or migratory stocks[135]). Indeed, such subsidies may even be in pursuit of a more or less explicit policy to promote domestic supply over potential imports.[136] Still, such subsidies are rarely (if ever) made legally contingent on domestic supply. Moreover, Article 3.1(b) is really aimed at subsidies to producers who use parts or primary inputs in their production process, rather than at subsidies to their domestic suppliers. It is not fishers who are engaged in "import-substituting" behavior, even though the subsidies they receive may effectively distort import levels. Even where such subsidies are explicitly aimed at ensuring domestic supply, current SCM rules allow them to be reached only through actions under the so-called "amber light."

IV.B.2 The "amber light"—disciplining subsidies having "adverse effects." In the absence of any current SCM "green light" language, all subsidies not directly prohibited by Article 3 fall into the SCM's "actionable" amber light (SCM Articles 5–7). The rules of the amber light are nuanced and complex, reflecting an uneasy balance between the desire of WTO members to allow the use of subsidies (apart from prohibited subsidies) as a legitimate tool of domestic policy, and the fear that domestic subsidies can purposefully or inadvertently cause trade injuries. Rather than prohibit these subsidies *ex ante*, Article 5 of the SCM states: "No WTO member should cause, through the use of [a subsidy], adverse effects to the interests of other Members." A WTO member that feels it has suffered adverse effects can challenge a subsidy before a WTO dispute panel. But the "adverse effects" rather than the subsidy itself become the focus of the challenge—a challenger must allege and prove some harm caused by the subsidy. Moreover, a member found to have caused adverse effects may be allowed to maintain the offending subsidy, so long as the member acts to remove the adverse effects on the complaining member (adverse effects on WTO members not participating in the challenge are not considered).

(**a**) **Essence of the amber light:** The amber light, in contrast to the red light, is an *ex post facto* requirement to remove the harms (but not necessarily the subsidy itself) caused by subsidies that are found to cause negative impacts. The amber light procedure includes more room for negotiation and accommodation, with a heavier focus on correcting the adverse effects suffered by a complaining member than on

134. *See, e.g.*, OECD (2003a, 33). Price support policies are also often implemented in the form of tariffs. *See* OECD (2003c, ¶ 27).

135. A "straddling" fish stock is one whose range includes waters that fall on both sides of a country's EEZ frontier; a "migratory" stock is one that travels in and out of a country's EEZ, although at any one time may be located wholly inside or outside of a given EEZ.

136. Note that in some cases these policies may be in pursuit of **domestic food security**. WWF's proposed fishing subsidies disciplines take account of this concern with regard to developing countries. *See* ¶ V.H.3(b).

the enforcement of WTO rules.[137] If countermeasures are necessary, they are limited by the extent of any proven adverse effects.[138]

(b) Most fishing subsidies fall under the current amber light: Given the SCM's broad definition of "subsidy" (*see* ¶ IV.A.2)—and given the limited applicability of the current red and green lights (*see* ¶¶ IV.B.1(d) and IV.B.5(b))—the great majority of fishing subsidies fall within the potential reach of the SCM's amber light.

IV.B.3 Red and amber lights compared:

(a) The core elements of each light can be distinguished from its ancillary characteristics. The red and amber lights in the current SCM have multiple and quite different characteristics—not all of which dictated by the nature of the lights themselves. Since efforts to "clarify and improve" the SCM may result in altering some of the characteristics of each traffic light, it may be useful to distinguish those core characteristics that are essential to the concept underlying a particular light from those "ancillary characteristics" that can be abstracted from the provisions in which they currently happen to be located. For example, the timetable for adjudication under the current red light is shorter than under the amber light, but expeditious litigation is not inherent in the core concept of a rule to prohibit certain subsidies.

(b) A side-by-side glance at the core characteristics of the red and amber lights: The basic characteristics of the red and amber lights are detailed in a table attached as Appendix 5. Here it may be helpful to state what appears essential in the current definitions of "prohibited" and "actionable" subsidies, as follows:

- The essence of the red light is an absolute, *a priori* prohibition on a class of subsidies defined largely without regard to their actual impacts, enforceable through an obligation to withdraw the subsidy; and
- The essence of the amber light is a contingent requirement to remove the adverse effects (but not necessarily the subsidy itself) caused by subsidies in a class defined principally by the subsidies' injurious impacts.

IV.B.4 Complexity and burdens of the amber light: The focus on adverse effects makes the amber light complex and often burdensome to use.

(a) Tripartite definition of "adverse effects": SCM Article 5 defines "adverse effects" as any one of three harms:

(i) "Injury" to the domestic industry of another member: As a general matter, the injury test applies when the complaining member is the importer of subsidized goods.[139]

137. *See* SCM Art. 7. Note that, consistent with the "negotiated solution" orientation of the amber light, no provision is made in Art. 7 for the intervention of an independent expert group of factfinders.

138. SCM Art. 7.9.

139. SCM Art. 5(a), n. 11 imports into Art. 5 the technical definition of injury used in the section of the SCM dealing with national countervailing duty (CVD) actions. (One principal intention of the SCM as a whole was to discourage members from confronting each other's subsidies through national CVD actions, encouraging multilateral process under the WTO instead. However, the SCM continues to allow national CVD actions, within the limits set out in Part V of the agreement.) CVD actions arise when domestic industries complain about subsidized imports. Accordingly, the definition of injury (set out principally in SCM Art. 15) focuses on such factors as the volume of subsidized imports and the effect of imports on domestic prices. Complaining members must show both the effect of subsidized imports on volume and prices, and the impact of those effects on the economic condition of the domestic industry.

(ii) "Nullification or Impairment" of benefits: The term "benefits" here means those accruing directly or indirectly to other members under GATT 1994, and in particular the benefits of concessions bound under Article II of GATT 1994. This test is aimed mainly at cases in which a WTO member grants a new subsidy to a product after the product has been the subject of a binding WTO tariff commitment.[140] Such a subsidy may be seen as a way to circumvent the effects of a tariff binding, or at a minimum to disturb the balance of competitive forces created by a tariff deal.

(iii) "Serious Prejudice" to the interests of another member: This test usually applies when the complaining member is trying to export into the market of the subsidizing member or into a third market where exports from the two members compete.[141] Interestingly, "serious prejudice" can also arise if a subsidy on a ***primary product or a commodity*** causes an increase in the world market share for that product enjoyed by the subsidizing member.[142]

(**b**) **A heavy evidentiary burden:** The practical implications of the amber light's "adverse effects" test are significant. Any member petitioning for relief must present complex factual arguments and extensive data to demonstrate both the harm it has suffered and a causal link to the subsidies at issue. Even summaries of the arguments and evidence presented can run to hundreds of pages. Amber light cases can thus pose daunting elements of expense and uncertainty.

(**c**) **The lapsed "dark amber" provisions:** Recognizing these realities, WTO members originally agreed to SCM language that in some cases shifted the burden of proof from the complaining party to the party defending a subsidy. Article 6.1—also known as the "dark amber" light—provided that a rebuttable presumption of serious prejudice would be raised in the case of

- the total *ad valorem* subsidization of a product exceeding 5 percent;
- subsidies to cover operating losses sustained by an industry;
- subsidies to cover operating losses sustained by an enterprise, other than one-time measures that are nonrecurrent and cannot be repeated for that enterprise and that are given merely to provide time for the development of long-term solutions and to avoid acute social problems; or
- direct forgiveness of debt—*i.e.*, forgiveness of government-held debt, and grants to cover debt repayment.

In the cases covered by this language, the evidentiary burden to prove harm was obviously far reduced. However, these provisions, along with the SCM "green light"

140. WTO, SCM *Agreement Overview* (http://www.wto.org/english/tratop_e/scm_e/subs_e.htm).
141. SCM Art. 6.3(c) also contemplates that "serious prejudice" may result from "significant price undercutting" of a complaining member's products caused by a subsidy on like products by another member, no matter where the competitive market is located. This language appears to offer an alternative to the "injury" test for members harmed by subsidized products imported into their domestic markets. But where the "injury" test would treat price undercutting as one possible causal factor, and requires actual proof of economic damage to the domestic industry, the "serious prejudice" test requires only a demonstration of "significant" price undercutting *per se.*
142. SCM Art. 6.3(d). An absolute increase is required to trigger this clause, and must be shown to follow "a consistent trend over a period when subsidies have been granted." The test also does not apply to any product or commodity that is subject to a multilateral agreement governing its trade.

(nonactionable) subsidies, were adopted on a provisional basis only for the first five years of the SCM's operation, which lapsed on December 31, 1999.[143]

(**d**) **Broad dissatisfaction with the amber light:** Given the complexities and burdens discussed above, the amber light has proved a relatively weak instrument for the disciplining of subsidies. Many delegations have expressed frustration with its ineffectiveness, and proposals for strengthening the amber light provisions are already in play in the current negotiations.[144]

(**e**) **The amber light has failed in particular with regard to fishing subsidies.** In the case of fishing subsidies, the amber light has proved unable to discipline even the most economically disruptive programs. This failure results from the general weakness of the amber light, as compounded by four additional factors:

(**i**) **The unnecessarily narrow definition of "adverse effects" limits the applicability of the amber light to fishing subsidies:** The mandate of the WTO, as enshrined in the first paragraph of its founding agreement, includes

> ...**expanding the production** of and trade in goods and services, while allowing for the **optimal use** of the world's resources in accordance with the objective of **sustainable development**, seeking both to protect and preserve the **environment** and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development....[145]

Despite the breadth of this mandate, the notion of a "trade distortion" reflected in the terms and traditions of the SCM—and particularly in the definitions given to the term "adverse effects" in Article 5—is basically restricted to distortions suffered by exporters at the time of export. In the case of fishing subsidies, however, the primary economic distortion takes place at the level of production. In the context of competition for the exploitation of fisheries resources, subsidies more directly distort the access to production rather than the access to export markets. An early paper submitted by several

143. SCM Art. 31. The burden shifting language of SCM Art. 6.1 was included in the Uruguay Round text at the initiative of the United States, which insisted on a mechanism to ease challenges to subsidies in return for U.S. acceptance of the green light (SCM Arts. 8–9) promoted by the EU *See Inside U.S. Trade* (December 17, 1999). As the WTO approached both the Art. 31 deadline and the Seattle Ministerial in late 1999, discussions over extending the serious prejudice presumptions and the green light bogged down when leading developing-country delegations made the extension conditional on U.S. and EU acceptance of various developing-country demands, including the relaxation of deadlines for developing-country compliance with other elements of the WTO rules. *Id.*; *see also Inside U.S. Trade* (November 12, 1999). After the collapse of the Seattle Ministerial, developing countries blocked a final effort to adopt an extension. *See Inside U.S. Trade* (December 24, 1999). The statutory language implementing the green light into U.S. CVD law similarly expired on July 1, 2000. *See* United States URAA (in the National and Local Laws and Regulations section of References), Title II, Subtitle A § 251(a)(5B)(G) (1994) 19 U.S.C. § 1677(5B)(G). In what would appear an indication of Congressional suspicion of the green light, the URAA indicates that renewal of the authority should require special free-standing legislation. *Id.*, Title II, Subtitle B, Part 4, § 282 (1994) 19 U.S.C. § 3572.

144. *See, e.g.*, TN/RL/W/1 (**Canada**, April 15, 2002) (serious prejudice provisions are "an important complement" to prohibited subsidies provisions, and the importance of access to third-country markets "suggests a need to consider a more viable serious prejudice remedy"); TN/RL/W/78 (**United States**, March 19, 2003), p. 2 ("the serious prejudice remedy needs to be strengthened and made more effective"); *see also* TN/RL/W/85 (**Australia**, April 30, 2003), pp. 2–3 (contributing to discussion of how Art. 6.1 might be improved); TN/RL/W/102 (**Egypt**, May 6, 2003) § (a) ("Egypt considers that some of the concepts concerning actionable subsidies may be clarified" but takes issue with some elements of U.S. proposal).

145. *Agreement Establishing the World Trade Organization,* Preamble (emphasis added).

delegations identifies this as one of the principal concerns of the Friends of Fish.[146] As discussed in ¶ V.F.3, improved and clarified SCM disciplines will need to address this concern if the WTO is to succeed in meeting the first real test of its ability to deliver "win-win-win" outcomes.

(ii) **Stock depletion alters costs for all producers in a fishery.** It is important to recognize that, unlike in many other productive sectors, subsidies paid to a fishing enterprise can have a direct impact on the costs of production borne by its competitors. As fish become more scarce, "yield per unit effort" drops---*i.e.*, the cost of finding and catching the next fish rises. Thus, a subsidy that allows an enterprise or fleet to catch more than its "fair share" of fish can alter the cost structure for others in the same fishery. The effects of this race for resources are especially evident where fleets compete to catch fish from straddling or migratory stocks, or where distant water fleets are seeking access to third-country fisheries.

(iii) **The nature of the market for fish products makes meeting the evidentiary burdens of the amber light particularly difficult:** The heterogeneous and diffused nature of the fishery sector makes direct calculation of the price and market share impacts of subsidies more difficult than in most other sectors.[147] This problem is compounded by the serious lack of transparency in fishing subsidies programs (*see* ¶ V.G.2), and by often imperfect systems for tracking the origins and ultimate destinations of fish products. Data constraints and the endemic nontransparency of fishing subsidies also make proof of injury difficult.[148]

(iv) **Political constraints often impede WTO enforcement actions:** In many instances, the effectiveness of the SCM depends on the willingness of WTO members to pursue disputes against one another. The relatively small absolute size of the fisheries sector (compared, *e.g.*, with the agricultural sector), as well as the economically dependent position of many smaller economies for whom fishing is an important activity, often means that the political costs to enforcement actions under the amber light are not worth the benefits to the petitioner. In addition, the fact that many imperiled fisheries involve migratory or other transboundary stocks may tend to diffuse the national interests at stake.

IV.B.5 The lapsed "green light": Up until December 31, 1999, Articles 8 and 9 of the SCM created several classes of "non-actionable" subsidies that were exempt from attack under the amber light and under national countervailing duty laws (but remained subject to the prohibitions of the SCM's red light).

(a) **Scope of the lapsed green light:** The green light covered only a narrowly defined range of subsidies for the following three classes of activity:

- research and precompetitive development;
- assistance to disadvantaged regions; and
- certain types of assistance for adapting existing facilities to new environmental

146. TN/RL/W/3 (Australia, Chile, Ecuador, Iceland, New Zealand, Peru, the Philippines, and the United States, April 24, 2002),¶¶ 10, 14–16.
147. TN/RL/W/3, ¶ 16; TN/RL/W/12 (New Zealand, July 4, 2002); OECD (1993).
148. *See* discussion of transparency, ¶ V.G.2. *See also* WWF (2001e); Steenblik and Wallis (n.d.).

laws or regulations (the so-called green light for green subsidies).

These categories were given careful and detailed definitions, and were subject to the condition that they not cause "serious adverse effects" to another WTO member.[149] In addition, green light subsidies were subject to special notification and reporting requirements,[150] and to an expedited arbitration process if a member wished to challenge the inclusion of a subsidy within the green light (Article 8.5). In accordance with Article 31, the green light was applied only provisionally, and its life was not extended when it expired on December 31, 1999.[151]

(**b**) **The lapsed green light had limited applicability to fishing subsidies:** The green light of SCM Article 8 was of limited practical significance during the five years it was in force. In fact, its protections appear never to have been formally invoked.[152] And even its potential significance to fishing subsidies was unclear.

(**i**) **The environmental clause of SCM Article 8.2(c) was not pertinent to fishing subsidies.** Oddly, of the three protected subsidy types included under the green light, the environmental category may have been the least applicable to fishing subsidies. SCM Article 8.2(c) (*see* Appendix 4 for the text) appears to have been limited to subsidies for retrofitting industrial plants with pollution abatement equipment. Subsidies designed to help achieve sustainability through fishing capacity reductions (such as vessel buy-back and worker retraining programs) would certainly not have qualified. Even subsidies for environmentally motivated fishing gear modifications would likely have been excluded, since the provision was limited to equipment designed to reduce "nuisances and pollution."[153] Although sometimes called the "green for green" light, Article 8.2(c) was in fact only a rather limited "green for brown."

(**ii**) **The other elements of Article 8 may have had some potential application.** The nonactionable **category for research**, on the other hand, may have had some potential application to fishing subsidies. At least three countries have notified fishing subsidies to the WTO that included research activities,[154] although it is doubtful any of these would qualify under the limited terms of SCM Article 8.2(a).[155] Similarly, several fishing subsidies have been notified that may arguably have fallen within the green light **category for disadvantaged regions**.[156]

149. Under SCM Art. 9, a green light subsidy could be challenged if it causes "serious adverse effects" (*see* ¶ V.E.5(c)). Still, SCM Art. 9.4 maintains the protected nature of these subsidies by providing only for "removal of these effects" rather for the possible withdrawal of the subsidy, as called for in the amber light (Art. 7.8).
150. SCM Arts. 8.3 and 8.4. *See also* G/SCM/W/410 (*Draft Format for Updates of Notifications*, October 6, 1997)
151. *See* fn. 143 and accompanying text.
152. In November 1988, the SCM Committee (the WTO body charged with the administration of the agreement) reported that no green light notifications under SCM Art. 8.3 had yet been submitted. G/L/267 (November 5, 1998), ¶ 12. The Committee's report for 1999, submitted just weeks before the green light expired, makes no mention of green light notifications. *See* G/L/341 (November 5, 1999), ¶ 11.
153. SCM Art. 8.2(c)(iv).
154. *See* WT/CTE/W/80 (*Note by the Secretariat*, March 9, 1998), which includes references to subsidies for research activities notified by Norway, Tunisia, and Sweden.
155. Art. 8.2(a) and its footnotes include a series of limits, including, *e.g.*, the requirement that any personnel, instruments, or consultants supported by a qualifying subsidy be used exclusively for the research activity, and that the activity be focused on the discovery or design of new products, processes, or services. Such requirements could substantially limit the situations in which fishers might benefit from green light "research" subsidies.
156. *Id.* (referring to subsidies notified by Canada, Norway, Denmark, and Portugal).

IV.C Special and differential treatment (S&D) for developing countries:

The degree to which SCM disciplines should be relaxed to provide "special and differential treatment" for developing countries has long been a source of debate among WTO members. While current S&D provisions do not significantly affect the already limited impact of current SCM rules on fishing subsidies, developing-country provisions will need to be included in any new fishing subsidies disciplines (*see* ¶ V.H). A quick review of the current status of S&D provisions thus provides some useful background:

IV.C.1 Synopsis of the SCM's current S&D provisions: Article 27 of the SCM sets out several provisions giving developing countries special treatment, including, *inter alia*

(i) exemption from the prohibition on export subsidies of least developed countries, and of other developing countries for a period of eight years,[157] subject to certain conditions (*i.e.*, export subsidies may not be increased) and phase-out provisions;

(ii) exemption from the prohibition on domestic supply subsidies for five years (eight years for least developed countries);

(iii) application of a nonexpedited timetable to challenges to otherwise prohibited developing-country subsidies;

(iv) exemption of all developing-country members from the burden-shifting "dark amber" provisions;

(v) limitation of amber light causes of action against developing countries;[158]

(vi) protection of certain subsidies associated with privatization programs from amber light attack; and

(vii) limitation of national countervailing duty (CVD) actions against developing countries.

IV.C.2 The growing link between the green light and S&D issues: As is evident from the foregoing, current SCM provisions treat "non-actionable" subsidies in a manner that is quite distinct from the accommodations made for developing countries. As debate has developed over the future of these provisions, however, the sets of issues have become somewhat intertwined. As discussed in the following paragraphs, these linkages have grown mainly out of proposals made by some developing countries for the improvement and institutionalization of certain S&D concepts. However, from the

157. That is, until December 31, 2003. The "transition period" for certain developing-country export subsidies (especially export processing zones) under SCM Article 27.4 has, however, been conditionally extended until December 31, 2007. *See* WT/MIN(01)/17 (Ministerial Decision of 14 November 2001), ¶ 10.6; and G/SCM/39 (November 20, 2001).

158. SCM Art. 27.9 appears to limit amber light actions against developing countries in two ways. First, it restricts the use of the "serious injury" test to those situations which otherwise would have triggered the "dark amber" presumptions of Art. 6.1, while removing the presumption itself (*i.e.*, complaining members must prove *both* the facts giving rise to at least one of the Art. 6.1 situations *and* the existence of serious injury according to the various tests enumerated in Art. 6.3). *See Indonesia—Certain Measures Affecting the Automobile Industry*, ¶ 14.158 (under Formal WTO Documents/WTO and GATT Cases in References). Second, Art. 27.9 appears to limit claims for nullification or impairment to cases in which a complaining member's exports into a developing country's market have been impeded or displaced. This would, among other things, prohibit "non-violation" nullification or impairment claims against developing countries (*see* ¶ V.F.3(e)). There does not appear to have been any WTO case interpreting the "nullification or impairment" language of Art. 27.9. Claims under the "injury" test of Art. 5(a) do not appear to be limited by Art. 27.9.

perspective of sustainable development the increasing linkage also makes sense, since subsidies that favor sustainable development must by definition support both environmental stewardship and economic development.

(a) **Nonactionable subsidies and the "implementation" issues:** Many developing-country WTO members have long felt that the "non-actionable" provisions of SCM Article 8 worked to the exclusive benefit of wealthier developed-country members. Many (although perhaps fewer) have also felt that the S&D provisions of Article 27 were insufficient. Accordingly, among the implementation issues brought to Doha by developing countries was a call for certain Article 27 protections to be expanded and made permanent, including by making developmentally positive subsidies nonactionable under Article 8.[159] The Doha mandate explicitly requires negotiators to address the question of nonactionable subsidies for developing countries,[160] and two delegations have recently called for an exploration of Article 8 as a basis for doing so.[161] It is interesting that environmentally positive subsidies are among the developmental subsidies for which green light protection has been sought.[162]

(b) **Continuing skepticism and linkages all around:** In parallel with the calls for nonactionable developmental subsidies have come calls for renewing protections for environmentally positive subsidies generally.[163] These calls have been greeted with skepticism on the part of some delegations,[164] and reminders by others that Article 8 had originally been accepted in conjunction with the now-expired "dark amber" provisions of SCM Article 6.1.[165] Meanwhile, the United States and the European Union have clearly reiterated the view that the special treatment of developing-country subsidies in Article 27 should be temporary.[166]

159. *See Compilation of Outstanding Implementation Issues Raised by Members* (JOB(01)152/Rev.1, October 27, 2001), Tiret 64 (under Formal WTO Documents/Other Committees and Processes in References).

160. *See* (under Formal WTO Documents/Other Committees and Processes in References) *Ministerial Decision on Implementation-Related Issues and Concerns* (WT/MIN(01)/17, November 20, 2001), ¶ 10.2, which reads in part:

> [The Ministerial Conference] [t]akes note of the proposal to treat measures implemented by developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production as non-actionable subsidies, and agrees that this issue be addressed in [the context of the Doha Round negotiations].

161. TN/RL/W/41rev.1 (Venezuela and Cuba, March 10, 2003).

162. *See* the text of *Ministerial Decision* quoted in fn. 160; *see also Compilation* (cited in fn. 159), p. 6, third bullet of "Proposals by Least Developed Countries, 22 October 2001."

163. *See* TN/RL/W/30 (European Communities, November 21, 2002) § 5 ("[I]t may be necessary to address the environmental dimension of subsidies and, in particular, to consider further how to approach subsidies aimed at the protection of the environment, following the expiry of the'green light'").

164. *See, e.g.*, TN/RL/W/57 (**Egypt**, February 10, 2003) (noting the tension between India's view of Art. 8 and Venezuela's readiness to move forward using Art. 8 as a starting point); TN/RL/W/79 (**Egypt,** March 24, 2003), § 5; TN/RL/W/40 (**India**, December10, 2002), pp. 1–2.

165. *See, e.g.*, TN/RL/M/2 (Summary Report of Meeting Held on 6 & 8 May 2002), ¶ 7. The summary does not identify the delegation making this observation, but it is worth recalling that the United States was one of the principal *demandeurs* with regard to Art. 6.1, a position it took as a quid pro quo for the EC's demand for Art. 8. *See Inside U.S. Trade* (December 17, 1999).

166. TN/RL/W/30 (European Communities, November 21, 2002), p. 5 (E.C. is willing to consider additional S&D treatment "for a strictly temporary period"); TN/RL/W33 (United States, December 2, 2002). The U.S. paper calls S&D provisions in the SCM "temporary deviations," and concludes: "We do not believe... it is necessary to expand the special and differential treatment provisions of the Subsidies Agreement. *Id.* p. 3.

The bottom line: The linkages among the issues surrounding environmental subsidies, developmental subsidies, nonactionable subsidies, and special and differential treatment will likely be a factor in the rules group negotiations generally, and the negotiations over fishing subsidies in particular, particularly with regard to any proposals for resurrecting a nonactionable category of subsidies.

IV.D Surveillance and transparency: Article 25 of the SCM requires every WTO member to notify the WTO of each subsidy granted by it (within the meaning of SCM Articles 1–2), whether the subsidy is prohibited, actionable, or nonactionable. This broad notification requirement is much more than a clerical procedure. It is a fundamental substantive obligation which the inaugural chair of the WTO Subsidies Committee called "of critical importance to the effective operation of the Agreement."[167] Since policing the SCM is left largely to individual WTO members acting either at the national level (through countervailing duty cases) or through WTO dispute resolution, access to information about other member's subsidies is vital.[168]

IV.D.1 The generalized failure of Article 25: In light of the importance of Article 25, it is especially disturbing that compliance with it has been characterized by "the great tardiness or complete lack of notifications from the majority of Members."[169]

IV.D.2 The particular insufficiency of fishing subsidies notifications: The profoundly unsatisfactory implementation of Article 25 is particularly evident in the case of fishing subsidies. According to WWF estimates, it is likely that as many as 90 percent of fishing subsidies are not properly notified to the WTO. (*See* ¶ V.G.)

IV.E Why current SCM rules need to be improved and clarified (synopsis): This section provides a brief summary of the principal shortcomings of current SCM rules as they relate to fishing subsidies, for ease of review.

IV.E.1 Ambiguities in the definition of "subsidy": While the SCM definition of "subsidy" is broad and generally sufficient for application to fishing subsidies, there remain a few issues at the margins which would benefit from some form of clarification. (*See* ¶ IV.A.3; for proposed solutions, *see* ¶ V.B.)

IV.E.2 Absence of an affirmative prohibition: The inapplicability of the current SCM red light means that there is currently no *ex ante* prohibition on even the most harmful kinds of fishing subsidies. (*See* ¶ IV.B.1(d); for proposed solutions, *see* ¶ V.C.)

IV.E.3 Obstacles to "amber light" challenges: The unnecessarily narrow definition of "adverse effects," in combination with the lapsing of the "dark amber" burden-shifting provisions and the unusually steep practical challenges to proving an amber light case, makes effective application of the current amber light to fishing subsidies all but impossible. (*See* ¶ IV.B.4(e); for proposed solutions, *see* ¶ V.F.)

167. G/SCMM/1 (minutes of the SCM meeting of February 22, 95), ¶ L.
168. The notification requirement also helps impose self-discipline on subsidy policies at the national level. Market-distorting subsidies are often maintained (sometimes long after their originally intended life) as a result of political pressures raised by local constituencies. In the face of these pressures, mandatory transparency in national policy-making can help generate a context for more rational outcomes.
169. G/SCM/M/28 (minutes of the SCM meeting of May 2–3, 2001), ¶ 31.

IV.E.4 Insufficient protection for positive subsidies: The lapsing of the old green light means that even the most environmentally positive (and, in the long run, economically rational) fishing subsidies may be subject to challenge if they are arguably "trade distorting." Even reinstitution of the old green light language would have only limited application to fishing subsidies. Moreover, if proposals for strengthening WTO disciplines on fishing subsidies are adopted, new avenues for challenging fishing subsidies will be opened. In the absence of new green light language, these new provisions might also be applied in a counterproductive fashion to environmentally positive fishing subsidies. (*See* ¶ IV.B.5; for proposed solutions, *see* ¶ V.E.)

Note that in addition to proposing new protections for certain environmentally positive fishing subsidies, WWF is also proposing that **special and differential treatment** provisions for developing countries be extended in conjunction with any new disciplines to be adopted for fishing subsidies. (*See* ¶ V.H.)

IV.E.5 Inadequate transparency and surveillance: The need for improved transparency of fishing subsidies is particularly acute, yet the failure of most WTO members to make adequate notification of fishing subsidies programs is clear. Article 25 of the SCM needs to be strengthened and supplemented to bring greater transparency and accountability to fishing subsidies. (*See* ¶ V.G.)

IV.E.6 Incomplete institutional mechanisms: If new WTO disciplines are to take serious account of the resource and production distortions caused by some fishing subsidies—and if the WTO is to administer such disciplines without trespassing across the "thin green line"—existing institutional mechanisms will have to be strengthened and supplemented to ensure proper coordination with intergovernmental bodies responsible for fisheries management and policy-making. (*See* ¶¶ II.C.7 and V.I.)

Part V
Clarifying and Improving Fishing Subsidies Disciplines

V.A. Preliminary comments

V.A.1 These proposals build on the "traffic light" approach: Among delegations working on the fishing subsidies issue, a preliminary consensus appears to be emerging that new disciplines should begin by building on the "traffic light" approach of the SCM.[170] WWF supports starting with the traffic light architecture, and more particularly with a focus on how the specific elements of a given traffic light—the nature of its legal obligation, its scope, its procedural characteristics, etc.—can be modified to discipline fishing subsidies.[171]

V.A.2 For purposes of discussion, the provisions proposed below are located within the SCM. As discussed in ¶ II.B.8(d), WWF believes that new fishing subsidies disciplines must be given specific textual treatment within the WTO rule system, but has yet to take a fixed position on whether new WTO fishing subsidies disciplines should appear within the body of the SCM or should constitute a separate sectoral agreement. Given WWF's adoption of the traffic light approach, and for the sake of analytic ease, the discussion below assumes that the new disciplines will appear within the SCM itself. However, WWF believes negotiators should also give consideration to the drafting of a separate multilateral sectoral agreement on fishing subsidies. This latter approach may make it easier to achieve coherence among the various elements of the new rules, while allowing greater latitude for departure from traditional elements of the SCM. In the end, WWF supports whichever approach results in the most effective fishing subsidies disciplines.

V.A.3 The elements of WWF's proposals need to be read together: The specific suggestions offered in the remainder of this paper should be read in a comprehensive manner. This is important in two respects:

170. For a brief explanation of the "traffic light" approach, *see* ¶ IV.B. Several recent papers submitted by delegations have proposed using at least certain traffic light elements. *See* TN/RL/W/77 (United States, March 19, 2003) (proposing "red light" and "dark amber light" approaches); TN/RL/W/82 (European Communities, April 23, 2003) (proposing "red light" and "green light" approaches). *See also* TN/RL/W/88 (China, May 1, 2003) (welcoming the "traffic light" approach used by the United States in TN/RL/W/77). *But also see* TN/RL/W/97 (Korea, May 5, 2003) (suggesting that the U.S. version of the "traffic light" approach is untimely and inappropriate).
171. For a discussion of the elements (or "building blocks") of the traffic light approach, *see* ¶ IV.B.3(a).

- First, as noted in ¶ II.C.7(b), several of WWF's substantive proposals must be read in conjunction with WWF's call for institutional mechanisms to involve international fisheries management bodies in the administration of WTO fishing subsidies rules.[172]
- Second, the positive rules proposed below need to be understood along with any exceptions proposed to them, and with provisions for the "special and differential treatment" of developing countries.

A summary of WWF's technical proposals is attached as Appendix 1.

V.B. Defining "fishing subsidies"

V.B.1 Preliminary comments

(a) The difficulty of achieving a perfect theoretical definition: The precise nature of a "fishing subsidy" is the subject of much theoretical discussion.[173] For present purposes, it is important to recall that the objective is to agree on a definition that makes sense within the context of WTO subsidies disciplines and that facilitates desired outcomes.

(b) The need to clarify a definition of "fishing subsidy" in the SCM: As noted in ¶ IV.A.2, the current definition of "subsidy" under SCM Article 1.1 is relatively broad, but remains potentially ambiguous with regard to some kinds of government support to the fishing sector. Two basic questions are in need of some clarification:

- What kinds of governmental activities in the fishing sector should be deemed "subsidies"? For example, should the definition include the acquisition by a government of access to foreign fishing grounds for its domestic fleet? What about governmental involvement in fisheries management?
- What should be the definition of "fishing industry"? For example, should it include fish processors and marketers? Freshwater fisheries? Aquaculture?

Although these ambiguities might be addressed through clarifications to the language of SCM Article 1.1 itself, it may be possible to achieve the necessary clarification through notations to Article 1.1 or within new substantive fishing subsidies disciplines, as detailed in the following sections.

V.B.2 Government payments for access to foreign fisheries should be explicitly covered by fishing subsidies disciplines.

WWF has previously argued that access payments already fall within the ambit of the current SCM definition of "subsidy."[174] However, this view is not accepted by all observers.[175] Given the importance of access agreements as a form of subsidy, and considering the influence access agreements can have on the international economics of fishing, WWF believes the SCM should be clarified to ensure that subsidies associated with access agreement are subject to WTO disciplines. However, WWF also recognizes the importance of access payments to the

172. For a list of the proposed provisions that implicate the need for some kind of authority-sharing mechanisms, *see* fn. 349.
173. *See in particular* FAO (2002b, ¶¶ 16 *et seq.*); *see also* FAO *SOFIA 2002*, Part 3, pp. 91–95.
174. *See, e.g.*, WWF (1998a, Table 1 and fn. 41).
175. *Id.* For a brief legal analysis of this debate, *see* ¶ V.B.2(f).

economies of some coastal and small island developing states,[176] and thus proposes a nuanced approach to these disciplines. (*See* ¶ V.D.2(b).)

(a) **Access arrangements are common and diverse.** In the period following the establishment of the 200 mile EEZ limit and the subsequent entry into force of the UN Convention on the Law of the Sea (UNCLOS) in the 1970s, international fisheries access agreements have proliferated.[177] In some regions, fishing by foreign fleets under access agreements far exceeds fishing by coastal state fleets.[178] The majority of fishing access agreements are concluded between governments, although some are concluded directly between governments and private entities.[179] In almost all cases, access is granted in return for payments made to the host government.[180] Payments in return for access may take various forms, including

- direct government-to-government financial transfers in the context of a formal quid pro quo (money for access);
- foreign aid paid in cash provided in the context of a bilateral relationship that includes the granting of fisheries access;
- other forms of foreign aid;[181]
- payments to domestic fleets to support the purchase of foreign access rights; and
- quid pro quo granting of access to domestic fisheries ("fish for fish" deals).

Moreover, the agreements may involve the simple acquisition of a right to fish, or may encompass more complex relationships, including joint ventures between distant water and coastal fishing enterprises, agreements to land fish for processing or consumption, or other commercial arrangements.

(b) **Access agreements are of special interest to developing-country coastal states.** Under international law, littoral states have a legal right, and perhaps even an obligation, to grant foreign access to their underutilized fish stocks.[182] In some cases, payments in return for such access make an important contribution to the economies of developing countries. When coupled with local development

176. *See, e.g.*, TN/RL/W/136 (Small Island States, July 14, 2003); *see* also ADB (2003).
177. Access agreements are explicitly endorsed by the UN Convention on the Law of the Sea (UNCLOS). UNCLOS Art. 62(2) appears to require coastal states lacking the capacity to make full use of their fisheries to give other states access to the "surplus." Article 62(4) of the Convention specifically contemplates the payment of access fees. The European Union, for example, had 26 active access agreements in force between 1993 and 1999, mainly with African and Indian Ocean coastal states. *European Parliament ("Europarl") Factsheets 1999–2002* (European Communities 2000, § 4.2.4) (http://www.europarl.eu.int/factsheets/4_2_4_en.htm; *see* Other Government Documents under References). The FAO maintains a database on fisheries agreements, *see* FAO (1999b).
178. *See* WWF (2001b) ("In some regions of the world, such as West Africa and the South Pacific, fishing by distant water fleets under bilateral access agreements accounts for the vast majority of the fishing within their EEZs").
179. *See* FAO (1999b, fig. 3). In addition, increasingly complex "joint venture" arrangements have resulted in what are essentially multiparty agreements.
180. In this section, and throughout this paper, the term "payments" for fishing access is used broadly to cover direct monetary transfers as well as any other financial or "in kind" contributions made to host governments in return for access rights.
181. Early access agreements between the EU and Senegal, for example, have included compensation packages divided between direct payments paid to the Senegalese Treasury, support for the Ministry of Fisheries, support for the monitoring agency, bursaries for students, support for research institutes and programs, and support for the artisanal sector. Johnstone (1996, 8).
182. *See* UNCLOS Art. 62.

strategies, access agreements may also help integrate developing-country fishing or fish-processing industries into the global economy.[183] And if properly designed and implemented, access agreements can help promote conservation and sustainable fisheries management—indeed, developed countries entering into access agreements with developing countries should be seen as carrying special obligations to ensure these agreements help provide assistance, technology transfer, and the knowledge needed to accomplish this.

For these reasons, it is necessary to recognize the significant role access agreements play in the domestic and foreign policies of some developing countries. It is also important to recognize the significance of government-funded access agreements to some developed countries, which may enter into access agreements as a means to create employment for their domestic fleets (in effect, to export overcapacity), or to maintain a "domestic" supply of fish.[184,185]

(c) **Access arrangements can have beneficial or harmful impacts on resource management and coastal state economies.** There is no question that access agreements (and the payments associated with them) can provide important resources to developing-country governments and societies. Access payments can also directly benefit fisheries resources where they are used to help improve resource management. Too often, however, access arrangements have been concluded on terms more favorable to the short-term economic interests of the developed country and its distant water fleet than to the host country or its fishery. Access agreements have too often been associated with the overexploitation of host country resources or with the irresponsible exportation of excess fishing capacity into foreign waters (or with both).[186] The mixed potential of access agreements has been widely recognized by governments, intergovernmental authorities, and nongovernmental organizations (NGOs).

(d) **Government payments for fisheries access confer real domestic commercial advantages, with strong potential to distort trade.** Government transfers in conjunction with access agreements constitute a significant portion of all fishing subsidies. For example, in 2000, EU access payments agreements accounted for almost a quarter of the EU's fishing subsidies budget.[187] In the United States, access payments on behalf of the western Pacific tuna fleet have been $14 million per year. These and other access payments clearly reduce the cost of production for the beneficiary fleets, and they are widely considered to produce trade distortions.[188]

183. *See* TN/RL/W/136 (Small Island States, July 14, 2003).

184. The national origin of wild-capture fish is determined by the flag of the fishing vessel, not the territory in which the fish may be caught.

185. Access arrangements can also have important economic dimensions for developed-country fleets. In 1993, for example, fishing in "non-adjacent" waters constituted 47 percent of the fishing carried out by Spain's national fleet. Johnstone (1996, 3).

186. *See, e.g.*, UNEP (2001) (the Argentinean case); Haynes (2003); BBC News (2001); CFFA (2003); de Vries (1996); United Kingdom (Parliament) (2003) (in "Other Government Documents" section of References). Regarding EU policies in this regard, *see* fn. 21 and accompanying text.

187. IEEP (2000b, Table 1) (based on EU funding exclusive of member state aids). The EU currently maintains access agreements with around 20 countries.

188. *See, e.g.*, Stone (1997, p. 525 and n. 94) ("From a trade perspective, all these payments are distorting"). Interestingly, the trade effects of access agreements may sometimes return benefits to the host country as well. *See* Johnstone (1996, 29) (Senegal may have granted EU access rights as an indirect way to benefit from the sale of fish from its EEZ in Europe, where EU nontariff barriers made export otherwise impossible).

(e) **Accordingly, access payments should be permitted—but also strictly disciplined—by new WTO disciplines on fishing subsidies.** Recent years have seen an increase in international efforts to ensure that access agreements are equitable and support the husbandry of fisheries.[189] As discussed in ¶ V.D, WTO rules can and should make an appropriate contribution to these efforts by adopting rules that allow, but strictly discipline, access payments.

(f) **Access payments arguably fall within current SCM rules.** As noted earlier, WWF believes current SCM rules should be considered to cover access payments. Accordingly, the improvement of the SCM definition in this regard requires only clarification of the existing terms, rather than any substantive expansion of the scope of Article 1.1.

(i) **Government-to-government payments are "financial contributions" within the meaning of Article 1.1(a)(1)(i).** SCM Article 1.1(a)(1)(i) states that a "subsidy" may exist if "a government practice involves a direct transfer of funds...." Some observers argue that financial transfers to foreign governments (rather than to domestic fishing enterprises themselves) are excluded from the SCM on the grounds that such transfers are not sufficiently "direct" within the meaning of Article 1.1(a)(1)(i).[190] But the term "direct" in that clause does not mean "directly to the subsidized party." For a subsidy to exist under SCM Article 1, there must be both a "financial contribution" from a government and a "benefit" conferred. Article 1.1(a) defines the term "financial contribution"; the "benefit" requirement is set out separately in Article 1.1(b). As implied by this separate treatment, and as confirmed by recent WTO jurisprudence, it is the benefit, not necessarily the financial contribution, that must run to the subsidized party. As one recent panel put it:

> [A] "financial contribution" does not have to be bestowed directly on a company in order to confer a "benefit" on that company. For example, one company may be found to "benefit" from a "financial contribution" conferred on another company.[191]

The word "direct" in Article 1.1(a)(1)(i) operates only to define one form of a financial contribution—*i.e.*, the actual transfer of money. Article 1.1(a)(1) goes on to identify other forms of "financial contribution" that implicitly allow (or even depend on) the making of the contribution to a party other than the ultimate recipient of the subsidy.[192]

(ii) **Access payments also arguably constitute the provision of "goods or services" within the meaning of Article 1.1(a)(1)(iii).** SCM Article 1.1(a)(1)(iii) holds that the provision of goods or services (other than "general infrastructure") constitutes a "financial contribution." This language appears

189. *See, e.g.*, WWF (2001b); CFFA (2003); IEEP (2003a); ICSF et al. (2003).
190. This at least appears to be the objection raised by both Porter (1998b) and Stone (1997); *see* fn. 122 and accompanying text in this paper.
191. *United States–Countervailing Duties on UK Steel,* fn. 69 (under Formal WTO Documents/WTO and GATT Cases in References). With regard to the definition of "benefit" under SCM Art. 1.1(b), *see* ¶ V.B.2(d).
192. Article 1.1(a)(1)(iv), for example, refers to the making of a financial contribution through an intermediary funding mechanism, potentially including a private body.

intended to reach any government action that provides capital or operating resources to specific industries on terms better than could be obtained on the open market. Access payments, regardless of their form, are tantamount to the provision of foreign fishing licenses to a domestic industry, in a context in which the only alternative for the industry would be to purchase the licenses themselves.[193] It would be inconsistent with the policy clearly intended by the SCM to exclude such payments from the definition of "subsidy."

V.B.3 Public "fisheries management services" should not be considered "subsidies" within the meaning of the SCM. Some economists, and perhaps some governments, consider the provision of public fisheries management services (including, *e.g.*, stock assessments, regulatory enforcement, licensing, etc.) to be a subsidy unless the full costs of those services are recovered from the industry.[194] But treating a regulatory function commonly carried out by governments as a subsidy would likely be inconsistent with the current jurisprudence of the SCM. And even if the economist's view may hold some theoretical water, treating management services (or even the simple right to fish) as a subsidy would hinder efforts to improve fisheries management. In general, the management of fisheries is commonly underfunded—among the reasons that fisheries management is so often poor is that the resources necessary to support it are not forthcoming. Whatever the merits of seeking to impose the costs of management on the fishing industry, a rule essentially requiring this would be counterproductive in many cases.

V.B.4 The "fishing industry" should include all "wild capture" fisheries. Consistent with the Doha mandate, new WTO disciplines on fishing subsidies should aim at improving the sustainable economic management of wild-capture fisheries (marine or freshwater), wherever located.[195] As noted in ¶ I.F.2, the current negotiations are aimed in substantial part at reducing those economic harms that result from the subsidized race for a dwindling natural resource. The fishing industry should thus be considered to comprise those enterprises engaged in the extraction of that resource. Other economic activities that have an impact on fisheries or that affect the economics of fishing (such as aquaculture, the construction of dams, or coastal zone management) may pose significant challenges to the achievement of sustainable fisheries. WWF analysis and proposals, however, are focused on fishing subsidies to wild-capture fisheries.[196]

---

193. Some economists might argue that a similar analysis suggests uncompensated access to domestic fisheries also constitutes a subsidy. This theoretical analysis, however, fails to take account of significant real-world policy differences between the two cases. *See* WWF's discussion of "public fisheries management services" in ¶ V.B.3.

194. This "full cost recovery" approach is often coupled with arguments in favor of creating and allocating tradable property rights to the fisheries resources themselves—that is, in transforming a publicly held, unpriced resource into a privately controlled resource susceptible to market valuation. This approach in turn may suggest that the mere grant of a free right to fish could constitute a subsidy.

195. New disciplines should thus avoid any inappropriate distinctions or exclusions, such as more relaxed disciplines for "domestic" fisheries than for "high seas" fisheries.

196. The exclusion of aquaculture here should not be misconstrued. In addition to its capacity for causing substantial damage to coastal habitats, aquaculture can have significant impacts on the biology and commercial life of wild-capture fisheries. For example, much of the feed used to raise farmed fish comes from wild-capture fish products. The FAO has estimated that the production of farm-raised carnivorous fish and crustaceans (which together form the majority of aquaculture products) absorbs more dietary fish resources than it produces by a factor of two to three

(Footnote 196 continues on next page)

V.B.5 Subsidies to ports, processors, or other actors should be considered "fishing subsidies" if they benefit fishing enterprises. While the focus of new fishing subsidies disciplines should be on fishing enterprises, subsidies paid to or benefiting other ancillary actors (such as fish processors, transporters, marketers, ship builders, gear makers, port operators, and so on.) should be considered fishing subsidies if they also benefit fishing enterprises. The determination whether a particular subsidy confers a benefit on a fishing industry or enterprise would be subject to the normal jurisprudence of the SCM with regard to pass-through subsidies.[197] In addition, such subsidies would also have to meet the "specificity" test set forth in SCM Article 2, where applicable (but *see* ¶ V.C.7). Nevertheless, considering the particular treatment to be given fishing subsidies, the possibility of pass-through subsidies qualifying as "fishing subsidies" should be explicitly contemplated on the face of the new rules.

V.C Prohibiting the most harmful fishing subsidies—the "red light"

V.C.1 The most harmful fishing subsidies should be subject to an outright ban.

(a) **The crisis in world fisheries requires a strong response.** As detailed in ¶¶ I.A *et seq.*), the dramatic decline in many of the world's most valuable fish stocks, coupled with the substantial overcapacity of the fishing industry (when considered on a global basis) amounts to an unprecedented biological and industrial crisis for the world's fisheries. Under these circumstances, WWF believes that harmful fishing subsidies need to be subject to a strong and effective response. While it will be important not to "throw the baby out with the bath water," the most harmful classes of fishing subsidies should simply be prohibited.

(b) **An *ex ante* prohibition is most effective.** There is little doubt that the prohibitions of the SCM's red light have proved more effective than the more nuanced *ex post facto* disciplines of the amber light. While WWF believes that a "clarified and improved" amber light can play an important part in new WTO fishing subsidies disciplines (*see* ¶ V.E.6(b)(i)), the simple policy guidance offered by an *ex ante* prohibition will likely remain the most effective approach to subsidies disciplines.

(c) **An *ex ante pro*hibition reduces the risk of crossing the "thin green line."** As discussed in ¶ III.C, the risk of entangling WTO decision makers in matters of fisheries policy is substantially higher for rules that require evaluation of a subsidy's impacts than for rules that look to the objective features of a program's design. The

(Footnote 196 continued)

(FAO 1997, § 2.1). Aquaculture, which is one of the fastest growing sectors on Earth, can also create substantial commercial competition for wild-capture fish products, driving down prices and prompting increased pressure on stocks. Meanwhile, escapes of specimens from some fish farms threaten to pose increasingly dangerous biological competition with wild stocks or alterations in their genetic composition. Alongside these direct links between aquaculture and fisheries is the fact that aquaculture is heavily subsidized in many places—sometimes out of the same subsidy programs that support wild-capture fishing. *See* APEC (2000). In short, sustainable economic and biological management of fisheries likely cannot be fully achieved without attention to aquaculture. For this and other reasons, subsidies to the aquaculture sector warrant increased international attention and discipline, possibly including at the WTO. However, such disciplines would have to look quite different from the kinds of fishing subsidies disciplines now under negotiation at the WTO. Disciplines on such subsidies would not, for example, need to focus on the kind of "access to production" effects that are so relevant in the case of fishing subsidies (*see* ¶ IV.B.4(e)(i) and V.F.3).

197. *See, e.g.*, *United States—Softwood Lumber* ¶¶ 7.82ff. (under Formal WTO Documents/WTO and GATT Cases in References).

same clarity and evidentiary simplicity that make the red light more effective than the amber light also make it less likely to require judgments that fall beyond the sole competence of the WTO.

(**d**) **A red light for fishing subsidies is consistent with other efforts to strengthen SCM disciplines.** Proposed changes to the current red light rules have already entered the discussion of SCM rules beyond fishing subsidies. The United States, for example, has proposed expanding the red light category, possibly by including some subsidies that previously fell within the now expired dark amber provisions of SCM Article 6.1.[198]

V.C.2 There is substantial support for a "red light" for fishing subsidies.

(**a**) **International calls for eliminating certain fishing subsidies imply a red light.** As noted in ¶ I.D, governments have issued several multilateral calls for eliminating certain classes of fishing subsidies.[199] In the context of the SCM, this can only really mean crafting a red light for fishing subsidies, since the lesser discipline of an amber light, at least under the present rules, is not an instrument for eliminating subsidies (*see* ¶ IV.B.2).

(**b**) **Proposals for WTO prohibitions on certain fishing subsidies have been tabled.** At least three delegations have tabled negotiating papers proposing a red light for fishing subsidies.[200] The concept of a red light for certain fishing subsidies has subsequently received visible support from a significant number of other delegations.[201]

V.C.3 New red light provisions should cover three broad categories of fishing subsidies.

As a general matter, three classes of subsidies should fall under a new red light prohibition: (a) subsidies that contribute to fishing capacity or effort; (b) subsidies that contribute to IUU fishing; and (c) subsidies pursuant to "domestic supply" policies. These prohibitions should be subject to certain narrowly limited exceptions (*see* ¶ V.D) and to provisions for the "special and differential treatment" of developing countries (*see* ¶ V.H).

(**a**) **Subsidies that contribute to fishing capacity or effort**[202]**—**Given the direct links between subsidies and increased fishing capacity and effort, it is clear that high priority should be given to disciplining subsidies that are directed at either of these.

(**i**) **Many governments support prohibitions on capacity- or effort-enhancing subsidies.** Among delegations supporting the fishing subsidies negotiations, a solid consensus is emerging in favor of a red light that focuses on subsidies that contribute to fishing capacity or effort. In fact, all of the specific proposals

198. TN/RL/W/78 (United States, March 19, 2003), p. 2. Australia has raised questions about the expansion proposed by the U.S. TN/RL/W/89 (Australia, May 1, 2003), p. 1.
199. *See, e.g.*, WSSD Plan, ¶ 31(f); IPOA-Capacity ¶ 26; UN CSD (1996, ¶ 21(c)).
200. *See* TN/RL/W/77 (U.S.), ¶ 5; TN/RL/W/82, (E.U.) ¶ 4(i); TN/RL/W/115 (Chile), pp. 2–3.
201. *See* TN/RL/M/7 (Summary report of the meeting held on March 19–21, 2003), ¶ 23 ("Many participants reacted positively to the idea of expanding the 'red light' (prohibited) category of subsidies for fisheries subsidies with negative effects," [as put forward by the U.S. in TN/RL/W/77]).
202. For a brief discussion of the terms "capacity" and "effort," *see* ¶ V.C.4(a).

tabled so far give prominence to this approach.[203]

(ii) **The negotiating submissions to date focus on "capacity," but implicitly comprise "effort."**[204] The submissions to the WTO negotiations so far have made greater use of the term "capacity" than of "effort."[205] The specifics of some of the proposals, however, refer to classes of subsidies that would more commonly be classified as "effort-enhancing" than "capacity-enhancing."[206] Moreover, delegations have made repeated references to "overfishing," often as a complement to the term "overcapacity."[207] While "overfishing" can be taken to mean "depletion of stocks," it can also be viewed as an action in itself that in turn has the consequence of depleting stocks.[208] In this sense, it refers to fishing effort. In short, notwithstanding the infrequent use of the term "effort," subsidies that are effort-enhancing have been put squarely on the negotiating table.

(b) **Subsidies that contribute to IUU fishing—**As noted in ¶ I.A.3(c), "illegal, unreported, and unregulated" fishing has been recognized as a leading threat to the sustainability of global fisheries, and heads of state meeting at the recent World Summit on Sustainable Development have specifically called for the elimination of subsidies that contribute to IUU practices.[209] It is thus interesting that IUU fishing

203. The U.S. proposal states that "the goal of clarified and improved rules [on fishing subsidies] is to provide better disciplines on government programmes that promote overcapacity and overfishing, or have other trade-distorting effects." TN/RL/W/77 (United States, March 19, 2003), ¶ 3. It goes on to call for expanding the red light category "expressly to cover those fisheries subsidies that directly promote overcapacity and overfishing, or have other direct trade-distorting effects." *Id.* ¶ 5. **The EC proposal** focuses on "the problem of subsidies and overcapacity" and calls for prohibitions on certain types of capacity-enhancing subsidies. TN/RL/W/82 (European Communities, April 23, 2003). (The EC has also reportedly made oral statements in the Rules Group clarifying that the list offered in W/82 is not meant to be exhaustive.) **Chile** has similarly called for new red light provisions covering "subsidies of a commercial nature, directly geared towards lowering costs, increasing revenues, raising production (by enhancing capacity), or directly promoting overcapacity and overfishing...." TN/RL/W115 (Chile, June 10, 2003), p.2. **China** has also urged negotiators to focus on "government subsidies that promote overcapacity and overfishing or have other trade-distorting effects," although the country has not yet voiced support for new red light provisions. TN/RL/W/88 (China, May 1, 2003), p. 1. This focus on overcapacity and overfishing dates from the outset of the negotiations. **An early submission by various Friends of Fish** noted: "A distinctive feature of fisheries sector subsidies is the effect that over-capacity and over-fishing by subsidised producers can have in limiting other producers' access to the shared resource." TN/RL/W/3 (Australia, Chile, Ecuador, Iceland, New Zealand, Peru, the Philippines, and the United States, April 24, 2002), p.1. This submission went on to state that among the "key problems" caused by fishing subsidies is that "these subsidies can contribute to the environmental problems caused by excessive fishing capacity, most importantly the depletion of fish stocks." *Id.* ¶ 3.

204. Regarding the use of the terms "capacity" and "effort," *see* ¶ V.C.4(a).

205. So far, only the EC's paper (TN/RL/W/82) has employed the word "effort."

206. For example, the Chilean red light proposal (TN/RL/W/115) includes "subsidies that contribute to reducing the costs of production factors." Presumably, this refers to government supports such as fuel subsidies—a subsidy to a key variable cost, the principal impact of which would be to increase fishing effort.

207. In addition to the submissions cited in fn. 203, *see* WT/CTE/M/29 (Minutes of CTE meeting of March 21, 2002), ¶¶ 41 *et seq.* (reporting frequent references during first post-Doha CTE meeting to concerns with link between fishing subsidies and overfishing).

208. *See, e.g.*, WT/CTE/GEN/10 (Statement by the director of the WTO Rules Division, April 11, 2003), ¶ 4 ("The main environmental damage attributed by the demandeurs to fishery subsidies, via the fostering of overcapacity and overfishing, is the depletion of world fish stocks.").

209. *See* ¶¶ I.A.3(c) and I.F.3.

has so far been given little attention in the WTO fishing subsidies negotiations.[210] WWF considers that the case for including subsidies to IUU fishing within new red light prohibitions is compelling, for several reasons:

(i) **IUU fishing is particularly damaging and illegitimate.** As noted in ¶ I.A.3(c)(i), IUU fishing can have devastating consequences. Since it is also considered illegitimate by definition, good public policy demands that governments avoid supporting it directly or inadvertently with funding. Subsidies to IUU fishing are especially pernicious because IUU fishing detracts directly from efforts to achieve improved fisheries management.

(ii) **IUU fishing is linked to overcapacity.** IUU fishing exacerbates the problem of overcapacity by creating capacity that is invisible and impossible to address through capacity management policies. Conversely, overcapacity is often a driver of IUU fishing, particularly when vessels exit (or are actively exported) from depleted "first world" fisheries only to wind up fishing under "flags of convenience" in under-regulated fisheries.

(iii) **IUU fishing distorts competition.** In the words of the IPOA-IUU, IUU fishing "leads to the loss of both short- and long-term social and economic opportunities."[211] A recent global survey identified "the significant economic gains available through IUU fishing" as one of the principal drivers of the problem, pointing out in particular that the motive to avoid costs borne by legal fishing operations increases as effective management improves.[212]

(iv) **IUU fishing particularly injures developing countries.** Because developing countries often lack the resources necessary to maintain effective enforcement of their fisheries regulations, they are especially vulnerable to IUU activities, often in the form of fishing by distant-water vessels from developed countries.[213] Small Island Developing States have expressed particular concern,[214] while the UN General Assembly has repeatedly noted the impact of IUU fishing on developing countries.[215]

(v) **Governments are subsidizing IUU fishing.** There is no question that some subsidies wind up supporting IUU activities. While the lack of transparency in fishing subsidies programs and the hidden nature of IUU fishing make detailed proof difficult to obtain, substantial evidence of the diversion of

210. In a rare reference, **the U.S. paper takes an indirect approach to IUU fishing** when it says, "Better disciplines on fisheries subsidies that promote overcapacity and overfishing should also contribute to reductions in illegal, unreported, and unregulated (IUU) fishing...." TN/RL/W/77, ¶ 3. **Japan and Korea** have, however, made repeated reference in their submissions to the need to address the IUU problem, albeit without acknowledging the link to subsidies. *See* TN/RL/W/11 (Japan, July 2, 2002), ¶ 8; TN/RL/W/52 (Japan, February 6, 2003), ¶¶ 10-1; TN/RL/W/17 (Korea, October 2, 2002), p. 6.

211. IPOA-IUU, ¶ 1.

212. Bray (2000a, ¶ 2.2).

213. *See* Tokrisna (2000). Particular examples include Namibia, which has complained of IUU fishing by Spanish vessels within its EEZ; Senegal, another main destination for European distant-water fleets, which states that most IUU fishing within its EEZ is carried out by foreign enterprises; the waters of the small island states of the South Pacific, where the Fisheries Forum Agency has estimated serious nonreporting and under-reporting of catches by Japan, Korea, and Taiwan; etc. *See also* Mande et al. (2003) (citing particular concern with piracy by EU vessels, as well as enterprises from Japan and China).

214. *See* Bray (2000a, App. 2, ¶ 14, and Annex A).

215. *See, e.g.*, the UN General Assembly resolutions cited in Bray (2000a, App. 2, ¶ 29).

subsidies to IUU fishing exists, including the following:

- There are high-value fisheries in which IUU fishing and subsidization are highly correlated.[216]
- Nongovernmental experts have reported IUU fishing linked to subsidies.[217]
- Governments have recognized that subsidies flow to IUU fishing, and have called for such subsidies to be eliminated.[218]

(c) **Subsidies pursuant to "domestic supply" policies:** As noted in ¶ IV.B.1(d)(ii), some fishing subsidies aim at increasing or maintaining a country's domestic supply of fish, Whatever their original intention, these subsidies obviously can be highly trade distorting, and the policies with which they are associated—of maintaining domestic fleets—are directly responsible for significant fishing overcapacity. (Note, however, the possible role of domestic fish supply subsidies in the food security strategies of some developing countries—*see* fn. 136 and ¶ V.H.3(b).

V.C.4 A ban on "capacity- or effort-enhancing" subsidies can focus on specific kinds of subsidy programs. Capacity- or effort-enhancing fishing subsidies can generally be identified by examining the design (or, in some cases, the design and context) of particular subsidy programs. Thus, although the legal language establishing the prohibition can and should be relatively broad, the scope of the ban can be more precisely defined in illustrative lists of subsidy types.

(a) **A note about the terms "capacity" and "effort":** This paper, like the dialogue around fishing subsidies generally, makes frequent use of the terms "fishing capacity" and "fishing effort." These important concepts warrant a few preliminary remarks:

(i) **The technical use of these terms is the subject of vigorous specialized debate.** The words "fishing capacity" and "fishing effort" suffer from two problems: first, fisheries economists are engaged in an ongoing and highly technical debate over what precisely these terms mean and how precisely they should be measured; and second, nonspecialists often utter them with loose imprecision.[219] As a result, it can be hard to employ these terms with much certainty of being clearly understood. Similarly, the terms "overcapacity" and "excess capacity" are used loosely and interchangeably by some, but are carefully kept distinct by others.[220]

216. For example, as noted in ¶ I.A.3(c)(i), the majority of swordfish and tuna landings in Spain have at times proved to be illegal catches. Yet the Spanish deep-water fleet is one of the most highly subsidized in the world. The Spanish fishing sector is the main recipient of EU fishing subsidies, receiving 46.3 percent of the programmed aids in the main EU fishing subsidies program (FIFG) from 2000 to 2006 (a total of approximately ¤ 1,712.1 billion). Spain is also the European country that has received the heaviest subsidization per tonne of captured fish (IEEP 2002b).

217. *See, e.g.*, Bray (2000a, ¶¶ 189 and 202) (citing WWF and Greenpeace reports); Darby (2003) (linking subsidies to illegal toothfish fishing); Dallmeyer (1989) (subsidies supporting illegal fishing by motorized artisanal fleet in Australian waters).

218. *See* WSSD Plan ¶ 31(f); IPOA-IUU ¶ 23.

219. For a basic introduction to these terms, *see* Scottish Fisheries Research Service (1999). For an example of a more arcane technical discussion, *see, e.g.*, FAO (1999a, Ch. 1); *see* also Iceland (2004) (in the Other Government Documents section of References).

220. The terms "**overcapacity**" and "**excess capacity**" are sometimes used to distinguish the short-term microeconomic problem of having more capacity than can be used at profit-maximizing levels of production ("excess capacity") from the long-term overinvestment in fishing capital that results in under-regulated, open-access fisheries. *See* FAO (2002a, Part III, §§ 1.2 and 2.1–2.3); *see* also Porter (1998b, 11–14).

(ii) **The details of this debate are not strictly relevant in the WTO context.** As explained in the following paragraphs, the modifications to WTO rules proposed in this paper would not require the WTO to become involved in the technical debate over the definitions or measurement of "capacity" and "effort." On the contrary, by adopting broad working definitions of these terms, WTO policy makers can avoid entanglement in this debate while crafting the most effective possible rules.

(iii) **In this paper, "capacity" and "effort" are given their basic general meanings.** This paper takes a relatively simple and common approach to defining these words—roughly as follows:

- **"fishing capacity"** is the extractive potential of the (mainly physical) capital available to catch fish, often measured in terms of vessel tonnage, engine size, or both. The extractive capability of fishing gear is also an element of capacity, and human capital (available labor or skill) may be included as well;
- **"fishing effort"** is the degree to which fishing capacity is actually employed. Sometimes effort can be crudely equated with fishing activity (*e.g.*, days at sea), although it is more correct to say that effort is the product of fishing capacity and fishing activity.

(iv) **In the text of new WTO disciplines, the terms "capacity" and "effort" should be given broad operational definitions.** To be effective, and to avoid drawing the WTO across the "thin green line" (*see* ¶ II.C), new disciplines must not require the WTO to enter into technical or legal debates over the precise meanings of these terms.

- **The terms should cover all reasonable and current definitions.** Given the broad policy objective underlying the new red light—and its urgency—the ban should cover subsidies that enhance capacity or effort under any reasonable definition that has gained currency within the fisheries community. For example, it should never be necessary to ask whether capacity is a function of vessel tonnage or of engine power; rather, any subsidy of a kind that tends to enhance either type of capacity should fall within the ban.

(v) **The terms "overcapacity" and "overfishing" should be avoided, other than in hortatory language.** While discouraging overcapacity and overfishing is certainly one of the ultimate policy goals that should underlie fishing subsidies disciplines, the concepts of overcapacity and overfishing are inappropriate as the basis for any new red light category, for three reasons:

- Neither term is easily applied in the context of an *ex ante* prohibition. Since no government ever designs a subsidy to encourage overcapacity or overfishing, these terms must either lead to "effects-based" criteria (*i.e.*, did a particular subsidy lead to overcapacity or overfishing?) or depend on proof that a given subsidy is likely to cause overcapacity or overfishing. In either

case, the legal standard would not be easily applicable as an *ex ante* prohibition.[221]

- **Both terms risk overstepping the "thin green line."** The determination whether a given level of capacity or fishing is or is likely to become excessive would require difficult judgments about environmental facts and policies, which are beyond the WTO's competence.
- **Paradoxically, a focus on "overcapacity" or "overfishing" could be too narrow.** In light of the urgency of the current fisheries crisis—and considering both the interdependence of fisheries and the mobility of fishing vessels—all but a very few capacity- or effort-enhancing subsidies should be banned, not just those that can be tied more or less directly to overcapacity or overfishing.

(vi) **Similarly, the term "fishing pressure" should be avoided or used with care.** At times, this paper will seek to avoid the problems of distinguishing "capacity" from "effort" by using the term "fishing pressure." As used by some fisheries experts, "pressure" refers to the effects produced on the marine ecosystem by a combination of effort and capacity, without having to ask exactly how these latter terms are defined.[222] While one underlying policy goal should clearly be to eliminate fishing subsidies that promote unsustainable levels of fishing pressure, this term is too loose, and focuses too closely on resource effects, to be applied in the text of new WTO disciplines. Clarified and improved WTO language should concentrate on broad operational definitions of the terms "capacity" and "effort."

(b) **A basic WTO definition of "capacity- or effort-enhancing":** Arguably, any true subsidy to the fishing industry has the effect of lowering costs, and thus can potentially lead to increased capacity or effort. However, a strict legal prohibition should focus on those classes of subsidies that increase (or artificially maintain) fishing capacity or effort in a fairly direct and immediate manner.

(i) **The new prohibitions should be stated broadly, but should be accompanied by an illustrative annex.** Clarified and improved rules for fishing subsidies need to strike a balance between breadth and specificity. This can best be achieved by including language in the body of the agreement that is stated broadly enough to create a general norm, while supplementing that language with more detailed guidance in the form of an illustrative annex. This approach would follow the model of the current SCM prohibition on export subsidies,[223] as well as of

221. Of course, it would be possible to employ these terms while giving them definitions that would try to avoid this problem. For example, the prohibition could aim at "fishing subsidies of a kind that lead to overcapacity or overfishing," and then define these as "subsidies designed to increase or maintain fishing capacity or effort." While such an approach might have the benefit of stating the ultimate policy goal on the face of the new rule, it would require a somewhat strained definition of the primary terms, and in any case would continue to invite the kinds of *ex post facto* or speculative arguments a prohibition is meant to avoid.

222. Even the term "pressure," however, is not immune to confusion. *See, e.g.*, TN/RL/W/82 (EC, April 23, 2003), second paragraph under heading 2 (equating "pressure" with "effort").

223. SCM Art. 3.1(a) uses only 25 words to state one of the most basic and important norms of the SCM, but then offers several pages of supplementary guidance in Annex I (illustrative list of export subsidies), Annex II (guiding the definition of "consumption of inputs" for purposes of determining whether tax rebates or drawback systems are export subsidies), and Annex III (guiding the definition of "drawback systems").

other existing elements of the SCM.[224]

(ii) **Possible text:** A basic definition of "capacity- or effort-enhancing" subsidies might look something like this:

> Subsidies of a kind that if granted would likely have the direct effect of maintaining or increasing the capacity of a fishing enterprise, fleet, or industry to conduct fishing activities, or of maintaining or increasing the effort applied by an enterprise, fleet, or industry to fishing activities.

Note that this definition expressly adopts the **disjunctive "or"** to link the concepts of capacity-enhancing and effort-enhancing subsidies. This is important, because, as discussed in ¶ I.A.3(b), overcapacity is a significant problem in its own right, and subsidies that contribute to overcapacity should be subject to discipline with or without a provable link to increased fishing effort.

(c) **Examples of capacity-enhancing subsidies:** The following is a nonexhaustive list of capacity-enhancing subsidy types that should be included in an illustrative annex helping define the scope of the red light:

- subsidies to fishing vessel construction or repair;
- subsidies to vessel modernization or gear acquisition or improvement;[225]
- subsidies to maintain employment in the fishing sector;
- subsidies for the transfer of capacity to foreign or high-seas fisheries, including through joint ventures;
- payment or subsidization of payments for access to foreign fisheries;[226] and
- grants to support research and development of fishery technology.

(**Note:** Subsidies that include potentially "capacity enhancing" elements but which are granted in the context of capacity reduction efforts (such as "buyback" programs) would not be included within this definition, and are treated separately in ¶¶ V.E.4(d).

(d) **Examples of effort-enhancing subsidies:** The following is a nonexhaustive list of effort-enhancing subsidy types that should be included in an illustrative annex helping define the scope of the red light:

- subsidies contingent on fishing;
- fuel subsidies;

---

224. The SCM uses this approach to provide guidance on the **interpretation of substantive terms** (*see* Art. 6.1(a) (serious prejudice deemed where *ad valorem* subsidization exceeds 5 percent) and Annex V (guiding calculation of *ad valorem* subsidization)), as well as to provide **procedural guidance** for the fact-finding processes required to implement certain SCM norms (*see* Art. 6.8 (serious prejudice to be determined upon information submitted to the panel) and Annex V ("procedures for developing information concerning serious prejudice")); *see also* Art. 12.6 (authorizing authorities in national countervailing duty cases to conduct investigations on the premises of a foreign enterprise) and Annex VI (procedures for on-the-spot investigations).

225. The EC has proposed prohibiting "subsidies for marine fishing fleet renewal." TN/RL/W/82 (European Communities, April 23, 2003), p.2. Compare, however, IEEP's comments on the remaining room within the reformed EU CFP for vessel modernization (IEEP 2002a, 4–5).

226. The EC has proposed prohibiting "subsidies for the permanent transfer of fishing vessels to third countries." *Id.*

- bait or ice provided in kind;
- subsidies to marine insurance;
- subsidies to other operating costs; and
- promises to reimburse vessel owners for fines or impoundments imposed by foreign authorities.

(e) Exceptions to a ban on capacity- or effort-enhancing subsidies: Given that the potential for negative impacts of capacity- or effort-enhancing subsidies can depend on context-specific factors, some exceptions to the foregoing prohibitions are necessary. These are discussed in ¶ V.D.

V.C.5 A ban on subsidies to IUU fishing should establish a strong international norm. As discussed earlier in ¶ V.C.3(b), there is a clear need for the WTO to take a firm stand against the subsidization of IUU fishing. However, for the reasons outlined in the following paragraphs, the technical approach to doing this must be somewhat different from the approach proposed above for new red light provisions on capacity- or effort-enhancing subsidies.

(a) Several problems complicate efforts to craft an IUU subsidies rule. The role of the WTO in the fight against IUU fishing is important, but it is also limited by the nature of the international efforts to combat the IUU problem and of the subsidies that IUU fishing receives.

(i) The breadth and complexity of the fight: The fight against IUU fishing is in essence a fight to establish an "anti-IUU environment" by ensuring effective regulatory control in every one of the world's fisheries. It requires, in essence, that all fisheries be subject to competent and proactive governmental authority, that all fishing activities be transparent and tracked, and that all fishing regulations be effectively enforced. These three elements of the combat—which might be summarized as "licensing, reporting, and enforcement"—obviously imply a wide and complex range of positive government actions that lie far beyond the WTO's mandate. The commitments enshrined in the FAO IPOA-IUU clearly illustrate this reality.

(ii) The hidden and diffuse nature of the subsidies: Subsidies to IUU fishing differ from most other fishing subsidies in several important respects:

- No government explicitly designs subsidy programs to benefit IUU fishing;, and thus a design-based *ex ante* ban can be of only limited value;
- Almost any kind of fishing subsidy can potentially find its way into the hands of an IUU fisher, and thus disciplines cannot focus on particular subsidy types; and
- In many cases, only part of a subsidy program will be tainted by association with IUU activities, raising the question of what remedies can best be applied (*i.e.*, automatic withdrawal of the subsidy may seem extreme or even unproductive).

These characteristics raise questions about the practical value of a simple *ex ante* ban, particularly one resting on design-based criteria. Similarly, these facts

raise questions about the most appropriate and effective nature of the remedies available against IUU subsidies.

(iii) **The proactive and administrative nature of the necessary reforms:** As with the fight against IUU practices themselves, the eradication of subsidies to IUU fishing depends mainly on improved regulation and administration. Where governments have the political will to confront the problem, regulatory and institutional obstacles often arise:

- Combating subsidies to IUU fishing requires good coordination among the often disparate offices responsible for fisheries management policy, for regulatory enforcement, and for the administration of subsidy programs;
- These offices may lack the legal mandate to cooperate on preventing subsidies to IUU activities; and
- Institutional cultures and information flow may also present significant obstacles.

None of these challenges can be confronted simply by creating a WTO prohibition against subsidies to IUU fishing.

(b) **Despite these problems, the WTO has an important (albeit limited) role to play in the fight against IUU subsidies.** The problems outlined above reduce, but do not eliminate, the scope for effective WTO disciplines. Given the importance of the IUU issue, the WTO must find a way to make more than a rhetorical addition to the fight against IUU subsidies.

(c) **Basic elements of a WTO prohibition on subsidies to IUU fishing:** A new SCM red light provision for fishing subsidies should include at a minimum the following:

(i) **The articulation of a broad and strong international norm:** New fishing subsidies disciplines should include a fundamental and binding statement that subsidies contributing to IUU fishing activities are prohibited, and that WTO members shall neither grant nor maintain such subsidies. Negotiators should consider accompanying such language with a broad hortatory statement recognizing that subsidies to IUU fishing are particularly pernicious and distorting.

(ii) **An obligation to withdraw subsidies to enterprises engaged in IUU activities:** Where a subsidy can be shown "more likely than not" (including by circumstantial evidence) to have contributed to IUU activities of particular enterprises, governments should be obliged to withdraw all subsidies to those enterprises.[227] Moreover, enterprises found to have engaged in IUU activities

227. Some governments have already been taking steps in this direction. The EC, for example, has adopted a regulation forbidding subsidies for the transfer of fishing vessels to countries "that have been identified by the relevant regional fisheries organisations as countries that permit fishing in a manner which jeopardises the effectiveness of international conservation measures." *See* EC Council Regulation (EC) No. 179/2002 of 28 January 2002 (*see* full citation in the National and Local Laws and Regulations section of References. (Note that this regulation will be superseded by the more recent decision to end subsidization of export of capacity altogether—*see* fn. 21.) Similarly, the regional government of Galicia, Spain, has moved to deny subsidies to Galician vessels fishing under flags of convenience rather than under the regional government's official vessel registry. *See* Xunta de Galicia, Order of May 8, 2002 (giving force to the Xunta's Decree 420/1993 of December 17, 1993) (both regulations are listed in the National and Local Laws and Regulations section of References).

(whether subsidized or not) should be barred from receiving fishing subsidies for a determined period (*e.g.*, five years).[228] Members should be required to notify the WTO of any cases in which a subsidy has been withdrawn (or partly withdrawn) owing to the discovery of IUU activities (*see* ¶ V.G.8).

(iii) **An obligation to avoid or withdraw subsidies to "unregulated" fisheries:** As discussed in ¶ V.C.5.(e), the definition of "IUU" should include fishing in any fishery not subject to a management regime. This provision is intended particularly to cover high seas fisheries not under the jurisdiction of active international management. Since it is possible to know with relative ease whether a fishery is "unregulated" in this sense, this case provides one of the only situations in which the red light for subsidies to IUU fishing can function as a clear "design-based" *ex ante* prohibition.[229]

(iv) **A presumption of violation in the absence of a current national plan under the IPOA-IUU:** Given the importance of supporting international efforts to combat IUU fishing, and considering the substantial difficulties associated with the gathering of evidence of IUU activities, a new red light provision should establish that any fishing subsidy supporting activities in a fishery not covered by a current national plan of action in accordance with the FAO IPOA-IUU shall be rebuttably presumed to be contributing to IUU activities.[230]

(d) **Other possible elements of a WTO rule:** A more aggressive approach to IUU subsidies might include elements such as those articulated below. The first two of these would likely raise the need for joint administration under authority-sharing mechanisms of the kind described in ¶ V.I.4. The possible elements are as follows:

(i) **An obligation to terminate programs tainted by a pattern of IUU abuse:** A "remedies" provision should also establish that where a given subsidy program can be shown "more likely than not" (including by circumstantial evidence) to be tainted by a pattern contributing to IUU activities, governments must withdraw the subsidy program altogether. Withdrawal of such subsidies should be subject to mandatory notification (*see* ¶ V.G.8).

(ii) **An obligation to avoid or withdraw all subsidies to a tainted fishery:** In addition to the obligation to withdraw entire subsidy programs tainted by a

228. Both of the provisions in the preceding paragraph should also apply to any enterprises "**substantially related**" to enterprises found to have engaged in IUU activities. The "substantially related" test should combine considerations of corporate control and flows of profits, along with other economic tests such as those used to establish pass-through subsidies (*see* ¶ V.B.5). The identity of vessel captains should also be a highly relevant consideration.

229. This provision also provides an extension of the "patently unregulated" concept used elsewhere in WWF's proposed rules (*see* ¶¶ II.C.6 and V.D.3(b), and fn. 172). A fishery that is wholly unregulated (other than by generally applicable international legal norms) is the extreme case of "patently unregulated." The provision suggested here would essentially say that the complete absence of proactive regulatory control is *per se* a condition warranting the prohibition of all subsidies to the fishery in question.

230. The arguments necessary to rebut such a presumption would likely be similar to those needed to avoid a finding that a fishery was "patently undermanaged" (*see* ¶ V.D.3(b)), and so this provision may implicate the need for authority-sharing mechanisms of the kind described in ¶ V.I.4. **AN ALTERNATIVE** would be simply to make such a presumption unrebuttable. Some observers may complain that this approach looks like using the WTO to enforce commitments made in another forum. That is not, however, the case. What is at stake here is the right to subsidize, and not any general question of compliance with other instruments.

pattern of IUU abuse, governments could be obligated to withdraw all subsidies benefiting enterprises active in fisheries shown "more likely than not" (including by circumstantial evidence) to be tainted by a pattern of IUU abuse. Withdrawal of such subsidies should be subject to mandatory notification (*see* ¶ V.G.8).

(**iii**) **A hortatory call for proactive legal and administrative steps:** Negotiators should consider crafting language to encourage governments to take legal and administrative steps to avoid the subsidization of IUU fishing. Such a hortatory section could be included in the body of a new red light provision, in a footnote or annex thereto, or even in a wholly separate (and possibly "plurilateral") voluntary declaration to parallel the voluntary commitments enshrined in the IPOA-IUU. The recommended legal and administrative steps might include, for example, the following:

- Establishment of an explicit legal requirement making eligibility for subsidies contingent on full compliance with all applicable regulations and reporting requirements, whether domestic, foreign, or international;[231]
- Criminalization of the use of public funds for participation in IUU fishing activities (*i.e.*, to allow monetary or other punishments to apply to violators);
- Establishment of formal mechanisms to increase functional coordination between regulatory authorities and agencies administering fishing subsidies (including by international agreement, where necessary);
- Inclusion of actions to prevent subsidization of IUU activities in national action plans developed and submitted under the IPOA-IUU;
- Active review of the operation of existing subsidy programs to ensure compliance by grantees with all applicable regulations and reporting requirements; and
- Establishment of an ombudsman or tip line to encourage private reporting of IUU activities by enterprises receiving subsidies.

(**iv**) **Special WTO reporting requirements:** In addition to the mandatory notification of subsidies withdrawn due to the discovery of their contribution to IUU activities (*see* ¶¶ V.C.5(c)(ii) and V.C.5(d)(i)-(ii)), new rules could require either:

- that every fishing subsidy reported to the WTO be accompanied by a declaration of specific steps taken to ensure the subsidy does not contribute to IUU activities; or
- that the regular "trade policy reviews" conducted pursuant to Article III.4 of the Agreement Establishing the WTO include the solicitation and review of detailed information regarding steps taken to ensure that fishing subsidies do not contribute to IUU activities.

231. For a nonhortatory application of this concept in the context of exceptions to red light prohibitions, *see* ¶ V.D.4(d).

(e) **The definition of "IUU fishing":** A red light prohibition on subsidies to IUU fishing will have to grapple with the scope of the term "IUU." The best starting place for the definition of IUU is the FAO IPOA-IUU. However, the definitions in the IPOA will need adaptation and simplification for use in the WTO context, both to avoid overstepping the "thin green line" and to maximize the effectiveness of the WTO in supporting the objectives of the IPOA.[232] Technical considerations of potential interest to negotiators undertaking such an adaptation are set out in some detail in Appendix 6, and can be summarized as follows:

- The term "illegal fishing" should be limited to activity contrary to domestic laws or to applicable international treaties;
- The term "unreported fishing" should include any fishing activities that are not reported in fact, even in the absence of mandatory reporting requirements (*i.e.*, the existence of reporting obligations should be a precondition to maintaining any fishing subsidy);
- The term "unregulated fishing" should include any fishing in unmanaged waters (*i.e.*, the existence of a national or international management regime should be a precondition to maintaining any fishing subsidy); and
- The ban should cover subsidies to IUU fishing and to "activities contributing to IUU fishing."

Note that as an additional contribution to the fight against IUU activities, certain elements drawn from the IPOA-IUU are included among the "objective indicia of minimum adequate fisheries management" contributing to the definition of a "patently undermanaged" fishery.[233]

(f) **No exceptions to the ban on subsidies to IUU fishing.** Given the illegitimate nature of IUU fishing, and the need for a strong multilateral response to it, no exceptions to the basic prohibition on subsidies to IUU fishing should be allowed. However, given the potential utility of subsidies in developing an "anti-IUU environment," some exception might be contemplated to the rule barring subsidies to enterprises previously found to be engaged in IUU activities or to a rule barring subsidies to fisheries tainted by a pattern of IUU activities. For example, government subsidies to improve monitoring technologies (*e.g.*, automatic satellite tracking of vessels) or to pay for observer programs might merit inclusion in such an exception.

V.C.6 A ban on "domestic fish supply" subsidies should be introduced into SCM Article 3.1(b). As discussed earlier in ¶ IV.B.1(d)(ii), certain kinds of fishing subsidies are very similar to the kind of "domestic supply" subsidies currently prohibited under SCM Article 3.1(b), but nevertheless fall beyond its reach. This gap in current SCM rules could be filled with a relatively simple interpretive note, possibly accompanied by a short illustrative annex.

(a) **The primary target of the ban should be price supports to fisheries products.** Price supports obviously can be particularly trade distorting and can serve to

232. Such refinements are contemplated by the IPOA itself. *See* introductory abstract to FAO (2002c), stating that the IPOA is a "toolbox" suitable for adaptation and application "by means of other legal instruments, including global, regional and subregional instruments."

233. *See* ¶ V.D.3(b); regarding WWF's uses of the "patently at risk" concept more generally, *see* ¶¶ II.C.5 *et seq.*

encourage fishing that would otherwise be unprofitable. Market interventions in the form of payments, purchases, or price guarantees for fish products should be subject to prohibition.

(**b**) **Exceptions to a ban on "domestic fish supply" subsidies:** As indicated in ¶ V.H.3(b), the food security concerns of developing countries should be taken into account in provisions for "special and differential treatment."

V.C.7 Prohibited fishing subsidies should be exempt from the specificity requirement: SCM Article 1.2 restricts the application of SCM disciplines to subsidies that are "specific" to an enterprise or industry in accordance with SCM Article 2.[234] However, SCM Article 2.3 states that any subsidy falling within the current "red light" of Article 3 shall automatically be deemed to meet the specificity test.[235] By removing the requirement to show specificity in the case of prohibited subsidies, the SCM reinforces the underlying notion that red light subsidies are illegitimate and harmful *per se*. WWF believes the fishing subsidies it has proposed for prohibition also represent harms *per se*, and should be similarly exempt from the specificity requirement (or "deemed" to be specific, as the current rule provides).

(**a**) **The example of fuel subsidies:** Fuel subsidies provide a case in point. In some countries, these subsidies may be granted on a sufficiently general basis to fall arguably outside the SCM's definition of "specific." However, even in such cases the effect of fuel subsidies on fishing capacity or effort may be significant.[236] Regardless of their general availability to other sectors, such subsidies can cause the productive distortions (and resource depletions) that WTO fishing subsidies disciplines intend to combat.[237,238]

(**b**) **An overly broad rule can be avoided:** In practical terms, extending the presumption of specificity to prohibited fishing subsidies may raise certain

---

234. The policy underlying the specificity test appears to reflect two basic considerations: first, that subsidies providing equal benefits to all within a society are far less likely to distort international production patterns; and second, that such a test is necessary to prevent the SCM from interfering with basic social policies that might be construed as "generally available" subsidies (such as, *e.g.*, the provision of police protection). *See* Jackson (1991, 267–68).

235. Whether the test would apply to the red light in the absence of Art. 2.3 is left somewhat ambiguous by the language of Art. 1.2, which reads as follows:

> A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2. [*emphasis added*]

The first use of the word "or" could be read to mean that the specificity test applies only with regard to the provisions of Part III ("Actionable Subsidies") and Part V ("Countervailing Measures"). Alternatively, the first "or" could be read simply as a disjunctive connector within a single list (as with the second use of "or" 10 words later). This ambiguity may amount to legal quibble, since (as discussed in the text accompanying this footnote) the specificity test is not applied in the context of Part II ("Prohibited Subsidies"). It is worth noting, however, that Art. 2.3 does not make the specificity test inapplicable to Part II, but rather irrebutably deems it to be fulfilled.

236. According to Greenpeace (2004b), fuel subsidies are especially important in sustaining the effort of large factory ships.

237. In this sense, the communal, interdependent, and depletable nature of fisheries resources creates a situation in which reducing the absolute cost of production (and not merely the cost of production relative to costs (or returns on investment) experienced in other sectors) leads to dangerous economic distortions.

238. WWF is aware that the question of fuel subsidies raises a variety of concerns for some governments that consider them important, including questions regarding the basis for energy pricing in different countries. Nevertheless, given the direct impact of these subsidies on fishing effort, WWF feels that they must be included within the basic prohibition on capacity- and effort-enhancing subsidies.

complications. A generally available subsidy should not necessarily be treated as prohibited simply because its application by the fishing industry falls within the ambit of a new red light. Accordingly, WWF proposes the following solution:

- Any subsidy falling within the ambit of a new red light for prohibited fishing subsidies should be exempt from the specificity test; but
- where any such subsidy would otherwise be considered nonspecific, it should be treated as prohibited only with regard to its application within the fisheries sector.

V.D Exceptions to the red light prohibitions. (Note—This section addresses certain general exceptions to WWF's proposed red light for fishing subsidies. These should be read in conjunction with WWF's discussion of "special and differential treatment" for developing countries in ¶ V.H.)

V.D.1 Some exceptions to the ban on capacity- or effort-enhancing subsidies are necessary. The definitions of capacity- and effort-enhancing subsidies proposed in ¶ V.C.4(b) are relatively broad. This is as it should be, given the strong tendency for these types of subsidies to be harmful. However, in certain limited situations, capacity- or effort-enhancing subsidies may serve such compelling policy goals that they should be allowed, subject to strict conditions. (Note—there should be no exceptions to the ban on IUU fishing, as defined in ¶ V.C.5(e))

V.D.2 Subsidies to be included within the exception:[239]

(**a**) **Short-term emergency relief and adjustment—**That is, assistance to fishers (or their families) suffering significant loss of income as a result of reductions in fishing caused by conservation measures or unforeseeable natural disasters, including:

- income supports or other subsidies to meet the basic human needs of fishers and their dependents; and
- adjustment assistance, including worker retraining, to facilitate movement of labor out of the fishery sector.

This exception should be defined to require that emergency relief subsidies avoid increasing fishing capacity or effort, be temporary, and not form part of a pattern of subsidized relief from repeated management failures.

(**b**) **Certain foreign access payments—**That is, government-to-government payments for access to EEZ fisheries, provided such fisheries are not "patently at risk" or "patently undermanaged" (*see* definitions in ¶ V.D.3).

(**c**) **Certain subsidies to artisanal fishing—**That is, subsidies to small-scale artisanal fishers active exclusively in fisheries that are not "patently at risk" or "patently undermanaged." (For additional comments on artisanal fishing, *see* ¶ V.D.6. For the definition of "patently at risk", *see* ¶ V.D.3.)

239. Note that in addition to the exceptions listed here, certain classes of subsidies would also be exempt as a consequence of qualifying for "green light" treatment. *See* ¶ V.E.

V.D.3 Definitions of "patently at risk" and "patently undermanaged" fisheries: The exceptions outlined in the previous paragraph present one of the few instances in WWF's fishing subsidies proposal where certain facts about the fisheries context are relevant to the legal outcome.[240] As discussed at length in ¶ II.C, WWF shares with many governments (and others) a strong desire to help the WTO avoid straying across the "thin green line." The definitions outlined below are intended to allow some rudimentary consideration of the fisheries context without succumbing to this danger. It should be emphasized again that these tests (and, in the case of "patently undermanaged," the accompanying institutional mechanisms) specifically avoid requiring the WTO to make judgments or policies beyond its competence.

(a) Definition of a "patently at risk" fishery: In the context of fishing subsidies disciplines, the general notion of an "at risk" fishery is one in which the perilous condition of fish stocks, overcapacity of fleets, or insufficiency of management render certain classes of subsidies more likely to be harmful than they would be in a fishery that is not at risk. The constraints of the thin green line, however, prevent the WTO from making its own evaluations of these contextual factors. As an incomplete surrogate for such evaluations, WWF proposes that a fishery be considered "patently at risk" if any of the following conditions applies:

(i) Objective exploitation status—The status of exploitation is "not known or uncertain" or is "overexploited," "depleted," or "recovering" according to the FAO[241] (or is deemed equivalent to the foregoing by the FAO or by another competent regional or international fisheries management authority);[242]

(ii) Objective species status—The status of the target species or stock is "data deficient," "vulnerable," "endangered," or "critically endangered" on the IUCN Red List[243] (or is deemed equivalent to the foregoing by the IUCN or by

240. For a list of other instances, *see* fn. 349.

241. The terms used in this paragraph are drawn from the FAO *State of World Fisheries and Aquaculture* series. *See, e.g.*, *SOFIA 2002*. This report, produced every two years, is based on a combination of government reporting to FAO and the work of independent FAO analysts.

242. In addition to judgments by the FAO, objective exploitation status could also be based on the findings of bodies such as the Advisory Committee on Fishery Management of the International Council for the Exploration of the Sea (ICES) (*see* http://www.ices.dk/iceswork/acfm.asp). Where no objective exploitation status is available, the fishery should be considered "patently at risk." The **judgments of national authorities** are not included here or elsewhere in these definitions for the reasons discussed in fn. 113.

243. What is the IUCN "Red List"? IUCN (also known as The World Conservation Union) is a world-renowned membership organization with both governmental and nongovernmental members. In 1963, the IUCN Species Survival Commission (SSC) established the IUCN "Red List," which has grown into the most authoritative inventory of the global conservation status of the Earth's plant and animal species. It is produced and updated regularly by the SSC's network of over 7,000 scientists from nearly every country.

Official uses of the list: The Red List inventory is often used by governmental and intergovernmental authorities. For example, the U.S. Department of the Interior regularly cites the Red List when making formal rulings on species status under the U.S. Endangered Species Act and for other critical policy decisions. *See, e.g.*, the following citations from Volumes 67 (2002) and 68 (2003) of the U.S. Federal Register: 68 FR 70185, 68 FR 52169, 68 FR 46559, 68 FR 43706, 67 FR 71529, 67 FR 66464, 67 FR 49657, and 67 FR 35942. Similarly, the Red List is frequently cited in the development of European Commission "action plans" for endangered European birds. (This can most easily be demonstrated by searching the EU's website, http://europa.eu.int, for the term "IUCN red list.") Leading intergovernmental bodies and research institutions have also recognized the authority of the Red List. *See, e.g.*, U.N. CBD (2001, 9); FAO (1999c, § 3.5; 2002d).

For more information, including definitions of the Red List categories mentioned above, *see* the Red List Web site at http://www.redlist.org/.

any competent regional or international authority having jurisdiction over the fishery);[244] or

(**iii**) **Objective capacity management status—**Total fishing capacity in the fishery has not been quantitatively assessed by a competent authority with jurisdiction over the fishery, and such assessment included in a current capacity management plan submitted in accordance with the FAO International Plan of Action for the Management of Fishing Capacity, or such a current quantitative assessment has been performed and the fishery has been found to be at or above full capacity.

(**b**) **Definition of a "patently undermanaged" fishery:** Given the significant underinclusiveness of the "patently at risk" concept (*see* ¶ II.C.5(a)), some classes of fishing subsidies should be excluded from red light exceptions if the fishery in which they are applied lacks any of certain "objective indicia of minimum adequate management."[245] These criteria should based on internationally recognized norms, such as those set out in the U.N. Code of Conduct for Responsible Fishing and the IPOAs on Capacity and IUU.[246]

(**i**) **Form of the criteria:** The objective indicia used to judge whether a fishery is "patently undermanaged" should be set forth in a note or annex to the appropriate SCM provisions. The criteria should be "yes or no" questions articulated to favor simplicity and objectivity. For example, instead of asking "Are conservation and management measures based on the best scientific evidence available?" the indicator might be "Are conservation and management measures based on scientific evidence?" Other examples of possible indicators could include the following:

- Are management measures such as catch limits, effort limits, or capacity limits in place in the fishery?
- Are transboundary or migratory stocks that are exploited by two or more states subject to cooperative management?
- Are measures for monitoring, surveillance, and control of the fishery in place?
- Has an optimum or target level of optimum level of capacity for the fishery been defined?

244. In addition to judgments by IUCN, objective species status could also be based on the findings of bodies such as the Commission for the OSPAR Convention governing the North-East Atlantic. *See* OSPAR Species List in references hereto. (The OSPAR Convention was created in practice in 1992—formally entering force in 1998—out of the administrative conjunction of the 1972 "Oslo Convention" on the prevention of marine dumping by ships and aircraft and the 1974 "Paris Convention" on land-based sources of marine pollution. *See* http://www.ospar.org.)

245. "Objective indicia of minimum adequate management" should be set forth in a note or annex to the appropriate SCM provisions, and should be based on internationally recognized criteria, such as those articulated in FAO (1996b). In addition, the indicia should include elements drawn from both the IPOA-Capacity and the IPOA-IUU. The criteria should be "yes or no" questions articulated to favor simplicity and objectivity. For example, instead of asking, "Are conservation and management measures based on the best scientific evidence available?" the indicator might be, "Are conservation and management measures based on scientific evidence?" Determinations of whether a fishery lacked these indicia would be made according to the institutional mechanisms proposed in ¶ V.I.4.

246. An excellent aid to translating the Code of Conduct into practical indicators is an implementation "checklist" prepared for that purpose by the FAO. (*See* FAO 1996b.)

- Has current capacity in the fishery been measured?

It bears repeating that **these criteria are not intended to measure the quality of management.** They are intended only to gauge whether the minimum elements of an adequate management system are formally in place in a given fishery.

(**ii**) **Link to authority-sharing mechanisms:** As noted in ¶ II.C.7, determinations of whether a fishery should be considered "patently undermanaged" should be made according to the institutional mechanisms proposed in ¶ V.I.4.

V.D.4 Prerequisites to the exceptions—Despite meriting exclusion from new red light prohibitions, all of the exempted subsidy classes proposed above have some potential for contributing to overcapacity or overfishing, or for causing significant trade distortions. In order to reduce this potential, the following conditions and limits should apply to all exempted subsidies, in addition to those conditions discussed for specific exceptions in ¶ V.D.2:

(**a**) **The legal definitions of the exempt classes should be narrowly tailored.** The legal language creating the exempt classes should be constructed with care, and supplemented by illustrative lists.

(**b**) **Exceptions should be contingent on advance notification.** Consistent with Article 8.3 of the now lapsed SCM green light, exemptions from red light fishing subsidies prohibitions (other than for short-term emergency relief, as noted in ¶ V.D.2(a)) should require advance notification to the WTO. *See* ¶ V.G.

(**c**) **Exceptions should be contingent on consistency with a capacity management plan.** As a prerequisite to exemption from red light prohibitions, a capacity plan as called for under the FAO IPOA-Capacity (*see* ¶ I.A.3(b)(iii)) should be required, and exempted subsidies should be legally required to be applied in a manner consistent with the plan. For vessels active in more than one fishery, capacity plans for each fishery should be in place.[247]

(**d**) **Exceptions should require subsidies to be legally contingent on compliance with all applicable laws and regulations.** Red light exceptions should be extended only to subsidy programs whose conditions of eligibility explicitly require recipients to conduct their fishing activities in full compliance with all applicable laws, regulations, and reporting requirements, whether domestic, foreign, or international.[248]

(**e**) **No exception should be allowed to the ban on subsidies to IUU fishing.** Subsidies that contribute to IUU fishing activities are always illegitimate and harmful *per se*, and no exception to the prohibition on such subsidies should be allowed.

247. ALTERNATIVE: Instead of requiring a capacity management plan under the IPOA-Capacity, the rule could forbid exceptions to red light prohibitions in the context of any fishery that is "patently undermanaged" (*see* ¶ V.D.3(b)).

248. This requirement tracks WWF's proposal for a ban on subsidies to IUU fishing, which includes a call for hortatory language urging WTO members to include such a conditionality in the eligibility criteria for all fishing subsidies. *See* ¶ V.C.5(d)(iii). The proposal here is to make such a contingency mandatory in the case of exceptions to the red light.

V.D.5 Supplementary disciplines applicable to exempt subsidies: Subsidies qualifying for exemption from the red light prohibitions should remain subject to continuing discipline, as follows:

(a) **All exempted subsidies should remain subject to current Article 3 prohibitions.** The proposed exceptions would not have any effect on the scope of the SCM's ban on export or domestic supply subsidies.

(b) **All exempted subsidies should remain actionable under the current amber light.** Exemption from new red light provisions should not be equivalent to green light protection from challenge. In particular, exempt subsidies should not be allowed to cause "adverse effects" within the traditional meaning of SCM Article 5.

(c) **"Emergency relief" subsidies should be automatically subject to dark amber provisions specific to fishing subsidies.** By definition, emergency relief subsidies are granted in the context of a fishery or a fleet that is already in trouble due to stock depletion (whether anthropogenic or otherwise), overcapacity, or both. In this context, and considering that "emergency relief" subsidies should by definition include mechanisms to avoid increasing fishing capacity or effort, governments granting these subsidies should be open to challenge and should bear the burden of proving they have not caused "adverse effects" within the meaning of the new amber light provisions proposed in ¶ V.F.3.[249]

(d) **All exempted subsidies should be subject to special reporting requirements and periodic review.** *See* ¶¶ V.G.11.

V.D.6 Additional comments regarding artisanal fishing: The formal record of the current negotiations suggests that Friends of Fish intend to exempt artisanal fishing from any new subsidies disciplines.[250] This position reflects concerns voiced in the WTO Committee on Trade and Environment (CTE) prior to Doha on behalf of artisanal fishing communities in developing countries.[251] Note, however, that the term "artisanal" has not been clearly defined, and **Japan** in particular has made interventions that may suggest an interest in applying an exemption for artisanal fishing to its own

249. ALTERNATIVE: A hair trigger for dark amber, rather than automatic application. WWF believes that automatic application of the dark amber presumption to emergency relief subsidies is appropriate—particularly considering that the administrative and political costs of bringing any WTO action would serve to dissuade frivolous complaints. Nevertheless, if governments felt that dark amber provisions should always require some *prima facie* demonstration by complainants, one possibility would be to require complainants to show, for example, a specific competitive relationship between the complainant's domestic fleets and those benefiting from emergency relief.

250. *See* WT/CTE/GEN/10 (Statement by the director of the WTO Rules Division, April 11, 2003), ¶ 6 ("the demandeurs also consider stock depletion to constitute a development problem attributable to fishery subsidies, and in this context suggest exempting from any new disciplines subsidies to artisanal fisheries of developing countries"); TN/RL/W/77 (United States, March 19, 2003), fn. 1 ("Programmes for artisanal fisheries in developing countries are likewise not a focus."); *see* also TN/RL/M/2 (Summary of Rules Group meeting of May 6 and 8, 2002), ¶ 16 ("certain delegations" noted artisanal fishing "should not be subject to any new disciplines").

251. *See, e.g.*, WT/CTE/M/23 (Minutes of CTE meeting of February 29–March 1, 2000) ¶ 43 (**Thailand** seeks "flexibility" on fishing subsidies for "artisanal and off-shore fisheries"); WT/CTE/M/24 (Minutes of CTE meeting of July 5–6, 2000) ¶¶ 95 and 99 (U.S. considers that "discussion" of artisanal will be "necessary"; **Argentina** criticizes a U.S. paper on fishing subsidies for failing to distinguish artisanal fisheries); WT/CTE/M/25 (Minutes of CTE meeting of October 24–25, 2000) ¶ 97 (**Thailand** repeats views on artisanal and offshore fishing).

small-scale coastal fisheries.[252] WWF is a strong supporter of sustainable community-based fishing.[253] However, WWF views with some skepticism the assumption that artisanal fishing (whether of the developed-country or developing-country kind) is tantamount to responsible fishing. Accordingly WWF cautions against any blanket exemption based on "artisanal" status. Indeed, at least one recent case study suggests that poorly designed subsidies to artisanal fisheries can have negative consequences.[254]

V.E Allowing environmentally positive fishing subsidies—the "green light"

V.E.1 Preliminary comments:

(a) **The essence of a green light for fishing subsidies: Protection from WTO challenge.** As discussed in ¶ IV.B.5, the category of "non-actionable" subsidies is expressly designed to protect certain subsidies from attack under WTO rules. The green light provision proposed here thus differs from exceptions WWF has proposed to the red light, since a green light for fishing subsidies would protect eligible programs from attack under existing SCM rules as well as under the new rules to be adopted for fishing subsidies.

(b) **A green light must be viewed in combination with other allowances for beneficial subsidies.** The green light is only one of several possible mechanisms for giving exceptional treatment to beneficial (or potentially beneficial) fishing subsidies under WTO rules. Others include provisions granting exceptions to red light prohibitions (*see* ¶ V.D); limitations on the scope of "dark amber" rules (*see* ¶V.F.4); and provisions for the "special and differential treatment" of developing countries (*see* ¶ V.H).

(c) **Any proposals for new green light provisions raise technical and political issues.** As noted above, the debate over the possible reinstatement of a "non-actionable" class of subsidies is complex. The issue is historically linked to debate over dark amber provisions (*see* fn. 143) and now is directly linked to debate over "implementation issues" and proposals to make certain "developmental" subsidies nonactionable (*see* IV.C.2). The result is a wide disparity of views among WTO delegations about possible green light provisions—disparities that often cut across traditional blocs of interest.

---

252. *See* TN/RL/W/84 (Japan, April 30, 2003) Question 2 ("Does the word 'artisanal' mean small-scale coastal?"). Japan focuses its remarks on developing countries, but there may be reason to believe it is also concerned with its own coastal fisheries—fisheries that it subsidizes and considers "artisanal." *See, e.g.*, G/SCM/Q2/JPN/34 (Japan, October 28, 2002), p. 11, Reply to Q4 (characterizing certain Japanese coastal fishing operations as "artisanal"). The United States, in an oral answer to Japan's query, has offered the following definition of "artisanal":

> As regards the term "artisanal fisheries", it referred to small-scale fisheries that employed labour intensive harvesting, processing and distribution technologies to exploit marine and inland fishery resources. Such fisheries typically targeted local rather than export markets.

TN/RL/M/8 (summary of Rules Group meeting of May 5–7, 2003), ¶ 37.

253. For example, WWF has worked hard to develop a program to support the certification of community-based fisheries by the Marine Stewardship Council, including through the adaptation of methodologies and the provision of grant funding. *See* WWF (2004c).

254. *See* UNEP (2001) (the Senegal study). Note also evidence that subsidies to artisanal fleets have at times been linked to IUU fishing (Dallmeyer 1989).

(**d**) **Green light protections for development subsidies are not discussed here.** WWF's proposals here are without prejudice to any discussion of proposals for protecting certain development subsidies under a reconstituted SCM green light, with the sole caveat that developmental subsidies in the fisheries sector would be counterproductive if allowed to escape from the disciplines proposed by WWF to ensure that subsidies do not contribute to overcapacity or overfishing.

(**e**) **Generic green light issues are in play in the current rules negotiations beyond fishing subsidies.** As noted earlier in ¶ IV.C.2(b), at least one proposal for renewing a generic green light for environmental subsidies has been tabled in the current negotiations, to a mixed reception.

V.E.2 The case for a green light: Allowing public investment in the pursuit of sustainable fisheries: In calling on governments to reduce and reform fishing subsidies, WWF has never taken the position that all fishing subsidies should be eliminated. On the contrary, WWF believes that appropriate government interventions can play an important role in promoting the transition to sustainable and healthy fisheries,[255] and several major studies have found at least a portion of fishing subsidies to be of a positive environmental character.[256]

But a green light must be approached with caution. The fundamental difficulty, of course, is that some subsidies that are described or intended as environmentally beneficial may fail to meet that goal, or even be counterproductive. The discussion that follows in ¶ V.E.5(g) of "capacity-reducing" subsidies provides a case-in-point. Accordingly, WWF's proposed green light for certain fishing subsidies includes conditions and limits meant to prevent the accidental or intentional abuse of the green light protections.

V.E.3 Two green light proposals have been tabled so far for fishing subsidies. In addition, two delegations—the European Communities (EC) and China—have separately submitted calls for establishing a green light for certain fishing subsidies.[257]

(**a**) **The EC proposal:** The EC has called for a green light covering subsidies to reduce fishing capacity or to "mitigate negative social and economic consequences of the restructuring of the fisheries sector."[258] Specifically, the EC proposes to include

- subsidies to support the retraining of fishers, early retirement schemes, and diversification;
- limited subsidies for modernization of fishing vessels to improve safety, product quality or working conditions or to promote more environmentally friendly fishing methods (however, any such modernization must not increase the ability of the vessel to catch fish);

255. *See, e.g.*, WWF (2001d); IEEP (2003b).
256. *See, e.g.*, Milazzo (1998); APEC (2000); OECD (2000a); OECD (2000b). Note that WWF does not necessarily endorse the specific characterizations contained in these studies.
257. In their formal submissions thus far, Friends of Fish have been notably reticent on the topic of a green light. Among the only formal written references is a statement by the United States noting that subsidies that "may help to reduce overcapacity and overfishing, and contribute to fisheries sustainability... are not the focus of the negotiations." TN/RL/W/77 (March 19, 2003), fn. 1.
258. TN/RL/W/82 (European Communities, April 23, 2003), ¶ 4(ii).

- subsidies to fishers and vessel owners who have to temporarily stop their fishing activity, when stoppages are due to unforeseeable circumstances such as natural disasters, or in the framework of tie-up schemes linked to permanent capacity reduction measures in the context of recovery plans for overexploited fish stocks;
- subsidies to assist in the establishment of biologically important "no take zones"; and
- subsidies for the scrapping of vessels and the withdrawal of capacity.[259]

(b) The Chinese proposal: China has presented a nonexhaustive list of fishing subsidies to be covered by a green light, saying that such subsidies have no negative impacts on trade, environment, or sustainable development.[260] The list includes subsidies

- for infrastructure construction;
- for prevention and control of disease;
- for scientific research and training; and
- for assistance to fishers switching to other businesses.

V.E.4 The scope of a green light for fishing subsidies: A new green light should cover four narrow classes of fishing subsidies, subject to strict conditions:

(a) Subsidies for certain research activities. Some research activities can play an obviously positive role in achieving sustainable fisheries, such as subsidies to support research (including research conducted by fishing enterprises as a public service) aimed at

- facilitating or improving fisheries management (including, *e.g.*, data collection, monitoring, or stock sampling);
- conserving other marine resources that may be affected by fishing; or
- the development (as opposed to adoption or deployment) of environmentally preferable fishing gear or techniques.

(b) Subsidies for the adoption of environmentally preferable fishing gear, techniques, or practices. It is widely understood that the costs of environmental degradation are often "externalized" away from those benefiting from an economic activity, only to be paid by others, or by the public at large. In a world that is far from adopting the policies necessary to internalize the costs of unsustainable fishing practices, subsidies may be necessary to encourage the adoption of environmentally preferable fishing techniques—especially where transaction costs are high or where such techniques are more expensive than more destructive alternatives. In cases where newly imposed regulations require the adoption of improved techniques or practices, subsidies may be required as a matter of equity, or at least of creating the real-world political conditions for the improved regulations in the first place. The establishment of Marine Protected Areas or No Take Zones provide a common case in point. Obviously, however, subsidies to the adoption of fishing gear or practices can have a capacity-enhancing quality, and so a green light for such subsidies must be narrowly tailored and strictly controlled.

259. *Id.*, p. 3 (the list is reproduced here *verbatim*).
260. TN/RL/W/9 (China, June 20, 2002); *see* also TN/RL/W/88 (China, May 1, 2003), p.1 (repeating without elaboration China's interest in a green light for positive fishing subsidies).

(c) **Subsidies for the adoption of fishing gear or techniques to meet safety or sanitary standards.** Governments should be permitted to support investment in safety and human health, and to subsidize adoption of gear or techniques needed to comply with safety standards (particularly when newly imposed). Here again, however, the green light should be carefully circumscribed to prevent abuse or the inadvertent support of overcapacity or overfishing.

(d) **Subsidies for the reduction of fishing capacity.** Many governments today grant subsidies that are designed (at least putatively) to reduce capacity in overcapacity fisheries.[261] Indeed, some subsidizing governments—such as the EC—are substantially increasing their investment in subsidies of this kind.[262] Clearly, where they are truly effective, such subsidies—which include programs such as vessel buy-backs, license retirements, repurchase of quota allocations, etc.—can be a key component of restoring the health of fish stocks and fishing communities alike. As discussed below, however, capacity-reducing subsidies have had a very mixed record when it comes to their actual results. Too often, these programs have ended up actually contributing to the problems they were intended to solve. Thus, capacity-reducing subsidies should be included within a new green light, but only in the company of strict and effective controls. (*See* ¶ V.E.5(g).)

V.E.5 All green light fishing subsidies should be subject to certain basic conditions and limits. To prevent green light provisions from being inadvertently or purposefully abused, all green light subsidies should be subject to the following general provisos. For some green light subsidies, additional limits and conditions would also apply (*see* ¶ V.E.6).

(a) **No exemption from Article 3 prohibitions.** As with the now lapsed Article 8, a new green light should not circumvent the Article 3 ban on export or domestic supply subsidies. (Note, however, the proposed provision of "special and differential treatment" regarding domestic supply subsidies—¶ V.H.3(b).)

(b) **No exemption from the ban on subsidies to IUU fishing.** Given the nature of IUU fishing, no subsidies to IUU activities or to activities contributing to IUU fishing should be allowed (*see* ¶ V.C.3(b)).

(c) **Requirement not to cause "serious adverse trade effects."** As was the case of the lapsed green light, fishing subsidies qualifying under a new green light should remain subject to challenge if they cause "serious adverse effects" to the interests of another member (*see* ¶ IV.B.5(a) and fn. 149).[263] (Regarding the application of a standard giving additional protection to developing countries, *see* ¶ V.H.3(c).)

(d) **Requirement of advance notification.** As with proposed exceptions to the red light (*see* ¶ V.D.4(b)), and consistent with Article 8.3 of the now lapsed SCM green light, the protections of a green light for fishing subsidies should require advance notification to the WTO. *See* ¶ V.G.

261. For data on the involvement of major industrial countries with supposedly capacity-reducing subsidies, *see* OECD (2000b, 134 and Table 4).

262. IEEP (2002a).

263. The original provision, found in SCM Art. 9.1, meant that even green light subsidies remained actionable, but under a standard more difficult to meet than the normal "adverse effects" standard of Art. 5. The meaning of the additional adjective "serious" was left unclear. A subsequent phrase in Art. 9.1 continues, "such as to cause damage which would be difficult to repair," but nothing further is said. The term "serious adverse effects" has never been explored in the context of a WTO dispute.

(e) **Requirement of consistency with a capacity management plan.** As with exceptions to the red light (¶ V.D), green light protections should be granted only if a capacity plan as called for under the FAO IPOA-Capacity is in place for each relevant fishery, and protected subsidies are legally required to be applied in a manner consistent with that plan. For vessels active in more than one fishery, capacity plans for each fishery should be in place.[264]

(f) **Requirement of legal contingency on compliance with all applicable laws and regulations.** As with exceptions to the red light (¶ V.D), green light protections should be extended only to subsidy programs whose conditions of eligibility explicitly require recipients to conduct their fishing activities in full compliance with all applicable regulations and reporting requirements, whether domestic, foreign, or international.[265]

(g) **All exempted subsidies should be subject to special reporting requirements and periodic review.** *See* ¶ V.G.11.

V.E.6 Capacity-reducing subsidies should be subject to special disciplines. As noted earlier in ¶ V.E.4(d), buy-backs and other subsidies intended to reduce fishing capacity are an important and growing part of the fishing subsidies universe. WWF wishes to support the effective use of capacity-reducing subsidies. However, it would be a grave error for the WTO to give *carte blanche* to any program proclaiming itself to be aimed at capacity reduction. The mixed history of these programs, in combination with the intense interest of many governments in continuing to use them, will make the accommodation of capacity-reducing subsidies one of the most significant topics negotiated in the course of the WTO fishing subsidies talks. This highly technical issue will likely require treatment in greater depth than can be offered here. The following is intended to introduce some of the salient issues:

(a) **Capacity-reducing subsidies can fail.** The literature of fisheries management and fisheries economics is replete with warnings that capacity-reducing subsidies often fail, and have at times actually increased overcapacity.[266] This literature documents a mixture of problems, including failure to associate capacity-reducing subsidies with proper management controls, "leakage" of capacity between fisheries, poor monitoring and enforcement, and "input stuffing" (reinvestment in more efficient vessels or gear). Even otherwise well-designed buy-back programs may cause increased investment in fishing capacity if the programs have been anticipated by investors accustomed to iterative government buy-back efforts.

(b) **A green light for capacity-reducing subsidies should be narrowly defined and subject to strict conditions and limits.** In light of the foregoing, it will be critical for negotiators to craft accommodations for capacity-reducing subsidies that are tightly defined and controlled. Among the approaches for doing this, negotiators should consider the following:

264. ALTERNATIVE: Instead of requiring a capacity management plan under the IPOA-Capacity, the rule could forbid green light subsidies in the context of any fishery that is "patently undermanaged" (*see* ¶ V.D.3(b)).

265. This requirement tracks WWF's proposed ban on subsidies to IUU fishing, which includes a call for hortatory language urging WTO members to include such a conditionality in the eligibility criteria for all fishing subsidies. *See* ¶ V.C.5(d)(iii). The proposal here is to make such a contingency mandatory in the case of exceptions to the red light.

266. *See, e.g.*, Cox and Schmidt (2002, ¶¶ 48–49); Gréboval (2000, ¶¶ 25–30); Lodge (2002, § 5.8); Munro (1998, esp. 22ff.); Porter (2004a, ¶¶ 72–106); Ward and Metzner (2002, § 5.3.2). A frequently cited (but apparently not available on the Internet) survey of experience with buy-back programs is Holland et al. (1999).

(i) **Conditioning green light treatment on a capacity management plan meeting certain minimum formal criteria.** In addition to the general requirement that all green light subsidies be granted only in the presence of a capacity management plan consistent with the FAO IPOA-Capacity (*see* ¶ V.E.5(e)), the green light for capacity-reducing subsidies could be conditioned on fulfilling additional specific requirements, such as evidence that capacity in a fishery is subject to regular scientific quantitative evaluation. These criteria might be similar to those developed for the "patently undermanaged" test (*see* ¶ V.D.3), in that they would not require actual judgments of the quality of management, but would be aimed at testing whether a government had put in place the minimum necessary elements of a capacity-management program. Even so, such criteria would likely have to be administered in part through authority-sharing mechanisms of the kind discussed in ¶ V.I.4.

(ii) **Preventing the export of capacity and "input stuffing."** The definition of a capacity-reducing subsidy qualifying for green light treatment could be tailored to require programs to include design features such as guarantees against input stuffing (*i.e.*, the use of vessel scraping or license retirement payments to enhance the gear or power of remaining vessels), reinvestment in capacity or fishing rights, or export of capacity. The notion of disallowing capacity exports has already been introduced into the negotiations by the EU.[267]

(iii) **Subjecting capacity-reducing subsidies to time limits and rules against iteration.**[268] The theory of a buy-back scheme is in some ways similar to the theory of "safeguard measures" familiar to trade specialists. Like safeguard measures, a buy-back program is meant to be a one-time government intervention to help adjust productive capacity to the conditions of a new environment, while cushioning the blow to firms and individuals who must leave the field (or fishery, as the case may be). Like safeguard measures, subsidies for capacity adjustments are subject to abuse if they do not have a time limit. It is important to ensure that capacity-reducing subsidies do not become subsidies to operations, and to discourage speculative investment made in anticipation of (or assuming the likely safety net of) capacity-reducing subsidies. Accordingly, capacity-reducing subsidies qualifying for green light treatment should be subject to time limits, including limits to disallow repetitive or multiple programs applied to a single fishery or fleet. Article 7 of the WTO Agreement on Safeguards may serve as an instructive model in this regard.[269]

(iv) **Building in a sunset clause for the green light on capacity-reducing subsidies *per se*.**[270] In addition to limiting the duration of any given capacity-reducing subsidy, a time limit on the operation of the green light for such subsidies

267. The EU's proposal for a red light includes a prohibition on "subsidies for the permanent transfer of fishing vessels to third countries, including through the creation of joint enterprises with third country partners." TN/RL/W/82 (EC, April 23, 2003), § 4. This proposal is consistent with a recently adopted EC regulation phasing out such subsidies by the end of this calendar year, discussed earlier in fn. 21.

268. WWF is indebted to Gareth Porter, among others, who used the occasion of one of the workshops preparatory to this paper to raise the suggestion of applying time limits to capacity-reducing subsidies. The idea is further developed in his forthcoming theoretical paper for UNEP (Porter 2004b).

269. Art. 7 (Duration and Review of Safeguard Measures) includes a four-year time limit, subject to limited a right of extension, as well as a rule against reapplication of the safeguards for a determined period of time.

270. This idea was also introduced to WWF by Gareth Porter during a WWF workshop.

might also be considered. This would, in effect, give added urgency to the need for the prompt and effective elimination of fishing overcapacity. Governments would be on notice that capacity adjustments would have to be accomplished within a certain period (perhaps five years?), or would risk having to proceed without the aid of subsidies. A rule of this kind would, of course, have to include some exceptions for cases in which overcapacity was suddenly generated by truly unforeseeable exogenous causes, such as natural disasters.

(v) **Conditioning green light treatment on specific monitoring and evaluation requirements.** As with so many other aspects of fishing subsidies, transparency, active monitoring, and accountability are absolutely vital to any effective capacity-reducing subsidy program. Special reporting requirements for such programs should be built into a new green light.

(vi) **Withdrawing green light treatment upon showing of actual increases in capacity.** Finally, negotiators should consider a provision that would withdraw the protection of the green light for capacity-reducing subsidies where it can be shown that the subsidy has in fact funded capacity increases. As mentioned earlier in ¶ V.C.4(a), the definition and measurement of capacity are questions fraught with technical complexity. A rule such as the one proposed here could only be workable in a WTO context if a very broad and inclusive definition of "capacity" were adopted. Depending on the nature of the definition ultimately included in new WTO provisions, however, this rule might be one that would benefit from administration through authority-sharing mechanisms of the kind discussed in ¶ V.I.4.

(c) **Textual and institutional approaches to a green light for capacity-reducing subsidies:** The complexity of an effective and properly limited green light for capacity-reducing subsidies suggests that its details would likely require treatment outside the body of the SCM proper, perhaps in an appropriate annex. But beyond their technical difficulties, some of the ideas outlined in the preceding paragraphs—particularly subparagraphs V.E.6(b)(i)and V.E.6(b)(ii)—also run hard against the "thin green line." As with those provisions proposed elsewhere in this paper that rely on the concept of a "patently undermanaged" fishery, negotiators may be faced with a stark choice between, on the one hand, a blunt and relatively weak rule administered purely by the WTO, and, on the other hand, a more effective and nuanced rule requiring administration in part through authority-sharing mechanisms.[271]

V.F Disciplining all other fishing subsidies—the "amber light"

V.F.1 Preliminary comments:

(a) **The essence of an amber light for fishing subsidies: Liability to *ex post facto* challenge.** In proposing an amber light for certain classes of fishing subsidies, WWF intends a rule that functions in a manner similar to the current SCM amber

271. AN ALTERNATIVE: An intriguing possibility, and one that might be optimal from a variety of perspectives, would be to condition a green light for capacity-reducing subsidies on adherence to an agreement outside of the WTO that would set certain international standards for capacity-reducing subsidy programs. In some ways, such an agreement (which obviously has yet to be negotiated) would stand in relation to the SCM much as does the OECD arrangement on export credit agencies enshrined in SCM Annex I, ¶ (k).

light (*see* the earlier discussion in ¶ IV.B.1(d)). That is, fishing subsidies subject to the amber light would be allowed, so long as they did not cause certain enumerated types of harm to the interests of another WTO member.[272]

(**b**) **The amber light has historically proved weak—especially in the case of fishing subsidies.** As discussed in ¶ IV.B.4(d), the amber light has been considered a relatively weak provision of the SCM. Further, as discussed in ¶ IV.B.4(e), the provision has been particularly unhelpful in confronting harmful fishing subsidies.[273] Crafting a truly effective amber light for fishing subsidies will therefore present real challenges.

(**c**) **Avoiding the "thin green line" is more difficult in the amber light context.** As discussed in ¶¶ IV.B.1(d) *et seq.*, the traditional focus of the amber light is on the harms caused by subsidy programs that are otherwise considered legitimate. Implementation of the amber light thus turns more often on effects-based judgments than on the design or context of a given subsidy. For fishing subsidies, this means the amber light must be carefully crafted to avoid legal tests that turn on judgments about environmental effects, and/or to "outsource" any judgments (or findings of fact) that require environmental expertise (*see* ¶ V.I).

(**d**) **Despite these difficulties, an amber light for fishing subsidies is necessary.** Unless all harmful (or potentially harmful) fishing subsidies are to be banned, some must fall beyond the scope of the red light. WWF does not believe, however, that any fishing subsidies should remain entirely undisciplined by WTO rules. The intermediate treatment of the amber light is thus necessary, albeit in the form of rules that are truly "clarified and improved."

(**e**) **Some delegations have already called for an amber light for fishing subsidies.** In separate submissions, two of the core Friends of Fish have proposed consideration of an amber light for fishing subsidies.[274] In addition, at least one other delegation has made proposals for strengthening the generic amber light, and in particular for reviving the lapsed "dark amber" provisions.[275]

V.F.2 The narrow scope of an amber light for fishing subsidies.

(**a**) **New amber light provisions would discipline some subsidies exempted from the red light.** The exceptions to the red light ban on "capacity- or effort-enhancing" subsidies include one category that, despite its exemption, is supposed not to produce actual capacity- or effort-enhancing production effects—*i.e.*, subsidies for emergency relief and adjustment (*see* ¶ V.D.2(a)).[276] These subsidies would remain

272. Note, however, that WWF proposes substantially strengthening the remedies associated with an amber light for fishing subsidies. *See* ¶ V.F.5.

273. The basic weakness of the amber light has led at least one delegation to call for moving certain types of subsidies out of the amber light and into the prohibited red light category. *See* TN/RL/W/78 (United States, March 19, 2003), p.2. Consistent with this, the U.S. proposal on fishing subsidies focuses on additions to the red light list. *See* TN/RL/W/77 (United States, March 19, 2003), ¶ 5.

274. *See* TN/RL/W/77 (U.S., March 19, 2003) and TN/RL/W/115 (Chile, June 10, 2003).

275. *See* TN/RL/W/1 (Canada, April 15, 2002), p. 1; TN/RL/W/112 (Canada, June 6, 2003), pp. 2–3. Note that the U.S. proposal also explicitly contemplates a "dark amber" for fishing subsidies. TN/RL/W/77, ¶ 6.

276. Subsidies in this category need to be exempted the red light because, by the nature of their design, they can be classified as "capacity- or effort-enhancing" despite the fact that in the cases covered by the exception they would not actually be designed to be capacity- or effort-enhancing (*e.g.*, an income support subsidy is generally classified as capacity-enhancing, but should not be banned where associated with appropriate emergency relief).

subject to amber light disciplines, in addition to other limits and conditions imposed on red light exceptions.[277]

(b) **The amber light would discipline subsidies not otherwise covered by the new red or green lights.** As previously noted, the amber light is a residual category covering all subsidies that are neither prohibited under the red light nor protected under the green light. In the discussion above, WWF has proposed red and green lights that, taken together, cover most of the significant classes of fishing subsidies, leaving relatively few within the scope of the amber light.[278]

V.F.3 Clarifying the concept of "adverse effects" for fishing subsidies: The essential reform required to adapt the SCM's amber light provisions to the context of fishing subsidies is clarification of the harm ("adverse effects") on which the operation of the amber light turns. As noted in ¶ IV.B.4(e), the adverse effects recognized by the current amber light are restricted to patent distortions of export markets. Effective fishing subsidies disciplines—and indeed the achievement of a true "win-win-win" outcome from the present negotiations—will depend on the willingness of governments to broaden this concept of adverse effects to include economic distortions that harm the fisheries' resource base itself, and that distort patterns of production—not merely patterns of international sale.

(a) **Clarifications should be applied mainly to the definition of "serious prejudice."** As discussed in ¶ IV.B.4(a), the current amber light includes three types of "adverse effects": "serious prejudice," "injury," and "nullification or impairment." Of these three, the first is most likely to be relevant in the case of fishing subsidies.[279] Except as noted in ¶¶ V.F.3(d) and V.F.3(e), therefore, the remainder of this section discusses proposed clarifications to the term "serious prejudice."

(b) **The challenge is to find an effects-based test that does not trespass over the "thin green line."** Adverse effects of the kind at issue here have a hybrid nature—they are simultaneously economic distortions and environmental impacts. Where the husbandry of a common or fungible resource base is at stake, the distinction between an environmental impact and a trade impact is often merely semantic. From this fact arises the fundamental potential for fishing subsidies disciplines to achieve a true "win-win-win" outcome; and from this same fact also arises the difficulty of crafting rules that avoid entangling the WTO in "environmental" questions beyond its competence and authority. For example, a test that looked at the impact of a subsidy on fish stocks would focus the amber light directly on the

277. The other two exempt categories—foreign access payments and subsidies to artisanal fishers—by their nature may have capacity- or effort-enhancing results. It would not make sense to subject such subsidies to amber light provisions that are aimed principally at confronting capacity- or effort-enhancing production effects (*see, however,* ¶ V.D.4).

278. Such subsidies could include those to industries or enterprises that are ancillary to fishing industries or enterprises, such as certain subsidies for port construction, housing, transportation, processing or marketing of fish products, etc., where such subsidies are passed through to fishing enterprises (*see* ¶ V.B.5). Recall that such subsidies may qualify for treatment under proposed "special and differential treatment" provisions (*see* ¶ V.H).

279. This is so for two reasons. First, those WTO members that most heavily subsidize fishing (*e.g.*, Japan and the EU) also are net fish importers, while many of the countries (particularly developing countries) most likely to be harmed by fishing subsidies are net fish exporters. Thus, challenges against fishing subsidies are most likely to be brought by WTO members that believe their ability to export (or to produce for export) have been affected, making serious prejudice the most relevant category of adverse effects. Second, as developed in ¶ V.F.3(c), several of the new tests proposed here are similar to tests already applied under the current "serious prejudice" rule.

problem of overfishing and resource depletion that lies at the economic and environmental heart of the fishing subsidies issue. However, given the numerous (and often uncertain) environmental factors that can influence the health of fish stocks, such a test would also inevitably lead WTO panelists to render judgments about strictly environmental facts and policies (*e.g.*, was a decline in fish stocks attributable to a subsidy or to natural changes in spawning patterns?). The challenge, therefore, is to find a definition of "adverse effects" that addresses the trade-environment nexus without overstepping the thin green line.

(**c**) **The solution is an approach focused on prices, production, and input use.** Fortunately, there are several strictly economic indicators that can be used to judge impacts at the trade-environment nexus. Specifically, three new definitions of "serious prejudice" should be adopted:

(**i**) **Increased catch share—**Increases in the relative landed catch share of a subsidized fleet (relative to the share taken by competing fleets) can and should be taken as evidence that the subsidies have altered the fleet's competitive posture and have resulted in it catching more fish than it otherwise would have. This approach closely tracks SCM Article 6.3(d), which states that serious prejudice may arise if

> the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared with the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted. *(footnote omitted)*

By focusing on relative catch share rather than absolute stock levels, this test would also avoid any need to debate exogenous (*e.g.*, environmental) factors that may affect total catch sizes.[280]

(**ii**) **Decreased landing prices—**Another familiar element of the existing "serious prejudice" rule is the concept of price undercutting. SCM Article 6.3(c) states that serious prejudice may arise if

> the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market.

Under its present formula, this test requires the direct comparison of competitive products in a given market (generally, an export market[281]). In the case of fishing subsidies, such direct comparisons may be impossible (*e.g.*, because an unsubsidized fleet has simply been unable to produce a competitive product). Moreover, the export market price may not be the most relevant in

280. Neither would a "relative catch share" test interfere with the ability of a coastal state to allocate catches of stocks found exclusively within its EEZ, in accordance with its rights and obligations under UNCLOS Art. 62. However, the rule would mean (at least with regard to major fishing economies—*see* ¶ V.H.3(d)) that allocations resulting in increased domestic catch shares could not be accompanied by subsidies to the domestic fleet.

281. *See, e.g.*, *Indonesia — Automobile Industry*, ¶ 14.237ff. (under WTO and GATT cases in References). SCM Art. 6.5, which gives some further definition to the term "price undercutting," also reflects the traditional export market orientation of this concept when it allows use of "export unit values" where direct price comparisons cannot be obtained.

judging the competitive effects of the subsidy at the level of production. Accordingly, in the case of fishing subsidies, the term "serious prejudice" ought to be clarified to include significant reductions in the price for fish upon first landing, without requiring comparison with a competitor's price.[282] Here again, the test is straightforwardly economic—did a subsidy enable a fishing enterprise to sell at an artificially low price? While this test would be a less direct indicator of resource impacts than the "catch share" test proposed above, basic principles of free market economics suggest that where fishers are able to sell profitably at a lower price, they can and will be able to catch more fish than if a higher price were required to maintain profitability.

(**iii**) **Increased input use (capacity and effort)—**As discussed earlier in ¶ I.B.1, chief among the harms to which fishing subsidies can contribute are overcapacity and overfishing. Indeed, most of the negotiating proposals tabled to date in favor of new WTO fishing subsidies disciplines take aim at these twin evils,[283] and WWF has joined calls for establishing a new "red light" rule to ban subsidies that can be classified as "capacity- or effort-enhancing" by design.[284] It would make sense, therefore, for a new amber light to allow disciplinary action against any nonprohibited (and not otherwise protected) subsidy that can be shown to cause an increase in fishing capacity or effort. However, as noted earlier in ¶ V.C.4(a), the concepts of capacity and fishing effort involve technical complexities and factual questions that could draw the WTO across the "thin green line." One key to avoiding this pitfall is to recognize that fishing "capacity" and "effort" can be described in terms of capital and productive inputs. Thus, a "serious prejudice" test could be based on objective, noncontroversial, economic indicators whose application would not require the rendering of environmental judgments (*see* ¶ V.C.4(a)(iv)).

(**d**) **Clarifying the "injury" test.** Although, as noted above, the concept of "injury" under SCM Article 5(a) is likely to be secondary to "serious prejudice" in the operation of new fishing subsidies disciplines, it nevertheless deserves attention, and the question has already been introduced into the negotiations.[285] The injury test is relevant for two reasons: First, there could well be cases in which a WTO member is harmed by the subsidization of fish products imported into its domestic market—making "injury" the relevant prong of the "adverse effects" definition; and second, the injury test bears both on actions brought before the WTO Dispute Settlement Body under SCM Article 7 and on the right of WTO members to impose national countervailing duty (CVD) measures under SCM Part V. While CVD actions should not be considered an optimal tool, their potential utility in confronting harmful fishing subsidies cannot be altogether discounted.[286]

282. Recall, however, that increased landing prices are often a symptom of fishery depletion (as catch per unit effort declines). Thus, it is important that the price reduction here be in relation to a theoretical "unsubsidized" price, and not necessarily an absolute reduction in actual price.

283. *See, e.g.*, TN/RL/W/3 (Australia et al., April 24, 2002); TN/RL/W/21 (U.S., October 15, 2002); TN/RL/W/77 (U.S., March 19, 2003); TN/RL/W/82, (EC, April 23, 2003); TN/RL/W/88, (China, May 1, 2003), TN/RL/W/115 (Chile, June 10, 2003).

284. *See* ¶ V.C.3(a).

285. TN/RL/W/12 (New Zealand, July 4, 2002) ¶¶ 5 and 14.

286. WWF's campaign to reduce and reform fishing subsidies has not sought to encourage national CVD actions. As a general matter, WWF believes that multilateral action is the preferred means of solving international problems, and considers unilateral trade measures to be tools of last resort. *See* WWF (1998a, 149).

The SCM's definition of "injury" is set forth mainly in the context of the rules governing national CVD actions.[287] It follows that the test in its current form focuses directly and exclusively on the competitive impact of subsidized imports on a domestic industry. As noted earlier (¶ IV.B.4(e)), the harms caused by fishing subsidies are generally felt more keenly at the production level than at the point of sale. Moreover, even where competitive distortions caused by subsidized imports are at issue, the nature of the international market for fish makes a classic proof of "injury" unusually difficult if not impossible. Accordingly, for purposes of fishing subsidies, the definition of "injury" should be expanded in a fashion parallel to the clarifications for "serious prejudice" proposed in the preceding paragraphs.

Specifically, catch share, production costs, and revenue should be considered. Where market conditions make establishing baselines for import volumes and prices of wild-capture fish products difficult, relative catch share, costs (including "yield per unit effort"), and enterprise or fleet revenue should be accepted as elements of an injury determination, without requiring reliance on import volume and price data exclusively. SCM Articles 15.1 and 15.2 should be clarified accordingly.

(**e**) **Clarifying the "nullification or impairment" test.** The "nullification or impairment" test of SCM Article 5(b) is the most arcane—and for fishing subsidies possibly least relevant—of the three "adverse effects" tests. Still, there is a narrow class of WTO cases, known as "non-violation nullification or impairment" cases, that may bear some investigation from a fishing subsidies perspective.[289]

(**i**) **Background on "non-violation nullification or impairment":** "Nullification or impairment" is the term used for the basic and original cause of action for complaints under the General Agreement on Tariffs and Trade (GATT).[290] While most often applied in the context of alleged breaches of GATT legal obligations, nullification or impairment can be claimed even in the absence of an alleged breach.[291] The availability of so-called non-violation nullification or impairment claims reflects the dual character of the GATT—on the one hand, a body of legalistic rules; on the other hand, an elaborate commercial bargain involving thousands of specific tariff bindings, etc. The notion underlying the nonviolation clause is that GATT parties (now WTO members) should not be allowed to do anything that contradicts the mutual understandings reflected in the deal as a whole, regardless of the technical fine print. In such cases, however, the burden of proving "nullification or impairment" remains on the complaining party. If a violation of a GATT obligation is proved, the burden shifts to the defending party to prove that "nullification or impairment" has not occurred.

(**ii**) **GATT subsidies cases:** Nonviolation cases have been rare under the GATT (increasingly so, as the formal rule system has expanded).[292] The most

287. *See* footnote 11 to SCM Art. 5(a) and SCM Art. 15.
288. *See* ¶ IV.B.4(e)(iii).
289. The likely "real world" impact of the "non-violation" clarifications proposed here has not been thoroughly researched. This analysis is offered as an aid and as a spur to the imaginations of participants in the fishing subsidies negotiations.
290. *See* GATT Art. XXIII.
291. GATT Art. XXIII:1(b).
292. *See Japan—Photographic Film*, ¶ 10.36 (under WTO and GATT cases in References); *see* also Trachtman (1999, 371ff.).

common use has been in attacking subsidies granted on products after a tariff binding on them had been agreed.[293] Even where such subsidies were not otherwise actionable, they have been found to cause nonviolation nullification or impairment because they alter the basic competitive balance struck by the tariff deal.[294]

(iii) **SCM Article 5(b):** Article 5(b) imported the "nullification or impairment" clause into the SCM. While this in some sense has had the effect of making "non-violation" cases into "violation" cases, the burden to prove harm nevertheless remains on the complaining party. It is interesting, however, that the mere existence of an *ex post facto* subsidy has apparently been found to upset the competitive balance, without much proof of actual harm. In any event, these cases now can proceed according to the dispute resolution provisions of the SCM.

(iv) **Recent interest in nonviolation approaches:** Despite the absence of nonviolation cases in recent years, some observers have taken a new-found interest in using a "non-violation" approach to expand the effective reach of new WTO norms.[295] The approach thus appears to have some currency.

(v) **Potential application to fishing subsidies:** Research has not been done to reveal how many fishing subsidies have been granted that may affect products previously subject to tariff bindings. However, if sectoral liberalization proposals for fish and fish products currently being entertained in the Negotiating Group on Market Access enjoy any significant success, the relevance of a nonviolation approach could take on renewed significance for fishing subsidies.[296] Even without new tariff bindings, it is possible that significant potential cases already exist. In any case, a formal interpretation or amendment of Article 5(b) could be used to reinvigorate this approach both by shifting the burden and by establishing a point in time after which new subsidies could more easily be argued to upset the mutual expectations of WTO members. For example, a second footnote to Article 5(b) could read as follows:

> 12*bis*. In the case of subsidies to the wild capture fisheries sector, "nullification or impairment" shall be [rebuttably] presumed to exist with regard to any subsidies granted to a domestic fishing enterprise or industry that is engaged in the production or sale of any product subject to a previous [tariff binding].

V.F.4 Shifting the burden of proof —"dark amber" provisions for fishing subsidies.

As described in ¶ IV.B.4(c), the drafters of the SCM included a set of provisions (now lapsed) known as the "dark amber light" aimed at facilitating challenges to certain

293. Trachtman (1999, 372).

294. The landmark GATT case in this regard was *Australian Subsidy on Ammonium Sulphate,* adopted on April 3, 1950, BISD II/188.

295. *See, e.g.*, Trachtman (1999) (contemplating the application of nonviolation approaches to competition policies); *see also* Stilwell and Tuerk (2001).

296. Regarding proposals for sectoral tariff liberalization on fish products, *see, e.g.*, TN/MA/12 (Chair's Report, September 1, 2003), ¶ 9 (listing "fish and fish products" among sectors proposed for elimination of all tariffs as an export sector of particular interest to developing and least developed countries).

classes of subsidies by shifting the burden of proof in those cases to require that the respondent prove its subsidies had not caused "adverse effects" to the complainant. Reviving and adapting the dark amber device is critical to the effectiveness of any future amber light provision for fishing subsidies. Given both the urgency of eliminating harmful fishing subsidies and the unusual difficulty of proving the specific elements of adverse effects even in fishing subsidies cases where such effects are extremely likely (*see* ¶ IV.B.4(e)), a "dark amber" rule for fishing subsidies is particularly appropriate. Dark amber treatment should apply to all amber light fishing subsidies that

(a) **are applied in a fishery that is "patently at risk" or "patently undermanaged";** *see* ¶ V.D.3.

(b) **are likely to disadvantage developing countries.** This trigger is justified by the particular vulnerability of developing countries to injury by foreign fishing subsidies (*see* ¶ I.B.9). A provision establishing this trigger might read as follows:

> Any subsidy benefiting fishers who catch fish of a kind, or of a kind directly competitive with another kind, caught by a developing country member, where the total catch of the kind of fish in question by the domestic fleet of the subsidizing member accounts for more than [20%] of the world catch, and [or] where the kind of fish caught by the developing country member accounts for more than [20%] of the revenue of that country's commercial fishing sector.

(c) **exceed 5 percent *ad valorem* for any fleet or fishery;** and

(d) **are granted to a fleet or an enterprise to cover operating losses.**

Note that the last two of these triggers are taken from the lapsed dark amber provisions of SCM Article 6.1.

V.F.5 Requiring withdrawal of offending subsidies. Among the weaknesses of the current amber light is the provision of SCM Article 7.8 allowing a member to maintain a subsidy that has caused adverse effects if the adverse effects of the subsidy are removed. At least one delegation has already proposed strengthening the generic amber light by altering this provision to require withdrawal of the offending subsidy itself.[297] In the case of fishing subsidies, this modification would make particularly good sense. In the case of traditional amber light subsidies, "removing the adverse effects" means in essence restoring the competitive balance (usually prices) in a given export market. Where fishing subsidies are concerned, however, the adverse effects are expressed in a more intractable and physical reality—the existence of fishing overcapacity and the increased danger of depleted fish stocks.[298] These harms are both more profound and more difficult to observe than traditional export market distortions. Subsidies causing them should be subject to mandatory withdrawal.[299]

297. *See* TN/RL/W/78 (U.S., March 19, 2003), p.2.

298. Avoiding subsidies that encourage the depletion of fish stocks is clearly one of the key underlying policy goals, even if it is not used as a legal test owing to a desire to avoid the "thin green line."

299. Alternatives to blanket mandatory withdrawal: While WWF believes that an absolute requirement to withdraw fishing subsidies that cause adverse effects would likely be the best option, other possibilities include requiring withdrawal of amber light subsidies falling within the "dark amber" category or requiring withdrawal of subsidies that have not been properly notified (regarding the latter, *see* ¶ V.G.7(b)(ii)).

V.G Improving Notifications and Surveillance

V.G.1 The importance—and the failure—of WTO subsidy notification requirements:

(a) **Establishing transparency and accountability is a fundamental element of WTO subsidy disciplines.** The public availability of information about government subsidy programs is essential to the effectiveness of WTO subsidy disciplines, for three basic reasons:

- Without transparency, government subsidies are prone to mismanagement and abuse;[300]
- Without transparency, government subsidies are prone to "political capture" by powerful special interests; and
- Without transparency, trade distortions resulting from subsidies may be invisible.[301]

In recognition of these facts, SCM Article 25 requires WTO members to disclose all subsidies granted by them to their domestic industries. While this notification obligation is only one of many found throughout the WTO rule system, its role within the SCM system is especially important. The inaugural chair of the SCM Committee has called Article 25 "of critical importance to the effective operation of the Agreement."[302]

(b) **Unfortunately, Article 25 of the SCM has been a wholesale failure.** The obligations of Article 25 have been honored mainly in the breach. One chairperson of the SCM Committee's Working Party on Subsidy Notifications has referred to the "significant and worsening problem" posed by "the great tardiness or complete lack of notifications from the majority of Members."[303] As discussed below, solutions for this basic flaw in the SCM system have so far proved elusive.

---

300. In 1998, the **European Court of Auditors** carried out what appears to be the only audit of a major fishing subsidies program ever undertaken by any government. The audit revealed a program rife with examples of mismanagement and abuse, including

- subsidies granted to support the fishing activities of at least five vessels after these had sunk in marine accidents;
- subsidies granted to vessels that had been inactive for a considerable time prior to receiving subsidies, despite the fact that the subsidies were intended to reduce the level of fishing activities in EU waters;
- subsidies that were granted to vessels that were technically unfit for the fishing activities to be supported by the payments;
- payments (including at least two individual grants of two million ECU or more) to joint enterprises where the joint enterprise was a shell entity, or otherwise could not be considered *bona fide*;
- subsidies granted on the basis of significant misrepresentations in applications for aid submitted by the grantees;
- overpayments and significant miscalculations of aid as a result of mismeasurements of vessel capacity;
- unequal application of the rules governing the subsidy payments among various EU member states; and
- subsidies granted to reduce fishing capacity that had itself been created with other EU subsidies totaling millions of ECUs, without appropriate recovery of the double payment.

(European Court of Auditors, Special Report No.18/98)

There is no reason to believe that this particular subsidy program was unique in its degree of mismanagement. (Regarding the transparency of EU fishing subsidies generally, *see* fn. 311.)

301. Whenever a subsidy is undetected, its impact on international markets may be invisible to competitors. In the case of fishing subsidies, where the primary impacts are often felt at the level of production (or access to resources), the impact of unreported subsidies may be still more difficult to detect.

302. G/SCM/M/1 (Minutes of the SCM Committee Meeting of February 22, 1995), ¶ L.

303. G/SCM/M/28 (Minutes of the SCM Meeting of May 2–3, 2001), ¶ 31.

V.G.2 The poor transparency of fishing subsidies is particularly problematic.[304] As the EC's delegation to the WTO has succinctly put it: "Increased transparency is a condition sine qua non to deal effectively with the problem of fisheries subsidies."[305]

(a) Fishing subsidies are notoriously nontransparent. Time and again, researchers and policy makers seeking information about fishing subsidies have been hindered by lack of information. For example:

- An early and authoritative World Bank study was, according to its author, "seriously encumbered by a woeful lack of up-to-date and reliable information."[306] The author, a government official with excellent access to information resources, concluded that "[t]ransparency is generally insufficient [and] information on major players... is woefully inadequate."[307]
- A 1998 UNEP study of fishing subsidies was "hampered by the lack of transparency in the present global system of fisheries subsidies."[308]
- A 1999 Congressional task force on U.S. fishing subsidies reported that "[t]hroughout its proceedings, and running as a theme through this report, the Task Force constantly came up against data limitations. The available data are simply not adequate to permit proper empirical analysis of the various government programs that affect capacity in the fishing industry."[309]
- An official 1998 audit of a major European subsidies program concluded that numerous irregularities in the program "were due, in no small measure, to poor monitoring and control procedures by the Member States and the Commission."[310] The auditors further concluded that EU officials could not even document all of the assistance granted to any particular ship by EU member states.[311]
- OECD analyses have indicated data gaps, where governments have not provided information requested for a study.[312]
- A comprehensive WWF study in 2001 revealed significant gaps, inconsistencies, and underreporting in government reporting of fishing subsidies to intergovernmental bodies.[313]

(b) The vast majority of fishing subsidies are not currently notified to the WTO. In 1998, a WWF study concluded that fewer than 10 percent of all fishing subsidies

304. For a good overview of issues surrounding the lack of transparency in fishing subsidy programs, *see* WWF (2001e).
305. TN/RL/W/82 (EC, April 23, 2003), p. 4.
306. Milazzo (1998, v).
307. *Id.*, p. 73.
308. Porter (1998b, 39).
309. *Federal Fisheries Investment Task Force: Report to Congress* (July 1999, 157).
310. European Court of Auditors, Special Report No.18/98 (http://www.eca.eu.int/EN/reports_opinions.htm), p. 61 (under Other Government Documents in References).
311. *Id.*, ¶ 30. It should be noted that, despite the findings of the Court of Auditors, the transparency of fishing subsidies in Europe is among the best in the world. The EU and some of its member states have been making some efforts to improve the transparency of their fishing subsidies programs. Despite this, it remains true that no government has achieved a degree of transparency and reporting of fishing subsidies that WWF considers adequate.
312. *See, e.g.*, Cox and Schmidt (2002, 8, Table 1, fn. 1). *See also* Steenblik and Wallis (n.d.).
313. WWF (2001a, pp.15–23).

that should have been notified to the WTO in accordance with SCM Article 25 had been duly notified.[314] In 2001, WWF updated this research, finding little or no change in the overall level of notification, despite improvement in reporting patterns by one or two WTO members.[315]

V.G.3 Fisheries-specific and enterprise-specific information is needed. Effective disciplines on fishing subsidies will require information about who is receiving the subsidies, and about how and where the subsidies are used. As noted in ¶ II.B.5, this means that fishing subsidies disciplines must operate at a fisheries-specific level, and in some cases must even focus on the behavior of particular enterprises. In addition, administration of new fishing subsidies disciplines will at times require information about the fisheries context in which a given subsidy is granted (*e.g.*, whether the fishery is already suffering from overcapacity). Accordingly, WTO notifications on fishing subsidies should require detailed reporting about the actual uses and contexts of the subsidies, including

- identification of fisheries in which subsidized fishing takes place under a given subsidy program;
- basic information about the status of the fisheries in question;[316]
- subsidy amounts on a per vessel, per fleet, and per fishery basis;
- specific descriptions of how subsidies are actually applied; and
- identification of specific enterprises receiving subsidies.

Notification provisions should, at a minimum, require the reporting of information sufficient to allow a *prima facie* evaluation of whether the fishery in question is "patently at risk" or "patently undermanaged." In addition, consideration should be given to requiring every fishing subsidy notification to include information on specific steps taken to ensure that the subsidy does not contribute to IUU fishing activities (*see* ¶ V.C.5(d)(iv)).

V.G.4 The formal requirements of Article 25 need to be clarified: Even if WTO members complied more fully with their subsidy notification obligations, SCM Article 25 would remain problematic for fishing subsidies. Currently Article 25 does not require information sufficient to support administration of effective fishing subsidy disciplines. A summary of the requirements of Article 25 is provided in Appendix 7.

(a) Article 25 is too vague regarding the purpose of notifications. Article 25 notifications are intended to allow members "to evaluate the trade effects and to understand the operation of notified subsidy programmes" (Article 25.3). Consistent with the need to clarify the concept of "trade effects" for new disciplines on fishing subsidies, the language of Article 25 needs to be clarified to ensure it covers the production-level effects that are the principal locus of harm caused by fishing subsidies (*see* ¶ V.F.3).

314. WWF (1998a, pp. 153–55).
315. WWF (2001a, pp. 15–16). In what may be a measure of the general lack of transparency of fishing subsidies programs, notifications to the WTO remain one of the most important sources of information about fishing subsidies, despite the insufficiency of those notifications. *Id.*
316. This basic information is needed to allow members to form an opinion about whether fishing subsidies are being granted to fisheries that are "patently at risk" or "patently undermanaged." *See* ¶ V.D.3.

(b) **Article 25 is too vague regarding the specificity of notifications.** Article 25.3 also requires members to submit notifications "sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes." While this language could theoretically be construed to require a sufficient level of specificity, current WTO practice reveals that most members consider themselves obliged to submit only very general data about their subsidy programs.

With regard to the **actual uses and impacts** of a given subsidy, the current "questionnaire format" gives members great latitude to submit only the broadest of information.[317] For example, while members are required to state "to whom" a subsidy is granted, the questionnaire implies the answer may be stated in such broad terms as "producers" or "importers." Similarly, the questionnaire explicitly says that the level of detail required for statistics about trade effects "is left to the judgment of the notifying member."

These provisions obviously do not require—nor have they resulted in—notifications that include sufficient detail to understand the particular operation of subsidy programs generally, or of fishing subsidies in particular.

(c) **Article 25 does not require adequate information about the context in which fishing subsidies may be granted.** As discussed in ¶ II.C.3, the international trade–related and economic impacts of fishing subsidies often depend on basic facts about the regulatory status and biological condition of the affected fisheries. In its current form, Article 25 does not require the provision of information of this sort, and clarifying language should be added to it to meet this need.

V.G.5 Efforts to improve WTO subsidies notifications have borne little fruit. The difficulty of achieving compliance with WTO notification obligations has been the subject of much hand-wringing since shortly after the WTO came into existence. There is no doubt that the notifications problem is a substantial one—notification obligations appear in almost all WTO agreements, and a complete listing of them runs to nearly five pages.[318] But efforts to improve the system for subsidy notifications have so far borne little fruit.

(a) **Early efforts to harmonize notifications under the SCM and the Agreement on Agriculture failed.** In 1996, the WTO's Council on Trade in Goods recommended that the SCM and Agriculture committees work toward a harmonized approach to subsidy notifications, but the two committees were unable to agree on a method.[319]

(b) **More recent efforts to address problems with Article 25 have produced only minor reforms.** Starting in November 2000, the SCM's Working Party on Subsidies Notifications, along with the SCM Committee, undertook a series of activities

317. *See* G/SCM/6 (August 9, 1995).

318. *See, e.g.*, G/L/223/Rev.9 (November 12, 2002), pp. 3–7.

319. *See* G/C/M/14 (Minutes of Council on Trade in Goods meeting of October 15, 1996), ¶¶ 4.4–4.5 (recommending that SCM and AoA committees consider mutual conforming revisions to their notification guidelines including G/SCM/6); G/SCM/M/14 (Minutes of SCM Committee of May 1–2, 1997), ¶ 120 (reporting that the SCM Working Group on Notification Obligation and Procedures had been unable to agree on adoption of a revision to G/SCM/6 as requested by the Council); and G/AG/R/9 (report of Committee on Agriculture meeting of November 28, 1996) at ¶ 39 ("taking note" of the Council request). No further action appears to have been taken in the Committee on Agriculture.

aimed at improving the operation of Article 25.[320] This process culminated with the adoption of some minor procedural reforms in May 2001.[321]

- **The May 2001 reforms—less is more?** The main thrust of the May 2001 reforms—and indeed of most proposals to date for "improving" notifications—seems to be on finding ways to let members do less notifying. The reforms focus on reducing administrative burdens by launching a process aimed at **simplifying the form** of notifications, and by giving members latitude to **"de-emphasize" notification updates** (as opposed to "new and full notifications"). The first idea apparently has not gone far.[322] The second reform has led to questions about its consistency with the requirements of Article 25, leading some delegations to propose amending the SCM text to incorporate it directly.[323]
- **Review of the May 2001 reforms—less is *not* more.** At the SCM Committee meeting in May 2003, the chair reported that two years after the adoption of the May 2001 reforms, "the overall record of Members' compliance with the obligation in Article 25.1 to submit subsidy notifications remain[s] extremely poor."[324] Nevertheless, apparently for want of a better alternative, the chair reported an apparent consensus among members to continue with the procedural changes in "emphasis and timing" set forth in 2001.
- **The process continues.** Despite the apparent lack of significant progress toward improving Article 25 notifications, the Working Party on Subsidy Notifications remains formally engaged on the issue, and "consultations" are continuing.[325]

V.G.6 Recent negotiating proposals include calls for reform. Several submissions to the Rules Negotiating Group have called for negotiations on strengthening the SCM's notification provisions.[326] At least three delegations have specifically referred to the need to improve notifications in the context of fishing subsidies.[327] These proposals are discussed in greater detail in the next section.

---

320. In November 2000, the Working Party on Subsidies Notifications launched a questionnaire to WTO members about the difficulties faced in submitting subsidies notifications. A summary of the responses can be found in G/SCM/W/432 (March 27, 2001). In October 2002, the WTO hosted a Seminar for Capital-Based Officials on subsidies notification. *See* Chairman's Report in G/SCM/M/43, ¶¶ 89–93.

321. *See* G/SCM/M/30 (Minutes of the special SCM meeting of May 31, 2001); *see* also the earlier discussions in G/SCM/M/28 (Minutes of the SCM meeting of May 2–3, 2001), ¶¶ 30–35.

322. The WTO questionnaire providing formal directions for Art. 25 notifications is contained in document G/SCM/6 (August 9, 1995). Despite the process launched in May 2001, G/SCM/6 is still apparently the required format. *See* G/SCM/N/95 (February 18, 2003), ¶ 3.

323. *See* TN/RL/W/89 (**Australia**, May 1, 2003), p. 3 ("Australia agrees that the approaches adopted by the Committee in May 2001 should be more fully reflected in the SCM"); *see also* TN/RL/W/85 (Australia, April 30, 2003), p. 2. The **United States** has taken a similar position. TN/RL/W/78 (March 19, 2003), p. 6.

324. G/SCM/M/46 (minutes of SCM Committee meeting of May 8, 2003), ¶ 43.

325. *See*, *id.*, ¶ 39.

326. **Australia** and the **United States** have indicated some support for reforming Art. 25 to reflect (and fully legitimize) the May 2001 procedural reforms. *See* TN/RL/W/89 (Australia, May 1, 2003), p. 3; TN/RL/W/85 (Australia, April 30, 2003), p. 2; *see also* TN/RL/W/78 (United States, March 19, 2003), p. 6. The **European Communities** have also called for measures to promote compliance. *See* TN/RL/W/30 (European Communities, November 21, 2002), p. 4.; *see also* TN/RL/W/82 (European Communities, April 23, 2003), p. 4.

327. *See* TN/RL/W/77 (**United States**, March 19, 2003), p. 2; TN/RL/W/82 (**European Communities**, April 23, 2003), p. 4; TN/RL/W/88 (**China**, May 1, 2003).

V.G.7 WWF's proposals for improving fishing subsidies notifications.

(a) **Two key directions for improvement: Better compliance and better data.** As discussed in ¶¶ V.G.1 and V.G.3, the two basic problems with the current SCM notifications regime, insofar as fishing subsidies are concerned, are (i) the fundamental lack of compliance with current Article 25 reporting requirements; and (ii) the specificity and quality of the information required by Article 25. The following proposals seek to address these issues in turn.

(b) **The cost of noncompliance should be substantially raised.** In its current form, Article 25 is essentially unenforceable—WTO members are free to ignore its requirements without significant consequences. Almost a decade of pleading and cajoling by SCM chairmen and WTO officials has had no impact on compliance levels. It is time for WTO members to get serious about making Article 25 work. In the case of fishing subsidies in particular, effective WTO disciplines will depend on improved notifications. Accordingly, WTO negotiators should give strong consideration to mechanisms of the following kinds:

(i) **Punitive or quasipunitive mechanisms:** A number of delegations have indicated some support for penalizing failures to notify under Article 25, although the nature and degree of any penalties have remained unclear. For example, an early proposal by the EC specifically called for "penalizing partial or non-notifications."[328] This proposal has drawn some opposition.[329] A more recent EC proposal appears to take a softer line, calling for the creation of a "scoreboard" to publicize the relative levels of compliance with Article 25.[330] This latter proposal has gained some support.[331] For its part, WWF has previously suggested that punitive mechanisms might include the imposition of monetary fines.[332]

The "mini-dispute" problem: An obvious difficulty with a purely punitive approach is that it would require some type of procedure for determining guilt and meting out punishment. The EC's original proposal, for example, suggested either adoption of a mechanism similar to that now under discussion for weeding out spurious antidumping cases or referral of non-notifications to the SCM Permanent Group of Experts.[333]

A possible solution: One way to avoid the need for such a "mini-dispute" mechanism would be to allow punitive measures for non-notification to be imposed by WTO dispute panels in the context of challenges based on violations other than non-notification. For example, in the course of a

328. TN/RL/W/30 (European Communities, November 21, 2002), p. 4.
329. *See, e.g.*, TN/RL/W/39 (**Australia**, December 6, 2002), p. 2; TN/RL/W/57 (**Egypt**, February 10, 2003) p. 4 (calling the EC proposal unnecessary, difficult to enforce, and beyond the Doha mandate of the Rules Group). *See also* TN/RL/M/5 (summary of Rules Group meeting of November 25–27, 2002), ¶ 18; TN/RL/M/6 (summary of Rules Group meeting of February 3, 6, 7, 2003), ¶ 32.
330. TN/RL/W/82 (European Communities, April 23, 2003), p. 4.
331. *See* TN/RL/W/115 (Chile, June 10, 2003), p. 3.
332. WWF (2003b, ¶ 4(a)(ii)).
333. TN/RL/W/30 (European Communities, November 21, 2002), p. 4. Regarding discussions of mechanisms for confronting spurious antidumping initiations, *see, e.g.*, the proposals for a "swift control mechanism" summarized by the Rules Group chair in TN/RL/W/143 (August 22, 2003), p. 74. Regarding WWF's proposal for a Permanent Group of Fisheries Experts, *see* ¶ V.I.4(c)(ii).

challenge against an "actionable" subsidy, proof of non-notification could allow the panel to impose monetary damages, whether or not the subsidy at issue were found to have caused adverse effects.

(ii) **Attaching legal consequences to non-notification:** As either an alternative or an adjunct to purely "punitive" mechanisms, an improved Article 25 could create certain negative legal consequences for non-notification. For example, in the case of actionable ("amber light") subsidies, a failure to notify could subject a subsidy program to

- an automatic presumption of serious prejudice;[334]
- higher evidentiary bars for rebutting serious prejudice; and/or
- an obligation to withdraw a subsidy found to cause adverse effects (rather than the right merely to remove the effects).[335]

In the case of prohibited subsidies, WWF has already proposed that subsidies for which an exemption from the red light is sought should be notified as such in advance (*see* ¶ V.D.4(b)). In addition, automatic monetary penalties should be imposed on non-notified subsidies later found to violate the red light provisions. Such penalties should apply even if a prohibited subsidy were promptly withdrawn, and might be made to increase in proportion to the duration of the violation prior to withdrawal.[336]

(c) **Ensuring that adequate information is reported.** As noted in ¶ V.G.3, notifications of fishing subsidies need to include information of a kind not required by current interpretations of Article 25. WWF believes Rules Group negotiators should clarify existing rules to ensure that notifications of fishing subsidies include the kinds of information detailed in ¶ V.G.3. Additionally, negotiators should consider providing more detailed guidance on the content and format for fishing subsidies notifications. One means would be to devise a "questionnaire" specifically for fishing subsidies notifications.

V.G.8 Special notification requirements generated by specific fishing subsidies disciplines: In addition to the general notification requirement, as clarified and improved for fishing subsidies in the manner discussed above, several other disciplines proposed in this paper would generate specific notification and reporting requirements. These include the following:

- Notification of any subsidies withdrawn (whether on an enterprise-specific basis or more broadly) owing to the discovery of subsidized IUU activities (*see* ¶¶ V.C.5(c)(ii) and V.C.5(d)(i)-(ii));
- Advance notification of subsidies maintained as exceptions to the red light prohibitions on certain fishing subsidies (*see* ¶ V.D.4(b));

334. This concept has also been proposed by Chile. TN/RL/W/115 (June 10, 2003), pp. 2–3.
335. This third point is relevant only as a possible alternative to modifying SCM Art. 7.8 to require withdrawal of all subsidies found to cause "adverse effects" (*see* ¶ V.F.5).
336. The notion of imposing punitive sanctions on prohibited subsidies is not new to the SCM. As discussed in ¶ IV.B.1(c), SCM Art. 4 already allows sanctions *in excess of compensatory duties* to be levied against governments that fail to withdraw a prohibited subsidy. Here, WWF's proposal is simply to require application of punitive fines as an automatic consequence of failure to notify.

- Reporting and reviewing (within the context of regular Trade Policy Review Mechanism reviews) of subsidies maintained as exceptions to the red light prohibitions on certain fishing subsidies (*see* ¶ V.D.5(d));
- Advance notification of subsidies maintained under the green light for certain fishing subsidies (*see* ¶ V.E.5(d)); and
- Advance notification of subsidies maintained in accordance with provisions for "special and differential treatment" of developing countries (*see* ¶ V.H.4).

V.G.9 A radical, plausible, and most effective solution—an independent monitoring mechanism. In private, trade officials frequently voice pessimism—perhaps even cynicism—regarding the possibility of substantially increasing compliance with subsidy notification requirements. Faced with the daunting political and administrative obstacles to real improvement, some experts have (again, privately) suggested that the only truly effective solution would be to empower an independent body of international civil servants to collect and report the required information. In the past, data collection efforts of this kind by organizations such as the OECD and the Asia-Pacific Economic Cooperation have shown respectable results.[337] In both cases, the method used was the creation of a survey instrument by the intergovernmental investigators, and a process for vetting the responses with governments and other observers prior to publication. WWF strongly believes that a mechanism of this kind should be created for WTO subsidy notifications, under the auspices of the WTO Secretariat or of a properly staffed and authorized Permanent Group of Fisheries Experts (*see* ¶ V.I.4(c)(ii)).

V.G.10 Confronting the administrative burden problem through "special and differential treatment." Regardless of the means by which reporting of fishing subsidies (and other subsidies) is improved, there is no doubt that the administrative burdens associated with notification are real. However, except in the case of the least developed WTO members, WWF cannot accept that these burdens present a legitimate excuse for failure to achieve transparency in subsidy programs. There is little doubt that the public costs suffered as a result of perverse subsidies far outweigh the administrative costs of proper monitoring and reporting. Moreover, it is likely that in many cases lack of public transparency is a symptom of lack of internal accountability, often associated with incoherent policy or mismanagement.

Nevertheless, in the case of least developed WTO members, a combination of technical assistance and "special and differential treatment" should be made available to ease notification burdens. Both of these ideas have received some support during the current negotiations.[338] Special and differential treatment could include some of the following:

- Relieving least developed members of notification requirements altogether, relying instead on regular trade policy reviews;

337. *See* discussion in ¶ I.B.1, and in WWF (2001a).

338. *See, e.g.*, TN/RL/W/30 (**European Communities**, November 21, 2002), p. 5 (proposing relieving developing countries of some reporting obligations); TN/RL/W/107 (**Venezuela**, May 13, 2003), p.2 (reducing reporting obligations and providing technical assistance); TN/RL/78 (**United States**, March 19, 2003), p. 6. Note that the United States appears to be rejecting (or at least pointedly not joining) the EC proposal of exempting least developed countries from Art. 25's notification obligations, although the U.S. submission goes on to say that "consideration should be given to other ways to lessen the burden on these Members."

- Establishing *de minimis* thresholds (in either absolute or *ad valorem* terms) below which notification of subsidies would not be required;
- Relaxing timetables for reporting; and
- Streamlining notification formats, allowing least developed members to report only very basic information about a subsidy until such time as another WTO member requests a full notification.

V.G.11 Beyond notifications—proactive monitoring and surveillance. The foregoing discussion focused on the need to improve formal notifications under SCM Article 25 or its equivalent. In addition, new disciplines on fishing subsidies should be subject to other review mechanisms, including

- reporting and reviewing (possibly within the context of regular Trade Policy Review Mechanism reviews) of steps taken by members to ensure that subsidies do not contribute to IUU activities (*see* ¶ V.C.5(d)(iv));
- mechanisms for the review of red light exceptions and green light provisions (*see* ¶ V.D.5(d)); and ¶ V.E.5(g)
- a mechanism for a review of the operation of new fishing subsidies disciplines generally, perhaps at regular intervals (*e.g.*, every three years).

V.H Special and differential treatment for developing countries

V.H.1 Preliminary comments:

(a) **New fishing subsidies disciplines must take into account developing-country concerns.** The Doha mandate on fishing subsidies specifically calls on members to take account of the importance of the fisheries sector to developing countries.[339] WWF fully embraces this mandate, understanding that attention to the unique challenges faced by developing countries is critical not only to economic development but also to the successful conservation of the world's fisheries resources. Accordingly, the following paragraphs set out WWF's preliminary thoughts and proposals regarding S&D, for the purposes of promoting attention to this aspect of the fishing subsidies discussion.

(b) **WWF lacks the expertise necessary to make definitive proposals regarding S&D provisions.** The ideas in this section are thus to be treated as an indication of WWF's orientation, and as an invitation to dialogue.

(c) **There have been only limited references to S&D in the fishing subsidies negotiations so far.** References to S&D issues in the context of the fishing subsidies talks thus far have mainly been limited to remarks of a general nature.[340] The only exceptions have been several references to artisanal fishing, as discussed earlier in ¶ V.D.2(c).

339. *Doha Declaration* (November 20, 2001), ¶ 28.

340. *See* TN/RL/W/9 (**China**, June 20, 2002) ("S&D treatment should be accorded to developing countries while participants aim to clarify and improve the disciplines on fisheries subsidies."); TN/RL/W/11 (**Japan**, July 2, 2002), ¶ 17 ("due consideration" should be given to S&D for fisheries development, but only in context of a nonsectoral generic discussion of S&D within the SCM); TN/RL/W/52 (**Japan**, February 6, 2003), ¶ 7 (stressing the importance of technical and financial assistance to developing countries for achieving sustainable fisheries); TN/RL/W/82 (**European Communities**, April 23, 2003) § 6 (EC is "prepared to engage constructively in drawing up rules in the context of Article 27 ASCM which take special account of the distinct needs of developing countries in fisheries").

(**d**) **S&D treatment should not be a justification for subsidies that cause overcapacity or overfishing.** S&D provisions should be tailored to allow the pursuit of economic and social development, and to relieve developing countries of obligations they cannot reasonably be expected to meet. But given the impacts of the worldwide fisheries crisis on developing countries, it is important that S&D provisions not inadvertently contribute to the decline of developing-country fisheries. This will call for a careful balancing of risks and priorities.

(**e**) **S&D provisions should discourage developing countries from injuring each other.** Close observers of the WTO will know that some developing countries themselves harbor misgivings about the operation of S&D provisions. Given the particular vulnerability of developing countries to harm from fishing subsidies, consideration should be given to how S&D provisions themselves can be prevented from allowing benefits to accrue to one developing country at the expense of another.

V.H.2 The problem of "major fishing" developing countries: When it comes to fishing subsidies, the absolute scale of fishing conducted by a country is a relevant consideration, independent of level of development. China, for example, simply cannot be put into the same category as a small island state with regard to the likely impacts of its fishing subsidies programs. The S&D concepts discussed next in ¶ V.H.3 are intended as protections for developing countries whose fishing industries operate on a small and relatively local scale, and whose overall impact on marine fishing is relatively small. This implies a need to limit eligibility for some or all of the S&D provisions eventually adopted for fishing subsidies. This might be done either by creating a category of excluded "developing countries with major fishing industries," based on certain definitions, or by establishing a list of specific countries for exclusion or partial exclusion from S&D treatment of fishing subsidies.

This approach would reflect, *inter alia,*

- the treatment of China for purposes of its accession to the WTO;[341] and
- provisions such as SCM Articles 27.5 and 27.6, which make the market strength of a developing country relevant to determining whether it qualifies for certain elements of S&D treatment.

V.H.3 Some concepts for S&D provisions on fishing subsidies: The following are offered for purposes of discussion. WWF does not currently intend to endorse these as its own proposals. Also recall that these concepts are suggested with regard to developing countries other than those which might be considered "major fishing nations" (see the preceding paragraph).

(**a**) **Possible relaxation of the prohibition on capacity- or effort-enhancing subsidies.** The red light prohibition on capacity- or effort-enhancing subsidies could be relaxed for developing-country fleets fishing in fisheries that are not "patently at risk" or "patently undermanaged." Some limits should nevertheless apply (such as limits on the duration of this relaxation, or on its precise scope). The burden to prove that a fishery is not "patently at risk" or "patently undermanaged" should

341. *See Accession of the People's Republic of China*, WT/L/432 (November 23, 2001). Although China was allowed to retain its status as a "developing country" when entering the WTO, it relinquished a number of its rights to S&D treatment, including, for example, the relaxations of SCM Art. 27.2 on the export subsidy prohibition. *Id.*, ¶ 10.3.

rest squarely on the subsidizing developing country, and subsidies granted this relaxation should be subject to amber or possibly dark amber treatment.

(**b**) **The ban on "domestic supply" fishing subsidies could be relaxed for developing countries.** Given the heavy dependence of some developing countries on dietary fish protein and on coastal fishing economies (*see* ¶ I.A.2), and in view of the continuing practice by some developed countries of using tariffs on fish products as a means of domestic price support (*see* fn. 134), some provision needs to be made for the food security policies of developing countries. Governments should consider relaxing the ban proposed in ¶ V.C.5(a) on subsidies used as price supports for fish products (compare SCM Article 27.3), although perhaps such a relaxation should be limited to price supports not affecting fisheries that are "patently at risk" or "patently undermanaged" (¶ V.D.3).

(**c**) **The "serious adverse effects" threshold for challenging green light subsidies should be lowered for developing countries.** In cases where a subsidy maintained under the green light is "likely to disadvantage developing countries" as defined in ¶ V.F.4(b), the threshold for finding that a green light subsidy has caused "serious adverse trade effects" (*see* ¶ V.E.5(c)) could be lowered. The subsidizing member in such cases should, however, be allowed to maintain the green light subsidy upon making compensation to the affected developing-country members.

(**d**) **The "catch share" test for serious prejudice should be refined for developing countries.**

(**i**) **The test should be inapplicable on purely domestic stocks.** The "catch share" test should not apply with regard to any fishing by a developing country on a stock located exclusively within its EEZ.[342]

(**ii**) **Otherwise, additional burdens should be imposed on developed-country complainants.** In cases where a major economy challenges a developing-country fishing subsidy on grounds of catch share, the rule could require, for example, proof that any increase in catch share for the subsidized fleet was at least 5 percent of the catch, and proof that the decreased catch share for the complainant's fleet was at least 5 percent of the complainant's catch.

(**e**) **Other serious prejudice tests should apply only to developing-country subsidies in "patently at risk" or "patently undermanaged" fisheries.** The burden to prove that a fishery is "patently at risk" or "patently undermanaged" should rest on the challenger.

(**f**) **The dark amber provisions should not apply to developing countries (other than those that are "major fishing countries").** This concept tracks SCM Article 27.8.

(**g**) **Reporting requirements could be relaxed for least developed countries.** For example, reporting requirements on fishing subsidies could be wrapped into regularly scheduled trade policy reviews.

342. WWF believes that this asymmetrical treatment of developing-country and developed-country EEZ fisheries is justified both by the economic conditions of developing countries and by the historical asymmetry in access to marine resources.

V.H.4 Requirement of advance notification: Any developing country seeking to maintain a fishing subsidy in accordance with these "special and differential treatment" provisions should be required to give advance notification of such subsidies. *See* ¶ V.G.8.

V.I Improving institutional mechanisms

V.I.1 The need for new mechanisms: New WTO disciplines on fishing subsidies need to be accompanied by improved institutional mechanisms for two underlying reasons:

(a) **The interdisciplinary nature of the fishing subsidies issue requires that the WTO work with other international bodies.** By definition, any true "win-win-win" outcome to the fishing subsidies negotiations will produce new WTO disciplines that are at least somewhat interdisciplinary in nature, and it is obvious that the WTO is not the only international institution working to reform fishing subsidies policies.[343] As in other areas where the WTO enjoys overlapping or closely related competence with other intergovernmental bodies, mechanisms to ensure cooperation, consistency, and the appropriate distribution of authority will be needed. Specifically, new mechanisms should explicitly ensure the appropriate participation of external intergovernmental organizations and individual experts with competence in fisheries management and marine conservation in disputes and WTO reviews involving fishing subsidies. Failure to adopt such mechanisms would not only risk causing policy incoherence, but would also increase the odds of entangling the WTO in areas of policy-making behind its legitimate competence.

(b) **WTO processes in general continue to lack adequate external transparency.** For many years, WWF has joined dozens of other civil society groups from all over the world calling upon the WTO to increase the public transparency of its proceedings.[344] The adoption of a "win-win-win" set of fishing subsidies disciplines affords an excellent opportunity for the WTO to undertake long overdue reforms to increase public access to its proceedings, particularly those regarding formal WTO disputes.

The fishing subsidies negotiations to date have touched on the question of institutional mechanisms, but only lightly.[345]

V.I.2 The kinds of issues likely to arise under new disciplines. The interdisciplinary nature of new fishing subsidies disciplines means that their implementation will at times require information and judgments that lie beyond the traditional competence of the WTO. But not all aspects of the new disciplines will raise issues of this type. Rather,

343. Regarding work being undertaken in other international fora, *see* ¶ I.D.

344. *See, e.g.*, WWF (1998c; 2001c).

345. So far, only one delegation has made explicit mention of institutional aspects of new fishing subsidies disciplines:

> In considering the possible structure of these improved disciplines, the Rules Group should explore ways to draw upon information about the state of fisheries stocks and similar expertise in other organizations, including development of relationships with the UN Food and Agriculture Organization and regional fisheries management organizations. The Group could also find ways to obtain the views of non-governmental groups and individuals with expertise, including the fisheries industry and environmental conservation groups.

TN/RL/W/77 (U.S., March 19, 2003), pp. 2–3.

issues arising under the substantive provisions proposed above would fall along a continuum that would include

- issues familiar to the routine operations of the SCM;[346]
- "novel but not problematic" issues specific to the realm of fishing subsidies, but still within the competence of the WTO;[347] and
- issues (especially related to questions of fisheries management) beyond the sole competence of the WTO.[348]

Issues of the first type obviously need no special institutional mechanisms for their resolution. Issues of the second and third types, however, would greatly benefit from (and in the latter case would require) WTO interactions with the world of fisheries management. These imply the need for two kinds of new institutional mechanisms, as discussed in the following paragraphs.

V.I.3 "Expert input" mechanisms would ensure well-informed deliberations. When WTO decision makers face issues of the "novel but not problematic" type, they will need the advice and assistance of people and institutions with specialized knowledge about fisheries economics and fishing subsidies. To accomplish this, WWF proposes the institutionalization of several possible "expert input" mechanisms already familiar to WTO practice, including

- the proactive solicitation by panels of expert testimony or of advisory input from external expert bodies;
- the inclusion on panels of persons expert in relevant fields (such as fisheries economics); and
- the acceptance of appropriate and useful briefs from *amici curiae*.

WWF believes that such mechanisms should be strongly and explicitly encouraged on the face of new fishing subsidies disciplines. Moreover, governments should consider maintaining a WTO roster of expert bodies and individuals to facilitate the availability of expert advice.

V.I.4 "Shared authority" mechanisms would allow direct consideration of fisheries contexts. As noted in ¶ II.C.3, there are cases in which the beneficial or harmful nature of a fishing subsidy is determined in substantial part by the fisheries context in which it operates. In the foregoing sections of this paper, WWF has made every effort to propose disciplines that either avoid issues related to the fisheries context or refer to contextual questions that can be decided on the basis of simple and objective indicators. Nevertheless, a truly robust system of fishing subsidies disciplines must at

346. For example, whether a subsidy falls within the red light's ban on subsidies to encourage domestic fish supplies, whether a subsidy has caused a change in prices or production volumes, etc.

347. Issues could fall into this category either because they are susceptible to fact-finding or economic analyses of a generally familiar character (*e.g.*, whether a subsidy is of a kind that is likely to increase productive fishing capacity), or because they can be answered on the basis of simple and objective evidence (*e.g.*, whether a fishery is classified as "overexploited" by the FAO).

348. For example, whether a fishery should be considered "patently at risk" because it fails to meet the "objective indicia of minimum adequate management" test.

times raise contextual questions that require expert judgment, and that may relate closely to the operations and authority of existing fisheries management bodies.[349] Such questions should only be resolved with the direct involvement of bodies competent in the field of fisheries management.

(a) The concept of sharing institutional authority over particular issues is not new to the WTO system. While there has been a sometimes deep resistance within the WTO to forging links with "non-trade" institutions, within the field of economic governance the WTO is engaged in several successful authority-sharing relationships. For example, the WTO has what are in effect authority-sharing arrangements with the following:

(i) The International Monetary Fund (IMF): Perhaps the most strongly worded example of institutional authority-sharing within the WTO system is the mandatory deference given to the judgments of the IMF on matters of monetary policy. Article XV:2 of the GATT reads in full:

> In all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund. In such consultations, the CONTRACTING PARTIES shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES. The CONTRACTING PARTIES in reaching their final decision in cases involving the criteria set forth in paragraph 2 (*a*) of Article XII or in paragraph 9 of Article XVIII, shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases. *(emphasis added)*

349. Provisions implicating the possible need for shared-authority mechanisms are mainly those that involve WWF's test for determining "patently undermanaged" fisheries (*see* ¶¶ II.C.7 and V.D.3(b)). The "patently undermanaged" test plays a potential role in the following provisions: (i) the exception to the "red light" for foreign access payments (¶ V.D.2(b)); (ii) the exception to the "red light" for subsidies to artisanal fishing (¶ V.D.2(c)); one of the triggers for "dark amber" treatment (¶ V.F.4(a)); and in three elements of "special and differential treatment" (¶ V.H.3(a), (b), and (e)). In addition, provisions that may implicate judgments similar to those required by the "patently undermanaged" test include (i) one of the elements of the proposed prohibition on subsidies to IUU fishing (¶ V.C.5(c)(iv)) and (ii) some of the conditions proposed to allow "capacity-reducing" subsidies to qualify for green light treatment (¶ V.E.6(b)).

WTO panels and the Appellate Body have shown little patience with the efforts of some defendants to attack the legitimacy of this deference in the context of disputes.[350,351]

(ii) **The World Customs Organization (WCO):** The Tokyo Round Customs Valuation Code[352] creates a tight working relationship between the WTO (and previously the GATT) and the World Customs Organization.[353] Article 18:2 of the Code creates a Technical Committee on Customs Valuation that actually meets under the auspices of the WCO.[354] The Technical Committee has been quite active over the years providing "advisory opinions" to the WTO, including on issues of some sensitivity.[355] Especially interesting with regard to the WCO is a 1998 WTO Appellate Body ruling that a WTO panel had erred in failing to take account of a decision of the WCO regarding the interpretation of a tariff concession that was at issue in the case.[356]

(iii) **The Codex Alimentarius Commission and others:** The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) recognizes the authority of the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention to set international standards within their respective fields of expertise.[357] It further requires the SPS Committee to secure from these organizations "the best available scientific and technical advice for the administration of this Agreement."[358]

---

350. *See, e.g.*, *India—Automotive Sector*, ¶¶ 7.282–7.294 (under WTO and GATT Cases in References). Indeed, this deference is routinely granted, and the only outstanding question is whether the language of Art. XV:2 leaves panels any discretion at all, or whether the findings of the IMF on these matters listed is legally dispositive. *See India—Agricultural, Textile and Industrial Products*, ¶¶ 5.11–5.13 (under WTO and GATT Cases in References). In the latter case, the strongest attack the defending government could offer on the language of Art. XV:2 was to suggest that this language as incorporated into the WTO is binding on the General Council and the Balance of Payments Committee, but not on other WTO bodies. While the panel and the Appellate Body declined to reach this hair-splitting argument, an earlier ruling appears to have rejected it implicitly. *See Argentina—Footwear*, ¶ 84 (under WTO and GATT Cases in References).

351. A fuller sense of the depth of the relationship between the WTO and the IMF can be obtained from, *e.g.*, WT/GC/W80 (Secretariat, March 10, 1998).

352. Formally known as the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade.*

353. *See id.*, Art. 18:2 and Annex II. The WCO is the "working name" of the Customs Cooperation Council, which was established as an independent intergovernmental body in 1952 "to enhance the effectiveness and efficiency of customs administration." It is responsible for promulgating a harmonized nomenclature for customs duties, and for harmonizing various technical aspects of customs administration. It also undertakes training and capacity building. The WCO currently has 161 member states. *See generally* WCO online publication *About Us*, http://www.wcoomd.org/ie/En/AboutUs/aboutus.html.

354. This would appear a nice bit of juridical legerdemain, since the GATT and the WCO had (and have) different signatories.

355. For an example of its recent activity, *see also* G/VAL/51 (December 11, 2002).

356. *European Communities—Computer Equipment*, ¶ 90 (under WTO and GATT Cases in References). One leading delegation subsequently commented that "[t]he Appellate Body had clarified the relationship between the WTO and the WCO by implicitly accepting that *the former should not deal with technical aspects regarding the classification of products* and that in the area of dispute settlement concerning tariff concessions in the WTO, the provisions of the Harmonized System and its Explanatory Notes as well as the decisions of the WCO should be taken into account." WT/DSB/M/46 (Minutes of DSB, June 22, 1998), Item 2(a) (*emphasis added*).

357. SPS Annex A, ¶ 3.

358. SPS Art. 12:3.

(**b**) **The diffusion of authority over fisheries presents difficulties.** As the foregoing examples make clear, there is no legal obstacle to the establishment of authority-sharing relationships between the WTO and international bodies in the field of fisheries management. There are, however, two practical difficulties: First, there are multiple international bodies with competence and authority over various fisheries; and second, there are some fisheries over which no competent international body has the requisite competence and authority.[359]

(**c**) **Accordingly, WWF proposes a two-part mechanism:** These are outlined in the following paragraphs:

(**i**) **Reference to existing bodies:** Where a competent international body has jurisdiction over the management of a fishery, WTO panels should be required to refer questions beyond the WTO's competence to those bodies, and the findings or judgments of those bodies with regard to such questions should be binding.

(**ii**) **Creation of a Permanent Group of Fisheries Experts:** Where a competent international body does not exist or is otherwise unable to provide the WTO with the required findings of judgments, questions beyond the sole competence of the WTO should be referred to a new Permanent Group of Fisheries Experts (PGFE) to be established in cooperation with the FAO, UNEP, and major regional fisheries management bodies. The PGFE would be composed of 5–7 persons, serving in their individual capacities for fixed and staggered terms, the majority of whom should be nominated by the FAO, UNEP, and major regional fisheries management bodies. These persons would be recognized experts in the field of fisheries management, and would be drawn from the ranks of international civil servants, academics, and NGOs. The PGFE would have the authority to make binding findings on questions referred to it. It would also serve in an advisory capacity to assist the WTO in the general administration (including monitoring and review) of new fishing subsidies disciplines.

V.I.5 Potential institutional partners for implementing new WTO disciplines on fishing subsidies:

• FAO

• UNEP

• Regional fisheries management organizations (RFMOs).[360]

V.I.6 Other institutional considerations:

(**a**) **Cooperative relationships:** In addition to the other mechanisms described above (and as an aid to their establishment and implementation), WWF proposes that the WTO (or at least the Subsidies Committee) enter into formal memorandums of understanding, including observer status where appropriate, with the FAO, UNEP,

359. With regard to fisheries located wholly within the EEZs of WTO members, it is obvious that no international body has management authority over them, although it is important to recall that fisheries beyond actual territorial limits remain in important respects parts of the global commons. *See* ¶ II.B.2(a)(ii).
360. For a list of RFMOs and a map of their locations, *see* http://www.seafriends.org.nz/issues/fishng/unrfbrsc.html.

and major regional fisheries management bodies to foster mutual cooperation and information exchange with regard to fishing subsidies.

(**b**) **Public access to WTO process:** WWF has long been a proponent of increasing the public transparency of the WTO. The interdisciplinary nature of a "win-win-win" rule system particularly calls for open process. WWF renews its calls upon the WTO to open its dispute resolution pleadings and hearings to the public, and to admit representatives of civil society to the greatest extent practicable as observers to all other WTO deliberations.

References

(Note: All Internet references are current as of circa March 2004)

Books, Articles, Papers, and Proceedings

ADB. 1997. *The bank's policy on fisheries*. Asian Development Bank, September. <http://www.adb.org/Documents/Policies/Fisheries/default.asp?p=policies#contents>

ADB. 2003. *Technical assistance for alternative negotiating arrangements to increase fisheries revenues in the Pacific* (TAR:OTH 36669). Asian Development Bank, October. <http://www.adb.org/Documents/TARs/OTH/tar_oth_36669.pdf>

APEC. 2000. *Study into the nature and extent of subsidies in the fisheries sector of APEC members economies.* PricewaterhouseCoopers, A Report Prepared for the Fisheries Working Group, Asia Pacific Economic Co-operation. <http://www.apecsec.org.sg/apec/apec_groups/working_groups/fisheries.downloadlinks.0004.LinkURL.Download.ver5.1.9>

Arnason. 1999. "Fisheries subsidies, overcapitalization and economic losses." In Hatcher and Robinson (eds.), *Overcapacity and subsidies in European fisheries,* Centre for the Economics and Management of Aquatic Resources, University of Portsmouth.

BBC News. 2001."The battle for West Africa's fish." BBC Internet publication, August 1, 2001. <http://news.bbc.co.uk/1/hi/world/africa/1464966.stm>

Beattie, Sumaila, et al. 2002. "A model for the bioeconomic evaluation of marine protected area size and placement in the North Sea." *Natural Resource Modeling* 15(4) (Winter). <http://www.seaaroundus.org/Journal/BeattieMPA.pdf>

Bray. 2000a. *A global review of illegal, unreported and unregulated (IUU) fishing.* Background paper for the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, May 15–19, 2000. Included in FAO (2000).

Bray. 2000b. *Illegal, unreported and unregulated (IUU) fishing.* A paper presented at the International Conference on Fisheries Monitoring, Control and Surveillance, Brussels, Belgium, October 24–27, 2000. <http://europa.eu.int/comm/fisheries/news_corner/autres/control/bray.pdf>

Brown. 2000. "Fears for Jobs as Fish Quotas Cut to Bone." *The Guardian Unlimited,* December 16. <http://www.guardian.co.uk/fish/story/0,7369,412218,00.html>

Dallmeyer. 1989. "Traditional fishermen being caught in Australia's net." *Hobart Mercury,* January 5.

Darby. 2003. "One rogue vessel captured, But pirate kings slip the net." *The Age* (Melbourne), August 30, p. 8.

CFFA. 2003. "Fisheries partnerships agreements: Will they be fair?" Coalition for Fair Fisheries Agreements. <http://www.csa-be.org/IMG/doc/doc-82.doc>

Cox. 2004. *Subsidies and deep-sea fisheries management: Policy issues and challenges*. OECD. <http://www.oecd.org/dataoecd/10/27/24320313.PDF>

Cox and Schmidt. 2002. *Subsidies in the OECD fisheries sector: A review of recent analysis and future directions.* Background paper for the FAO Expert Consultation on Identifying, Assessing and Reporting on Subsidies in the Fishing Industry held in Rome, December 3–6, 2002. OECD. <http://www.oecd.org/dataoecd/43/40/2507604.pdf>

de Vries. 1996. "The fight for fish: Towards fair fisheries agreements." Eurostep. <http://www.eurostep.org/pubs/position/coherence/fishppa2.htm>

FAO. 1993. "Marine fisheries and the law of the sea: A decade of change." Special chapter (revised) of *The state of food and agriculture 1992*, FAO Fisheries Circular No. 853, Rome.

FAO. 1996a. Grainger and Garcia, *Chronicles of marine fishery landings (1950–1994): Trend analysis and fisheries potential*. FAO Fisheries Technical Paper No. 359, Rome.

FAO. 1996b. *A checklist for fisheries resource management issues seen from the perspective of the FAO Code of Conduct for Responsible Fisheries.* FAO Fisheries Circular No. 917 FIRM/C917, Rome. <http://www.fao.org/docrep/W3140E/W3140E00.htm>

FAO. 1997. *Review of the state of world aquaculture*. FAO Fisheries Circular No. 886, FIRI/C886(Rev.1), Rome. <http://www.fao.org/docrep/003/w7499e/w7499e00.htm>

FAO. 1998a. "World fisheries trade and some emerging issues." *FAO Fact Sheets—Third WTO Ministerial Conference* (Seattle, November 28–December 3, 1999). <http://www.fao.org/docrep/003/X6730E/X6730E07.htm.>

FAO. 1998b. Seijo et al., *Fisheries bioeconomics theory, modelling and management*. FAO Fisheries Technical Paper No. 368. <http://www.fao.org/docrep/003/W6914E/W6914E00.htm.>

FAO. 1999a. Gréboval (ed.), *Managing fishing capacity: Selected papers on underlying concepts and issues*. FAO Fisheries Technical Paper No. 386. <http://www.fao.org/docrep/003/X2250E/x2250e00.htm#Contents>

FAO. 1999b. *Fisheries Agreement Register (FARISIS).* Background paper for the 23rd Session of the FAO Committee on Fisheries, February 15–19, 1999. <http://www.fao.org/docrep/meeting/w9885e.htm>

FAO. 1999c. Vannuccini, *Shark utilization, marketing and trade.* FAO Fisheries Technical Paper No. 389, Rome.

FAO. 2000a. *Report of and papers presented at the expert consultation on illegal, unreported and unregulated fishing* (Sydney, Australia, May 15–19, 2000). FAO Fisheries Report No. 666, Rome, 2001. <http://www.fao.org/docrep/005/Y3274E/y3274e00.htm#Contents>

FAO. 2000b. *Report of the expert consultation on economic incentives and responsible fisheries* (Rome, November 28–December 1, 2000). FAO Fisheries Report No. 638. <http://www.fao.org/docrep/004/X9143E/x9143e00.htm#Contents>

FAO. 2001. *World fishery production: Estimated value by groups of species.* <ftp://ftp.fao.org/fi/stat/summ_01/appIIybc2001.pdf>

FAO. 2001a. "Illegal fishing tops the agenda as world fisheries authorities meet in Rome." Press release, Feb 22. <http://www.fao.org/WAICENT/OIS/PRESS_NE/PRESSENG/2001/pren0108.htm>

FAO. 2001b. *Progress in the implementation of the Code of Conduct for Responsible Fisheries and related international plans of action*, COFI/2001/3 (24th Session of COFI, February 26–March 2, 2001). <http://www.fao.org/docrep/meeting/003/X9187E.htm>

FAO. 2002a. *Report of the expert consultation on catalysing the transition away from overcapacity in marine capture fisheries* (October 15–18, 2002). FAO Fisheries Report No. 691, Rome. <http://www.fao.org/docrep/005/Y8169E/y8169e00.htm#Contents>

FAO. 2002b. *Report of the expert consultation on identifying, assessing and reporting on subsidies in the fishing industry* (December 3–6, 2002). FAO Fisheries Report No. 698, Rome. <ftp://ftp.fao.org/docrep/fao/005/y4446e/y4446e00.pdf>

FAO. 2002c. *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*. FAO Technical Guidelines for Responsible Fisheries No. 9. <http://www.fao.org/docrep/005/Y3536E/y3536e00.htm#Contents>

FAO. 2002d. Mattson et al., "Management and preservation of the giant fish species of the Mekong." In Petr and Swar (eds.), *Cold Water Fisheries in the Trans-Himalayan Countries,* FAO Fisheries Technical Paper No. 431, Rome. <http://www.fao.org/docrep/005/y3994e/y3994e13.htm#bm39>

FAO. 2002e. Lodge, "Review of factors of unsustainability in fisheries: relationship to international fisheries instruments." In FAO, *Report and documentation of the international workshop on factors of unsustainability and overexploitation in fisheries* (Bangkok, Thailand, February 4–8, 2002). FAO Fisheries Report. No. 672, Rome.

FAO. *SOFIA 2002. State of world fisheries and aquaculture 2002*, Rome. <http://www.fao.org/docrep/005/y7300e/y7300e00.htm#TopOfPage>

FAO. 2003a. *Progress in the implementation of the Code of Conduct for Responsible Fisheries and related international plans of action.* COFI/2003/3Rev.1 (25th Session of COFI, February 2003). <http://www.fao.org/docrep/MEETING/005/Y8370E.htm.>

FAO. 2003b. "Strong support for firmer action against IUU fishing." Press release of March 3, 2003. <http://www.fao.org/english/newsroom/news/2003/14660-en.html>

FAO. 2004. *Gender and food security: Fisheries facts and figures* (Web publication). <http://www.fao.org/Gender/en/fishb3-e.htm>

Federal Fisheries Investment Task Force. 1999. *Report to Congress* (a report mandated by the U.S. Congress in 1996). United States, July 1999. <http://www.nmfs.noaa.gov/sfa/ITF.html>

Gooday. *Fisheries subsidies.* ABARE. <http://www.abare.gov.au/pages/freepubs/Fisheriessubsidies.pdf>

Gréboval. 2000. *The international plan of action for the management of fishing capacity and selected issues pertaining to illegal, unreported and unregulated fishing*. In FAO (2000a). <http://www.fao.org/docrep/005/Y3274E/y3274e0f.htm#fnB303>

Greenpeace. 1998. *Principles for ecologically responsible low-impact fisheries.* May. <http://archive.greenpeace.org/oceans/globaloverfishing/lowimpactfisheries.html#v>

Greenpeace. 2004a. "Fleet migration—exporting the overfishing problem." <http://archive.greenpeace.org/comms/fish/part8.html>

Greenpeace. 2004b. "Too many big boats catching too many fish." <http://archive.greenpeace.org/comms/fish/part7.html>

Haynes. 2003. *European Community third party fisheries agreements and the future of partnership agreements within the common fisheries policy.* Joint Nature Conservation Committee (an organ of the government of the United Kingdom). Published circa 2003. <http://www.jncc.gov.uk/marine/fisheries/pdf/TPFA2.PDF>

Holland, Gudmundsson, and Gates. 1999. "Do fishing vessel buyback programs work: A survey of the evidence." *Marine Policy* 24.

Hongskul. 1999. *Into the next millennium: Fishery perspective.* FAO, Bangkok, Thailand. <http://www.fao.org/docrep/003/X6947E/x6947e05.htm#bm05>

Howgate. n.d. *Contribution of fish processing to food security*. Kyoto Conference Outcome and Papers Presented. <http://www.fao.org/docrep/006/AC442e/AC442e12.htm>

ICSF et al. 2003. "Case for small-scale fisheries." Joint NGO statement presented at the 25th Session on the FAO Committee on Fisheries (COFI), February 26, 2003 (reprinted in SAMUDRA, March 2003). <http://www.icsf.net/jsp/publication/samudra/pdf/english/issue_34/art07.pdf>

IEEP. 2002a. "Amending EU Fisheries Aid Rules (COM(2002)187 and COM(2002)190)." *CFP reform 2002: Briefing No. 3* (Institute for European Environmental Policy, London, May 29, 2002). <http://www.ieep.org.uk/PDFfiles/PUBLICATIONS/CFPBriefings/CFP%20Briefing%203%20-%20fisheries%20aid%20-%20formatted.pdf>

IEEP 2002b. *Subsidies to the European Union fisheries sector*. IEEP-WWF. <http://www.panda.org/downloads/marine/subsidiesreport.pdf>

IEEP. 2003a. "Integrated framework for fisheries partnership agreements with third countries (COM(2002)637)." *CFP reform 2002 series, briefing No. 11*, IEEP, February 2003. <http://www.ieep.org.uk/PDFfiles/PUBLICATIONS/CFPBriefings/Briefing%2011%20-%20Access%20agreements.pdf>

IEEP. 2003b. *FIFG and the environment: Guidance for potential beneficiaries.* WWF-IEEP.

Inside U.S. Trade. 1999a. "WTO members fail to agree to extension of greenlighted subsidies." November 12.

Inside U.S. Trade. 1999b. "Developing, industrialized countries to clash over WTO extensions." December 17.

Inside U.S. Trade. 1999c. "Developing countries block extension of green subsidies rules." December 24.

IUCN. 2003. *Statement to the second committee concerning sustainable ocean development*. UN General Assembly, 58th Session (November 24, 2003). <http://www.iucn.org/info_and_news/press/ungamarine.pdf>

IUCN Red List. 2003. IUCN Species Survival Commission, *2003 IUCN Red List of Threatened Species.* <http://www.redlist.org/>

Jackson. 1991. *The world trading system: Law and policy of international economic relations.* Cambridge, Mass.: MIT Press.

Johnstone. 1996. *The economics of fisheries access agreements: Perspectives on the EU-Senegal case.* International Institute for Environment and Development, Discussion Paper DP-96-02, IIED. <http://www.iied.org/docs/eep/dp96_02.pdf>

Lodge. 2002. *Review of factors of unsustainability in fisheries: Relationship to international fisheries instruments*. In FAO (2002e). <http://www.fao.org/docrep/005/Y3684E/y3684e04.htm>

Mande et al. 2003. "Tanzania to crack down on pirate vessels along its coast." *The East African* (Web publication), March 17. <http://www.nationaudio.com/News/EastAfrican/17032003/Regional/Regional1703200330.html>

McGinn. 1998. "Rocking the boat: Conserving fisheries and protecting jobs." *Worldwatch Paper No. 142*, Worldwatch Institute. Abstract: <http://www.worldwatch.org/pubs/paper/142/>

McGinn. 2002. "From Rio to Johannesburg: Healthy oceans key to fighting poverty." *World Summit Policy Brief No. 5,* May 21, Worldwatch Institute. <http://www.worldwatch.org/press/news/2002/05/21/>

Milazzo. 1998. *Subsidies in world fisheries: A reexamination.* World Bank Technical Paper No. 406, April.

Munro. 1998. *The economics of overcapitalization and fishery resource management: A review*. Discussion Paper No. 98-21, Department of Economics, University of British Columbia, Canada, December. <http://www.econ.ubc.ca/dp9821.pdf>

Munro and Sumaila. 2002. "The impact of subsidies upon fisheries management and sustainability: The case of the North Atlantic." *Fish and Fisheries* (Blackwell Science) 3: 233–50.

Myers and Worm. 2003. "Rapid worldwide depletion of predatory fish communities." *Nature* 423 (May 15).

NCEAS (National Center for Ecological Analysis and Synthesis, University of California). 2001. *Scientific consensus statement on marine reserves and marine protected areas*. Issued at the Annual Meeting of the American Association For the Advancement of the Sciences, February 17, 2001. <http://www.nceas.ucsb.edu/fmt/doc?/frames.html>

NRC (National Research Council).1999. *Sustaining marine fisheries*. Washington, D.C.: National Academy Press. Abstracts: <http://www.nap.edu/books/0309055261/html/index.html>

OECD. 1993. *Economic assistance to the fishing industry: Observations and finding* [sic]. AGR/FI(93)11/Rev. 1.

OECD. 2000a. *Transition to responsible fisheries: Economic and policy implications (case studies)*. <http://www.olis.oecd.org/olis/2000doc.nsf/LinkTo/agr-fi(2000)10-final>

OECD. 2000b. *Transition to responsible fisheries: Economic and policy implications*. Available for purchase: <http://oecdpublications.gfi-nb.com/cgi-bin/OECDBookShop.storefront/EN/product/532000021P1>

OECD. 2003a. *Review of fisheries in OECD countries: Policies and summary statistics*. <http://www.oecd.org/document/24/0,2340,en_2649_33901_15089112_1_1_1_1,00.html>

OECD. 2003b. *OECD technical expert meeting on environmental harmful subsidies* (various documents). OECD Web site. <http://www1.oecd.org/agr/ehsw/index.htm>

OECD. 2003c. *Scope for market liberalisation in the OECD fisheries sector*. <http://www.oecd.org/dataoecd/11/42/2957608.pdf>

OSPAR Species List. 2004. *Case reports for the initial list of threatened and/or declining species and habitats in the OSPAR maritime area*. OSPAR Publication No. 198. <http://www.ospar.org>

Pauly and Watson. 2003. "Counting the last fish." *Scientific American* 289 (July).

Pauly et al. 2002. "Towards sustainability in world fisheries." *Nature* 418 (August).

Porter. 1998a. *Estimating overcapacity in the global fishing fleet.* WWF.

Porter. 1998b. *Fishing Subsidies, Overfishing and Trade*. UNEP/WWF workshop on the role of trade policies in the fishing sector. UNEP, June 1998.

Porter. 2002. *Fisheries subsidies and overfishing: Towards a structured discussion*. In UNEP (2002, 34 *et seq.*). <http://www.unep.ch/etu/etp/acts/capbld/rdtwo/FE_vol_1.pdf>

Porter. 2004a. *A Matrix Approach to analyzing the resource impacts of fisheries subsidies.* Forthcoming from UNEP.

Porter. 2004b. *Incorporating impacts on resources into disciplines on fisheries subsidies: Issues and options*. Forthcoming from UNEP.

Portsmouth Conference Report. 1999. European Association of Fisheries Economists (EAFE), "Conference reports—overcapacity, overcapitalisation and subsidies in european fisheries." In *EAFE Bulletin*, No. 13 (August 1999) (reporting on the Concerted Action workshop, Portsmouth, October 28–30, 1998). <http://www.lei.dlo.nl/EAFE/bulletin/html/bulletin13-e.html>

Schmidt. 2002. "Fish crisis: A problem of scale." *OECD Observer*, August 19. <http://www.oecdobserver.org/news/fullstory.php/aid/748/Fish_crisis:_A_problem_of_scale.html>

Scottish Fisheries Research Service. 1999. "Fishing effort." *Capture and conservation* series, Information Leaflet No. 2 (January). <http://www.marlab.ac.uk/FRS.Web/Uploads/Documents/2GiR.pdf>

Steenblik. 2003. "Subsidy measurement and classification: Developing a common framework." Chapter 3 in *Environmentally harmful subsidies: Policy issues and challenges, proceedings of the OECD Workshop on Environmentally Harmful Subsidies* (Paris, November 7–8, 2003). OECD (2003, 101–41).

Steenblik and Wallis. n.d. *Subsidies to marine capture fisheries: The international information gap.* <http://biodiversityeconomics.org/pdf/topics-340-01.pdf>

Stilwell and Tuerk. 2001. *Non-violation complaints and the TRIPS agreement: Some considerations for WTO members.* Center for International Environmental Law, May. <http://www.ciel.org/Publications/Nonviolation_Paper1.pdf>

Stone. 1997. "Too many fishing boats, too few fish: Can trade laws trim subsidies and restore the balance in global fisheries?" *Ecology Law Quarterly* 24: 505 ff.

Sumaila and Charles (eds.). 2003. *Natural Resource Modeling* 15(3 and 4 [Special Issues]). Abstract: <http://www.eurekalert.org/pub_releases/2003-02/s-tda020303.php>

Tokrisna. 2000. *WTO-consistent trade-related measures to address IUU fishing—developing country issues*. Background paper for the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, May 15–19, 2000. Included in FAO (2000).

Trachtman. 1999. "The domain of WTO dispute resolution." *Harvard International Law Journal* 40: 333 ff.

TRAFFIC. 1999. Raymakers and Lynham, *Slipping the net: Spain's compliance with ICCAT recommendations for swordfish and bluefin tuna*. TRAFFIC Species in Danger Report. <http://www.traffic.org/news/ICCATreport.pdf>. Summary: <http://www.traffic.org/swordfish/>

TRAFFIC. 2001. Lack and Sant, "Patagonian toothfish: Are conservation and trade measures working?" *TRAFFIC Bulletin* 19(1). <http://www.traffic.org/toothfish/toothfish.pdf>

UN. 1997. "Round up press release" of the Earth Summit +5 Special Session of the General Assembly to Review and Appraise the Implementation of Agenda 21, New York, June 23–27, 1997. <http://www.un.org/ecosocdev/geninfo/sustdev/es5final.htm>

UN. 1999. *Oceans and the law of the sea: Report of the secretary-general.* UN Doc. No. A/54/429 (September 30, 1999). <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N99/283/83/PDF/N9928383.pdf?OpenElement>

UN CBD. 2001. *Progress report on ongoing assessment processes: Note by the executive secretary*. Convention on Biological Diversity—Subsidiary Body on Scientific, Technical and Technological Advice, Seventh Meeting, Montreal, November 12–16, 2001. UNEP/CBD/SBSTTA/7/3 (September 20, 2001). <http://www.biodiv.org/doc/meetings/sbstta/sbstta-07/official/sbstta-07-03-en.pdf>

UN CSD. 1996. *Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources (report of the secretary-general)*. United Nations Commission on Sustainable Development, UN Doc. No. E/CN.17/1996/3 (February 12, 1996). <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N96/023/48/PDF/N9602348.pdf?OpenElement>

Underhill. 2002. "Africa's lost fish." *The Bulletin, Newsweek*, August 28. <http://bulletin.ninemsn.com.au/bulletin/eddesk.nsf/All/276555203DD41E10CA256C2100092DE3?OpenDocument>

UNEP. 2000. "Marine and coastal areas." Ch. 2, Section 2.5, in *Global environment outlook 2000*. <http://www.unep.org/geo2000/english/0047.htm>

UNEP. 2001. Onestini and Dahou et al., *Fisheries subsidies and marine resources management: Lessons learned from studies in Argentina and Senegal* (UNEP/ETB Fisheries and the Environment, Vol. 2). <http://www.unep.ch/etu/etp/acts/capbld/rdtwo/FE_vol_2.pdf>

UNEP. 2002. *Workshop on the impacts of trade-related policies on fisheries and measures required for their sustainable management.* Geneva, Switzerland, March 15, 2002. <http://www.unep.ch/etu/etp/events/Fisheries/15March_fisheries.htm>

Ward and Hegerl. 2003. *Marine protected areas in ecosystem-based management of fisheries: A report for the Department of the Environment and Heritage.* Government of Australia, August. <http://www.deh.gov.au/coasts/mpa/wpc/pubs/mpas-management-fisheries.doc>

Ward and Metzner. 2002. *Fish harvesting capacity, excess capacity, and overcapacity: A synthesis of measurement studies and management strategies.* In FAO (2002a). <http://www.fao.org/docrep/005/Y8169E/y8169e0g.htm#bm16>

Ward et al. 2001. *The role of marine reserves as fisheries management tools: A review of concepts, evidence and international experience*. Department of Agriculture, Fisheries, and Forests, Australia. <http://www.affa.gov.au/corporate_docs/publications/pdf/rural_science/fisheries/brs_marine_report.pdf>

Weber. 1994. "Net loss: Fish, jobs and the marine environment brown." *Worldwatch Paper No. 120* . Abstract: <http://www.worldwatch.org/pubs/paper/120/>

WTO. *SCM agreement overview* (WTO Web site). <http://www.wto.org/english/tratop_e/scm_e/subs_e.htm>

WWF. 1997. *Subsidies and Depletion of World Fisheries: Case Studies.*

WWF. 1998a. Schorr, "Towards rational disciplines on subsidies to the fishery sector: A call for new international rules and mechanisms." Initially printed in WWF, *The footprint of distant water fleets on world fisheries* (1998).

WWF. 1998b. *Creating a sea change: Resolving the global fisheries crisis*.

WWF. 1998c. *Civil society statement on openness, transparency, and access to documents in the WTO*. Statement signed by WWF and 50 other NGOs, July 1998. <http://www.ictsd.org/ministerial/geneva/statement.pdf>

WWF. 2001a. *Hard facts, hidden problems: A review of current data on fishing subsidies*.

WWF. 2001b. Martin et al., *A handbook for negotiating fishing access agreements*.

WWF. 2001c. WWF et al., *Open letter on institutional reforms in the WTO*. October. <http://www.panda.org/downloads/policy/reform.pdf>

WWF. 2001d. *Put environment at the heart of European fisheries policy: WWF manifesto for the review of the EU common fisheries policy*. <http://www.panda.org/downloads/marine/manifesto_1.pdf>

WWF. 2001e. *Fishing in the dark: A symposium on access to environmental information and government accountability in fishing subsidy programs (symposium proceedings)*. <http://www.belgium-info.com/projects/fishing/docs/about.htm> and <http://www.panda.org/about_wwf/what_we_do/policy/trade_and_investment/trade_pubs.cfm?uPage=5>

WWF. 2002. *Ecosystem-based management for marine capture fisheries*. <http://www.panda.org/downloads/marine/EBM_Marine_Capture_Fisheries_summary_english.pdf>

WWF. 2003a. Gell and Roberts, *The fishery effects of marine reserves and fishery closures*. <http://www.worldwildlife.org/oceans/fishery_effects.pdf>

WWF. 2003b. *New WTO Disciplines on Fishing Subsidies: Outline of a Robust Solution* (April 29, 2003).

WWF. 2004a. "Working to set up marine protected areas." <http://www.panda.org/about_wwf/what_we_do/marine/what_we_do/protected_areas/index.cfm>

WWF. 2004b. "WWF *stop over-fishing* campaign." <http://www.panda.org/about_wwf/what_we_do/marine/what_we_do/policy_events/common_fisheries_policy.cfm>

WWF. 2004c. "Information on community fisheries." <http://www.panda.org/about_wwf/what_we_do/marine/what_we_do/sustainable_fisheries/market/community_fisheries/index.cfm>

International Treaties and Other Formal Instruments and Declarations

APEC Ministers. 1997. "Early voluntary sectoral liberalization." An annex to the *Ministerial Statement* of the *Ninth APEC Ministerial Meeting* (Vancouver, Canada, November 21–22, 1997). <http://www.apecsec.org.sg/apec/ministerial_statements/annual_ministerial/1997_9th_apec_ministerial/annex.html>

G-8 Action Plan. 2003. *Marine environment and tanker safety: A G8 action plan*. Endorsed by the G-8 summit held in Evian-les-Bains, France, June 1–3, 2003. <http://www.un.org/Depts/los/reference_files/G8summmit_marine_environment.htm>

IPOA-Capacity. 1999. *International Plan of Action for the Management of Fishing Capacity*. FAO, Rome. <http://www.fao.org/docrep/006/x3170e/x3170e04.htm>

IPOA-IUU. 2001. *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.* FAO, Rome. <http://www.fao.org/docrep/003/y1224E/Y1224E00.htm.>

OECD Ministers. 2001. *Communiqué of the OECD council at ministerial level,* May 16–17, 2001. <http://www.oecd.org/document/25/0,2340,en_2649_33901_1914137_1_1_1_1,00.html>

OECD Ministers. 2002. *Communiqué of the OECD council at ministerial level,* May 15–16, 2002. *<http://www.oecd.org/document/41/0,2340,en_2649_33745_2088681_119690_1_1_1,00.html>*

UNCLOS. *United Nations Convention on the Law of the Sea,* 22 I.L.M. 1261 (December 10. 1982). <http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>

UN Code of Conduct. 1995. *Code of Conduct for Responsible Fisheries*. FAO, Rome. <ftp://ftp.fao.org/docrep/fao/005/v9878e/ V9878E00.pdf>

UN General Assembly Resolution No. 57/142 (February 26, 2003). <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/547/60/PDF/N0254760.pdf?OpenElement>

UN Straddling Stocks Agreement. 1995. *Straddling Stocks and Highly Migratory Fish Stocks Agreement* (U.N. Doc. A/CONF.164/37, September 8, 1995). <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N95/274/67/PDF/ N9527467.pdf?OpenElement>

WSSD Plan. *World summit on sustainable development plan of implementation*. Included in Report of the World Summit on Sustainable Development, U.N. Doc. A/CONF.199/20, p.24. <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm>

Formal WTO Documents:

Basic Legal Texts

[WTO Charter] *Agreement Establishing the World Trade Organization*, LT/UR/A/2 (April 15, 1994) (also known as the "Marrakesh Agreement"). <http://www.wto.org/english/docs_e/docs_e.htm>

Agreement on Agriculture, LT/UR/A-1A/2. <http://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm>

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, LT/UR/A-1A/4 ("Customs Valuations code"). <http://www.wto.org/english/docs_e/legal_e/20-val_01_e.htm>

Agreement on the Application of Sanitary and Phytosanitary Measures, LT/UR/A-1A/12 ("SPS"). <http://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm>

Agreement on Subsidies and Countervailing Measures, LT/UR/A-1A/9 ("SCM"). <http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm>

General Agreement on Tariffs and Trade, LT/UR/A-1A/1/GATT/2 (1947) ("GATT"). <http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm>

General Agreement on Tariffs and Trade 1994, LT/UR/A-1A/1/GATT/1 ("GATT 1994"). <http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm>

Ministerial Declaration—Adopted on 14 November 2001. Ministerial Conference, Fourth Session, November 9–14, 2001, Doha. WT/MIN(01)/DEC/1 (November 20, 2001) ("Doha Declaration"). <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>

SCM Committee—Reports and Minutes

G/L/267, *Report (1998) of the Committee on Subsidies and Countervailing Measures* (November 5, 1998).

G/L/341, *Report (1999) of the Committee on Subsidies and Countervailing Measures* (November 5, 1999).

G/SCM/M/1, *Committee on Subsidies and Countervailing Measures—minutes of the meeting held on 22 February 1995* (May 5, 1995).

G/SCM/M/14, *Committee on Subsidies and Countervailing Measures—minutes of the meeting held on 1-2 May 1997* (July 29, 1997).

G/SCM/M/28, *Committee on Subsidies and Countervailing Measures—minutes of the meeting held on 2-3 May 2001* (August 14, 2001).

G/SCM/M/30, *Committee on Subsidies and Countervailing Measures—minutes of the special meeting held on 31 May 2001* (August 14, 2001).

G/SCM/39, *Committee on Subsidies and Countervailing Measures—procedures for extensions under article 27.4 for certain developing country members* (November 20, 2001).

G/SCM/M/43, *Committee on Subsidies and Countervailing Measures—minutes of the regular meeting held on 31 October and 1 November 2002* (March 17, 2003).

G/SCM/M/46, *Committee on Subsidies and Countervailing Measures—minutes of the regular meeting held on 8 May 2003* (July 23, 2003).

SCM Notification Materials

G/L/223/Rev.9, *Updating of the listing of notification obligations and the compliance therewith as set out in annex III of the report of the working group on notification obligations and procedures—revision* (November 12, 2002) (*see also* G/L/223/Rev.9/Corr.1 (December 10, 2002), replacing some table pages).

G/SCM/6, *Questionnaire format for subsidy notifications under Article 25 of the Agreement on Subsidies and Countervailing Measures and under Article XVI of GATT 1994—adopted by the committee on 21 July 1995* (August 9, 1995).

G/SCM/N/95, *Notifications pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures* (February 18, 2003).

G/SCM/Q2/JPN/34, *Subsidies—Replies to questions posed by Australia and the United States regarding the new and full notification of Japan* (October 28, 2002).

G/SCM/W/410, *Draft format for updates of notifications under Article 8.3 of the Agreement on Subsidies and Countervailing Measures, note from the chairman* (October 6, 1997).

G/SCM/W/432, *Summary of responses to subsidy notification questionnaire* (March 27, 2001).

Committee on Trade and Environment—Reports, Minutes, and Submissions

PC/SCTE/M/5, Preparatory Committee for the World Trade Organization Sub-Committee on Trade and Environment, *Report of the meeting held on 23-24 November 1994—note by the secretariat* (December 15, 1994).

WT/CTE/GEN/10, *Environment-related issues in the negotiations on WTO rules—statement by Mr. Jan Woznowski at the regular session of the committee on trade and environment of 29-30 April 2003 (paragraph 51)* (April 11, 2003).

WT/CTE/M/23, *Committee on trade and environment—report of the meeting held on 29 February–1 March 2000 (note by the secretariat)* (April 5, 2000).

WT/CTE/M/24, *Committee on trade and environment—report of the meeting held on 5-6 July 2000 (note by the secretariat)* (September 19, 2000).

WT/CTE/M/25, *Committee on trade and environment—report of the meeting held on 24-25 October 2000 (note by the secretariat)* (December 12, 2000).

WT/CTE/M/29, *Committee on trade and environment—report of the meeting held on 21 March 2002 (note by the secretariat)* (May 7, 2002).

WT/CTE/W/51, *Environmental and trade benefits of removing subsidies in the fisheries sector — submission by the United States* (May 19, 1997).

WT/CTE/W/52, Item 6: *The fisheries sector—submission by New Zealand* (May 21, 1997).

WT/CTE/W/80, *GATT/WTO rules on subsidies and aids granted in the fishing industry—note by the secretariat* (March 9, 1998).

WT/CTE/W/99, *Comments by the European Community on the document of the secretariat of the committee on trade and environment (WT/CTE/W/80) on subsidies and aids granted in the fishing industry—note by the European Community* (November 6, 1998).

WT/CTE/W/103, *The Icelandic Fisheries Management System: A market-driven sustainable fisheries regime—submission by Iceland* (January 25, 1999).

Other Committees & Processes

G/AG/R/9, *Committee on agriculture—Summary report of the meeting held on 28 November 1996—note by the secretariat* (January 17, 1997).

G/C/M/14, *Council for trade in goods—minutes of meeting held in Centre William Rappard on 15 October 1996* (October 30, 1996).

G/VAL/51, *Terms of reference for the work of the technical committee on customs valuation in connection with concerns on the accuracy of the declared value* (December 11, 2002).

JOB(01)152/Rev.1, *Compilation of outstanding implementation issues raised by members* (October 27, 2001).

WT/DSB/M/46, *Dispute settlement body—minutes of meeting held in the Centre William Rappard on 22 June 1998* (August 6, 1998).

WT/GC/W/80, *References to the International Monetary Fund in the agreements, ministerial decisions and declarations resulting from the Uruguay round of multilateral trade negotiations—note by the secretariat* (March 10, 1998).

WT/GC/W/303, *Preparations for the 1999 ministerial conference—fisheries subsidies (communication from Australia, Iceland, New Zealand, Norway, Peru, the Philippines and the United States)* (August 6, 1999).

WT/L/432, *Accession of the People's Republic of China* (November 23, 2001).

WT/MIN(01)/17, *Ministerial decision of 14 November 2001 on implementation-related issues and concerns* (November 20, 2001).

Current Negotiating Documents (Rules Negotiating Group)

Rules Group Meeting Minutes

TN/RL/M/2, *Summary report of the meeting held on 6 and 8 May 2002—note by the secretariat* (June 11, 2002).

TN/RL/M/5, *Summary report of the meeting held on 25–27 November 2002—note by the secretariat* (January 8, 2003).

TN/RL/M/6, *Summary report of the meeting held on 3, 6, 7 February 2003—note by the secretariat* (March 18, 2003).

TN/RL/M/7, *Negotiating group on rules: Summary report of the meeting held on 19–21 March 2003—note by the secretariat* (April 11, 2003).

TN/RL/M/8, *Negotiating group on rules: Summary report of the meeting held on 5–7 May 2003—note by the secretariat* (June 10, 2003).

Rules Group Working Papers

TN/MA/12, *Negotiating group on market access, report by the chairman, Ambassador Girard, to the trade negotiations committee* (September 1, 2003).

TN/RL/W/1, *Improved disciplines under the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement—communication from Canada* (April 15, 2002).

TN/RL/W/3, *The Doha mandate to address fisheries subsidies: Issues—submission from Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines, and United States* (April 24, 2002).

TN/RL/W/9, *Proposal from the People's Republic of China on fisheries subsidies* (June 20, 2002).

TN/RL/W/11, *Japan's basic position on the fisheries subsidies issue* (July 2, 2002).

TN/RL/W/12, *Fisheries subsidies: Limitations of existing subsidy disciplines—submission from New Zealand* (July 4, 2002).

TN/RL/W/17, *Korea's views on the Doha development agenda discussions on fisheries subsidies* (October 2, 2002).

TN/RL/W/21, *Adverse trade and conservation effects of fisheries subsidies—communication from the United States* (October 15, 2002).

TN/RL/W/30, *WTO negotiations concerning the WTO Agreement on Subsidies and Countervailing Measures—proposal by the European Communities* (November 21, 2002).

TN/RL/W33, *Special and differential treatment and the Subsidies Agreement—communication from the United States* (December 2, 2002).

TN/RL/W/39, *Comments from Australia on the European Communities' subsidies paper (TN/RL/W/30)—submission by Australia* (December 6, 2002).

TN/RL/W/40, *Intervention by India on the proposal by the EC captioned WTO negotiations concerning the WTO Agreement on Subsidies and Countervailing Measures (TN/RL/W/30)* (December 10, 2002).

TN/RL/W/41rev.1, *Improved rules under the Agreement on Subsidies and Countervailing Measures: Non-actionable subsidies paragraph 10.2 of the document on implementation-related issues and concerns—proposal by Venezuela and Cuba* (March 10, 2003).

TN/RL/W/52, *Japan's contribution to discussion on fisheries subsidies issue* (February 6, 2003).

TN/RL/W/57, *Egyptian paper containing questions and comments on the contributions submitted in the framework of the Doha negotiations on the Subsidies and Countervailing Measures Agreement* (February 10, 2003).

TN/RL/W/77, *Possible approaches to improved disciplines on fisheries subsidies—communication from the United States* (March 19, 2003).

TN/RL/W/78, *Subsidies disciplines requiring clarification and improvement—communication from the United States* (March 19, 2003).

TN/RL/W/79, *Preliminary comments and questions by the Arab Republic of Egypt on the contributions submitted in the framework of the Doha negotiations on the Anti-Dumping Agreement and on the Agreement on Subsidies and Countervailing Measures—submission from Egypt* (March 24, 2003).

TN/RL/W/82, *Submission of the European Communities to the negotiating group on rules—fisheries subsidies* (April 23, 2003).

TN/RL/W/84, *Questions from Japan concerning papers on the fisheries subsidies issue* (April 30, 2003).

TN/RL/W/85, *General contribution to the discussion of the negotiating group on rules on the Agreement on Subsidies and Countervailing Duty Measures—submission from Australia* (April 30, 2003).

TN/RL/W/88, *Comments from the People's Republic of China on the United States proposal on fisheries subsidies (TN/RL/W/77)* (May 1, 2003).

TN/RL/W/89, *Comments by Australia on the United States' paper on subsidies disciplines requiring clarification and improvement (Document TN/RL/W/78)* (May 1, 2003).

TN/RL/W/97, *Korea's comments on the submission from the United States (TN/RL/W/77)—submission from Korea* (May 5, 2003).

TN/RL/W/102, *Egypt's preliminary comments on the contributions submitted in the framework of the Doha negotiations on the Agreements on Anti-Dumping and Subsidies and Countervailing Measures (TN/RL/W/78)* (May 6, 2003).

TN/RL/W/107, *Observations and comments by Venezuela on document TN/RL/W/78 submitted by the United States concerning prohibited subsidies and other subjects under the WTO Agreement on Subsidies and Countervailing Measures* (May 13, 2003).

TN/RL/W/112, *Improved disciplines under the Agreement on Subsidies and Countervailing Measures—communication from Canada* (June 6, 2003).

TN/RL/W/115, *Possible approaches to improved disciplines on fisheries subsidies—communication from Chile* (June 10, 2003).

TN/RL/W/136, *Fisheries subsidies* (Antigua and Barbuda, Belize, Fiji Islands, Guyana, the Maldives, Papua New Guinea, Solomon Islands, St Kitts and Nevis ("Small Island States"), July 14, 2003)).

TN/RL/W/143, *Negotiating group on rules note by the chairman—compilation of issues and proposals identified by participants in the negotiating group on rules* (August 22, 2003).

WTO and GATT Cases

Argentina—measures affecting imports of footwear, textiles, apparel and other items, WT/DS56/AB/R (March 27, 1998).

Belgian family allowances (allocations familiales), report adopted by the [GATT] contracting parties on 7 November 1952 (G/32 - 1S/59) (BISD 1S/59).

Canada—measures affecting the export of civilian aircraft (report of the appellate body), WT/DS70/AB/R (August 2, 1999).

Canada—certain measures affecting the automotive industry (report of the appellate body), WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000).

European Communities—customs classification of certain computer equipment, AB-1998-2, WT/DS62/AB/R (June 5, 1998).

India—quantitative restrictions on imports of agricultural, textile and industrial products (report of the panel), WT/DS90/R (April 6, 1999).

India—measures affecting the automotive sector (report of the panel), WT/DS146/R (December 21, 2001).

Indonesia—certain measures affecting the automobile industry (report of the panel), WT/DS54/R; WT/DS55/R; WT/DS59/R; WT/DS64/R (July 2, 1998).

Japan—measures affecting consumer photographic film and paper (report of the panel), WT/DS44/R (March 31, 1998).

United States—imposition of countervailing duties on certain hot-rolled lead and bismuth carbon steel products originating in the United Kingdom (report of the panel), WT/DS138/R (December 23, 1999).

United States—tax treatment for "foreign sales corporations": Recourse to arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM agreement (decision of the arbitrator), WT/DS108/ARB (August 30, 2002).

United States—final countervailing duty determination with respect to certain softwood lumber from Canada (report of the panel), WT/DS257/R (August 29, 2003).

National and Local Laws and Regulations

European Communities. *Council Regulation (EC) No 2369/2002 of 20 December 2002 amending Regulation (EC) No 2792/1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector*. *Official Journal of the European Communities*, December 31, 2002, p. L358/49. < http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_358/l_35820021231en00490056.pdf>

United States. URAA. *Uruguay Round Agreements Act*, Public Law 103-465 [H.R. 5110] December 8, 1994.

Xunta de Galicia. Decree 420/1993. *Decreto 420/1993, do 17 de decembro, polo que se refunde a normativa vixente en materia de rexistros de buques e de empresas halioalimentarias* (reproduced in the Gallego language at <http://perso.wanadoo.es/papiro1/021.htm>).

Xunta de Galicia. Order of May 8, 2002. *Orde do 8 de maio de 2002, pola que se actualiza o Rexistro de Buques da Comunidade Autónoma de Galicia e se establecen normas sobre a súa xestión e control.* Diario Oficial de Galicia, May 16, 2002 (reproduced in the Gallego language at <http://www.xunta.es/NewPesca/NoticiasPesca.nsf/0/7a57bb9b3f674d6ec1256bbb002878cc?OpenDocument>).

Other Government Documents

Australia. 2004. "Steps Australia has taken to address illegal fishing." Australian Department of Agriculture, Fisheries and Forestry. <http://www.affa.gov.au/content/output.cfm?&OBJECTID=D2C48F86-BA1A-11A1-A2200060B0A01397>

European Communities. 2000. *European Parliament ("Europarl") Factsheets 1999–2002.* <http://www.europarl.eu.int/factsheets/4_2_4_en.htm>

European Court of Auditors. 1998. "Special Report No. 18/98 concerning the community measures to encourage the creation of joint enterprises in the fisheries sector accompanied by the replies of the commission." In *Official Journal of the European Communities*, December 16: C393/1 ff. <http://www.eca.eu.int/EN/reports_opinions.htm>

Iceland. 2004. "Fishing Effort." Information Center of the Icelandic Ministry of Fisheries. <http://www.fisheries.is/ships/effort.htm>

United Kingdom (Parliament). 2003. Record of parliamentary questions, June 30. <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmhansrd/cm030630/text/30630w07.htm>

Acronyms and Abbreviations

ADB	Asian Development Bank
APEC	Asia-Pacific Economic Co-operation
CBD	Convention on Biological Diversity
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for Conservation of Southern Bluefin Tuna
CFP	Common Fisheries Policy (EU)
CSD	Commission on Sustainable Development (UN)
CTE	WTO Committee on Trade and Environment
CVD	Countervailing duty
DSB	Dispute settlement body
DSU	Dispute settlement understanding
EC	European Communities
EEZ	Exclusive economic zone
EU	European Union
EVSL	Early Voluntary Sectoral Liberalization Initiative
FAO	Food and Agriculture Organization (UN)
FIFG	Financial Instrument for Fisheries Guidance
GATT	General Agreement on Tariffs and Trade
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICES	International Council for the Exploration of the Sea
IFI	International Financial Institution
IMF	International Monetary Fund
IPOA-Capacity	International Plan of Action for the Management of Fishing Capacity (FAO)
IPOA-IUU	International Plan of Action to Confront IUU Fishing
IUCN	World Conservation Union
IUU	Illegal, unreported, or unregulated (fishing)
MEA	Multilateral environmental agreement

MPA	Marine protected area
MSC	Marine Stewardship Council
NAFO	Northwest Atlantic Fisheries Organization
NGO	Nongovernmental organization
OECD	Organisation for Economic Cooperation and Development
OSPAR	The Convention for the Protection of the Marine Environment of the North-East Atlantic
PGE	Permanent Group of Experts
PGFE	Permanent Group of Fisheries Experts
RFMO	Regional Fisheries Management Organization
S&D	Special and differential treatment
SCM	Agreement on Subsidies and Countervailing Measures (WTO)
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures (WTO)
SSC	Species Survival Commission
U.K.	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
U.S.	United States
WCO	World Customs Organization
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization
WWF	World Wide Fund for Nature

Appendix 1
Outline of WWF's Initial Proposals

The text starting on the following page provides a summary outline of WWF's initial proposals for new WTO disciplines on fishing subsidies. This outline, an updated version of an earlier "white paper" produced by WWF in March 2003, is also being distributed as a free-standing document.

HEALTHY FISHERIES, SUSTAINABLE TRADE: CRAFTING NEW RULES ON FISHING SUBSIDIES IN THE WORLD TRADE ORGANIZATION

OUTLINE OF WWF'S PROPOSALS

JUNE 2004

When trade ministers from around the world met in November 2001 to launch the current round of WTO trade talks, they instructed WTO negotiators to "clarify and improve" WTO subsidy disciplines with regard to fishing subsidies.[1] In order to contribute to these negotiations, WWF has prepared a report, *Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization,* to provide a detailed overview of the issues from the perspective of a nongovernmental organization dedicated to the conservation and sustainable use of the world's living resources.

The following outline—published as a companion to WWF's full-length report—summarizes WWF's specific proposals for a successful outcome to the fishing subsidies talks.[2] This outline assumes substantial familiarity with current WTO subsidies disciplines. Background information, along with a detailed explanation of the proposals summarized below, is set forth in WWF's full report.

Given the sensitivities surrounding the fishing subsidy negotiations, WWF offers the following caveats to the views expressed below:

- First, this outline should be understood as a well-developed but still early contribution to the fishing subsidies talks. Although it can be taken as WWF's position as of June 2004, WWF reserves the right to develop and alter these positions as the negotiations progress.
- Second, the elements of the solution suggested here should be read together as parts of an integrated whole.
- Third, this outline is presented from an environmentalist perspective. As a step toward a balanced solution, however, this outline also includes some attention to development issues. Any insufficiencies in WWF's approach should be regarded as an invitation to dialogue rather than as an effort to promote a lopsided outcome.
- Fourth, this outline assumes that new disciplines on fishing subsidies will be located within the current WTO Agreement on Subsidies and Countervailing Measures. WWF believes, however, that consideration should be given to locating new disciplines in a separate multilateral WTO agreement.
- Fifth, this outline does not contain certain alternative proposals included in WWF's full report, and thus must be seen as an incomplete version of WWF's current views.

1. *Ministerial Declaration adopted on 14 November 2001*, WTO Doc. No. WT/MIN(01)/DEC/1 (November 20, 2001), ¶ 28.

2. This outline also updates and supersedes an earlier "white paper" outline circulated by WWF in March 2003. For a descriptive overview of WWF's approach, including some of the basic policy considerations that guided WWF's effort to avoid entangling the WTO in questions beyond its trade-related mandate, *see* the Executive Summary to the full report. The structure of WWF's argument is most visible in the report's detailed table of contents.

Defining Success

As discussed in detail in WWF's full length report, WWF believes that new WTO disciplines on fishing subsidies can only qualify as a genuine success if they

(i) achieve a true "win-win-win" for trade, environment, and development, without requiring the WTO to exceed its proper authority and competence;

(ii) are comprehensive, covering all fishing subsidy programs affecting wild-capture fisheries;

(iii) forbid harmful fishing subsidies while accommodating beneficial ones, including by

- effectively prohibiting the most harmful types of fishing subsidies;
- allowing and protecting fishing subsidies that promote the achievement of sustainable fisheries;
- subjecting all nonprohibited fishing subsidies to effective disciplines requiring them to avoid contributing to excess fishing capacity or overfishing;

(iv) take account of the special needs of developing countries, and particularly of those with communities dependent on the fisheries sector;

(v) promote the administration of fishing subsidies programs on a fisheries-specific basis, so that proper account can be taken of the factors that most commonly distinguish harmful programs from those that are beneficial or benign;

(vi) improve transparency and accountability by subjecting all nonprohibited fishing subsidies to effective surveillance, including through proactive monitoring and substantially strengthened WTO notification requirements; and

(vii) provide mechanisms to guarantee that WTO fishing subsidies disciplines are administered with the appropriate participation of intergovernmental bodies and experts competent in fisheries management and protection of the marine environment, and with improved public transparency.[3]

3. Given the importance of ensuring that the WTO does not seek to exercise authority beyond its legitimate competence, there is a critical and necessary link between some of WWF's proposed substantive disciplines and some of its calls for institutional reform. A truly robust set of WTO disciplines on fishing subsidies cannot avoid taking account of the fisheries context in which subsidies operate. Accordingly, some elements of WWF's proposal consider whether a given fishery is "patently at risk" or "patently undermanaged" in order to determine whether subsidies in those fisheries should be subject to stricter or more lenient disciplinary treatment. The "patently at risk" determination can be based on simple, objective, and readily available information. The "patently undermanaged" determination, however, may involve a more detailed evaluation of the surrounding facts and policies, possibly including judgments WWF considers beyond the competence or proper authority of the WTO. To handle these cases, as well as certain other elements of WWF's proposal, WWF is proposing institutional mechanisms for effective sharing of authority with competent intergovernmental bodies and experts. Without such mechanisms, it would be necessary to scale back WWF's substantive proposals to avoid rules that would be improper for the WTO to administer alone. The consequence would be fishing subsidies disciplines that are both "overinclusive" and "underinclusive" at the margins, but would nevertheless be a substantial advance over the status quo.

Specific Elements

(1) Defining "fishing subsidies"

New WTO fishing subsidies disciplines must be sufficiently comprehensive to cover all significant fishing subsidy programs. This means, among other things, that

(a) the definition of "fishing subsidies" should include all subsidies that confer a commercial benefit on individuals or enterprises engaged in fishing, even if the subsidy is not granted directly to them including all governmental financial contributions to or on behalf of fishing interests, including, *e.g.*, government-to-government payments for access to EEZ fisheries;

(b) new disciplines must avoid inappropriate distinctions or exclusions, such as more relaxed disciplines for "domestic" fisheries than for "high seas" fisheries;

(c) public "fisheries management services" should not be considered "subsidies" for the purposes of new WTO disciplines;

(d) the "fishing industry" should include all "wild capture" fisheries; and

(e) subsidies to ports, processors, transporters, marketers, or other actors should be considered "fishing subsidies" if they benefit fishing enterprises in accordance with existing SCM jurisprudence for "pass through" subsidies.

(2) A red light to prohibit the most harmful fishing subsidies

(a) Scope

Subject to certain exceptions enumerated below, and to provisions for the special and differential treatment for developing countries, the following fishing subsidies should be explicitly prohibited by new WTO "red light" provisions:

(i) Subsidies that, by nature of their design, are likely to contribute to increasing or maintaining fishing capacity or effort, such as subsidies for

- fishing vessel construction or repair
- vessel modernization or gear acquisition/improvement
- maintaining employment in the fishing sector
- transfer of capacity to foreign or high seas fisheries, including through joint ventures
- access to foreign fisheries
- research and development of fishery technology
- subsidies contingent on fishing
- fuel subsidies
- bait or ice provided in kind
- subsidies to marine insurance

- subsidies to other operating costs
- promises to reimburse vessel owners for fines or impoundments imposed by foreign authorities

(ii) Subsidies that contribute to "illegal, unreported, or unregulated" fishing, or activities that contribute to IUU fishing[4]

(NOTE: The definition of "IUU fishing" for purposes of new WTO disciplines should be based on ¶¶ 3.1–3.4 of the FAO's International Plan of Action on IUU fishing.)[5]

(iii) Subsidies in support of increasing or maintaining levels of domestic fish supplies, such as price supports paid to domestic fleets.[6]

Note that the foregoing prohibitions could be achieved through new legal language in the body of the SCM in combination with illustrative annexes.

As with the current red box for export and domestic supply subsidies, prohibited fishing subsidies should be exempted from the specificity requirement of Article 1.2 of the SCM.[7]

(b) Exceptions to the prohibitions

Given the broad nature of the prohibitions proposed in ¶ 2(a), and in light of the legitimate role subsidies can play in promoting transitions to sustainable fisheries and economic development, the following classes of subsidies should be exempt from the foregoing red light prohibitions:[8]

4. With the exception of subsidies to activities in unregulated fisheries, subsidies to IUU activities can rarely be identified ex ante (*i.e.*, on the basis of how a subsidy is designed). Accordingly, among the remedies associated with this prohibition would be (i) the removal on an enterprise-by-enterprise basis of any subsidy to an enterprise shown "more likely than not" to be engaged in IUU activities; (ii) a subsequent ban on any subsidies to such enterprises for a determined period (*e.g.*, five years); (iii) the avoidance or withdrawal of subsidies to "unregulated" fisheries; and (iv) the establishment of a rebuttable presumption that a subsidy contributes to IUU activities whenever the subsidy supports fishing in a fishery not covered by a current national action plan submitted in accordance with the IPOA-IUU. Other possible elements of this WTO rule could include (i) termination of programs tainted by a pattern of IUU abuses; (ii) the withdrawal of all subsidies to activities within a fishery shown "more likely than not" to be tainted by a pattern of IUU abuse; (iii) a strong hortatory call for proactive steps to prevent subsidies from contributing to IUU activities; and (iv) special reporting or review requirements focused on steps taken by governments to avoid subsidies that contribute to IUU activities.

5. The definitions in the IPOA-IUU should be simplified and adapted for application within the WTO context. Such refinements are both consistent with the IPOA itself and necessary for the proper functioning of new WTO disciplines. The necessary refinements include (i) narrowing the definitions of "illegal fishing" and "unregulated fishing" to ensure that WTO dispute panels are not drawn into debates over the meaning or extent of international fisheries law; (ii) expanding the definition of "unreported fishing" to include any fishing not subject to reporting, registration, or monitoring, regardless of whether the fact of being "unreported" violates any applicable laws or cooperative fisheries management measures; and (iii) expanding the definition of "unregulated" fishing to include any fishing in unmanaged waters.

6. Food security concerns of developing countries should be taken into account in provisions for special and differential treatment, discussed in ¶ 6.

7. Fuel subsidies, for example, may be highly capacity- or effort-enhancing and thus should be banned, even if they are available on a sufficiently general basis to fall arguably outside the SCM's definition of "specific." To avoid an overly broad rule, however, WWF proposes that nonspecific subsidies falling within a new red light provision should be considered prohibited only with regard to their application to the fishing sector.

- short-term emergency relief and adjustment—*i.e.*, temporary assistance to fishers (or their families) suffering significant loss of income as a result of reductions in fishing due to conservation measures or unforeseeable natural disasters;
- certain foreign access payments—*i.e.*, government-to-government payments for access to EEZ fisheries, provided such fisheries are not "patently at risk" or "patently undermanaged" (*see* definitions under ¶ 2(c)), and further provided that access agreements are legally conditioned on compliance with prevailing national and international laws and norms; and
- certain subsidies to artisanal fishing—*i.e.*, subsidies to small-scale artisanal fishers active exclusively in developing-country fisheries that are not "patently at risk" or "patently undermanaged."

(c) Definitions of "patently at risk" and "patently undermanaged" fisheries

WWF has developed these two terms in order to take rudimentary consideration of the fisheries context in which subsidies are given, without asking the WTO to make environmental judgments.

(i) Definition of a "patently at risk" fishery: In the context of fishing subsidies disciplines, the general notion of an "at risk" fishery is one in which the perilous condition of fish stocks, overcapacity of fleets, or insufficiency of management renders certain classes of subsidies more likely to be harmful than they would be in a fishery that is not at risk. In order to avoid having the WTO make environmental judgments, the "patently at risk" concept is significantly underinclusive. In the context proposed here, a fishery would be considered "patently at risk" if any of the following conditions apply:

- the status of exploitation is "not known or uncertain" or is "overexploited," "depleted," or "recovering" according to the FAO;
- the status of the target species or stock is "data deficient," "vulnerable," "endangered," or "critically endangered" on the IUCN Red List;
- 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; or
- total fishing capacity in the fishery has not been quantitatively assessed by a competent authority with jurisdiction over the fishery, and such assessment included in a current capacity management plan submitted in accordance with the FAO International Plan of Action for the Management of Fishing Capacity, or such a current quantitative assessment has been performed and the fishery has been found to be at or above full capacity.

(ii) Definition of a "patently undermanaged fishery": Because of the significant underinclusiveness of the "patently at risk" concept, certain classes of subsidies should be excluded from red light exceptions if the fishery lacks any of certain

8. These exceptions are in addition to other derogations from the red light ban located in the "green light" and "special and differential treatment" provisions, discussed separately in ¶¶ 3 and 6.

"objective indicia of minimum adequate management."[9] Determination of whether a fishery should be considered "patently undermanaged" will require authority-sharing mechanisms to involve appropriate fisheries management and marine conservation authorities in the administration of new WTO fishing subsidy disciplines.

(d) Prerequisites and limits to red light exceptions: Subsidies qualifying for exemption from the new red light prohibitions should remain subject to continuing discipline, as follows:

- No exceptions should be allowed to the prohibition against subsidies that contribute to IUU fishing activities.
- Subsidies should qualify for exemption only if notified in advance to the WTO in accordance with special notification provisions, and if all other applicable WTO notification requirements are fully and accurately satisfied.
- Subsidies should qualify for exemption only if they are legally contingent on consistency with an existing capacity management plan as called for under the FAO's International Plan of Action for the management of fishing capacity.[10]
- All exempted subsidies should remain subject to current Article 3 prohibitions on export and domestic supply subsidies.
- All exempted subsidies should remain actionable under the current amber light if they cause "adverse effects" within the traditional meaning of SCM Articles 5–6.
- "Emergency relief" subsidies should be automatically subject to dark amber provisions specific to fishing subsidies (*see* ¶ 4(c)).
- All exempted subsidies should be subject to special reporting requirements and periodic review.

(3) A green light to allow environmentally positive fishing subsidies

(a) Scope

Subject to certain conditions enumerated below, the following classes of fishing subsidies should be protected from challenge under most current or future WTO subsidy rules:

- subsidies to research activities (including data collection) aimed at improving the management of fishery and other marine resources, or at the development of fishing gear or techniques to protect and preserve marine resources and ecosystems;

9. "Objective indicia of minimum adequate management" should be set forth in a note or annex to the appropriate SCM provisions, and should be based on internationally recognized criteria, such as those articulated in *A Checklist for Fisheries Resource Management Issues Seen from the Perspective of the FAO Code of Conduct for Responsible Fisheries* (FAO Fisheries Circular No. 917 FIRM/C917, Rome, 1996) (http://www.fao.org/docrep/W3140E/W3140E00.htm). In addition, the indicia should include elements drawn from both the FAO IPOA-Capacity and the IPOA-IUU. The criteria should be "yes or no" questions articulated to favor simplicity and objectivity. For example, instead of asking, "Are conservation and management measures based on the best scientific evidence available?" the indicator might be, "Are conservation and management measures based on scientific evidence?" Determinations of whether a fishery lacked these indicia would be made according to the institutional mechanisms proposed in ¶ 7.

10. As an alternative to requiring capacity management plans under the IPOA-Capacity, the rule could forbid exceptions to red light prohibitions in the context of any fishery that is "patently undermanaged," as defined in ¶ 2(c)(ii) of this Appendix.

- subsidies to the adoption of environmentally preferable fishing gear, techniques, or practices (including, for example, in conjunction with the establishment of marine protected areas or no-take zones), especially where transaction costs discourage their adoption or where such techniques are more expensive than less "clean" alternatives;
- subsidies to assist fishers in the adoption of fishing gear or techniques necessary to meet safety or sanitary standards; and
- subsidies that are designed to and in fact do lead to the reduction of fishing capacity in overcapacity fisheries (*e.g.*, buy-back programs, license retirements, retraining programs, etc.). (Note, however, the special rules proposed for capacity-reducing subsidies in ¶ 3(c).)

(b) Prerequisites and limits to all green light subsidies

All subsidies qualifying for green light protection should be subject to the following disciplines:

- Nothing in the green box should allow export or domestic supply subsidies otherwise prohibited by the current red box (SCM Article 3).
- All green light subsidies should remain subject to new red light prohibitions on subsidies to IUU fishing (*see* ¶ 2(a)).
- All green light subsidies should remain subject to amber light challenge if they cause "serious adverse trade effects" (*i.e.*, a very high standard of injury). (Note, however, that this threshold might be relaxed in the case of subsidies particularly likely to have adverse effects on developing countries—*see* ¶ 6 of this Appendix.)
- Subsidies should qualify for green light protection only if notified in advance to the WTO, in accordance with special notification provisions.
- Subsidies should qualify for green light protection only if they are legally contingent on consistency with a current capacity management plan as called for under the FAO's International Plan of Action for the management of fishing capacity.[11]
- All green light subsidies should be required to contain explicit legal conditions requiring recipients to conduct their fishing activities in full compliance with all applicable laws, regulations, and reporting requirements, whether domestic, foreign, or international.
- All green light subsidies should be subject to special reporting requirements and periodic review.

(c) Additional disciplines on "capacity reducing" subsidies

Many capacity-reducing subsidies fail to meet the goal of lowering fishing capacity, and some even wind up contributing to the problem they are intended to resolve. For this reason, capacity-reducing subsidies qualifying for green light treatments should be:

- narrowly defined for purposes of the green light;

11. As an alternative to requiring capacity management plans under the IPOA-Capacity, the rule could forbid green light subsidies in the context of any fishery that is "patently undermanaged," as defined in ¶ 2(c)(ii) of this Appendix.

- subject to effective time limits and to rules preventing their repetitive application in a given fishery;
- conditioned on guarantees against export of capacity;
- conditioned on guarantees against "leakage" and "input stuffing";
- conditioned on specific monitoring and evaluation requirements;
- subject to mandatory withdrawal upon a showing of actual increases in capacity in the relevant fleet or fishery; and
- conditioned on a capacity-management plan meeting certain formal criteria, similar to those developed for the "patently undermanaged" concept.

In addition, a sunset clause for the green light for capacity-reducing subsidies should be considered (*e.g.*, to expire in five years, with limited exceptions for unforeseeable capacity crises).

(4) An amber light to discipline all remaining fishing subsidies

(a) Scope

The foregoing red and green lights cover most significant classes of fishing subsidies. For the remainder, new "amber light" disciplines are necessary. Specifically, new amber light provisions should require the withdrawal of any subsidy deemed to have "adverse effects" (as defined in ¶ 4(b)), and should cover

- any "emergency relief" subsidies exempted from the new red light prohibitions (*see* ¶ 2); and
- all other fishing subsidies not otherwise covered by the new red or green lights.[12]

(b) Clarifying the definition of "adverse effects"

In order for new "amber light" provisions to be effective in disciplining harmful fishing subsidies, current SCM definitions of harm must be clarified to cover economic distortions at the fisheries production level. Technically, this should be accomplished by

(i) clarifying the SCM's definition of "serious prejudice" to include

- changes in relative catch shares;[13]
- decreases in landing prices;[14] or

12. Such subsidies could include those to industries or enterprises that are ancillary to fishing industries or enterprises, such as certain subsidies for port construction, housing, transportation, processing or marketing of fish products, etc., where such subsidies are "passed through" to fishing enterprises and are not deemed capacity- or effort-enhancing by design (*see* ¶ 1(e)). Recall that such subsidies may qualify for treatment under proposed "special and differential treatment" provisions (*see* ¶ 6).

13. A change in relative catch shares could be either an increase in the relative catch of the subsidized vessels or a decrease in the relative catch of other vessels fishing in the same fishery or for like or competitive products. The focus on relative catch shares is meant to avoid debate over causal factors that might be associated with changes in absolute catch levels. "Causality" should be demonstrable by showing a temporal correlation between subsidies and changes in catch share (cf. SCM Art. 6.3(d)).

14. The "decrease" at issue here should not require an actual reduction in the landed prices compared with historical prices, but rather a price lower than would be offered in the absence of a subsidy. It is important to recognize that landing prices often rise in the context of fisheries depletion.

- increases in fishing capacity or effort, as measured by certain economic indicators;[15]

(**ii**) **clarifying the SCM's definition of "injury to a domestic industry"** to allow consideration of catch share, production costs (including yield per unit effort), and fleet or enterprise revenue in lieu of direct evidence of changes in import volume or import prices; and

(**iii**) **creating a rebuttable presumption of "nullification or impairment"** in any case where a subsidy is granted to an enterprise or fleet engaged in the production or sale of a product subject to an existing GATT tariff binding.

(**c**) **Reviving and refining "dark amber" provisions for subsidies likely to be harmful**

The urgency of the fishing subsidies issue and the inappropriately heavy evidentiary burdens under standard amber light provisions call for a renewal and revision of the now lapsed "dark amber light."[16] Specifically, new dark amber provisions should cover:

- All fishing subsidies when applied in a fishery that is "patently at risk" or "patently undermanaged";[17]
- Those amber light fishing subsidies most likely to disadvantage developing countries (*e.g.*, "Any subsidy benefiting fishers who catch fish of a kind, or of a kind directly competitive with another kind, caught by a developing country member, where the total catch of the kind of fish in question by the domestic fleet of the subsidizing member accounts for more than [20%] of the world catch, and [or] where the kind of fish caught by the developing country member accounts for more than [20%] of the revenue of that country's commercial fishing sector").
- Any amber light fishing subsidies to a given fleet or fishery where the total subsidization is greater than five percent *ad valorem* (this rule should also clearly cover price supports to fish products).
- Any amber light fishing subsidies to a fleet or an enterprise to cover operating losses.

(**d**) **Requiring withdrawal of offending subsidies**

In light of the general weakness of the current SCM amber light provisions, and considering the often irreversible nature of the harms caused by fishing subsidies, any fishing subsidy found to have caused "adverse effects" should be subject to mandatory withdrawal, rather than merely to a requirement of removing the adverse effects.

(5) Notification and surveillance

Among the greatest obstacles to disciplining fishing subsidies—whether at the international level or at the level of national or subnational governments—is the nearly universal lack of

15. Given the technical issues that can accompany efforts to assess capacity or effort, the rule proposed here would require that any significant increase in any of a range of standard indicators of capacity or effort be considered an increase in capacity or effort. Even with that simplification, administration of this test might benefit from the institutional mechanisms discussed in ¶ 7.

16. The dark amber provisions of the SCM were a device for shifting the burden of proving (or disproving) "serious prejudice" from the party challenging a subsidy to the party maintaining the subsidy. Those provisions lapsed in January 2000.

17. *See* the definitions of these terms in ¶ 2(c).

transparency and accountability in fishing subsidies programs. At the WTO, this results in part from the profound failure of the general subsidy notification provisions in SCM Art. 25. Improving the WTO regime for notification and surveillance of fishing subsidies is absolutely critical to the future of fishing subsidies reform.

(a) Improved notification requirements

(i) Better data: Notification requirements applicable to fishing subsidies—including for exceptions to the "red light," for "special and differential treatment," for inclusion within the "green light," and any other notifications required under SCM Art. 25 or analogous language—should require detailed reporting about the actual uses of the subsidies, including identification of specific enterprises receiving subsidies, identification of how subsidies are applied, identification of fisheries in which subsidized fishing takes place under a given subsidy program, certain basic information about the status of the fishery, and subsidy amounts on a per vessel, per fleet, and per fishery basis. At a minimum, notifications should be required to provide information sufficient to allow a prima facie evaluation of whether the affected fishery is "patently at risk" or "patently undermanaged." Consideration should also be given to requiring notifications to include information about steps taken to ensure that the notified subsidy does not contribute to IUU fishing activities.

(ii) Better compliance: Notification requirements should be made enforceable. Failure to notify a subsidy should have consequences, such as

- liability for monetary fines;
- application of a presumption of "serious prejudice" and raising of the evidentiary bar for proving the absence of adverse effects;
- automatic application, where adverse effects are found, of a recommendation to remove a previously unnotified subsidy (rather than mere removal of adverse effects);[18] and/or
- where a failure to notify is not remedied, liability to countervailing measures without a required showing of adverse effects.

(b) A radical, plausible and most effective solution—an independent monitoring mechanism

Compliance with Art. 25 has been so poor, and the administrative and political obstacles to compliance so intractable, that WTO members should consider the creation of an independent mechanism empowered to collect and report information of the kind required by Article 25, along with the additional information proposed above for fishing subsidies. Such a mechanism could be located within the WTO Secretariat or as an independent expert body. Appropriate avenues for governmental review of draft reports

18. This proposal would only apply as an alternative to the "mandatory withdrawal" proposal discussed in ¶ 4(d).

compiled by such a body would be part of the process, which could be modeled after procedures applied by the FAO, OECD, APEC, and other intergovernmental bodies.

(c) Other monitoring and reporting

- In addition to periodic reviews of the operation of the exceptions to the red light and of the green light (*see above*), periodic reviews of WTO fishing subsidy disciplines generally should be required. Specific goals of such reviews should include amending or refining the illustrative lists associated with new disciplines.
- All reviews relating to fishing subsidies should be carried out with the participation of appropriate experts and intergovernmental organizations with competence in fisheries management and marine conservation.

(6) Special and differential treatment for developing countries

Given the importance of fisheries to many developing countries, and in light of the Doha Declaration's mandate that new fishing subsidies disciplines take account of this importance,[19] implementation of special and differential treatment for developing countries in new fishing subsidies rules is essential. While WWF does not consider itself competent to make definitive proposals for such accommodations, the following concepts are offered as an indication of WWF's approach and as an invitation to dialogue, in addition to any other special and differential treatment provisions that may apply to the SCM as a whole:

- The ban on capacity- and effort-enhancing subsidies could be relaxed[20] for developing country fleets fishing in fisheries that are not "patently at risk" or "patently undermanaged"; the burden to prove the not "patently at risk" or "patently undermanaged" condition should remain on developing countries' subsidizers, and subsidies granted this relaxation should be subject to either amber or dark amber treatment.
- The ban on "domestic supply" fishing subsidies could be made not to apply to developing countries.
- The "serious adverse effects" threshold for challenging green light subsidies could be lowered for challenges against subsidies "most likely to disadvantage developing countries" within the meaning set forth in ¶ 4(c) (although in such cases compensation should be allowed as an alternative to mandatory withdrawal of an offending green light subsidy).
- The "catch share" test for serious prejudice could be relaxed for developing countries in the following manner:
  - The test should not apply with regard to any fishing by a developing country on a stock located exclusively within its EEZ.
  - In cases where a major economy challenges a developing country fishing subsidy on grounds of catch share, the rule could require: (i) proof not only of increased catch share for the subsidized fleet, but that the increase was at least 5% of the catch; and (ii) proof of decreased catch share for the complainant's fleet of at least 5% of the complainant's catch.

19. *Doha Declaration*, ¶ 28.

20. The precise nature and extent of the "relaxations" in question require further discussion and development. Some limits should certainly apply (such as limits on the duration of the relaxation, or on its precise scope).

- Other serious prejudice tests could apply only to developing country subsidies affecting fisheries that are "patently at risk" or "patently undermanaged," with the burden on any challenger to prove any alleged "patently at risk" or "patently undermanaged" condition.
- Dark amber provisions should not apply to developing countries.
- For least developed members, relaxation of (but not exemption from) reporting requirements (*e.g.*, inclusion of reporting in trade policy reviews).

NOTE: The foregoing concepts are intended for consideration with regard to developing countries other than "major fishing nations." This term, which would require definition, would be meant to exclude countries with major fishing industries from some or all of the special and differential treatment provisions for fishing subsidies.

Also note that any developing country seeking to maintain a fishing subsidy in accordance with these special and differential treatment provisions should be required to give advance notification of such subsidies.

(7) Institutional Mechanisms

(a) The need for new mechanisms

A true "win-win-win" outcome to the fishing subsidies negotiations will produce new WTO disciplines that are at least somewhat interdisciplinary in nature. As in other areas where the WTO enjoys overlapping or closely related competence with other intergovernmental bodies, mechanisms to ensure cooperation, consistency, and the appropriate distribution of authority will be needed. Specifically, new mechanisms should explicitly ensure the appropriate participation of external intergovernmental organizations and individual experts with competence in fisheries management and marine conservation in disputes and WTO reviews involving fishing subsidies. In addition, long overdue reforms to improve the public transparency of WTO processes, including disputes, should be instituted.

Of course, not all aspects of WTO fishing subsidies disciplines will require new institutional mechanisms for their implementation. Rather, issues arising under the substantive provisions proposed above would fall along a continuum that would include:

- issues familiar to the routine operations of the SCM;[21]
- "novel but not problematic" issues specific to the realm of fishing subsidies, but still within the competence of the WTO;[22] and
- issues (especially related to questions of fisheries management) beyond the sole competence of the WTO.[23]

21. For example, whether a subsidy falls within the red light's ban on subsidies to encourage domestic fish supplies, whether a subsidy has caused a change in prices or production volumes, etc.

22. Issues could fall into this category either because they are susceptible to fact-finding or economic analyses of a generally familiar character (*e.g.*, whether a subsidy is of a kind that is likely to increase productive fishing capacity), or because they can be answered on the basis of simple and objective evidence (*e.g.*, whether a fishery is classified as "overexploited" by the FAO).

23. For example, whether a fishery should be considered "patently undermanaged" because it fails to meet the "objective indicia of minimum adequate management" test.

Issues of the first type obviously need no special institutional mechanisms for their resolution.

Issues of the second type—which include questions regarding whether a particular fishery is "patently at risk"—would benefit greatly from "expert input" mechanisms such as those described in ¶ 7(b), to ensure WTO processes enjoy the advice and assistance of people and institutions with specialized knowledge about fisheries economics and fishing subsidies.

Issues of the third type obviously pose the greatest institutional challenge. As detailed in WWF's full paper, WWF has made every effort to propose disciplines that would avoid raising issues beyond the WTO's traditional competence. Nevertheless, as noted above,[24] a truly robust system of fishing subsidies disciplines must at times raise questions about the fisheries context in which some subsidies operate. Such questions—which may include whether a particular fishery is "patently undermanaged"—may require judgments beyond the proper competence of the WTO. When they do, they should only be resolved through new "shared authority" mechanisms, described in ¶ 7(c).

(b) "Expert input" mechanisms

WWF proposes the institutionalization of several possible "expert input" mechanisms already familiar to WTO practice, including

- the proactive solicitation by panels of expert testimony or of advisory input from external expert bodies;
- the inclusion on panels of persons expert in relevant fields (such as fisheries economics); and
- the acceptance of appropriate and useful briefs from *amici curiae*.

WWF believes that such mechanisms should be strongly and explicitly encouraged within new fishing subsidies disciplines. Moreover, governments should consider maintaining a WTO roster of expert bodies and individuals to facilitate the availability of expert advice.

(c) "Shared authority" mechanisms

The concept of institutional mechanisms under which the WTO shares authority over specific issues with other competent international bodies is not unknown to the WTO system.[25] In order to allow the WTO to consider questions about the fisheries context

24. *See* fn. 3.

25. For example:

(i) GATT Art. XV:2 requires the WTO to give deference to the judgments of the **IMF** on a range of issues relating to balance of payments and monetary policies.

(ii) The GATT Customs Valuation Code created a tight working relationship between the GATT and the **Customs Cooperation Council** (now known as the World Customs Organization). *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, GATT 26th Supp. BISD 116 (1980) (available at http://www.worldtradelaw.net/tokyoround/valuationcode.pdf) (*see esp.* Art. 18:2 and Annex II). (Indeed, in 1998 the WTO Appellate Body ruled that a WTO panel had erred in failing to take account of a decision of the WCO regarding the classification of a product under the Harmonized System for tariff classifications.) *European Communities—Customs Classification of Certain Computer Equipment*, AB-1998-2 (report of the Appellate Body), ¶ 90.

(iii) The SPS Agreement defers to the judgment of the **Codex Alimentarius Commission**, among others, with regard to the existence of international standards in a variety of fields. SPS Agreement Annex A, ¶ 3.

within which some subsidies operate, it will be necessary for the WTO to create this type of relationship with bodies competent in the field of fisheries management.

Two main difficulties complicate the establishment of such a mechanism: first, there are multiple international bodies with competence and authority over various fisheries; and second, there are some fisheries (including many fisheries located entirely within a single country's EEZ) regarding which there is no competent international body having the requisite competence and authority.

To deal with this reality, WWF proposes a two-part mechanism:

(i) **Reference to existing bodies:** Where a competent international body has jurisdiction over the management of a fishery, WTO panels should be required to refer questions beyond the WTO's competence to those bodies, and the findings or judgments of those bodies with regard to such questions should be binding;

(ii) **Creation of a Permanent Group of Fisheries Experts:** Where a competent international body does not exist or is otherwise unable to provide the WTO with the required findings or judgments, questions beyond the sole competence of the WTO should be referred to a new "Permanent Group of Fisheries Experts" to be established in cooperation with the FAO, UNEP, and major regional fisheries management bodies. The PGFE would be composed of 5–7 persons, serving in their individual capacities for fixed and staggered terms, the majority of whom should be nominated by the FAO, UNEP, and major regional fisheries management bodies. These persons would be recognized experts in the field of fisheries management, and would be drawn from the ranks of international civil servants, academics, and non-governmental organizations. The PGFE would have the authority to make binding findings on questions referred to it. It would also serve in an advisory capacity to assist the WTO in the general administration (including monitoring and review) of new fishing subsidies disciplines.

(d) Other institutional considerations

(i) **Cooperative relationships:** In addition to the other mechanisms described above (and as an aid to their establishment and implementation), WWF proposes that the WTO (or at least the Subsidies Committee) enter into formal memoranda of understanding, including observer status where appropriate, with the FAO, UNEP, and major regional fisheries management bodies to foster mutual cooperation and information exchange with regard to fishing subsidies.

(ii) **Public access to WTO process:** WWF has long been a proponent of increasing the public transparency of the WTO. The interdisciplinary nature of a "win-win-win" rule system particularly calls for open process. WWF renews its calls upon the WTO to open its dispute resolution pleadings and hearings to the public, and to admit representatives of civil society to the greatest extent practicable as observers to all other WTO deliberations.

Appendix 2

Who Says So?—A Sampling of Authorities Who Agree That Subsidies Contribute to Overcapacity and Overfishing

The following is a selection of quotations from various governmental, intergovernmental, and other authorities who in recent years have concluded that fishing subsidies can and often do contribute to fishing overcapacity, overfishing, and resource depletion.

> [A]s the opportunities for an increased catch from fishery resources have declined considerably, a continuation of the high subsidies can only lead to greater and greater economic distress as well as further depletion of stocks.
>
> **FAO, Department, Marine fisheries and the law of the sea: A decade of change, (Special chapter (revised) of *The state of food and agriculture 1992)*, FAO Fisheries Circular No. 853 (Rome, 1993) (as quoted by the WTO Secretariat in WT/CTE/W/80 (March 9, 1998), Annex II)**

* * * *

> To achieve sustainable fisheries, the following actions are required at all levels:
>
> > ...(f) Eliminate subsidies that contribute to illegal, unreported and unregulated fishing and to over-capacity, while completing the efforts undertaken at the World Trade Organization to clarify and improve its disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries....
> >
> > **World summit on sustainable development plan of implementation. Included in *Report of the world summit on sustainable development*, UN Doc. A/CONF.199/20, pp. 23–24. <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm>**

Fisheries policies have to address the relation between sustainable management of resources and trade liberalisation, the causes of unsustainable fishing, and the need to avoid those subsidies that are harmful . . . .

Statement of the OECD Council at the Ministerial Level, May 17, 2001, ¶ 40. <http://www.oecd.org/dataoecd/61/54/1900217.pdf>

* * * *

Governments are urged to reduce subsidies to the fishing industry and abolish incentives leading to over-fishing."

United Nations Commission on Sustainable Development, *Report of the Secretary-General* (February 12, 1996), ¶ 21(c).

* * * *

Incentives in the form of subsidies and protection very often lead to overexploitation of fishery resources, lower harvests, and economic inefficiency. Subsidies lower the costs of fishing, which increases profits. In the long run, however, profits are dissipated with the entry of more fishers attracted by subsidies. With overfished resources, incentives that increase fishing efforts reduce average catch rates, further deplete the resource, and eventually reduce employment. Protection and subsidization of the sector engender inefficiencies and may ironically aggravate the pervasive poverty in the sector.

Asian Development Bank, *The Bank's Policy on Fisheries*, (September 1997). <http://www.adb.org/Documents/Policies/Fisheries/default.asp?p=policies#contents>

* * * *

Any subsidy that increases revenues or lowers the cost of variable or fixed inputs will tend to lead to increased fishing effort, which in the longer term means increased capacity. Capital grants for vessel construction and modernisation will have the most immediate impact on fleet capacity. Subsidies would not be translated into increased fishing effort only where effort can be effectively and completely constrained by regulation or where property rights are perfectly assigned.

European Association of Fisheries Economists (EAFE), "Conference reports—overcapacity, overcapitalisation and subsidies in European fisheries." In *EAFE Bulletin*, No. 13 (August 1999) (reporting points of "broad agreement by participants" at the Concerted Action workshop, Portsmouth, October 28–30, 1998). <http://www.lei.dlo.nl/EAFE/bulletin/html/bulletin13-e.html>

[T]he primary motivation behind vessel modernisation and renewal. . . is to improve both the efficiency of the fleet and the productivity of capacity. Without effective management controls over effort or catch (or both), such transfers [subsidies] may have a negative effect on stocks and can offset the impact of capacity-reducing transfers. . . . Capacity-reducing transfers can lead to capacity and effort being shifted to other fisheries . . . the effects of catch declines on fishers can be masked by increased support from the government.

> ***Subsidies in the OECD fisheries sector: A review of recent analysis and future directions.*** **Background paper for the FAO Expert Consultation on Identifying, Assessing and Reporting on Subsidies in the Fishing Industry held in Rome, December 3–6, 2002. (OECD), pp. 15–16. <http://www.oecd.org/dataoecd/43/40/2507604.pdf>**

* * * *

The link between overfishing and subsidies has led commentators to pay more attention to the role that trade law could play in remedying fisheries subsidization, thus relieving pressures on fish stocks.

> **WTO Secretariat, WT/CTE/W/80 (March 9, 1998), Annex II, ¶ 3.**

* * * *

Public subsidies to the fisheries sector are substantial and have become a matter of concern in view of their negative effects on sustainable management of fishery resources and on comparative advantage on trade.

> **FAO, World Fisheries Trade and Some Emerging Issues, Trade Issues: FAO Fact Sheet No. 7, Third WTO Ministerial Conference, Seattle, November 28–December 3, 1999. <http://www.fao.org/DOCREP/003/X6730E/X6730E07.HTM>**

* * * *

Subsidies tend to exacerbate the over fishing [sic] and overcapitalization common in the world's commercial fisheries... most subsidies in fisheries have a negative impact from a conservation standpoint....

> **United States, WT/CTE/W/51 (May 19, 1997), ¶¶ 8–9 (*see also id.* ¶¶ 18–19).**

By providing additional revenue or reducing costs, the returns from fisheries are inflated beyond normal economic levels of exploitation. In the case of a fisheries resources [sic], the normal economic rate of exploitation will often be above the long term sustainable biological rates of yield.

New Zealand, WT/CTE/W/52 (May 21, 1997), ¶ 7.

* * * *

Governments must eliminate subsidies and other aid that support the expansion of fishing capacity, the over-capitalization or the migration of their fishing fleets to distant waters. Governments should fund compensation to help fishers and fishworkers who become displaced by fishing capacity reductions or who are affected by fishing moratoria or other forms of area closures.

Greenpeace International, *Principles for Ecologically Responsible Low-Impact Fisheries* (May 1998) ¶ 3.1.4 (fourth on a list of top ten urgent government actions needed) <http://archive.greenpeace.org/oceans/globaloverfishing/lowimpactfisheries.html>

Appendix 3
Excerpts from the Doha Declaration

The following are relevant portions of the declaration issued by WTO trade ministers in Doha, Qatar, on November 14, 2001. The formal citation for the Doha Declaration is as follows:

> *Ministerial Declaration—Adopted on 14 November 2001*. Ministerial Conference, Fourth Session, November 9–14, 2001, Doha. WT/MIN(01)/DEC/1 (November 20, 2001).
>
> <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>

MINISTERIAL DECLARATION

Adopted on 14 November 2001

* * *

6. We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO´s continued cooperation with UNEP and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.

WTO RULES

28. In the light of experience and of the increasing application of these instruments by Members, we agree 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. We note that fisheries subsidies are also referred to in paragraph 31.

* * *

TRADE AND ENVIRONMENT

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;

(ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;

(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.

Appendix 4
Excerpts from the SCM Agreement

The following are texts of articles from the WTO Agreement on Subsidies and Countervailing Measures (SCM) to which reference is made frequently in the body of this paper. The full text of the SCM in English is available at http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm.

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Members hereby *agree* as follows:

PART I: GENERAL PROVISIONS

Article 1

Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);[1]

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

1. In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

Article 2

Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large

2. Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[3] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

PART II: PROHIBITED SUBSIDIES

Article 3

Prohibition

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact,[4] whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;[5]

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

Article 4

Remedies

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

---

3. In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

4. This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

5. Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

4.4 If no mutually agreed solution has been reached within 30 days[6] of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts[7] (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel's terms of reference.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[8]

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate

6. Any time-periods mentioned in this Article may be extended by mutual agreement.
7. As established in Article 24.
8. If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

Body's report, the DSB shall grant authorization to the complaining Member to take appropriate[9] countermeasures, unless the DSB decides by consensus to reject the request.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.[10]

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

PART III: ACTIONABLE SUBSIDIES

Article 5

Adverse Effects

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

(a) injury to the domestic industry of another Member;[11]

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994;[12]

(c) serious prejudice to the interests of another Member.[13]

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 6

Serious Prejudice

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

9. This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.
10. This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.
11. The term "injury to the domestic industry" is used here in the same sense as it is used in Part V.
12. The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.
13. The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

(a) the total ad valorem subsidization[14] of a product exceeding 5 per cent;[15]

(b) subsidies to cover operating losses sustained by an industry;

(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;

(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.[16]

6.2 Notwithstanding the provisions of paragraph 1, 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 paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[17] as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: *(a)* there is an increase in the market share of the subsidized product; *(b)* the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; *(c)* the

15. Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.

16. Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

17. Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist[18] during the relevant period:

(a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;

(b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;

(c) natural disasters, strikes, transport disruptions or other *force majeure* substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;

(d) existence of arrangements limiting exports from the complaining Member;

(e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, *inter alia*, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);

(f) failure to conform to standards and other regulatory requirements in the importing country.

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V.

18. The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 7

Remedies

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to *(a)* the existence and nature of the subsidy in question, and *(b)* the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice[19] caused to the interests of the Member requesting consultations.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

7.4 If consultations do not result in a mutually agreed solution within 60 days,[20] any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel's terms of reference.

7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB[21] unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[22]

19. In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of paragraph 1 of Article 6, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of paragraph 1 of Article 6 have been met or not.
20. Any time-periods mentioned in this Article may be extended by mutual agreement.
21. If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.
22. If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

PART IV: NON-ACTIONABLE SUBSIDIES

Article 8

Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as nonactionable:[23]

(a) subsidies which are not specific within the meaning of Article 2;

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:[24,25,26]

---

23. It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.

24. Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product.

25. Not later than 18 months after the date of entry into force of the WTO Agreement, the Committee on Subsidies and Countervailing Measures provided for in Article 24 (referred to in this Agreement as "the Committee") shall review the operation of the provisions of subparagraph 2(a) with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible modifications, the Committee shall carefully review the definitions of the categories set forth in this subparagraph in the light of the experience of Members in the operation of research programmes and the work in other relevant international institutions.

26. The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term "fundamental research" means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

the assistance covers[27] not more than 75 per cent of the costs of industrial research[28] or 50 per cent of the costs of pre-competitive development activity;[29,30] and provided that such assistance is limited exclusively to:

(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);

(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;

(iv) additional overhead costs incurred directly as a result of the research activity;

(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development[31] and non-specific (within the meaning of Article 2) within eligible regions provided that:

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria,[32] indicating that the region's difficulties arise out of more

27. The allowable levels of non-actionable assistance referred to in this subparagraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.

28. The term "industrial research" means planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services.

29. The term "pre-competitive development activity" means the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects cannot be converted or used for industrial application or commercial exploitation. It does not include routine or periodic alterations to existing products, production lines, manufacturing processes, services, and other on-going operations even though those alterations may represent improvements.

30. In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to the above two categories, calculated on the basis of all eligible costs as set forth in items (i) to (v) of this subparagraph.

31. 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.

32. "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 as provided for in Article 2.

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:

- 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;

- 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.

(c) assistance to promote adaptation of existing facilities[33] to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(i) is a one-time non-recurring measure; and

(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and

(iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee 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.[34]

33. The term "existing facilities" means facilities which have been in operation for at least two years at the time when new environmental requirements are imposed.

34. It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 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 paragraph 2 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 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 referred to in paragraph 3.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, 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. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

Article 9

Consultations and Authorized Remedies

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

PART V: COUNTERVAILING MEASURES

* * *

Article 15

Determination of Injury[45]

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products[46] and *(b)* the consequent impact of these imports on the domestic producers of such products.

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects[47] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an

45. Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

46. Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

47. As set forth in paragraphs 2 and 4.

examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

15.6 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

15.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as:

(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

(ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;

(iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(v) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further subsidized exports are imminent and that, unless protective action is taken, material injury would occur.

15.8 With respect to cases where injury is threatened by subsidized imports, the application of countervailing measures shall be considered and decided with special care.

* * *

PART VI: INSTITUTIONS

Article 24

Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

PART VII: NOTIFICATION AND SURVEILLANCE

Article 25

Notifications

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this

connection, and without prejudice to the contents and form of the questionnaire on subsidies,[54] Members shall ensure that their notifications contain the following information:

(i) form of a subsidy (i.e. grant, loan, tax concession, etc.);

(ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);

(iii) policy objective and/or purpose of a subsidy;

(iv) duration of a subsidy and/or any other time-limits attached to it;

(v) statistical data permitting an assessment of the trade effects of a subsidy.

25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sector.

25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

54. The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193–194.

25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

25.12 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

Article 26

Surveillance

26.1 The Committee shall examine new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

PART VIII: DEVELOPING COUNTRY MEMBERS

Article 27

Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing

country Member shall not increase the level of its export subsidies,[55] and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-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 developing country Member in question. If the Committee determines that the extension is justified, the developing 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 developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either *(a)* on the basis of notification by the developing country Member having reached export competitiveness, or *(b)* on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

55. For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

* * *

PART XI: FINAL PROVISIONS

Article 31

Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of

those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

* * *

ANNEX I
ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.
(b) Currency retention schemes or any similar practices which involve a bonus on exports.
(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.
(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available[57] on world markets to their exporters.
(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes[58] or social welfare charges paid or payable by industrial or commercial enterprises.[59]
(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

---

57. The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

58. For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes;

"Remission or drawback" includes the full or partial exemption or deferral of import charges.

59. The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes[58] in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes[58] on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).[60] This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges[58] in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms. Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

60. Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

Appendix 5

Detailed Table Comparing Current Red and Amber Light Provisions

	Prohibited ("Red")	Actionable ("Amber")
Basic Obligation	*A priori prohibition* ("shall neither grant nor maintain" certain types of subsidies)	Soft obligation ("should") to avoid causing adverse effects Somewhat harder obligation to undertake *ex post facto* removal of injury ("shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy")
Method of Legal Classification	Mainly "design-based" with some "context-based" elements (*i.e.*, prohibited subsidies are defined according to the nature of the subsidized action, with no regard to injury, and (mainly) without regard to other facts)	Subsidies belonging to actionable class—defined by their adverse impacts ("injury," "nullification or impairment," or "serious prejudice")
Factual Focus	Nature of the subsidy, (especially the legal criteria triggering the subsidy) May focus on *de facto* contingency on export performance or domestic supply (*e.g.*, a "structure of industry/ market" analysis)	The adverse effects of the subsidy. Likely to require: • detailed empirical and econometric analysis of market and/or production conditions • complex "like product" analysis • extensive access to and disclosure of facts about foreign and domestic industries
Procedural Characteristics	Expedited timetable Possibility of binding finding by standing group of independent experts Discretion of panel is limited (must recommend withdrawal of subsidy)	"Normal" timetable Factual complexity and broader terms of reference give panel broader discretion Panel finding likely to have direct bearing on amount of any remedial countervailing duties
Remedies	Definitive withdrawal of subsidy must occur within time period set by panel Failure of subsidizing party to withdraw gives petitioner right "to take appropriate countermeasures" Countermeasures not (directly?) limited or measured by injury or extent of subsidy Arbitration in remedy phase focuses only on whether countermeasures are "appropriate" (*i.e.*, not likely to be empirically complex)	"Appropriate steps" to remove adverse effects or withdraw subsidy must be taken within six months Failure of subsidizing party to take "appropriate steps" to remove adverse effects gives petitioner right to take measures "commensurate with the degree and nature of the adverse effects"
Bottom Line	Relatively easy litigation (short, not fact-intensive, cheaper) Less diplomatic pain (adjudication is more "neutral" and determines legitimacy of the subsidy) Outcome easier to predict Remedy more absolute, countermeasures for noncompliance may be tougher	Burdensome litigation Likely to lead to "continuing negotiations" (due to complexity, softness of remedy, and fact that legitimacy of subsidy not decided *per se*) Outcome harder to predict Remedy "softer " (need not include withdrawal of subsidy; obligation to remove injury applies only with regard to petitioner, and qualified by "appropriate steps" language)

Appendix 6
Crafting a WTO Definition of "IUU Fishing"

The following paragraphs set out some technical information and argument for consideration by negotiators crafting a definition of "IUU fishing" for application in the WTO context, as discussed in ¶ V.C.5(e) of the main paper.

(a) Principles guiding the definition

The WTO definition of IUU fishing should aim to be

- clear enough to allow workable administration by the WTO;
- simple and noncontroversial enough to avoid entangling the WTO in issues beyond its competence; and
- as supportive as possible of the FAO International Plan of Action on IUU fishing (IPOA-IUU).[1]

(b) The scope of the ban should start with the definitions of IUU in the IPOA-IUU

Basic definitions of "illegal," "unreported," and "unregulated" fishing are set out in ¶¶ 3.1–3.4 of the IPOA-IUU, which read:

> 3.1 Illegal fishing refers to activities:
>
> 3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
>
> 3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
>
> 3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

1. Formally known as the *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing,* the IPOA-IUU was adopted by the FAO on March 2, 2001. It is available online at http://www.fao.org/DOCREP/003/y1224E/Y1224E00.HTM.

3.2 Unreported fishing refers to fishing activities:

3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or

3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

3.3 Unregulated fishing refers to fishing activities:

3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

3.4 Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the International Plan of Action (IPOA).

(c) An analysis of the IPOA definition

The three terms set forth in the IPOA-IUU are complex. Each is given a multipart meaning, according to various combinations of three basic parameters:

- the type of jurisdiction over the fishery (national, cooperative, or high seas);
- the nationality of the vessels engaged in fishing; and
- the nature of the illegitimate activity at issue.

Table 1 gives a synopsis of how these parameters are combined to determine the scope of the IPOA.

Table 1: Definitions of IUU in the FAO IPOA2

	National Jurisdiction	Cooperative Jurisdiction (*e.g.*, under a regional fisheries management organization [RFMO])	High Seas
"Illegal"	fishing by domestic or foreign vessels... without permission or contrary to national law	fishing by vessels of states party to an RFMO… contrary to binding rules of the RFMO or contrary to international law[3] fishing by vessels of non-party states… contrary to international law	fishing by vessels of any state… contrary to international law[4]
"Unreported"	fishing by domestic or foreign vessels… that is unreported or misreported contrary to national reporting requirements	fishing by vessels of states party to an RFMO (and possibly others)[5] … that is unreported or misreported contrary to RFMO reporting requirements	(not applicable)[6]
"Unregulated"	fishing in any wholly unmanaged domestic fishery?[7]	fishing by unflagged vessels or vessels of states not party to an RFMO… in a manner "inconsistent with" RFMO management measures	fishing by any vessel… in a manner "inconsistent with state responsibilities"[8]

2. Based principally on ¶¶ 3.1–3.4 of the IPOA-IUU. Note that this table is interpretive, and the terms employed are not necessarily those of the IPOA itself.

3. Note that "international law" in such cases may take substantial account of the terms of an RFMO, at least with regard to states party to the UN Straddling Stocks Agreement, Articles 17 and 18 of which impose obligations on states nonparty to an RFMO to cooperate with the RFMO and prevent vessels flying their national flag from fishing that "undermines the effectiveness" of the RFMO.

4. Presumably, international law upon the high seas (in the absence of cooperative management instruments) refers to "customary" international law.

5. As noted in fn. 3, the terms of the UN Straddling Stocks Agreement impose certain obligations on states nonparty to an RFMO to cooperate and not undermine the RFMO.

6. Paragraph 3.2 of the IPOA-IUU defines "unreported" fishing as fishing not reported in compliance with national law or with the terms of an RFMO. Under this narrow definition, "unreported" fishing cannot exist on the high seas. For the sake of simplicity and effectiveness, WWF proposes a broader approach with regard to a new WTO prohibition on subsidies to "unreported" fishing. *See* ¶ V.C.5(e) of the main text, and ¶ I(d)(ii) of this Appendix.

7. Paragraph 3.3.2 of the IPOA-IUU leaves unclear (at least to this author!) whether the term "unregulated" could have application within waters subject to national jurisdiction. Such wholly unregulated national fisheries may well still exist. With regard to national fisheries located outside territorial waters but within an EEZ, UNCLOS Art. 61.2 imposes on the EEZ state an international obligation to manage the resource. In principle, there is no reason why the IPOA-IUU should not apply the term "unregulated" to domestic fisheries that wholly lack regulation or otherwise fail to meet the burdens of UNCLOS. Arguably, the result of including unmanaged domestic fisheries within the term "unregulated" would be to impose on states the obligation to forbid fishing in their own domestic fisheries even when their own domestic laws do not forbid it. Although this may sound odd, it would be consistent with other terms of the IPOA that impose obligations to make other aspects of IUU fishing illegal. WWF proposes including unmanaged domestic fisheries within the concept of "unregulated" for purposes of new subsidies disciplines. *See* ¶ V.C.5(e) of the main text, and ¶ I(d)(iii) of this Appendix.

8. The definition of "unregulated fishing" in an unmanaged high seas context appears to have been particularly problematic for the drafters of the IPOA, probably owing to differences of opinion about the applicable international customary law, including whether such fishing should be considered legitimate at all. *Compare* IPOA-IUU ¶ 3.3.2 with ¶ 3.4. WWF proposes that a definition be adopted in the context of new subsidies rules that avoids international legal disputes of this kind. *See* ¶ V.C.5(e) of the main text, and ¶ I(d)(iii) and fn. 12 of this Appendix.

(d) The IPOA's complex and imprecise definitions should be refined and simplified for the WTO context

In crafting the scope of a prohibition on subsidies to IUU fishing, the language of ¶¶ 3.1–3.4 will need some refinement in order to achieve a prohibition that is workable and effective, and appropriate to the WTO. Negotiators (working closely with fisheries policymakers within their governments) should not hesitate to undertake these refinements, since the IPOA leaves room for national governments and international bodies to adapt and tailor the IPOA to their particular circumstances.[9]

(i) The definition of "illegal fishing" should be narrowed to avoid debates over customary international law

Given the unsettled nature of some aspects of the customary international legal obligations of flag states with regard to the control of fishing activities by their nationals, a working definition of "illegal fishing" for purposes of new WTO disciplines should be limited to activity contrary to domestic laws or to applicable international treaties.

(ii) The definition of "unreported fishing" should be expanded to include *de facto* cases

Paragraph 3.2 of the IPOA limits the term "unreported" to fishing that takes place contrary to prevailing domestic or international reporting obligations. Given the special dangers posed by the lack of transparency in fishing subsidies programs[10]—and consistent with the improved notification obligations proposed by WWF[11]—WWF believes that a new red light provision should prohibit subsidies to any fishing activities that are not reported in fact. In other words, the existence of reporting obligations (as well as compliance with them) should effectively be a precondition to maintaining any fishing subsidy.

(iii) The definition of "unregulated fishing" should be narrowed to avoid debate over environmental law or policy

The IPOA-IUU's definition of "unregulated" fishing appears to reflect some uncertainty over the precise nature of the international legal controls on fishing in unmanaged waters.[12] As in the case of "unreported" fishing, the definition of "unregulated" used in the

---

9. The FAO has described the IPOA as a "toolbox" suitable for adaptation and application "by means of other legal instruments, including global, regional and subregional instruments" FAO (2002b) (quoted material is from the introductory abstract). *See also* Bray (2000b, 2–3) ("[T]he place where precision in defining what is illegal, unreported and unregulated… is more in national and regional instruments than in the IPOA itself").

10. *See* ¶ V.G.2.

11. *See* ¶ V.G.7.

12. Paragraph 3.3.2 begins by defining "unregulated" fishing as fishing "in areas or for fish stocks in relation to which there are no applicable conservation or management measures." However, the definition considers such fishing as "unregulated" only where it is "conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law." Paragraph 3.4 then goes on to state:

> Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the International Plan of Action (IPOA).

These provisions reflect, at a minimum, the absence of international consensus that fishing in unmanaged waters should be considered illegitimate *per se*. Undoubtedly, governments hold various views about the conditions under which international law permits fishing in unmanaged high seas fisheries. While it may make sense not to outlaw all fishing in unmanaged waters, the risk of overcapacity and overfishing in most such cases is so high that **all subsidies to fishing in unmanaged waters should be prohibited**, even if the fishing in question falls outside the IPOA's definition of IUU.

context of new WTO fishing subsidies disciplines should be simplified to avoid legal controversy and to minimize the likelihood that subsidies will contribute to overfishing. The best solution would be to treat any fishing in unmanaged waters as "unregulated." As with "unreported" fishing, this would effectively require the existence of a national or international management regime as a precondition to maintaining any subsidized fishing activities.

(e) The ban should cover subsidies to IUU fishing and "activities contributing to IUU fishing"

A red light prohibition aimed exclusively at subsidies to IUU fishing activity *per se* would not be sufficiently effective, for two reasons:[13]

(i) The prohibition should reflect the difficulty of proving or predicting specific instances of IUU fishing

Owing to its nature, IUU fishing is often difficult to detect or to prove. The IPOA repeatedly takes this fact into consideration. For example:

- ¶ 63 urges states and RFMOs to establish a rebuttable presumption that IUU fishing has taken place whenever a vessel fishes in the waters of an RFMO under the flag of a noncooperative nonparty to the RFMO. Significantly, the IPOA urges the application of this presumption in the context of trade measures (*i.e.*, to bar the landing or transshipment of fish from the vessels in question).
- ¶ 70 notes that measures to prevent trade in IUU fishing products may have to be applied at the stock or species-specific level, rather than on a vessel-by-vessel basis.[14]
- ¶ 80.11 calls on states to develop innovative ways to combat IUU fishing, including through the "definition of circumstances in which vessels will be presumed to have engaged in or to have supported IUU fishing."

Similarly, new red light language prohibiting subsidies to IUU fishing should cover circumstances in which IUU fishing is suspected or highly likely.

(ii) The prohibition should target activities that the IPOA considers problematic

The IPOA itself calls on states and international bodies to take action against activities contributing to IUU fishing, and not just against IUU fishing narrowly defined. For example, despite the somewhat narrow *de jure* definition of "unreported fishing" in IPOA-IUU ¶ 3.2 (*see* fn. 6 of this Appendix), the IPOA takes aim at the broader problem of insufficient reporting.[15] More generally, since IUU fishing can only be confronted through the creation of appropriate legal and administrative conditions, the IPOA treats

13. Note: For the sake of brevity, this paper makes frequent references to "subsidies to IUU fishing." This phrase should be understood to comprise "activities that contribute to IUU fishing" as well.

14. Paragraph 70 thus implicitly considers as legitimate trade measures that could effect goods not actually produced through IUU fishing, in cases when it is necessary to reduce as much as possible the economic incentive for IUU fishing on particularly at risk stocks or species. Given the explicit efforts of the drafters to ensure the IPOA's consistency with WTO rules (*see* ¶¶ 65, 66, and 68), paragraph 70 also appears to assume that the WTO would consider such measures legitimate as well.

15. For example, paragraph 42 of the IPOA issues an extensive and detailed call for states to establish and maintain records of fishing vessels under their jurisdiction. Clearly the IPOA considers such recordkeeping a critical element of the fight against IUU fishing.

the absence of these conditions as a policy failure. To be fully supportive of the IPOA, therefore, new WTO fishing subsidies disciplines should similarly extend to "activities contributing to IUU fishing" (or some equivalent formula).

Appendix 7
Scope and Content of Current Article 25 Notifications

Article 25 of the SCM currently requires[1]

- notification of "any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2" granted or maintained by a member within its territory (Art. 25.2)
- submission of such notifications "not later than 30 June of each year" (Art. 25.1)
  - "new and full" notifications must be submitted every third year, with "updating" notifications in intervening years. (G/SCM/6)
- the content of notifications to include information "sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes" (Art. 25.3)... including
  - title of the subsidy programme, if relevant, or brief description or identification of the subsidy. (G/SCM/6)
  - period covered by the notification. (G/SCM/6)
  - policy objective and/or purpose of the subsidy. (Art. 25.3(iii) and G/SCM/6)
  - background and authority for the subsidy (including identification of the legislation under which it is granted). (G/SCM/6)
  - form of the subsidy (*i.e.*, grant, loan, tax concession, etc.). (Art. 25.3(i) and G/SCM/6)
  - to whom and how the subsidy is provided (whether to producers, to exporters, or others; through what mechanism; whether a fixed or fluctuating amount per unit; if the latter, how it is determined). (G/SCM/6)
  - subsidy per unit, or in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year). (Art. 25.3(ii) and S/SCM/6)
  - duration of the subsidy and/or any other time limits attached to it, including date of inception/commencement. (Art. 25.3(iv) and G/SCM/6)

1. The following are quoted or paraphrased from Article 25 itself or from the *Questionnaire Format for Subsidy Notifications Under Article 25 of the Agreement on Subsidies and Countervailing Measures and Under Article XVI of GATT 1994*, G/SCM/6 (adopted by the SCM Committee on July 21, 1995) (subsequently approved by the Council on Trade in Goods, G/C/M/6 (minutes of September 26, 1995), ¶ 2.2).

- statistical data permitting an assessment of the trade effects of the subsidy. (Art. 25.3(v) and G/SCM/6)
  - "The specific nature and scope of such statistics is left to the judgement of the notifying Member" (G/SCM/6)
  - it is "desirable" to include statistics of production, consumption, imports, and exports of the subsidized product(s) or sector(s) for the most recent three years and for a "representative" year preceding the subsidy. (G/SCM/6)

WWF's mission is to stop the degradation of the planet's natural environment and to build a future in which humans live in harmony with nature by

- conserving the world's biological diversity,
- ensuring that the use of renewable natural resources is sustainable, and
- promoting the reduction of pollution and wasteful consumption.

WWF's Endangered Seas Programme is the world's largest marine program, working in more than 40 countries at a range of levels—from local communities through regional authorities and industry, to national governments and international conventions.

To turn the tide from decline to a healthy marine environment, WWF has set up two global targets for the year 2020:

(1) Within a generation, we aim to stop overfishing and ensure that all exploitation of fish stocks is sustainable.

(2) We shall also work toward establishing networks of well-managed and ecologically representative marine protected areas covering at least 10 percent of the world's oceans, including the high seas.

For further information:

Scott Burns
Director, Marine Conservation Program
WWF-US
1250 24th Street, NW
Washington, DC 20037
USA

Tel: +1 202 861-8327
Fax: +1 202 530-0743
Scott.burns@wwfus.org
http://www.worldwildife.org/

Aimée Gonzales
Senior Trade Policy Advisor
WWF-International
Avenue du Mont-Blanc
CH-1196, Gland
Switzerland

Tel: +41 22 364 9002
Fax: +41 22 364 8219
agonzales@wwfint.org
http://www.panda.org/