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Fisheries Subsidies: WWF Statement on the Chairman's Draft

(Geneva – 12 December 2007)

On 30 November 2007, the chair of the WTO Negotiating Group on Rules issued the first draft of text for proposed new disciplines on fisheries subsidies.¹ WWF has previously welcomed this draft, calling it a “serious and constructive text” and “a solid basis for negotiations to proceed.”² Today, as negotiators meet for the first formal discussions of the draft, WWF issues this statement to reiterate and extend its initial remarks.

The fisheries subsidies issue has been under discussion at the WTO since 1998. From the outset, it has been clear that the issue presents an unusual and important opportunity for governments to make good on their commitment, as enshrined in the WTO charter, to pursue trade policies that support sustainable development. The need for the WTO to act on fisheries subsidies was given global recognition by heads of state at the 2001 World Summit on Sustainable Development in Johannesburg. And it was unambiguously accepted by trade ministers in Hong Kong.

The chair's draft is significant precisely because it presents governments with the means to stand and deliver on the most important environmental promise that the WTO has yet made. It is a text whose substance and architecture contain the necessary elements of success.

It is not that the chair's text is without flaws; work will be required to clarify its terms to ensure that the rules ultimately adopted are workable and are best able to deliver on the ambition and vision already contained in the text.

The weeks ahead will afford opportunities for detailed technical discussions. For today, WWF offers only the following brief remarks on the substance of the chair's draft:

1. The Scope of the Prohibition

The list of subsidies covered by draft Article I.1 is broad, and appears consistent with the goal of banning the most harmful classes of fisheries subsidies. Several strengths of this list deserve note:

- It explicitly covers direct subsidies to both capital and operating costs of fishing, as WWF believes it must do if the Hong Kong mandate is to have any meaning at all;
- It includes types of subsidies—such as income and price supports—that have historically been used to maintain excess capacity or unsustainable effort when biological or market conditions might otherwise discourage continued overfishing;
- It includes subsidies to vessel transfers, which can be used to encourage the “export” of overcapacity. Subsidized access to foreign fisheries is also included, although later made subject to a conditional exception in the context of S&DT (see discussion below).
- It recognizes that fishing activities often include processing and handling of fish products both at sea and in port, and that fishing activities benefit from the use of port infrastructure;
- It recognizes the need to halt subsidies that support illegal, unreported, or unregulated fishing.

¹ WTO Doc. No. TN/RL/W/213 (30 Nov 2007), Annex VIII.

² “WWF welcomes proposed WTO language to end subsidized overfishing”, 30 November 2007, available at www.panda.org/trade.

The language of Article I.2 forbidding subsidies to fisheries that are unequivocally overfished also presents a fundamental statement of sound policy—indeed it is a modest approach, since the best practice would obviously be to halt capacity- or effort-enhancing subsidies before stocks are depleted rather than after. In any case, in the context of other provisions of the draft, Article I.2 functions as a key concept not otherwise fully articulated in the text: that the biological condition of a fish stock must be considered in judging whether subsidies should be allowed.

Overall, then, draft Article I is a good basis for a robust prohibition. There are, however, a number of ambiguities and gaps that governments should consider addressing in further negotiations.

First, the treatment of subsidies to processing, infrastructure, and marketing (the last of which is not mentioned in Article I at all) requires further discussion to arrive at language that captures all subsidies that can have significant impacts on the economics of fishing. If the intention of the text is—as it appears—to target subsidies that alter the cost or revenue incentives for fishing, then the mainly physical or activity-based terms employed in draft Article I may need to be broadened to cover all subsidies that confer commercially meaningful benefits on fishing enterprises. WWF notes that the chair's draft declines to give prohibited fisheries subsidies the traditional presumption of specificity imposed on subsidies currently prohibited under the ASCM. This is a weakness in the text that should not be compounded by other overly narrow definitions.

Second, the draft is limited to subsidies to “marine” wild capture fishing. This formula appears to exclude all inland or fresh water fishing. As WWF has argued, this could allow subsidies to disrupt some major international fisheries. Compromise approaches to this issue have been previously introduced by some Members, and these deserve reconsideration in this regard.

Third, the prohibition against subsidies to IUU fishing is well-intended, but might have less impact than desired if left in its current form. This rule could be substantially strengthened without overreaching. For example, governments should consider barring subsidies to enterprises and individuals, and not just vessels, engaged in IUU fishing, and extending such prohibitions for a period after IUU activities have been halted. Special rules (*e.g.*, burden shifting) for fisheries that are tainted by a pervasive pattern of IUU activity could also be considered.

2. The General Exceptions

The subsidies subject to the general exceptions of draft Article II are all appropriate candidates for exemption from an eventual prohibition. It is important, however, that the definitions and conditions employed in these provisions be reviewed to ensure they do not create loopholes that erode the effectiveness of the prohibition itself.

In this regard, the draft has a major strength that deserves note: it calls for measuring capacity “on the basis of gross tonnage, volume of fish hold, engine power, or on any other basis.” The last clause of this phrase is vital to the effectiveness of the conditions set on exceptions to the prohibitions, and to the operation of the draft as a whole. It is often inappropriate and ineffective to equate fishing capacity with simple measures of vessel weight, volume, or engine power. Consistent with the approach advocated by the FAO, a broad definition of capacity, such as the one contained in the chair's draft, is critical to the real-world effectiveness of new fisheries subsidies rules.

Aside from ensuring that this broad definition of capacity is preserved, it will be useful to consider whether additional language is required to guard against ways in which exceptions (including the exception for “environmentally positive” subsidies) might be subject to misuse or abuse.

3. Disciplines and Conditions on Non-Prohibited Subsidies

An important strength of the chair's draft is that it embraces the principle of conditioning non-prohibited fisheries subsidies on what have been called “sustainability criteria”—*i.e.*, on conditions that aim to eliminate or at least substantially reduce the possibility that permitted subsidies will contribute to overcapacity or overfishing. This is a concept that WWF has sometimes roughly translated as the need to “count your fish before you build your boats.”

The chair's draft is also strong in emphasizing the management aspect of such conditions, articulating the need for certain minimum elements of adequate management to be in place. The emphasis on internationally recognized norms and best practices is also strength of the text. Moreover, the inclusion of a provision allowing challenges to subsidies that cause harms to certain fish stocks offers a much needed mechanism to confront subsidies that distort fisheries production.

Still, the ideas offered by the chair will require some discussion and refinement to ensure they are clear, plausible, and effective. In the end, the rules must strike a careful balance between asking too little and asking too much, between relying on the promises governments make on paper and demanding absolute proof of sustainability, between simply ratifying the status quo and seeking Shangri-La. The chair's draft makes a very good start at striking these balances, and WWF believes it should require only adjustments and not wholesale revisions to achieve success.

As the discussions proceed, WWF considers that several key concepts should be kept in mind:

- The conditions, to be meaningful, must apply on a fishery-by fishery basis. It would be a hollow rule, for example, only to require governments to maintain a general policy in favor of stock assessment without requiring that each fishery to be subsidized actually be assessed. In this regard, references to "national" or even "regional" compliance with sustainability criteria need to be clarified.
- Care will be required to ensure that subsidized fishing does not take place on any international stock (straddling, migratory, or high seas) that is not subject to effective international management. This raises questions both about the geographic limits to be imposed on subsidized fishing and about the conditionality to be imposed in any case where subsidized fishing is allowed on an international stock.
- In listing the elements of management, the rules will need to distinguish clearly between elements that are mentioned in an illustrative fashion and those that are set out as specific requirements of the conditional language.
- The importance of those elements relating to capacity assessment and management should be particularly considered; recalling that even under fished fisheries can be rapidly depleted if subsidies flow where capacity is already dangerously high.
- Further discussion of measures to prevent circumvention of the new rules will be needed, particularly considering the mobility and longevity of fishing vessels.

4. Special and Differential Treatment

WWF has always supported effective S&DT for developing countries, and has actively advocated in favor of early and consistent attention to developing country concerns throughout these negotiations. WWF's approach to S&DT has been premised on two linked concepts:

- that developing countries have a strong equitable claim to use subsidies where they have "room to grow" without causing overcapacity or overfishing; and
- that S&DT should not amount to a blank cheque for capacity- or effort-enhancing subsidies.

Consistent with these concepts, and in accordance with the Hong Kong mandate, WWF welcomes the extensive treatment of S&DT in the chair's draft.

On two issues that have been of special concern to many developing countries—artisanal fishing and access arrangements—the draft takes an approach that seems careful and balanced (even if, with regard to artisanal fisheries, the text departs substantially from the approach favored by WWF³).

The more general provisions for S&DT will undoubtedly be the subject of further negotiation. Here again, the chair's efforts at balance are evident, but the details may need refinement. The concerns of WWF in this regard are much the same as those noted above regarding sustainability conditionality generally. The text can be strengthened through streamlining and clarity, to achieve rules that require genuine policy reforms without seeking to overburden governments.

On one important point, however, WWF would like to reiterate a concern it has raised on multiple occasions: there is real danger in any provision that would loosen subsidy rules for vessels considered of small size. In the technical and commercial realities of today's world, all but the smallest undecked vessels may be ocean-going craft. Increasingly, "small scale" fleets that were once confined to inshore or near-shore operations are now venturing far from home in search of new

³ WWF would prefer a definition of artisanal fisheries that turns directly on the logistical challenges that impede their management rather than on their subsistence nature. Moreover, WWF believes that sustainability conditionality for artisanal fisheries should be relaxed and adjusted, but should be more than merely hortatory.

fishing grounds and new markets. And in combination with at-sea transfers or distant water in-port processing, small scale fleets can play an important role in what is in fact large-scale industrial fishing.

These concerns are not meant to deny the importance of small scale fisheries to developing country fishing nations. The sustainable development of small scale fishing is critical to the future welfare of many millions of people. The question, however, is whether subsidies to such fisheries should be somehow considered “safer” or less in need of careful conditionality than others.

5. Notification and Enforcement

Strong rules requiring increased transparency in fisheries subsidies programmes are essential to the ultimate effectiveness of the proposed new disciplines. WWF welcomes the provisions of the chair’s draft that attach burden-shifting legal consequences to the failure to notify fisheries subsidies or the transfer of access rights. Those presumptions could even usefully be extended to include other provisions of the draft, such as Article IV.1 (“General Discipline”).

To be fully effective, however, the requirements of draft Article VI will need to ensure that notifications clearly identify the specific fisheries to be affected by subsidy programmes, and include fishery-specific information sufficient to judge compliance with sustainability criteria.

With regard to implementation and enforcement, WWF is concerned that draft Article VIII.4 calling on panels to choose and consult fisheries experts does not go far enough to ensure the adequate involvement of fisheries experts and authorities in eventual disputes. As WWF has previously suggested, some further mechanisms to promote the involvement of the FAO and of Regional Fisheries Management Bodies should be contemplated. At a minimum, panels should be required to communicate with regional fisheries management bodies, where appropriate. A process for further exploration of formal liaison and consultation mechanisms should also be included in the final rules.

In this regard, WWF also takes note of the provision for FAO “peer review” in draft Article III.2 (b) (3). This innovative provision is very important. While the details may require further investigation, the principle established by this proposal is clear and correct. As governments consider whether it is necessary to refine this idea, WWF encourages them to continue the productive dialogue between the WTO and the FAO that has already been taking place.

To close with a final technical matter, WWF will seek further clarification of the draft, including Article VIII.1, with regard to the actionability and enforceability of the proposed rules. WWF notes that the chair’s text does not include an “actionable” category of subsidies per se, in the fashion of the traditional ASCM “amber box”. The balance between a broad prohibition and carefully articulated exceptions (and S&DT) may obviate the need for such a provision. However, as noted in the Hong Kong mandate, the enforceability of the rules ultimately adopted must be fully assured.

In sum, WWF once again welcomes the chair’s long-awaited text, and congratulates the chair for the significant and highly constructive effort that this draft reflects.