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One Step Forward, Three Steps Back:
Comments on TN/RL/GEN/163

WTO Fisheries Subsidies Negotiations — Geneva — 28 April 2010

The negotiating proposal on fisheries subsidies recently tabled by the delegations of Brazil, China, India, and Mexico (TN/RL/GEN/163, 11 Feb 2010) addresses several critical issues from the perspective of four leading developing country governments. It also offers detailed changes to the legal language in Articles III, IV, and V of the Chair's Text (TN/RL/W/213, 30 Nov 2007). Given the current focus of the negotiations, it is a proposal that merits analysis and commentary.

General Comments

The purpose of GEN/163, as stated by its authors, is to "make real" the Hong Kong mandate's call for "appropriate and effective special and differential treatment" as an "integral part" of new fisheries subsidies rules. This is an objective WWF actively shares, believing that sustainable fisheries must respond to the legitimate social and economic needs of developing countries.

However, successful fisheries development also depends on national and international policies that guarantee the long-term health of fish stocks and marine ecosystems. In a world of often inadequate fisheries management, undisciplined subsidies continue to undermine development by causing stock depletion and significant competitive imbalances. Indeed, the policies (and subsidies) of developing countries themselves are a growing part of the global race for fish.

In this context, WWF views GEN/163 as a very mixed contribution to the debate. Although it proposes some important elements of a solution to the issue of "S&DT beyond EEZs", it also calls for an expansive carve-out that could allow extensive and unconditional use of fishing subsidies by developing countries without attention to impacts on sustainability or trade. Similarly, while it attempts to simplify the management requirements of Article V and introduces the interesting and potentially significant concept of "fishery adverse effects" (Art. IV), it offers amendments that would end up weakening the Chair's Text and could substantially lower the ambition for the fisheries subsidies talks overall.

Key Issues Emerging from the Negotiating Context

Since 2004, delegations have widely shared view that S&DT should be broad and effective, but should not amount to a "blank cheque" for developing country fisheries subsidies. To avoid contributing to overcapacity and overfishing, and to guard against competitive imbalances, S&DT should include certain prerequisites that have been variously called "sustainability criteria" or "management conditions". This approach has been supported by many delegations from both developed and developing countries that the Chair has been able to treat the "no blank cheque" formula as a consensus starting point for technical discussions.

The discussions of S&DT and sustainability criteria have, however, included at least four relevant dynamics:

First, there have been **proposals to give unconditional S&DT to some fishing** activities.[1] Some delegations have sought a narrow blank cheque for "subsistence" fishing activities; others for a much broader category of "small scale" fishing.

Second, there has been **uncertainty over the specific sustainability criteria** that should be included in binding rules. Delegations have called for clarification and simplification of Article V to arrive at criteria that are clear, plausible, and adequately flexible.

Third, the Chair's Text has raised a sharp debate over whether S&DT should apply to **fishing outside of the EEZs of developing countries** (and, if so, under what conditions).

Finally, a **paper tabled by India, Indonesia, and China** in the spring of 2008 called for removing the conditionality of Article V altogether—an apparent rejection of the "no blank cheque" formula that had for so long defined the parameters of the S&DT talks.[2]

The governments submitting GEN/163 have taken very different positions on three of these four key issues. Brazil has been a leading supporter of meaningful sustainability criteria on S&DT, and has proposed limiting "blank cheque" treatment to a carefully defined class of subsistence fishing. Similarly, Mexico has supported meaningful sustainability criteria and, with Brazil and others, has called for strong fisheries subsidies disciplines. China and India, on the other hand, joined Indonesia in an apparent call for unconditional S&DT across the board, and have in any case argued for "blank cheque" treatment of a broad class of "small scale" activities that clearly include commercial and even some industrial fishing. China and India have also been generally less supportive of strong WTO fisheries subsidies disciplines than either Brazil or Mexico.

Given this history, it is worth asking to what degree GEN/163 represents a shifting of positions by some or all of its subscribing governments. In particular, what does GEN/163 say about the nature and extent of mandatory sustainability conditionality on S&DT, both for fishing within EEZs and beyond? Accordingly, a technical review of GEN/163 can be organized around the following four questions:

1. Does GEN/163 accept meaningful sustainability criteria for S&DT?
2. With regard to S&DT for fishing beyond EEZ boundaries (or on "international stocks" generally—see discussion below), does GEN/163 propose minimally adequate requirements for cooperative international management?
3. Do the modifications to Art. V proposed by GEN/163 strengthen or weaken the Chair's Text?
4. Do the modifications to Art. IV proposed by GEN/163 strengthen or weaken the Chair's Text?

These questions are discussed in sequence below.

[1] Delegations have also generally accepted that least developed countries could be exempt from most, if not all, new WTO fisheries subsidies disciplines.

[2] TN/RL/GEN/155/Rev.1, (19 May22 April 2008)

Question 1:
Does GEN/163 accept meaningful sustainability criteria for S&DT?

Short Answer: "GEN/163 offers a very ambiguous reply to this fundamental question." While parts of the paper appear to take sustainability criteria seriously, a potentially huge carve out for "low income" fishing could give a totally blank check to many, and possibly nearly all, developing country fishing activities.

GEN/163 Art. III.2 focuses on "the issue of small-scale, artisanal fisheries". This is an issue—or rather, there are *two issues* (see below)—at the heart of much debate since the outset of these negotiations. Clearly, the needs of severely under-developed fishing communities require special attention, and sustainability criteria may need to be adjusted for impoverished communities whose economic and social organization makes data-intensive, "command and control" management especially difficult.[3] But addressing such needs must not be an excuse to open a major loophole in new WTO rules. The question is not whether S&DT should be allowed for impoverished fishermen, but whether it should be given as a "blank cheque" free of any sustainability conditionality.

The proposed Art. III.2 would grant unconditional S&DT for fisheries subsidies:

> where the benefits of those subsidies are conferred on low income, resource poor or livelihood fishing activities, provided that these activities are performed by fishworkers on an individual or family basis or employed by associations or micro-enterprises or individual boat owners.

Such subsidies would be exempt them the conditions of Art. V, and subject only to the non-binding statement that they "should" be implemented in the context of fisheries management measures. **In short, Art. III.2 offers a blank cheque for the subsidies that it covers.**

Of course, the Chair's Text, also offers unconditional S&DT to a subset of fishing. But the Chair's Art. III.2(a) is narrowly based on a definition of "subsistence and livelihood" fishing previously proposed by Brazil and Argentina[4]—*i.e.*, focused on fishing at the most impoverished, least technically developed, and least commercially significant end of the spectrum.

WWF has previously expressed discomfort even with the narrow "blank cheque" of the Chair's proposal, since we believe that fisheries subsidies should never be divorced from management obligations.[5] WWF supported the Chair's Art. III.2 (a) as a tolerable compromise only in view of its very narrow scope and in the context of the Chair's Text as a whole. In contrast, the new

[3] WWF has repeatedly argued that any discussion of special S&DT for artisanal fishing should begin with the question "why is special S&DT needed?" Our answer: special S&DT rules are needed for artisanal fisheries because the legal conditions (esp. management conditions) attached to "normal" S&DT may not be appropriate in cases where a combination of poverty, geographic dispersion, commercial decentralization, and traditional community organization makes centralized, data-intensive management ineffective. *See* UNEP-WWF 2007.

[4] TN/RL/GEN/151 (17 September 2007), proposed Art. X.1(c) and fn.1. The Brazil/Argentina language itself draws heavily on earlier proposals by Brazil. *See, e.g.,* TN/RL/GEN/79/Rev.4 (13 March 2007), proposed Art. I.4 (a).

[5] *See Fisheries Subsidies: WWF Statement on the Chairman's Draft* (WWF 2007) fn. 2. WWF believes subsidies to subsistence fishing activities should be subject to relaxed management conditions, but not exempt from management conditions altogether. *See Sustainability Criteria for Fisheries Subsidies,* § III ("Criteria for 'Artisanal' Fisheries").

Art. III.2 proposed by GEN/163 gives a blank cheque to a much wider set of fishing activities, and does so within a generally weaker text.

Several delegations—including some subscribing to GEN/163—have noted that the treatment of "specificity" under the Chair's Text could effectively give some developed countries a "blank cheque" for important subsidies to fishing costs, such as "non-specific" subsidies to fuel. WWF shares this concern, and repeats our calls for a reexamination of this important issue.[6]

The gap caused by the Chair's treatment of specificity should not, however, be addressed by creating another serious weakness in the text. The language of proposed Art. III.2 is so broad and vague that it could turn into "the exception that swallows the rule".

The inclusion of "small scale" fishing

At a minimum, GEN/163 intends its revision of to extend blank cheque S&DT to so-called "small-scale" fishing. The authors of GEN/163 state this explicitly in their introductory narrative and clearly reflect their intention in the draft language they propose. The significance of this need to be appreciated both in terms of the history of the fisheries subsidies negotiations and in light of the technical realities of "small scale" fishing itself.

The term "small scale" has no clear technical definition. As used in these talks, the term can cover technically and commercially advanced activities. In fact, by calling for a definition based exclusively on vessel size, a number of delegations have proposed a carve out that would be available to fishers without regard for their level of development. Proponents of special treatment for "small scale" fishing have included advanced developed countries.[7]

WWF has previously argued that **"small scale" fishing cannot be meaningfully distinguished from industrial fishing for purposes of WTO subsidy rules**, and has particularly opposed using vessel size as a parameter for S&DT.[8] Small scale fishing can be highly competitive with "industrial scale" fishing both domestically and in seeking export markets. With improved engines and equipment, small vessels are no longer confined to coastal waters. When associated with at-sea transfers to refrigerator or processing ships, small fishers can remain at sea for months, and form part of massive industrial enterprises. And, unfortunately, small scale fishing has been repeatedly associated with overcapacity and the disastrous depletion of valuable stocks.

In light of these realities, WWF has previously warned against the accommodations made for vessels less than ten meters in the Chair's Text (Art. III.2(b)(2)).[9] In their early responses to the Chair's Text, however, some traditional proponents of a carve-out for "small scale" fishing (including, among others, India and China) argued that the Chair's Text did not go far enough.[10]

On its face, GEN/163 might at first seem to be a compromise position, since it agrees with eliminating vessel size as a criterion for expanded S&DT. In fact, however, GEN/163 is drafted to include small scale fishing within the scope of proposed Art. III.2, and could easily grant a blank cheque to much more than just "small scale" activities.

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[6] Unlike the ASCM, the Chair's Text would not "deem specific" the subsidies it prohibits. WWF has called for extending ASCM Art. 2.3 to cover all prohibited subsidies, including fisheries subsidies. We further agree that the multi-industry availability of fuel subsidies in some countries should not exempt them from new multilateral disciplines to limit these highly effort-enhancing supports.

[7] *See, e.g.*, TN/RL/GEN/144 (Norway, 26 January 2007); TN/RL/GEN/114/Rev.2 (Japan, Korea, & Taiwan, 5 June 2007)

[8] *See esp., Small Boats, Big Problems* (WWF 2008); *see also Best of Texts, Worst of Texts* (WWF 2006).

[9] WWF 2007.

[10] *See* TN/RL/GEN/155/Rev.1, (19 May22 April 2008).

Textual analysis of proposed Art. III.2

It is useful to compare proposed Art. III.2 with the language it would replace in the current Chair's Text. As summarized in the following table, the Chair's Art. III.2(a) implies five separate criteria for defining the scope of "blank check" S&DT. GEN/163 would eliminate three of these criteria completely, and substantially broaden the remaining two.

Proposed scope of "blank check" S&DT

Criterion	Chair's Text	GEN/163
Poverty level	(not specified, but drawn from "subsistence/livelihood" language of 2007 Brazil/Argentina proposal)	"low income, resource poor or livelihood fishing"
Location of fishing	inshore (i.e., "within territorial waters")	(no limit)
Technical fishing capacity	non-mechanized net-retrieval	(no limit)
Level of commerce/trade	"consumed principally by the fishworkers and their families and the activities do not go beyond a small profit trade"	(no limit)
Enterprise structure	"carried out on their own behalf by fishworkers, on an individual basis which may include family members, or organized in associations . . . [and] there is no major employer-employee relationship"	"performed by fishworkers on an individual or family basis or employed by associations or micro-enterprises or individual boat owners"

Obviously, the blank cheque offered by GEN/163 would be much broader than the "subsistence" exemption proposed by the Chair. But how far does the language of GEN/163 really go?

The "low income" criterion

The terms "low income" and "resource poor" in proposed Art. III.2, have wide potential reach. Although drawn from an existing WTO text, they lack any accepted definition in WTO law. They are used only once—in Art. 6.2 of the Agreement on Agriculture, as noted by GEN/163—where they are appear without being defined. They have never been construed by a WTO panel or the Appellate Body (although they were once raised in a case brought against Brazil that was dismissed on procedural grounds—*see below*).

So what do these terms mean? What *could* they mean? Are not fishing communities in many countries considered "low income", particularly when compared with other domestic sectors? Isn't the need for subsidies itself often an indication of a "low income" or "resource poor" condition? Is "low income" limited by the developmental level of the subsidizing country? By the commercial significance of the fishing or the resulting trade? Most importantly, is "low income" a good basis for identifying subsidies needing unconditional "blank check" treatment?

In the WTO, there is no consensus definition of "low income" or "resource poor" in fisheries management. As commonly used, the term "low income" is subject to diverse and very broad interpretations, and could easily include fisheries already enjoying substantial commercial

advancement. **The Mexican rural development program "*Alianza Contigo*"**—recently analyzed by the OECD—provides a case in point.[11] The *Alianza* program has included substantial funding for the fisheries sector, and is aimed at assisting "low income producers" ("productores de bajos ingresos").[12] The 2006 OECD review noted, however, that "[t]he programme is formally intended to benefit low income communities but does not include explicit targeting criteria to help achieve this."[13] It further found that the program distributed more funding in richer Mexican states than in poorer states. The report concluded:

> This result is, perhaps, unsurprising. *Alianza* funding seems to be directed mostly towards commercial fisheries, and towards production projects and action plans.

This does not mean, of course, that the *Alianza* programme was (or is) an inappropriate subsidy. On the contrary, it may be an excellent candidate for S&DT. But is it the kind of subsidy that should be granted a "blank cheque"?

Importantly, the *Alianza* program has not only been aimed at commercial fisheries, but at activities with direct implications for fishing capacity and overfishing. In 2005, twenty-six percent of *Alianza* fisheries expenditures went to vessel decommissioning in Mexico's internationally significant shrimp fisheries, which have been suffering from overcapacity for years.[14] Meanwhile, the *Alianza* programme also provided funding for upgrading outboard engines to "small scale" fishers.[15] While both of these subsidies were intended to be environmentally beneficial, such programmes clearly should be subject to sustainability criteria. Under Article II.d of the Chair's Text, subsidies for vessel decommissioning should be subject to strict management conditions to avoid the abuses and unintended consequences that have historically allowed many such programs to increase rather than decrease overcapacity and overfishing.[16] Similarly, funds for new motors are inherently capacity-increasing, and thus the kind of subsidies that are most likely to contribute to overfishing unless carefully managed.

The Mexican case—highlighted here in part because it appears to be a typical fisheries development subsidy program and in part because of its unusual and healthy degree of transparency—is just one example of how a subsidy aimed at "low income" fishing can end up supporting environmentally sensitive activities in commercially developed fisheries.

A second example—from the short jurisprudence of AoA Art. 6.2—shows how "low income" can describe highly competitive producers, and be used to justify subsidies that cause significant trade distortions. In **the *Desiccated Coconut* case**,[17] the Philippines (with third-party support from Sri Lanka and Indonesia) challenged countervailing duties imposed by Brazil against subsidies to Philippine coconut producers. In attacking Brazil's CVDs, the Philippines argued

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[11] *See Agricultural and Fisheries Policies in Mexico: Recent Achievements, Continuing the Reform Agenda* (OECD 2006), pp. 301 ff.

[12] *See* description of the "target population" at the Allianza website (as of 12 April 2010) *http://www.sagarpa.gob.mx/desarrolloRural/Programas/Paginas/ProgramadeDesarrolloRuraldelaAlianzaContigoPoblacionObjetivos.aspx*.

[13] OECD 2006, p. 301.

[14] OECD 2006, p. 301-02.

[15] *See Alianza* website, *supra n. 12; see also Alianza* budget reports, such as http://www.sagarpa.gob.mx/delegaciones/inicio/bajacaliforniasur/Lists/Padrn%20de%20Beneficiarios/Attachments/30/Beneficiarios2007.pdf

[16] *See* UNEP 2004, *Analyzing the Resource Impact of Fisheries Subsidies: A Matrix Approach,* pp. 24ff.

[17] *Brazil — Measures Affecting Desiccated Coconut* (*Report of the Panel)*, WT/DS22/R (17 October 1996) (Philippines vs. Brazil), As noted above, the Panel found for Brazil on procedural grounds, and thus never reached the Philippine argument based on AoA Art. 6.2.

that its subsidies were for "low-income or resource poor" producers, and thus legitimized by AoA Art. 6.2. But "low income" as they may have been, these producers were sufficiently powerful to cause injuries that Brazil felt necessitated CVDs. And f the Philippines "low income" defense had prevailed, it would have justified the subsidies regardless of their impact on Brazil's trade.

In Article III.2, GEN/163 proposes an even broader "low income" clause. Where AoA Art. 6.2 only covers subsidies that are "generally available" to low-income agricultural producers, Article III.2 omits the "generally available" requirement. In *Desiccated Coconut*, Brazil relied on the "generally available" language to argue that the Philippine subsidies were specific to the coconut industry and thus not protected by Article 6.2. Proposed Article III.2 would not support such a counterargument, as it would cover all subsidies to "low income" fishing activities, subject only to the "enterprise structure" test in its second clause (discussed below).

The foregoing examples make clear that Art. III.2 could grant "blank cheque" S&DT to environmentally sensitive subsidies in commercially developed fisheries, even if they cause significant trade distortions.

In fact, it is unclear is whether the concept of "low income" as used by Art. III.2 can be meaningfully restricted at all. GEN/163's elimination of references to scale, to near-shore location, to levels of technical capacity, and to levels of commercial development leave the term "low income" stripped of sociological or commercial limitation. Moreover, since Art. III.2 does not suggest any absolute measure of "low income", the term seems open to definition in purely relative terms (e.g., in comparison to other domestic sectors).

Even in advanced developed countries important parts of the fishing sector are often called "low income", notwithstanding developmental levels substantially higher than in many developing country sectors.[18] In one case, a report prepared for the EU recently described the entire German fishing industry as "low income".[19] In developing countries, it may be that the great majority of fishing—or perhaps even all of it—could be legitimately characterized as "low income".

The "enterprise structure" criterion

The only limit placed by GEN/163 on the scope of the "low income" clause of proposed Art. III.2 is the requirement that the subsidies be conferred on fishing

> performed by fishworkers on an individual or family basis or employed by associations or micro-enterprises or individual boat owners.

This is again much broader than the Chair's Text, and again seems likely to cover the great majority of developing country fishing activities. It is also a limit that seems easy to circumvent.

Unlike in GEN/163, the "enterprise structure" language proposed in the Chair's Text uses several socio-economic factors to describe what might be called small "owner-operator" enterprise structures. This is consistent with the intended focus of the Chair's language on "subsistence/livelihood" fishing. The proposed Art. III.2 in Gen/163, on the other hand, appears broad enough to allow blank cheque S&DT for fishing activities where the fishing is conducted on behalf of—and even under the direct control of—commercial enterprises up to and including highly vertically integrated corporate actors. Such structures could also include "major

[18] See, e.g., Federal Fisheries Investment Task Force Report to Congress (U.S. National Marine Fisheries Service, July 1999) (study of U.S. fisheries subsidies frequently referring to "low income" fishers in the United States); Improving the economic situation in the fishing industry (EU Parliament Resolution No. 2006/2110(INI)) (repeatedly referring to the relatively low income and economically fragile condition of the EU fishing industry, relative to EU industry generally, in calling for relaxation of environmental and other rules to allow increased subsidies in light of rising fuel prices).

[19] MacAlister Elliott and Partners Ltd, The Role of Women in the Fisheries Sector, (EC, DG-Fish 2002), Annex 5, p. 8 ("The fishing industry [in Germany] is a low-income industry");

employer-employee" relationships of the kind specifically excluded from Art. III.2(a) of the Chair's Text.

The broad scope of Art. III.2's test is accomplished two ways. First, its vocabulary and syntax would cover any enterprise structure other than direct ownership of vessels by corporations that do not qualify as "associations" or a "micro-enterprises". The terms "association" and "micro-enterprise" are not defined, but could include a variety of corporate arrangements, without regard for the social realities (or level of commercial development) that surround them.

Moreover, by consistently using the disjunctive "or", the enterprise structure clause in Art. III.2 could cover vessels on which multiple fishermen are employed. So long as the vessel itself is owned by an "association" or "micro-enterprise" or "individual", nothing in Art. III.2 limits the size of the crew or the nature of the employer-employee relationships involved.[20] Proposed Art. III.2 does not even limit the number of fishing vessels these kinds of owners can own.

Apart from the legal "wiggle room" afforded by its drafting, the language of GEN/163 achieves broad coverage by focusing uniquely on vessel ownership, rather than on more relevant socio-economic factors. In the practical world, however, vessel ownership alone is not always a good indicator of commercial realities. An example drawn from Brazil illustrates both the malleable nature of vessel ownership and the potential competitiveness of small scale fishing. We present this story in some detail, as it touches on several of the issues raised by GEN/163:

The example of Brazil's spiny lobster fishery[21]

In northeast Brazil, the spiny lobster fishery is an important component of the regional economy, and produces one of Brazil's leading fisheries exports. The fishery was considered largely "artisanal" until mechanization of the fleet began in 1968. For a period of time thereafter, vessel ownership was predominantly by large fishing companies. But in the late 1980s, as vessel ownership became less profitable, companies sold ownership of the fleet back to "small and medium sized fishers". The companies did, however, continue to provide economic support for operating costs, and in return received exclusive rights to the resulting catches.

Then, in the 1990s, rising lobster prices made fishing more profitable and the economic structure shifted again. Vessel owners took on their own operating costs, and presumably increased their commercial independence. At the same time, the introduction of gillnet technology into the fishery (in place of trap fishing) shifted the comparative advantage to smaller vessels (from which gillnets are more easily operated) and opened the door for numerous new entrants into the fishery.

The result was a massive increase in "small scale" capacity, and a rapid decline of more than 60% in lobster abundance during the 1990s. As overfishing progressed, the commercial value of the fishery also suffered. Until the early 1990s, lobster had been the leading export of the Brazilian state of Ceará (where the fishery is concentrated), with export earnings reaching $53 million in 1991. By 2002, however, annual export values had dropped to $35 million, and lobster had

[20] Nothing in Art. III.2 would prevent a set of vessel owners (or other capitalists) from forming an "association" to purchase a factory vessel, so long as the resulting fishing activities still qualified as "low income". This is not an improbable "real world" possibility, nor necessarily a bad one. In fact, WWF has opposed limiting S&DT to small vessels in part because we believe that fishers in low income communities should be allowed to band together to achieve industrial scale fishing, if that is the best path towards sustainable development. But when such efforts are subsidized, they should certainly be subject to appropriate management and other sustainability criteria, and not given "blank cheque S&DT" as proposed by GEN/163.

[21] Based on Castro e Silva, et al., "Report on The Spiny Lobster Fishery in Brazil", in FAO Western Central Atlantic Fishery Commission, *Report of the Second Workshop on the Management of Caribbean Spiny Lobster Fisheries in the WECAFC Area. Havana, Cuba, 30 September - 4 October 2002*, FAO Fisheries Report No. 715 (Rome, FAO 2003). (http://www.fao.org/docrep/006/y4931b/y4931b09.htm#bm9)

slipped to Ceará's fifth leading export. A report by FAO experts to the Western Central Atlantic Fishery Commission in 2002 called for an urgent improvement in the effective management of the fishery and for international cooperation to ban trade in undersized lobster. By 2006, the Commission was considering recommendations to ban gillnets altogether, due to their negative impact on lobster habitat.[22] The Commission also considered the need for increased public spending on regulatory enforcement and engagement of local stakeholders.[23]

This history of Brazil's spiny lobster fishery is instructive in several ways. First, it clearly demonstrates that **vessel ownership and actual capital control of a fishery can be separated,** as it was in the second phase of this fishery's industrialization. The return to individual owners seems to have been for the convenience of the companies, who for a time maintained effective control over the fishing even as they reduced risk by divesting their ownership in vessels.

The ease with which ownership can be manipulated also raises obvious questions about the potential circumvention of GEN/163's "ownership" language. If "blank cheque" subsidies could be obtained by shifting ownership to individuals, that could be quickly achieved without altering the fundamental structure of a fishery. In fact, the malleability of formal ownership is one of the significant problems facing governments as they seek to end illegal fishing practices and the abuse of "flags of convenience" that allow enterprises to avoid regulation.

The Brazilian lobster story also shows that small scale fishing can outcompete larger scale operations. In this case, small boats had an advantage in the use of gill nets, and so as the fishery grew the average size of vessels again declined. This kind of competitive small scale advantage is not limited to lobster fishing, as studies in Senegal and elsewhere have previously made clear.[24]

But most fundamentally, the Brazilian lobster story illustrates the need for sustainability criteria on fisheries subsidies—for both trade and environmental reasons. Reportedly, subsidies were used to help expand the Brazilian lobster fleet from 1965-85, and to build an associated "industrial park" for export companies in 1991.[25] As with the case of the Mexican *Alianza Contigo*, such subsidies could well be appropriate candidates for S&DT. But in this case, **sustainability criteria would have helped maintain profitability while reducing potential trade distortions, sustaining trade, and avoiding calls for environmental trade measures.**

In short, subsidies that were granted without consideration for stock and fleet management contributed to the depletion of a valuable natural resource while bringing more benefits to export companies than to the fishers themselves. This may help explain why, at a regional FAO meeting in 2006, leading fishermen's organizations in Brazil joined together not to call for additional subsidies, but for improved, stakeholder-oriented management of the fishery.[26]

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[22] FAO Western Central Atlantic Fishery Commission, *Report of the fifth Regional Workshop on the Assessment and Management of the Caribbean Spiny Lobster. Mérida, Yucatán, Mexico, 19–29 September 2006*, FAO Fisheries Report No. 826 (Rome, FAO. 2007), (ftp://ftp.fao.org/docrep/fao/010/a1518b/a1518b00.pdf), p. 51.

[23] NOTE: Constructive efforts to improve the management of the Brazilian lobster fishery have been underway for a number of years, including in conjunction with WWF projects and in cooperation with governmental authorities. These efforts deserve recognition and continued support.

[24] *See, e.g.,* cases of Senegal, France, Spain, and New England mentioned in WWF 2008, p. 3.

[25] In 2002 half of the 44 companies in the park were lobster exporters. FAO Western Central Atlantic Fishery Commission, *Report of the Second Workshop on the Management of Caribbean Spiny Lobster Fisheries. Havana, Cuba, 30 September-4 October 2002*, FAO Fisheries Report No. 715 (Rome, FAO 2003) (http://www.fao.org/docrep/006/y4931b/y4931b09.htm#bm9); *see also* "Statement of NGOs and Fisher Organizations from the State of Ceará, Brazil" in FAO Western Central Atlantic Fishery Commission, *National Reports Presented at the Fifth Regional Workshop on the Assessment and Management of the Caribbean Spiny Lobster*, *Mérida, Yucatán, Mexico, 19–29 September 2006*, App. G (p. 96).

[26] S*ee* "Statement of NGOs and Fisher Organizations from the State of Ceará, Brazil", *supra* n. 24

Conclusions re. proposed Art. III.2

In sum, the scope of the blank cheque proposed by Art. III.2 is potentially very broad indeed. Extending at a minimum to so-called "small scale" operations, and based on only two easily fulfilled criteria, the carve-out offered by Art. III.2 could cover a very significant set of developing country fishing activities, including activities that are internationally competitive, technically advanced, and environmentally sensitive. In WWF's view, this fundamental weakening of the Chair's Text is inconsistent with the Hong Kong mandate and the repeated commitments of many parties to the WTO fisheries subsidies talks.

Question 2:
Does GEN/163 propose adequate conditions on S&DT for fishing on international stocks?

Short Answer: "GEN/163 takes a step in the right direction." GEN/163 would substantially expand the scope of S&DT by eliminating the EEZ limit imposed by the Chair's Text. GEN/163 proposes conditions on this expansion which—if the "low income" carve out of Art. III.2 is put aside—would be an important step towards establishing appropriate requirements for S&DT on international fisheries. The concepts in proposed Art. III.3(b) need to be clarified and strengthened, but constitute a good starting place for further negotiations on this issue.

Article III.3(b) of GEN/163 proposes to expand S&DT by allowing subsidies to vessel capacity and operating costs for fishing activities beyond the EEZs of subsidizing developing country members. This significant extension of S&DT beyond the Chair's Text raises important questions about the conditions under which developing countries should be allowed to subsidize expanded fishing activities beyond their own jurisdictions.

This issue is both pressing and difficult. There is a compelling equity argument in favor of S&DT to help developing countries enjoy their rights in international fisheries. On the other hand, the challenge of managing international fisheries is especially severe. Regional fisheries management organizations (RFMOs) often prove weak and ineffective, sometimes failing dramatically. And as developing countries become increasingly powerful players in the global fisheries economy, the threat of a subsidized "South-South" race for fish is a significant and growing danger.

The principle of "no blank cheque" must, therefore, apply at least as strongly to subsidies for international fisheries as for domestic subsidies. Moreover, the mere existence of an RFMO obviously does not fulfill the need for adequate management. Just as sustainability criteria should make certain minimum demands on Members regarding their domestic fisheries management, the same—or perhaps even stronger—criteria should attach to fisheries under international management. Three of the delegations subscribing to GEN/163 have already indicated their agreement with this "RFMO plus" approach to S&DT beyond EEZs.[27]

Proposed Art. III.3(b) takes some important steps towards articulating elements of such an "RFMO plus" test, including:

[27] TN/RL/W/241/Rev.1 (Brazil, China, Ecuador, Mexico and Venezuela) (16 October 2009), p. 3.

- Extending S&DT beyond EEZs only where members enjoy fishing rights created by RFMOs or other binding international instruments;[28]
- Requiring that the applicable RFMO rights be quantitative, science-based, and enforceable;[29]

GEN/163 is unclear regarding certain details (see notes, below), but assuming it can be clarified to reinforce the two points just mentioned, it is a valuable step towards an effective rule.

Proposed Art. III.3(b) also maintains important references in the Chair's Text to ensure subsidized capacity does not exceed sustainable levels, and refers to "maximum sustainable yield" as a benchmark for limits on fishing. However, Art. III.3(b) does not guarantee that all of the important principles it mentions will be properly reflected in legal conditions. In particular,

- GEN/163 does not set any limit on the capacity that may be subsidized under S&DT, and in this regard should be compared with the much stronger language proposed by Brazil and Argentina in 2007.[30] GEN/163 also fails to require quantitative or even qualitative capacity assessments and fails to mention capacity plans as a necessary element of management. As discussed in the WWF-UNEP paper on sustainability criteria,[31] the need for capacity assessment and planning is fundamental in the context of proposed subsidies.
- The reference to MSY in proposed Art. III.3(b) is incomplete in two important ways. First, it is not linked directly to "quantitative and enforceable limits" on fishing, but mentioned only vaguely in a clause that leaves unclear whether RFMO limits set in excess of MSY would satisfy Art. III.3(b). Second, as discussed in detail in UNEP-WWF 2007, MSY alone is not a proper "limit reference point" for establishing sustainable fishing. It is widely understood today that fishing limits must be set at precautionary levels below MSY to account for scientific uncertainty and industrial inertia. Moreover, MSY establishes limits only in terms of target stocks, whereas sustainable fisheries management often requires limits that reflect the impacts of fishing on ecosystems, habitats, and non-target species.

In addition, proposed Art. III.3(b) deletes a provision of the Chair's Text that requires FAO peer review of "status assessments" performed to ensure that subsidized capacity does not exceed

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[28] TECHNICAL NOTE: The reference in Art. III.3 (b) to "enforceable" limits "established" by an RFMO seems to require actual membership in an RFMO, and not merely acting as a "cooperating non-party". This important point should be made explicit, as many RFMOs are significantly weakened by the refusal of some fishing countries to become fully bound (and dues paying) members.

[29] TECHNICAL NOTES: (1) Art. III.3 (b) leaves unclear whether the clause following the word "or" in footnote 2 presents an alternative to "enforceable quantitative limits" or is a description of some acceptable kinds of quantitative limits. The fisheries subsidies rules ultimately adopted by Members should ensure that all relevant limits on fishing effort (and capacity, if applicable) are enforceable and science-based. In addition, consistent with prevailing international norms, the term "science-based" or "based on the best available science" should be directly employed, as it was in W/241 and is in language from the Chair's Text that GEN/163 later accepts (GEN/163 Art.III.4).

(2) The body of III.3 (b) refers to prior scientific assessment without identifying the nature of the assessing authority and without requiring the scientific assessment to be the basis of RFMO rule-making. Footnote 2 seems to require that the RFMO itself use the science, and implies that the resulting rules should be based on that science. WTO fisheries subsidies rules should be drafted to reduce ambiguity, and to avoid the possibility that individual governments may seek to justify subsidies after they have unilaterally conducted and applied stock assessments, claiming their actions are consistent with obligations under an RFMO. The rules should make clear that enforceable RFMO limits themselves must be science-based and assessment-based.

[30] TN/RL/GEN/151 (17 September 2007), proposed Art. X.3.

[31] UNEP-WWF 2007, pp. 14 ff, & p. 41.

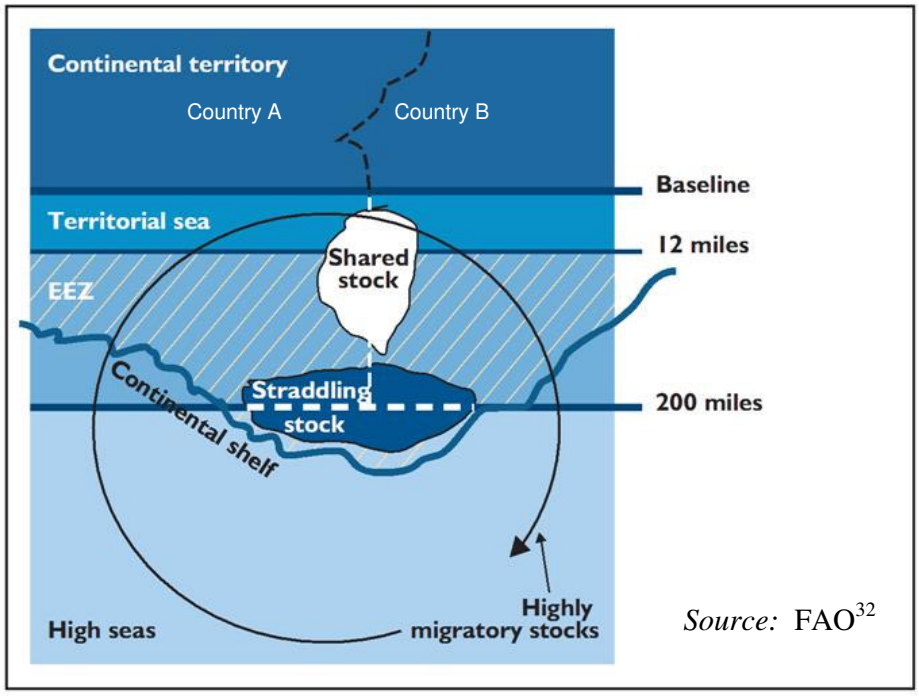
sustainable limits (GEN/163 also proposes deleting similar language from Article V). This question of "peer review" has been much discussed, with some delegations indicating strong opposition to anything that could amount to a "precertification" requirement for S&DT subsidies.

WWF agrees that the Chair's Text could be clarified to avoid creating a "precertification" process. However, the complete removal of a formal role for FAO in helping the WTO reach factual judgments about stock and management conditions is contrary to the institutional interests—and the limited mandate—of the WTO. Solutions such as those discussed in the WWF-UNEP sustainability criteria paper may a path towards plausible compromise.

The "international stocks" problem

GEN/163 also compounds one of the significant weaknesses in the Chair's Text: the failure to recognize the international character of many fishing activities located within EEZs. A fish stock should be considered "international" if more than one country has a legal right to harvest its fish. This concept covers all stocks that are "shared" (in more than one EEZ), "straddling" (on the high seas and in one or more EEZs), "highly migratory" (between EEZs and/or between one or more EEZs and the high seas), or "high seas" (only beyond EEZ boundaries).

Different Kinds of "International Stocks"



Source: FAO[32]

All international fish stocks require cooperative international management. In fact, a significant portion of stocks under the management of RFMOs is actually fished within EEZ boundaries, whether by the EEZ state or by foreign distant water fleets.

As WWF has previously remarked, the Chair's Text does adequately reflect the need for effective cooperative management of international stocks, but rather limits the extent of the problem by denying most S&DT beyond the EEZs of subsidizing states GEN/163's proposal to erase that limit makes it all the more important to recognize that fishing does not have to be on the "high seas" to be "international" in character, and thus to require effective RFMO management..

[32] "Simplified diagram of maritime zones and distribution of shared, straddling and highly migratory stocks as defined by UNCLOS" on FAO webpage "High Seas Resources" (http://www.fao.org/fishery/topic/1859/en) (as of 20 April 2010).

Access-related subsidies

With regard to "access-related" subsidies[33] (which frequently relate to international stocks), Art. III.4 of GEN/163 offers some curious changes to the Chair's Text. First, GEN/163 proposes to limit the right to grant access-related subsidies to developing countries. While this could arguably help reduce pressures on some fish stocks, it raises obvious concerns about the potential impact on revenues received by host states, and particularly on some small island states. WWF does not believe effective fisheries subsidies rules require such an outcome. Such a rule could also add incentives for the reflagging of fishing vessels to "flags of convenience".

Proposed Art. III.4 would also allow access agreements to "reference" international best practices rather than being "based" on them. While the intention of this proposed change is unclear, it would seem to "lower the bar" significantly.

Conclusions re. proposed Art. III

While GEN/163 appears to endorse two important elements of sustainability criteria for fisheries subsidies to international fisheries, its ambiguities and limits will need to be corrected (and Article V further clarified) before S&DT can be properly extended to developing country distant water fishing activities.

Question 3:
Do the modifications to Art. V proposed by GEN/163 strengthen or weaken the Chair's Text?

Short Answer: "The changes proposed by GEN/163 do not adequately clarify Article V, and could weaken it." GEN/163 removes language from Article V without clearly articulating basic standards and without addressing key shortcomings of the Chair's Text.

WWF has repeatedly called for "reducing the ambiguity, but not the ambition" of Article V of the Chair's Text by more clearly separating mandatory requirements from illustrations of options, and by strengthening some elements of the Article V text.[34] GEN/163 moves towards simplifying the Chair's list, but does so in a manner that weakens the text without sufficiently reducing its ambiguity. It also eliminates or weakens the links between Article V and international fisheries governance, while failing to address some of the gaps in the Chair's proposal.

At the outset, GEN/163 preserves one element of the Chair's Text that WWF finds worrisome. Footnote 34 of the Chair's Text allows developing countries to implement their management systems "on a regional rather than a national basis, provided that all of the requirements are fulfilled in respect of and by each Member in the region." This footnote should be eliminated or clarified to ensure that governments do not escape responsibility for directly and effectively regulating fishing within their jurisdictions (including on all vessels flying their national flags).

Second, the deletions proposed by GEN/163 weaken the text's focus on the link between subsidies and overcapacity. It eliminates references to licensing and the allocation of fishing rights (two of the most important means of regulating capacity), and fails to call for science-based

[33] "Access-related subsidies" are those "arising from the further transfer, by a payer Member government, of access rights that it has acquired from another Member government to fisheries within the jurisdiction of such other Member." Chair's Text, Art. I.1 (g).

[34] *See* WWF 2007.

capacity assessments or for the creation and implementation of capacity plans (such as those called for by the FAO International Plan of Action for the Management of Fishing Capacity).

Third, GEN/163 does not sufficiently clarify whether the management elements that remain listed in proposed Article V.2 are mandatory or illustrative. Some elements of GEN/163's proposed language continue to imply that some listed elements are illustrative, such as the phrase "effort and catch-based management measures."[35]

By reducing the list without clearly identifying its mandatory elements, the changes proposed by GEN/163 tend to weaken the text. What is needed is exactly the opposite—the clear identification of mandatory elements rather than the elimination of illustrations. As discussed in detail in the UNEP-WWF paper, mandatory elements that need to be included to achieve minimally adequate management (other than in artisanal/subsistence fisheries) include:

- science-based stock and capacity assessments;
- the formulation of capacity management plans consistent with the FAO International Plan of Action for the Management of Fishing Capacity;
- legally binding limits on fishing designed to maintain stock biomass at precautionary levels below MSY equilibrium, and taking account of all relevant ecosystem impacts;
- mandatory and transparent licensing of all fishing and registration of all vessels;
- mandatory systems for the regular collection of catch data;
- mechanisms for monitoring and enforcement, along with "reasonable" enforcement activities;[36] and
- mandatory withdrawal and recoupment of subsidies paid to any vessel or enterprise found to have engaged in "*non de minimis*" illegal fishing activities.

Finally, GEN/163 weakens the links between Article V and international fisheries governance in two ways. It weakens the reference to international best practices, and it completely eliminates a role for the FAO or other fisheries bodies in the implementation of its sustainability criteria (see related discussion under Question 2, above).

[35] The terms "effort-based" and "catch-based" are imprecise, and could even overlap to some degree. However, to the extent they mean different things (e.g., "input controls" vs. "output controls') they represent tools that are often not used in combination. A limited fishing season (a typical input control), for example, would often be seen as an alternative to an allocated catch share. This would support the conclusion that the list does not intend both to be mandatory, although they are conjoined by the word "and".

[36] WWF has recognized that WTO rules requiring enforcement of domestic laws may raise issues related to governmental resources and policy discretion. This does not mean, however, that the WTO rules should look no further than the legislation on paper. *See* discussion in UNEP-WWF 2007, pp. 24-25.

Question 4:
Do the modifications to Art. IV proposed by GEN/163 strengthen or weaken the Chair's Text?

Short Answer: "GEN/163 introduces some potentially important concepts, but includes language that could seriously weaken the Chair's Text." The proposed changes to Article IV include potentially positive suggestions to widen the article's scope and create a "dark amber" rule. But a closer look reveals changes that would in fact narrow Article IV and imply a significant weakening of the Chair's Text overall. The treatment of Article IV also risks opening a line of negotiation that could considerably lower the ambition of these fisheries subsidies talks.

The core of strong WTO fisheries subsidies rules must be a broad and strong ban on subsidies that enhance fishing capacity or fishing effort, coupled with appropriate exceptions to that ban, including ample and effective S&DT. While there may be a meaningful role to be played by a rule such as the Chair's proposed Article IV, nothing in that rule should narrow the scope of the primary ban or weaken the conditions placed on exceptions to it.

The revisions to Article IV proposed by GEN/163 introduce two potentially important ideas: the concept of "fishery adverse effects" and the creation of a "dark amber" category. But the specific language sought by GEN/163 would also weaken Article IV I some important ways, and has some very troubling (or at least deeply confusing) elements that could even imply a sharply reduced emphasis on prohibiting harmful fisheries subsidies.

On the positive side, GEN/163 would create the term "fishery adverse effects", giving a name and possibly greater legal weight and scope to a concept already implicit in the Chair's Text. GEN/163 also proposes that "fishery adverse effects" be deemed to exist in some circumstances, thus creating a kind of "dark amber" category of subsidies. WWF has long supported similar ideas.[37] It even seems possible that proposed Art. IV.3 would be stronger than "dark amber", if the "deeming" were considered absolute rather than creating a "rebuttable presumption" in the manner of ASCM Art. 6.2.

However, these generally positive concepts are offset by proposed changes that would ultimately weaken rather than strengthen Article IV, in three ways:

- By removing a reference to straddling or highly migratory stocks that would otherwise effectively create an assumed interest in those stocks held by all Members (i.e., GEN/163 would force a Member to prove an interest even in such cases, the Chair's text would not).
- By restricting the kinds of harms leading to "fishery adverse effects" by eliminating references to depletion or "harm" to a Member's interests per se, thus leaving only the creation of overcapacity as a basis for challenge.
- By weakening the rule against creating overcapacity in two ways: (1) by adding a requirement that overcapacity be correlated with "more than moderate exploitation"; and (2) by using language (in Art. IV.3(c)) that implies capacity should be defined only in terms of vessel tonnage, hold size, or engine power.[38]

[37] WWF 2004, § V.F.4.

[38] WWF has argued against such a limited definition of "capacity", and noted the importance of the much broader approach adopted in the Chair's Text. *See* WWF 2006 and WWF 2007.

In addition to these problematic details in Article IV.2, the text suggested by GEN/163 for a new Article IV.3 is directly in conflict with elements of the Chair's Text. Especially disturbing is the possible implication that proposed Article IV.3 could seriously erode elements of the prohibitions proposed by the Chair. There are two fundamental problems:

First, Article IV.3(a) proposes that adverse effects be deemed to exist if a subsidy is granted under a general exception (Art. II) or under S&DT (Arts. III.3 or III.4) without compliance with Article V. But compliance with Article V is meant to be a legal prerequisite to the exercise of the rights created by these derogations from the prohibitions of Article I. Failure to comply with that prerequisite would ordinarily cause the associated subsidies to fall back into the prohibited category, requiring removal of the subsidies without further proof of injury.

GEN/163, however, would require a panel to find "fishery adverse effects" before a failure to comply with Article V had any legal consequences. And if such a finding were made, the remedy could—following the law of ASCM Part III—allow removal of the "adverse effects" rather than withdrawal of the subsidy itself. In effect, non-compliance with Article V would be subject to a rule of "no harm, no foul." This would not only be a radical departure from standard WTO legal practice with regard to exceptions, but—as is clear from the historically weak implementation of ASCM Part III—would greatly decrease the effectiveness of new fisheries subsidies disciplines.

Second, proposed Articles IV.3(b) and IV.3(c)[39] are in tension with Article I.2 of the Chair's Text, which prohibits any subsidy to fishing "affecting fish stocks that are in an unequivocally overfished condition."[40] While further work may be needed to clarify the term "unequivocally overfished", there seems little doubt that a stock "which is declared 'overexploited', 'depleted', or 'recovering' by a regional or international organization with jurisdiction over the fishery" would meet this test. Unless GEN/163 is clarified to ensure that Articles IV.3(b) and (c) apply only to subsidies that are explicitly exempt from Article I.2, the proposed language dangerously trends towards replacing a key prohibition with a "dark amber" rule.

In sum, GEN/163's proposed changes to Article IV are negative in their details and disturbing in their possible implications. While proposals for "fishery adverse effects" and a dark amber category are positive, such rules should only apply to subsidies that fall outside the scope of a ban, and should not be used to weaken the legal conditions placed on exceptions.

[39] NOTE: It is not clear how proposed Arts. IV.3 (b) and IV.3(c) differ, since presumably any subsidy that fell under Art. IV.3(c) would also fall under IV.3 (b)—unless somehow a subsidy can cause an increase in capacity for fishing on a stock without being "used for fishing" on that stock.

[40] NOTE: We are assuming that the references to "Article I" in proposed Arts IV.3 (b) and IV.3(c) refer to the first article of the ASCM (which would more properly be referred to using an Arabic rather than a Roman numeral), rather than to the first article of the Chair's Text (i.e., we assume the reference is effectively to "any subsidy as defined by the ASCM" rather than to "subsidies prohibited by the Chair's Text"). If this assumption is incorrect, then obviously both Arts. IV.3 (b) and IV.3(c) would be direct efforts to replace the Chair's prohibitory language with dark amber rules.

CONCLUDING REMARKS

The need for a balanced resolution to the question of "S&DT beyond EEZs" is real. WWF has said publicly that the rule as set forth in the Chair's Text is less than optimal. But if the EEZ limit is to be removed, it must be replaced with a serious set of sustainability conditions, based on a formula that goes substantially beyond mere compliance with prevailing RFMO rules. GEN/163 makes a real contribution to the debate by proposing two essential elements of such an "RFMO plus" approach.

However, GEN/163 brings forward this important and constructive suggestion alongside other proposals that would profoundly weaken key elements of the Chair's Text. It proposes a "low income" carve out that could create an extremely broad "blank cheque" for S&DT, effectively taking back with one hand the conditionality it seems to endorse with the other. It also reduces without clarifying or strengthening the Chair's Article V. And, despite introducing some interesting concepts, it proposes changes that would weaken Article IV while threatening to erode the legal status of Article V and Article I.2. In all these ways, GEN/163 risks moving the debate towards a significantly lower level of ambition for the fisheries subsidies talks overall.

WWF believes that the interests of developing countries will be best served by putting an end to capacity- and effort-enhancing subsidies from developed countries while ensuring that subsidies from powerful developed countries do not become the engine of an unfettered "South-South" race for fish. A low ambition outcome to these talks will accomplish neither of these goals.

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