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## WTO DISCIPLINES ON FISHERIES SUBSIDIES: ELEMENTS OF THE CHAIR'S DRAFT

### Communication from New Zealand

The following communication, dated 18 February 2008, is being circulated at the request of the Delegation of New Zealand.

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In the interests of keeping the Rules Negotiating Group informed of related events outside the WTO, we attach the Workshop Report of UNEP, WWF, ICTSD and OCEANA concerning the WTO Disciplines on Fisheries Subsidies. This Report is provided for the information of Members.

**WTO DISCIPLINES ON FISHERIES SUBSIDIES:  
ELEMENTS OF THE CHAIR'S DRAFT**

**29 January 2008 - Geneva, Switzerland**

**WORKSHOP REPORT**

**I. INTRODUCTION**

1. This one-day workshop, hosted by UNEP and WWF in collaboration with ICTSD and Oceana, was held at the International Environment House in Geneva on 29 January 2008. The workshop was convened in response to multiple requests from WTO delegations for a forum to examine the draft text on fisheries subsidies proposed by the chair of the WTO Negotiating Group on Rules on 30 November 2007 ("Chair's draft").<sup>1</sup> The workshop was the latest in a series of conferences and workshops organized by the sponsors jointly and individually, and built in particular on a symposium organized by UNEP and WWF in March 2007 focused on sustainability criteria for fisheries subsidies (see TN/RL/W/207 (2 April 2007)).

2. The workshop was held back-to-back with a session on fisheries subsidies of the WTO Negotiating Group on Rules - the second following the introduction of the Chair's Draft. The meeting thus came at a critical moment, with governments and stakeholders now directly focused on the historic opportunity for the WTO to adopt groundbreaking new rules on fisheries subsidies.

3. Workshop participants included more than 90 Geneva-based and capital-based officials from 35 national governments (including officials from trade and fisheries agencies), as well as from the FAO, the OECD, and from six non-government organizations. The workshop offered a forum for informal dialogue outside of the official WTO negotiating context. Participants were all invited to speak in their personal capacities under "Chatham House Rules". The workshop was presided by Ms. Anja von Moltke of UNEP, Mr. Gordon Shepherd of WWF, and Mr. Ricardo Melendez Ortiz of ICTSD.

4. This summary report has been prepared under the responsibility of the organizers. It provides a synthesis of the main issues raised and discussed by participants. Although it has been reviewed by all participants, it is not intended as a consensus document. The workshop agenda and materials prepared by some of the presenters are available at <http://www.unep.ch/etb/areas/fisherySub.php> and <http://www.panda.org/trade>.

**II. MAIN POINTS OF DISCUSSION**

**A. THE PROPOSED PROHIBITIONS AND EXCEPTIONS**

5. The impacts of direct and indirect subsidies on fisheries resources, world trade, and prices are widely understood, as is the problem of poor transparency with regard to fisheries subsidies. In this context, Articles I and II of the Chair's draft establish the "prohibition of certain fisheries subsidies" and certain "general exceptions" thereto. The draft prohibitions are presented as a specific, but broad list that covers subsidies to fishing capital and operating costs, price and income supports, certain subsidies related to fisheries infrastructure and processing, and subsidies to IUU fishing, among others.

6. The quality of the overall ban proposed by the Chair's draft was discussed briefly. While one participant expressed disappointment about the Chair's text being unbalanced, and suggested that

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

proper fisheries management can prevent subsidies from leading to overcapacity or overfishing, many participants felt that the broad approach taken by the Chair's draft is appropriate and necessary in light of the unprecedented crisis of depletion confronting fisheries worldwide. Effective management still remains the exception, rather than the rule in most fisheries. Even with perfect management, subsidies can distort trade, reduce economic flexibility, and create social contexts in which effective management faces political obstacles.

7. The Chair's draft defines fisheries subsidies in a manner that is intended to exclude aquaculture. In practice, however, there can be some overlap in the activities associated with aquaculture and those associated with marine wild capture fishing. For example, wild fish may be caught specifically for use as a feedstock for aquaculture. In the case of marine "ranching", juvenile wild fish may be trapped and then raised in a partly controlled environment. The Chair's text may require some clarification in order to avoid ambiguity concerning such cases. It was also noted that the Chair's draft excludes inland fisheries, which is a category known to include a number of major transboundary fisheries and fisheries whose products enter international trade.

8. The Chair's draft does not prohibit subsidies to marketing of fish products. Such subsidies (as well as subsidies to downstream processing) may have significant competitive implications, especially for developing countries.

9. The link between processing subsidies and increased fishing pressure depend on the nature of the market relations between fishers and processors (e.g., as vertical integration increases, the impact of processing subsidies on fishing enterprises increases).

10. The silence of the text on subsidies to research and development was attributed to the attention of the text to more sensitive issues and it was noted that disputes on this topic would be unlikely. It was also noted that certain kinds of research aimed at mitigating the environmental impacts of fishing gear or at industrial development (as distinct from management-oriented general research) could have impacts on capacity.

11. The requirement in the Chair's draft that prohibited subsidies be "specific" (Art. I.1) was questioned since it could prevent the prohibition from reaching all subsidies that contribute to overcapacity or overfishing. Examples such as subsidies to multipurpose harbours were noted. Further clarification is needed as to whether the Chair's draft would require subsidies to be specific to the fishing sector, or rather would impose a broader specificity test. For example, would subsidies specifically to ship yards (assuming that they construct both fishing and non-fishing vessels) be "specific" for purposes of the draft prohibitions? It was argued that the language of draft Art. I already contained elements of specificity in its descriptions of individual categories of prohibited subsidies, and that failure to remove the draft's additional specificity test would be a departure from the ASCM's current approach to prohibited subsidies. Others, however, felt that the systemic implications of removing the specificity test for fisheries subsidies might be negative, especially as related to subsidies associated with social safety nets, such as income supports under generally available national unemployment programmes.

12. As to the scope of the proposed prohibition on subsidies, it is unclear whether the draft text distinguishes between operating costs and capital costs of infrastructure. It was noted that harbour facilities generally have very high capital costs and low marginal operating costs, and thus some clarification of the text on this point may be warranted. Further clarification is also needed on the intention and likely effects of draft Art. II (e) (subsidies to "user specific allocations"), which some participants found difficult to understand.

13. Draft Art. I.2 (the prohibition of subsidies affecting "unequivocally overfished" stocks) can be seen as an essential "environmental backstop". Since the terms of the provision as currently drafted

would not address subsidies that lead to the overfished condition itself, but only subsidies applied once that condition is already reached, a suggestion was made to strengthen the language to prohibit subsidies to fisheries that are "not unequivocally not overfished". It was also noted that the terms used in the draft text require further clarification. It was noted that the term "unequivocally", for example, was not defined in the draft. It was suggested that a determination as to stock status by an FAO peer review body should be deemed sufficient to satisfy the "unequivocal" condition. Questions were also raised about the criteria that would be used to establish the "unequivocally overfished" condition. The technical distinction between the terms "overfished" (which refers to the depleted biomass of a stock) and "overfishing" (which refers to unsustainable catch rates), was noted, and the suitability of either term to a provision such as draft Art. I.2 was discussed.

14. There appeared a broad sense among participants that the exceptions to the prohibitions proposed by Chair's draft Art. II cover a number of necessary and desirable subsidy categories. It was noted that the condition that such subsidies not increase capacity was appropriate and that the manner in which the text elaborated the condition was helpful. Concern was expressed, however, about the potential for these exceptions to be abused, or to have unintended negative consequences. It was suggested that the specification of the capacity condition in draft Art. II should be broadened to capture any subsidy that reduces the operating costs or increases the revenues of fishing enterprises. Others felt, however, that all subsidies could be characterized as having such effects. It was also suggested that the specification of the capacity condition should include a broad approach to defining the "useful life" of vessels. Still, the general question of defining capacity arose several times throughout the workshop. Simple metrics such as number of vessels or vessel size were considered inadequate measures of fishing power.

15. Allowing subsidies that promote environmental objectives, as included in Art II, was considered appropriate. Nevertheless, unintended consequences for resource management, such as direct impacts on fishing capacity or effort, would need to be avoided. The example of creating additional capacity through fuel efficient engines for trawlers was noted.

16. Several participants raised concerns with the exception for decommissioning programs, noting the evidence that such programs often fail or have unintended consequences. Proposals for strengthening draft Art. II(d) included: (i) requiring all subsidized decommissioning programs to require scrapping of vessels; (ii) preventing enterprises or individuals receiving decommissioning subsidies from investing in other fishing vessels or rights; (iii) requiring that decommissioning subsidies lead to demonstrable capacity reductions; and (iv) using burden shifting devices.

## B. DISCIPLINES AND CONDITIONS ON NON-PROHIBITED SUBSIDIES

17. The "sustainability criteria" contained in various articles of the Chair's draft are recognized as a core element of the proposed new fisheries subsidies disciplines. The proposed criteria are based in widely accepted international norms and practices. They are also consistent with the sustainability criteria recommended by the UNEP-WWF paper that emerged from the UNEPWFF symposium in March 2007.<sup>2</sup> Importantly, the proposed criteria draw on principles and concepts found at the core of the 2005 FAO Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries - guidelines that were the product of extensive international negotiation and dialogue. It was, however, noted that the standard of performance required by ecolabeling may "set the bar" substantially higher than the criteria proposed for new fisheries subsidies rules, so that the latter would impose requirements that would be easier to meet than the former.

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<sup>2</sup> UNEP and WWF 2007, "Sustainability Criteria for Fisheries Subsidies: Options for the WTO and Beyond", ([http://www.unep.ch/etb/publications/fishierSubsidiesEnvironment/UNEPWWF\\_FinalRevi09102007.pdf](http://www.unep.ch/etb/publications/fishierSubsidiesEnvironment/UNEPWWF_FinalRevi09102007.pdf)).

18. It was suggested that the Chair's draft might usefully be streamlined, without reducing its level of ambition. For example, it was suggested that draft Art. V, notwithstanding its apparent mandatory language, leaves unclear whether all of its elements are intended to be mandatory or if some are merely illustrative. Moreover, the repetition of some requirements in several overlapping articles could create ambiguity and raise questions of interpretation. It was suggested that criteria should focus on basic elements of sustainable management, while leaving flexibility for various national and local approaches to implement them. One approach would be to focus on key elements such as "science-based assessment", "science based controls", and "enforcement", along with basic elements of management administration, such as vessel registries, mandatory licensing, and collection of catch data.

19. Some elements of the Chair's draft also may require clarification to ensure the effectiveness of the sustainability criteria. Participants discussed the need to apply criteria on a fishery-by-fishery basis, and also to ensure that international fisheries are subject to requirements equivalent to those imposed on domestic fisheries. With regard to the latter point, some participants felt that compliance with existing rules of regional fisheries management bodies should be sufficient, while other participants stressed the weakness of many RFMO regimes, and called for rules that would help move beyond the status quo.

20. It was also noted that the basic elements of sustainability criteria for fisheries subsidies need to address the biological, industrial, and regulatory condition of target fisheries. Participants noted the emphasis placed in the Chair's draft on management-related criteria. In this regard, draft Arts. I.2 and IV impose obligations that depend in part on the biological condition of stocks. Article V, however, does not directly impose such conditionality, although management-related conditions could incorporate biological conditions by reference. It was noted that the management conditions in the Chair's draft imply certain conditions related to capacity levels, but that earlier proposals for conditions involving explicit caps on capacity were not included. Some participants viewed this as a weakness of the Chair's draft that should be addressed through clarifications.

21. The ability of developing countries to comply with all management requirements in Art. V is a matter of particular concern, especially with regard to small vulnerable economies. It is clear that management practices "on the ground" vary widely around the world, with examples of successes and failures in both developed and developing countries. Management problems in developed countries are often found particularly in the small-scale sector. On balance, it is widely acknowledged that the overall level of fisheries management is still far from what is required to achieve optimal and sustainable fisheries.

22. The question was raised of possible "differentiation of obligations" in sustainability criteria for developing countries, and it was observed that such differentiation is central to the concept of S&DT. Some participants felt, however, that the basic elements of responsible management should be universally required as a precondition to the use of fisheries subsidies, taking the view that public investments in management are necessary if development is to be based on the long-term profitability of the fishery sector. Given that the criteria required by the Chair's draft only apply when subsidies are being provided, and that the criteria describe a bare minimum level of adequate management, the question was raised whether differentiation is advisable, or even whether it is appropriate to exclude LDCs from nearly all sustainability criteria, as proposed by the Chair's draft. The importance of technical assistance for developing countries to establish and maintain management systems, as included in Art. III. 4 cannot be underestimated and the Chair's draft might have to be strengthened in that dimension.

23. The proposal in the Chair's draft for a "peer review" mechanism involving the FAO (draft Arts. III.2(b)(3) & V.1) was also discussed. Participants welcomed the presence of FAO fisheries department staff at the workshop, and several mentioned the need to involve expert organizations such

as the FAO in assisting the WTO on implementation of sustainability criteria in new fisheries subsidies rules. It was noted that the concept of FAO participation in an eventual WTO-FAO mechanism is consistent with the mission, expertise, and experience of the FAO. Frequent reference was made to the CITES-FAO process through which expert FAO panels advise CITES concerning proposals for imposing trade controls on marine species that are considered at risk of extinction. The CITES-FAO panels evaluate proposed CITES listings in accordance with a set of criteria that were previously developed by the FAO, and politically agreed by CITES members. Based on FAO recommendations, CITES parties then vote on the listing proposals at CITES COPs. This process provides a potential starting place for development of a WTO-FAO mechanism. To be workable and acceptable, however, the proposal for a peer review mechanism as part of new fisheries subsidies rules will need clarification. Specific questions about the mechanism included the nature of the events that would trigger reviews, the scope and depth of the reviews, the standards to be applied, and the legal implications of the outcomes under WTO rules.

24. Several participants voiced discomfort with the idea of giving an FAO panel a decision making role in the administration of WTO rules. Since the Chair's draft does not currently identify the legal results stemming from the peer reviews themselves, clarification of the text may be necessary. Under the CITES-FAO process, FAO expert panels provide technical advice to CITES, but CITES then takes decisions under its own authority. It was proposed that the peer review process could be designed to allow full transparency and consultation, similar to the process previously adopted for ASCM Art. 8. It should not necessarily be seen only as a mechanism for disputes, nor would it have to be a "pre-certification" procedure.

25. As to the scope of review, it was noted that a WTO-FAO peer review panel would not need to reach judgments as detailed as those required of CITES-FAO panels (which must decide whether trade is a threat to the survival of a given marine species). A WTO-FAO panel would only be called upon to examine basic levels of compliance with a limited number of core sustainability criteria. Thus, the depth of research to be considered or conducted by a peer review panel would be substantially less than in the CITES-FAO case. On the other hand, depending on the trigger to be chosen for peer reviews, it is likely that a WTO-FAO panel could be asked to handle many more cases than the CITES-FAO panel, which considers only a handful of cases every two years. This raised logistical questions about the funding and organization of an eventual panel.

#### C. SPECIAL AND DIFFERENTIAL TREATMENT (S&DT)

26. The Hong Kong mandate puts emphasis on the need for effective S&DT for developing countries as an integral part of new fisheries subsidies rules. In this light, Art. III of the Chair's draft is of significant interest to most WTO members. It was noted that the limits and conditions to be placed on S&DT should be balanced and realistic, taking into account both the special needs of developing country members and the emergence of increasing competition among developing countries for access to fisheries resources and markets for fisheries products. Care must be taken to ensure that S&DT simultaneously meets the developmental needs of developing country members and helps prevent subsidies that contribute to overcapacity or overfishing. Some participants remarked that subsidies to the value-added post-harvest sector may be especially important for the developmental strategies of some countries.

27. Participants discussed the proposed scope of S&DT in the Chair's draft. Several participants voiced concern with the sharp limits placed on the right of developing countries to employ subsidies to the operating costs of fishing, noting *inter alia* the widespread use of fuel subsidies by many developing countries. Other participants, however, felt that S&DT is intended to allow developing countries to "catch up" with developed countries in the level of development of their industries, and that such a policy goal requires S&DT for subsidies to capital costs but not necessarily to operating costs.

28. The use of vessel length for distinguishing different levels of S&DT treatment was addressed by many participants. In particular, it was pointed out that above a vessel length of ten meters, the draft would not allow subsidies for operating costs. It was noted that the draft does not state a rationale for the use of the vessel length criterion. Several participants stated that vessel length has no clear relationship to fishing power or to the level of development of a fishery, and thus would be an inappropriate basis for making distinctions aimed at capacity. Given the history of fisheries depletion involving so-called "small scale" fishing, a distinction based on vessel length could not be justified on the grounds that smaller vessels pose lower threats to sustainable management. As technology allows smaller and smaller vessels to achieve ocean-going fishing operations, the relevance of vessel size is decreased still further. Nevertheless, a number of participants indicated that vessel length is an important criterion for identifying socially sensitive subsectors within some national fishing industries.

29. Other participants noted that a limit on vessel length could be seen as an "anti-development" limit. Some participants felt that in this regard it would be desirable to increase the vessel length identified in the Chair's draft substantially beyond ten meters as this would reflect current realities in many countries whose small scale fisheries sector have vessel size of 20-24 meters. Others, however, noted that as lengths approach twenty or more meters, vessels capable of industrial scale, distant-water fishing are increasingly implicated.

30. A related question was the territorial limit placed on some S&DT by draft Art. III.2(b)(3) (which allows S&DT for certain subsidies only where used for fishing within the subsidizing Member's EEZ). A number of participants viewed this limit as directly at odds with the developmental aspirations of some developing countries. Others also noted that where EEZs are contiguous, such a rule could have unintended consequences for local fishing operations. Several other participants, however, felt that S&DT should be restricted to allowing developing countries to subsidize the exploitation of their national stocks, and should not extend to the subsidized exploitation of common resources. It was further noted that a subsidized race for international stocks would be especially dangerous wherever those stocks are subject to weak or absent management. The silence of the Chair's draft on sustainability criteria for international stocks was again noted.

31. With regard to both the vessel size and territoriality issues, several participants noted the possible relationship between the strength of sustainability criteria and the practical need for such limits.

32. Concern was expressed about the silence of the S&DT rules as to the onward transfer of subsidized vessels to fisheries other than those which qualified the vessels for subsidies. While the text directly prohibits subsidies to the international vessel transfer itself (draft Art.I.1(b)), the non-subsidized transfer of a vessel whose construction was subsidized is not addressed.

33. The treatment in draft Art. III.3 of subsidies associated with the acquisition and transfer of foreign access rights was seen as a carefully balanced treatment of a contentious and complex issue. It was pointed out that the Chair's approach appears consistent with existing WTO law, and would promote transparency. It was clarified that this provision, even if included under S&DT, would cover all agreements involving access to developing country EEZs, whether the distant water fleet nation was a developed or a developing state. Some concern was expressed regarding the trade and environmental impacts of private access arrangements, which would not fall under the discipline of the Chair's draft. It was noted, however, that the absence of a "subsidy" within the meaning of ASCM Art. 1 would make it difficult to address such issues within the WTO subsidy rules.

### **III. CONCLUSIONS AND WAYS FORWARD**

34. The discussion throughout the workshop was positive in tone, and confirmed the continuing interest of diverse stakeholders in achieving WTO rules that make a real contribution to sustainable

fisheries. Many participants expressed that the workshop had provided a useful forum for an unusually detailed discussion of important technical issues. The organizers offered future assistance, for instance by holding similar workshops as the fisheries subsidies talks progress in the months ahead.

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