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## **Reflecting Sustainable Development and Special and Differential Treatment for Developing Countries in the Context of New WTO Fisheries Subsidies Rules**

*Some Issues and Options*

**Working Draft**

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This working draft aims to stimulate discussion by raising issues and options. It has been distributed to governments and experts invited to participate in UNEP's Workshop on *Promoting Development and Sustainability in Fishery Subsidies Disciplines: An Informal Dialogue on Select Technical Issues* (Geneva, 30 June 2005). One purpose of the workshop is to obtain feedback on the draft from governmental and non-governmental experts.

The draft is written by Vicente Paolo B. Yu III and Darlan Fonseca-Marti of the South Centre in their personal capacity and does not reflect the official views or positions of UNEP, the South Centre, or the Member States of either organization. The authors acknowledge the valuable insights and contributions of Anja von Moltke of UNEP ETB and David Schorr in the preparation of this paper.

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**I. INTRODUCTION**

The world is now in a global fisheries<sup>1</sup> crisis. While the amount of fish landings has increased more than five times over the past 50 years as a result of industrialized fishing activities, more than three-fourths of commercially valuable fish stocks (especially of large predatory fish) are now mostly overexploited, fully exploited, significantly depleted, or slowly recovering from overexploitation. The levelling off of global fish catches in recent years, despite rising demand, would seem to indicate that there is less and less fish to be caught in the sea.<sup>2</sup>

The unsustainable exploitation of world fisheries represents a grave risk not only for specific species, ecosystems and the environment as a whole, but it also jeopardises food security and the livelihood of millions of people who depend on fish to live.

In recognition of the global fisheries crisis and the difficulty of dealing with the issue of fisheries subsidies in the frame of the current SCM agreement, the World Trade Organization's (WTO) Ministerial Conference decided at its 2001 meeting in Doha, Qatar, to include negotiations on new disciplines on fisheries subsidies within the package of issues to be negotiated as part of the Doha Work Programme (DWP). This negotiating mandate is provided for in the 2001 Doha Ministerial Declaration (DMD) as follows:<sup>3</sup>

28. In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. *In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines in fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31.* (emphasis supplied)

x x x

31. With a view to enhancing the mutual supportiveness of trade and environment, we

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<sup>1</sup> The authors use the word fisheries and fishery interchangeably. Similarly, fish and fish products refer to all products from marine and inland fisheries, such as fish, crustaceans and molluscs, whether fresh or frozen, smoked, canned or otherwise processed. The paper refers to both freshwater and marine fish, whether captured in the coastal area, within countries' Exclusive Economic Zones (EEZs) or in deep waters.

<sup>2</sup> See e.g. Gareth Porter, *Fisheries Subsidies and Overfishing: Towards a Structured Discussion* (UNEP, 2002), p. 184; David K. Schorr, *Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization* (WWF Position Paper and Technical Resource, June 2004), p. 5.

<sup>3</sup> See WTO, *Ministerial Conference – 2001 Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, 20 November 2001, paragraphs 28 and 31.

agree to negotiations, without prejudging their outcome on:

x x x

*We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.* (emphasis supplied)

From the paragraphs in the DMD regarding the negotiating mandate on fisheries subsidies, several elements need to be taken into account and reflected in the actual conduct of the negotiations. They indicate that these negotiations should reflect the interdisciplinary elements of the general subsidies negotiations and provide the fisheries subsidies negotiations with the qualitative parameters that they should meet. These include the following:

1. Negotiations on new disciplines on fisheries subsidies should take place in the context of the broader negotiations on improving and clarifying, inter alia, the existing Agreement on Subsidies and Countervailing Measures (SCM Agreement);
2. Fisheries subsidies negotiations have to take into account the needs of developing and least-developed countries and the importance of the fisheries sector to developing countries; and
3. Through the direct linkage made with the negotiating objective expressed in Paragraph 31 DMD, the fisheries subsidies negotiations must be with “a view to enhancing the mutual supportiveness of trade and environment.”

Hence, it could well be argued that these negotiations should meet both the economic concerns of developing and least-developed countries (including the need to provide them with special and differential (S&D) treatment with respect to any new commitments or obligations that may be negotiated) and the DWP’s sustainable development objectives. In this light, therefore, the mandate on fisheries subsidies given by Ministers at Doha represents a real window of opportunity to improve the international legal framework under which fish production and fish trade take place, with a view towards establishing a framework that promotes sustainable development in particular in developing and least-developed countries.

This note concentrates on the interests of developing countries in the WTO fisheries subsidies negotiations, and particularly on possibilities to incorporate these interests through special and differential treatment (S&DT) in the negotiations, taking into account that countries have different conditions and needs due to their varying levels of economic development and existence of natural resources. It should be noted that the suggestions contained in this paper should simply be seen as among the range of possible options that could be considered in the course of the negotiations. They are necessarily broad and general, and aim to stimulate the discussion rather than present the final solution.

This paper is structured as follows: first, the paper looks at how the concept of sustainable development could be viewed from the perspective of developing countries, taking into account their needs and concerns. Second, the role that fisheries play in the economic and social context of developing countries will be examined in order to provide the paper with the factual foundation for designing a fisheries subsidies S&D framework that takes into account these countries’ needs and

concerns. The paper will then discuss the relevance of the fisheries subsidies negotiations to developing countries, and then will look at possible approaches on how to make S&D treatment both operational and inclusive of sustainable development considerations in the context of the fisheries subsidies negotiations.

## II. SUSTAINABLE DEVELOPMENT AND DEVELOPING COUNTRIES

The achievement of sustainable development is a fundamental policy and institutional objective of the World Trade Organisation (WTO). Explicit references to this objective can be found in both the WTO's constitutional legal instrument – the Marrakesh Agreement to Establish the World Trade Organization – and in other subsequent WTO legal instruments.<sup>4</sup> The WTO Appellate Body has also stated that the explicit acknowledgment and recognition of the objective of sustainable development in the WTO Agreement's preamble showed that “the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy” and that this preambular recognition “informs not only the GATT 1994, but also the other covered agreements” of the WTO Agreement.<sup>5</sup>

Developing countries fully endorse the objective of sustainable development and the protection and preservation of the environment in a manner consistent with their development needs and concerns as stated in the preamble of the WTO Agreement. They recognize that environmental protection is an important policy objective within the concept of sustainable development, given that the environmental space within which the development process takes place is an indispensable prerequisite to the start and continuation of such process. Furthermore, developing countries have traditionally stressed that the economic and human development objectives within sustainable development are also equally important as in view of the massive social and cultural impacts that low levels of economic development could have on national political and social cohesion and hence on their national integrity.

Hence, when applied to the WTO context, the concept of sustainable development encompasses:

- a recognition that the different economic conditions of developing countries require S&D treatment (including sufficient policy space and flexibility) with respect to WTO rules and obligations; and
- support in the achievement of their sustainable development objectives through, inter alia, the expansion of market access opportunities for their exports; the provision of adequate technical and financial assistance so that

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<sup>4</sup> See e.g. WTO Agreement, 1<sup>st</sup> preambular clause; GATT 1947, *1994 Marrakesh Ministerial Decision on Trade and Environment*; GATT 1947, *1994 Marrakesh Ministerial Decision on Trade in Services and the Environment*; WTO, *Ministerial Conference – 1996 Singapore Ministerial Declaration*, WT/MIN(96)/DEC/, 13 December 1996, para. 16; WTO, *Ministerial Conference – 2001 Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, 20 November 2001, paras. 6 and 51.

<sup>5</sup> WTO Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (AB-1998-4)*, WT/DS58/AB/R, 12 October 1998, para. 129. Although statements contained in the preamble of an international instrument are usually considered as not having any binding effect on States parties to the instrument, Article 31(2) of the 1969 Vienna Convention on the Law of Treaties, however, states that the preamble constitutes part of the context in which the terms of the international instrument are to be read and interpreted.

their trade-related economic development policies and activities reflect environmental sustainability considerations (including transfers of environmental goods and technologies).

### III. ROLE OF FISHERIES IN DEVELOPING COUNTRIES

Fishing is an economic activity of crucial importance and serves a wide range of purposes in developing countries. Not only are these countries responsible for about half of total world exports of fish, but beyond trade, fisheries play a fundamental environmental and social role in such countries.

#### A. FISHERIES AS A SOURCE OF LIVELIHOOD

It is estimated that around 30 million people directly derive their income from fishing activities and it is further estimated that about 95% of that employment is located in the developing world. The contribution of fisheries to employment, economic security, social integration and social advancement can therefore not be overstated.

For example, the Food and Agriculture Organization (FAO) estimates that each fisherman creates occupation for other three additional workers. Processing activities; such as loining, canning, smoking, sun-drying and fermenting; and marketing activities employ many families after the fish is landed. That corresponds to about 120 million people whose income derives fully or partly from fishing, whether marine, inland or aquacultured. It is further argued that these figures should be considered as a conservative lower ceiling because they may not capture seasonal workers and many workers for whom fishing or fish trade are a complementary, not principle, source of income.

Moreover, fisheries are crucial for gender relations. In fact, women play a pivotal role in the preparatory work, such as mending and making nets, and processing activities. In artisanal or small scale fisheries, women help their husbands in the boats during difficult economic times, help unload the fish, sort it, clean it and process it. In Western Africa, women are predominantly responsible for smoking (using, for instance, traditional *chorkor* ovens), salting and drying fish. Women are also predominantly responsible for the link between production and consumption, because of their role in marketing the fish.<sup>6</sup>

In commercial fisheries, women are also intrinsically involved in the loining and canning processes and are largely employed in factories. In some developing countries, women have become important fish entrepreneurs, particularly in aquaculture, generating income not only for their household, but very often to the whole community. In any case, the monthly earnings obtained from fisheries trade, is sufficient to pay for the school fees of children and other family expenditures or, at least, to contribute to the household income. Hence, fisheries are a fundamental contributor to social integration and social advancement.<sup>7</sup>

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<sup>6</sup> In Western African and Asia, 80% of seafood is marketed by women (FAO - [www.fao.org/FOCUS/E/fisheries/women.htm](http://www.fao.org/FOCUS/E/fisheries/women.htm)).

<sup>7</sup> Isatou Touray, *Gender issues in the fisheries sector and effective participation* (paper for the "Workshop on gender roles and issues in artisanal fisheries in West Africa", Gender Trainer in the Management Development Institute, Lomé, 11-13 December 1996).

Fisheries are also a heavy employer in densely populated countries. In fact, 84% of fisherfolk and aquaculturists in the world are located in Asia. Besides, the pronounced reliance of many developing countries in the fishery activities makes fish the main or even the only source of livelihood for the bulk of the local population. The contribution of fisheries to employment and social stability makes it a sector of extreme strategic importance in many countries.<sup>8</sup>

Finally, in addition to the contribution of fisheries to employment, gender and livelihood, it is also worthwhile mentioning the crucial importance of fisheries for subsistence and rural livelihood of the very poor in developing countries for whom fisheries may be the last ditch before hunger and misery. The value of subsistence fisheries is unlikely to be captured in economic terms.

#### B. FISHERIES CONTRIBUTE TO FOOD SECURITY

The importance to developing countries of ensuring that fish stocks are not exhausted or overexploited and are sustainably managed also lies in the contribution that sustainable access to such stocks has to domestic food security. Absent such stocks, food insecurity often follows in many developing countries.

Fish production and trade contribute largely to household income in developing countries making the sector is also a fundamental contributor to food security. For example, the revenue generated from the sale of fish and fish products allows many families to purchase other items of food. In addition, fisherfolk also separate lower-value fish species from their daily catches for their own consumption. Finally, the produce of this economic activity, fish, is also a widely recognised highly nutritious source of animal protein, vitamins and minerals.

About 76% of world fisheries production in 2002 was used for human consumption and fish is in fact the staple food in many areas of the world<sup>9</sup>. While the world average apparent consumption of fish in 2002 was estimated at 16.2kg per person<sup>10</sup>, the yearly apparent consumption of fish is 187.3kg in the Maldives, 91.8kg in Palau, 75.5 in Kiribati, 57.6 in the Seychelles and 44.1kg in Gabon.<sup>11</sup>

Very pronounced geographical and regional disparities characterise fish consumption. As a general trend, as revenues rise, the consumption of fish also increases. Therefore the highest average apparent consumption is found in industrialised countries (28.6kg) and the lowest averages are found in Africa and the Near East (4.1kg/year/per capita in East Africa). However, while fish represents only 7.7% of the total protein intake in

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<sup>8</sup> About 3.3 million people work in capture fisheries in the Philippines, 10.6 million are directly engaged in fishing and fish farming in India and fisheries is the most important or second most important industry in a very large number of countries of the Pacific and Indian Ocean, the Caribbean and certain African regions. See Shunji Sugiyama, Derek Staples and Simon Funge-Smith, *Contributions of fisheries and aquaculture in the Asia-Pacific region*, (Food and Agriculture Organization, 2004).

<sup>9</sup> FAO, *State of World Fisheries and Aquaculture* (2004), Table 1, Part 1.

<sup>10</sup> Id. This average includes China, which is responsible for 33% of world production of fish. The figure excluding China is 13.2Kg per person per year.

<sup>11</sup> Stefania Vannuccini, *Overview of fish production, utilization, consumption and trade* (based on 2002 data)(FAO, 2004), Appendix I.

rich countries, it represents 50% or more of animal protein in many small island developing countries as well as in Bangladesh, Cambodia, Congo, Gambia, Ghana, Equatorial Guinea, Indonesia, Sierra Leone and Sri Lanka.

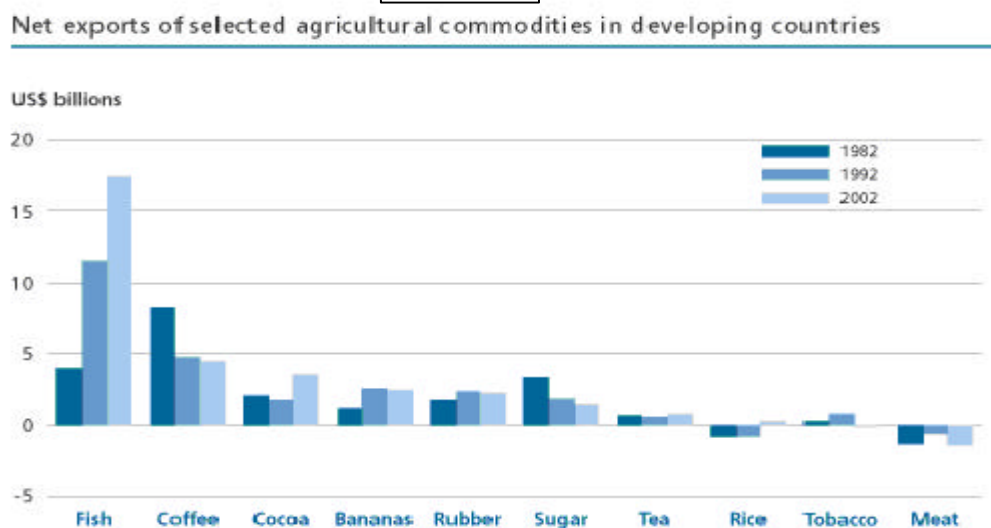
The strategic importance of fish as a staple food can be observed, for instance, in densely populated countries such as China where growth of fish production has outpaced population growth during the 1987 to 2002 period. While the population increase in China was 1.1%, food fish supply rose by 8.9%. Fish can be a cheap source of protein that can enormously contribute, even if consumed in small amounts, in the fight against food insecurity and hunger.

### C. FISHERIES AS A SOURCE OF EXPORT EARNINGS

Not only do fisheries make an enormous contribution to livelihood, employment and food security, but it is also a main source of export earnings and foreign exchange for a vast number of developing countries.

Although it is difficult to quantify the precise contribution of fisheries to national economies, there is clear evidence that earnings from exports are indeed very substantive. Developing countries are responsible for about half of world production of fish and 38% of the production enters international markets. They account for 49% of fish exports by value and 55% by volume. Low-Income Food-Deficit Countries (LIFDCs) alone account for 20% of exports by value. Net receipts of fisheries foreign exchange<sup>12</sup> in developing countries are worth US\$17.4 billion, or more than earnings from coffee, cocoa, bananas, rubber, sugar, tea, rice, tobacco and meat. Fish products are the single most valuable agricultural export from developing countries.

**Figure 1**



Source: FAO, *The State of World Fisheries and Aquaculture* (2004), Figure 31.

Apart from the weight and dynamism of the fisheries sector in the economy of developing countries as a whole, fish production and exports can often be the major source of export earnings. In fact, fish exports as a total of agricultural exports can be extremely high in developing nations such as Maldives (99.9%), Seychelles (99%),

<sup>12</sup> Fish exports less fish imports.

Angola, Tuvalu (96%), Gabon (82%), Bangladesh, Mauritania and Madagascar (over 70%). Of course, for developing countries whose composition of exports is heavily dependent on only a small number of primary agricultural commodities, such high ratios can turn out to be a source of economic vulnerability. The ratio of fishery exports as a total of merchandise exports is above 20% in several small island developing states and also Bangladesh, Namibia, Senegal, and Panama.

The contribution of fish production to developing countries GDP is also estimated to be very high, despite the difficulties in calculating the exact amount of contribution. The contribution is very high in small island developing states (33.56% for the Maldives) and can also be as high as 10% in Cambodia (capture fisheries only) and 5.77% in Laos (aquaculture only).<sup>13</sup> Shrimp production employs about 100,000 workers in Madagascar and corresponds to 7% of GDP.<sup>14</sup> Nevertheless, it is widely accepted that that contribution could be even higher because of problems of data reliability and also because of the difficulties in capturing the economic value of subsistence fishing.

To the importance of these earnings, one must add the earnings derived from compensatory fees paid under access agreements that many developing have concluded with Distant Water Fishing Nations (DWFN). Several nations in Africa and the Pacific region have concluded such agreements mainly with the EU, USA, Japan, Taiwan and Korean. The aggregate value of such agreements concluded by the EU alone is estimated around €170 million<sup>15</sup> for a single year and their weight within poor nations' overall government financing can often be very high. The contribution of financial transfers under access agreements represented more than 60% of overall Government revenues in Guinea Bissau.<sup>16</sup>

#### D. THE MULTIFUNCTIONALITY OF COASTAL AREAS

Coastal areas, particularly in Small Island Developing States (SIDS) or in states with extensive marine boundaries, are usually very densely populated areas (true of Africa, Asia, Latin America and the Caribbean) which often constitute fragile social and ecological environments. Protection and management of those areas are not only extremely important to ensure sustainable development, but also for human development.

Cultural heritage, including associated with the sea and fisheries, is extremely rich in those coastal areas. Coastal ecosystems (e.g. mangroves, reef atolls) are not only environmentally fragile but also fundamentally important beyond fisheries. For many poor developing countries, including Least Developed Countries (LDCs), "sun and

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<sup>13</sup> Shunji Sugiyama, Derek Staples and Simon Funge-Smith, *Contributions of fisheries and aquaculture in the Asia-Pacific region* (FAO, 2004).

<sup>14</sup> World Bank, *Madagascar diagnostic trade integration study* (2003).

<sup>15</sup> The EU has bilateral fishing agreements in force with 15 developing nations: Cape-Verde, Comoros, Côte d'Ivoire, Gabon, Guinea, Guinea-Bissau, Kiribati, Madagascar, Mauritius, Mauritania, Mozambique, São Tomé and Príncipe, Senegal, Seychelles, and Solomon Islands. The main beneficiaries of such agreements are Spain, France, Portugal, France and Greece.

" European Commission, *The international dimension of European Fisheries*" – Factsheets, in [http://europa.eu.int/comm/fisheries/doc\\_et\\_publ/factsheets/facts/en/pcp4\\_2.htm](http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/facts/en/pcp4_2.htm), last viewed 10 June 2005

<sup>16</sup> Beatrice Gorez, Coordinator of the Coalition for Fair Fisheries Arrangements (DFFA-CAP)

beach” and cultural tourism contain huge developmental potential.

Developing countries, such as the Maldives, where tourism and fisheries are the two most important, and almost exclusive, economic activities, the protection of coastal ecosystems and adequate management of fish stocks are of vital importance.

However, many developing countries have lacked institutional, financial and human capacity to implement proper management and monitoring schemes of fisheries. Technological improvement and innovation in traditional capture techniques and distribution can yield noticeable economic and income gains without intensifying the current fishing effort. For instance, although artisanal fishing is known for little waste of fish, post-harvest losses can be further reduced by improving sanitary, processing, conservation and transport conditions.

Similarly, techniques that are not adapted for the tropical waters seas of developing countries, such as the use of bottom trawls, can be discouraged. There is therefore a need to induce commercial fisheries to feel ownership and responsibility over fish stocks through management and conservation programmes.

#### E. PROSPECTIVE IMPORTANCE OF FISHERIES

Despite the impressive figures about the dynamism of fisheries trade in developing countries, much of the potential contained in that sector has still to materialise. Fisheries have in fact a large potential to lift a huge amount of people out of under-nourishment and poverty and the prospects of expansion of production in many developing countries remain very large.

Recent growth of production and exports by many non-traditional developing country producers reveal that potential. Some of the fastest progressions in production (for both aquacultured and captured fish) between 2001 and 2002 were recorded in countries with limited tradition in fish exports, such as Iran, Laos, Brazil, and Myanmar.<sup>17</sup>

Fishing, particularly artisanal fishing, is an industry that requires relatively little investment, or investment that can relatively easily be obtained. It is also an activity that often does not require access to complex and expensive technology. Therefore, to the extent that fish stocks are sustainably managed and not overexploited, and to the extent that the kinds of fishing activities undertaken are those that are both environmentally sustainable and economically beneficial, expanding fishing activities may be a means through which developing countries may diversify their economically productive sectors and thereby reduce their vulnerability resulting from dependency on a few sectors or on primary commodities.

And since fish is a highly perishable food product, it is predominantly traded in processed form. That requires investment in infrastructure (refrigeration, smoking, canning, and packaging), transport, market research and distribution. Such related more value-added activities may have very positive spill-over socio-economic effects. Moreover, cheaper operating and labour costs prevailing in developing countries may

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<sup>17</sup> Stefania Vannuccini, *Overview of fish production, utilization, consumption and trade*” (based on 2002 data) (FAO, 2004), pp. 6-7.

also constitute a significant drive for foreign direct investment and transfer of technology. Such is already a trend in some regions that certainly has the potential to extend to other developing countries.

The strategic future role of fisheries in the fight against poverty is unveiled by governmental and international efforts to mainstream fisheries in national developmental policies. International aid, environment and development agencies such as the World Bank, UNEP, FAO, and the EU already cooperate with several poor developing countries to integrate fisheries in national development plans. Successes have been recorded for instance in the Maldives, Seychelles, Fiji and Saint Lucia.<sup>18</sup>

#### **IV. RELEVANCE OF THE FISHERIES SUBSIDIES NEGOTIATIONS FOR DEVELOPING COUNTRIES**

The discussions above identify some of the reasons why fisheries are so central for sustainable developmental strategies. Consequently, international rules that impinge on fisheries and trade of fish products have potentially important consequences for developing countries. There are currently two aspects of trade of fish and fish products that are directly under negotiations as part of the DWP: market access and subsidies disciplines.

The first aspect, negotiated in the WTO Negotiating Group on Market Access (NGMA), concerns both the tariff treatment that is given to fish as well as non-tariff barriers (NTBs) that may operate as effective obstacles to the export of fish products. NTBs include, inter alia, rules of origin, aspects of customs administration and abuse of anti-dumping rules or sanitary and phyto-sanitary (SPS) measures. The negotiating mandate for market access is provided in Paragraph 16 of the DMD.

The second negotiation that directly relate to fisheries, is held in the WTO Negotiating Group on Rules (NGR) and concerns the adoption of improved disciplines to regulate subsidies that governments grant to the fisheries sector. The negotiating mandate to discuss subsidies is provided by Paragraph 28 of the DMD, and includes an explicit reference to the need to regulate fisheries subsidies given the importance of that sector for developing countries.

Given the present and future, economic, environmental, social and cultural importance that the fisheries have in developing countries, the stakes of the negotiations currently taking place in the WTO are extremely high.

As stated above, the fact that ministers have given particular consideration to fisheries within the negotiations for improved disciplines on subsidies opens a considerable window of opportunity to make a meaningful contribution to improving sustainable trade in fish and fish products. There is a real opportunity to demonstrate that a "win-win-win" outcome can be negotiated in the WTO, that is, the negotiated outcome could provide positive results for: (i) the development prospects of developing countries (through, e.g. more operational S&D in fisheries subsidies); (ii) for the fishing environment (e.g. tighter disciplines means reductions in fishing capacity and

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<sup>18</sup> Andy Thorpe, Chris Reid, Raymon van Anrooy and Cecile Brugere, *Integrating fisheries into the national development plans of Small, Island Developing States (SIDS)*" (2004).

fishing effort thereby leading to more sustainable fish stocks) and (iii) trade (e.g. increased shares by developing countries in global fish exports). Whether WTO Members remain faithful to the developmental promises of the Doha Declaration, particularly in fisheries, will be crucial in the assessment of the benefits of the DWP for developing countries.

Developing countries' concerns can be incorporated in the Fisheries Subsidies negotiations in two ways. The first concerns the design of improved disciplines that promote more sustainable fisheries by effectively curbing effort and capacity-enhancing subsidies. Developing countries also stand to gain from eliminating subsidies since it could make their own industries more competitive. The second concerns the incorporation in such disciplines of specific developmental needs in the form of operational special and differential treatment provisions so that whatever new rules are agreed are not incompatible with the implementation of development policies.

## **V. CURBING TRADE DISTORTING AND CAPACITY ENHANCING SUBSIDIES**

Market distortions through the use of subsidies, and particularly complex subsidies, by some countries contribute to the distortions in world fish prices and give an artificial competitiveness to subsidised fleets and multinational fish corporations. As a result, artificially competitive producers are those who benefit most from the levels of consumption and prices prevailing in high-value markets. These subsidies impact not only on capacity and the environment, but also distort market access opportunities of developing countries and have thereby a direct consequence for human development.

Moreover, subsidies have led to overinvestment and to an aggregate fleet capacity that is well beyond sustainable levels. A recent UNEP study analyzed the impact of fisheries subsidies under a variety of management and bio-economic conditions, and concluded that “most subsidies have the potential to be harmful to fish stocks particularly in the absence of effective management... Subsidies that contribute directly to increased fishing capacity or effort are among the most harmful.”<sup>19</sup> The idea that fisheries subsidies could lead to overcapacity and overexploitation seems to be well accepted in the Negotiating Group on Rules and now needs to be translated into well crafted and tight disciplines.

In that context, the task facing negotiators is to address the shortfalls in the current in order to establish disciplines on fisheries subsidies while also addressing developing countries' concerns that such disciplines be sufficiently flexible so as to allow them to provide subsidies that would otherwise be prohibited in a manner consistent with “win-win-win” outcomes for trade and sustainable development.

Furthermore, complex and sophisticated mechanisms make certain fisheries subsidies harmful for fish stocks despite their innocuous or even positive design. For instance, it is known that poorly monitored and managed decommissioning programmes ("buybacks") may lead to an increase in fishing capacity in domestic waters and the export of fishing capacity to foreign waters. Grants to support research and development of fishery technology may also lead to increased fishing capacity.

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<sup>19</sup> UNEP, *Analyzing the Resource Impact of Fisheries Subsidies: A Matrix Approach* (2004), p. 47.

Marine insurance, management services and government-to-government access fees also can provide significant benefits to the fisheries industry of those countries that provide them. Such instruments might have to be discussed in the negotiations so as to prevent “box shifting”<sup>20</sup> and while ensuring that appropriate flexibilities for developing countries are also provided.

The Negotiating Group on Rules is increasingly aware of the nuances that could undermine the effectiveness of possible new disciplines<sup>21</sup>. Some WTO members have proposed a broad based and effective elimination and reduction of fisheries subsidies, particularly the most capacity enhancing and trade distorting of them<sup>22</sup>. Other WTO Members agree that there is a need to ensure that the approach used for the identification of prohibited subsidies be effective in not creating loopholes in the final disciplines. Since developing countries have very limited financial, human and institutional resources to engage in the dispute settlement mechanism, broad-based, ex ante prohibitions of harmful subsidies most likely would be the most efficient way of tackling trade distorting and capacity enhancing subsidies.

However, while several developing countries which are already actively engaged in international fish production and trade would immediately benefit from a broad elimination of capacity enhancing fisheries subsidies, many poor developing countries whose fisheries resources are not overexploited may still need to have the possibility to support small scale and artisanal fisherfolk; create fishing capacity where it currently does not exist; and promote local food security. Some developing countries have suggested that new subsidies disciplines should be compatible with poor countries’ development needs.<sup>23</sup>

For this reason, while curbing trade-distorting and capacity-enhancing fisheries subsidies is essential in providing developing countries with a fairer competitive playing field, such disciplines should be balanced by an operational S&D mechanism that is also reflective of sustainable development considerations so as to ensure that the fisheries subsidies negotiations provide sustainable development benefits for all WTO Members.

## **VI. MAKING SUSTAINABLE DEVELOPMENT-BASED S&D OPERATIONAL IN THE FISHERIES SUBSIDIES NEGOTIATIONS**

### **A. DEVELOPING COUNTRIES’ EXPERIENCE WITH S&D IN THE WTO**

Before discussing specific S&D provisions within the Fisheries negotiations, it is worth undertaking a short review of S&D treatment in the WTO and the current SCM

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<sup>20</sup> This term refers to the agricultural negotiations where subsidies have been placed into categories, or “boxes”. In order to avoid a subsidy falling under a more regulated or prohibited category, developed countries design, frame and adapt their programmes in such a way that they fall under authorised categories of subsidies. Through that practice developed countries avoid reducing their overall levels of subsidisation.

<sup>21</sup> See “*Fisheries Subsidies to Management Services*” by New Zealand (TN/RL/GEN/36) and “*Programmes for Decommissioning of Vessels and Licence Retirement*” by the USA (TN/RL/GEN/41).

<sup>22</sup> The group is not a formal grouping of WTO member and its composition may vary. It usually includes Argentina, Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines and the United States.

<sup>23</sup> TN/RL/W/136 by Antigua and Barbuda, Belize, Fiji Islands, Guyana, the Maldives, Guinea, Solomon Island, and Saint Kitts and Nevis as well as TN/RL/W/176 by Brazil.

Agreement. Drawing on the experience of implementing WTO agreements and S&D provisions over the past years, an improved conceptual S&D framework can be used as a guideline for the crafting of new special and differential treatment in the Fisheries Subsidies context.

S&D treatment is a fundamental and important part of the multilateral trading system and its legal framework under the WTO. This was explicitly reaffirmed by the WTO Ministerial Conference at Doha.<sup>24</sup> Its importance within the Fisheries Subsidies framework has been acknowledged in Paragraph 28 DMD and subsequently by several WTO members in their submissions to the negotiating group.<sup>25</sup>

S&D legally, therefore, is not an exception to the application of multilateral trade rules provided for in the various WTO agreements. The fundamental premise of S&D is that countries continue to be at varying levels of economic development, with different economic needs, and therefore should have varying degrees of obligations commensurate to their levels of economic development. This is a premise that is still relevant as seen in, for example, Preamble 1 and 2 of the WTO Agreement. It is intended to achieve a key specific objective – that of providing a fair playing field for all WTO Members in which the rules are adjusted to take different capacities and levels of development among the participants into account. The indiscriminate application of single rules to players with unequal abilities only tilts the playing field in favour of players who are more capable of playing – whether by virtue of economic or political strength – than others.

So at its core, S&D is about creating a different set of multilateral trade rules crafted to meet and be commensurate with the needs of developing countries. These rules would be applicable to developing countries while they are still “developing”. This different set of rules for developing countries could be about safeguarding their policy space and options to adopt and implement trade, economic, and development policies in the context of the MTS in line with their own perceived development needs and priorities.

This could include the freedom of developing countries to choose and decide on the conditions, timeframes, policies, and objectives under which trade liberalisation takes place with respect to their economies. It tries, in essence, to provide fairness, justice, and equity in legal and political relations in an MTS that, many government and trade negotiators maintain, is currently imbalanced in favour of developed countries. S&D, therefore, is not simply about exceptions or transitional periods.

The WTO Secretariat classified the S&D provisions contained in various WTO agreements into six (6) types. These include: “(i) provisions aimed at increasing the trade opportunities of developing country Members; (ii) provisions under which WTO Members should safeguard the interests of developing country Members; (iii)

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<sup>24</sup> WTO, *Ministerial Conference – 2001 Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, 20 November 2001, paragraph 44 stating that S&D is an integral part of the WTO agreements, and Paragraph 50 which stresses the principle of S&D for developing countries and LDCs in the context of the Doha-mandated negotiations.

<sup>25</sup> See for instance TN/RL/W/82 by the EC, TN/RL/W/159 by Japan, TN/RL/W/166 by Friends of Fish; TN/RL/W/136 by Antigua and Barbuda, Belize, Fiji Islands, Guyana, the Maldives, Guinea, Solomon Island, and Saint Kitts and Nevis as well as TN/RL/W/176 by Brazil.

flexibility of commitments, of action, and use of policy instruments; (iv) transitional time periods; (v) technical assistance; and (vi) provisions relating to least-developed country Members.”<sup>26</sup>

However, many developing countries have faced difficulties with respect to these S&D provisions. Some of them have pointed out that under the WTO, the focus of S&D has shifted from addressing the problematique of promoting economic development into assisting developing countries implement their multilateral trade commitments more effectively (through grants of transition periods and technical assistance).<sup>27</sup> Others have also stressed that they “could hardly benefit from the almost 145 S&D provisions (in the Uruguay Round Agreements) which mostly do not go beyond a best endeavour promise and therefore are not legally enforceable. Lack of any mechanism to ensure effective implementation of S&D provisions in the WTO has [also] been a major concern ...”<sup>28</sup>

These broad concerns by developing countries regarding the inefficacy of current S&D provisions in the WTO legal regime in supporting and promoting their development needs are at the core of the negotiating mandates on implementation-related issues and on S&D established by the WTO Ministerial Conference at Doha in 2001<sup>29</sup> (including concerns with respect to the operation of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and its S&D provisions).

However, these Doha-mandated negotiations on S&D (which include both the negotiations on implementation-related issues and concerns as well as the negotiations under the S&D work programme) are now at a virtual standstill. Over three years after such negotiating mandates were established at Doha in November 2001, Members continue to be divided over the issue of how to effectively implement these mandates in order to achieve a mutually agreed negotiated outcome that would be reflective of the development needs and concerns of developing countries.

#### B. DEVELOPING COUNTRIES’ EXPERIENCE WITH S&D IN THE SCM AGREEMENT

The implementation of the SCM Agreement seems to indicate that the S&D provisions contained therein may not have effectively provided the necessary flexibility for developing countries. This is shown in, for example, the general discussions in the WTO relating to implementation-related issues and concerns on S&D.

Issues relating to the S&D provisions of the SCM Agreement – i.e. Article 27 – figure prominently among the SCM Agreement-related issues raised by developing country Members in the WTO from before the 1999 Seattle Ministerial Conference to the present. These issues are reflected in the “*Compilation of Outstanding Implementation*

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<sup>26</sup> See WTO, *Secretariat – Implementation of Special and Differential Treatment Provisions in WTO Agreement and Decisions*, WT/COMTD/W/77/Rev.1, 21 September 2001, para. 3.

<sup>27</sup> WTO, *Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe – Proposal for a Framework Agreement on Special and Differential Treatment*, WT/GC/W/442, 19 September 2001, paras. 7 and 9.

<sup>28</sup> *Id.*, para. 9.

<sup>29</sup> See DMD, para. 44; and WTO, *Ministerial Conference – 2001 Ministerial Decision on Implementation-Related Issues and Concerns*, WT/MIN(01)/17, 20 November 2001, paras. 12 and 13.

*Issues Raised by Members*,<sup>30</sup> the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns,<sup>31</sup> and the General Council Chairman's proposal with respect to Agreement-specific S&D proposals.<sup>32</sup> Alone among all these issues, only the issue relating to the method to be used for calculating 1990 dollars for the purposes of Annex VII(b) of the SCM Agreement has been definitively settled.<sup>33</sup> In addition, a procedure for the grant of extensions of transition periods under Article 27.4 of the SCM Agreement was also put in place in 2001.<sup>34</sup>

There are sixteen (16) S&D-related provisions in the SCM Agreement, mostly concentrated in Article 27 thereof. These provisions were identified and classified by the WTO Secretariat as follows:

1. Provisions under which WTO Members should safeguard the interests of developing country Members:  
Two provisions (Articles 27.1; and 27.15).
2. Flexibility of Commitments, of action, and use of policy instruments:  
Ten provisions (Articles 27.2(a) and Annex VII; Article 27.4; 27.7; 27.8; 27.9; 27.10; 27.11; 27.12; and 27.13). It should be noted that article 27.2(a) is applicable to a subset of developing countries, listed in Annex VII, and not developing countries as a whole.
3. Transitional time periods:  
Seven provisions (Article 27.2(b); Article 27.3; Articles 27.4 and 27.14; Article 27.5; Article 27.6; and Article 27.11).

Articles 27.4, 27.6 and 27.11 are listed in both the flexibility and transition time periods category, as their hybrid nature combines characteristics of both these categories.

In addition to these provisions applicable to developing countries, or a sub-group thereof, are four provisions (Articles 29, 1-4) which apply to members in the process of transformation from a centrally planned to a market-free enterprise economy.<sup>35 36</sup>

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<sup>30</sup> WTO, *Secretariat – Compilation of Outstanding Implementation Issues Raised by Members: Revision*, Job(01)/152/Rev.1, 27 October 2001. This compilation was incorporated by reference into the negotiating mandate under the Doha Work Programme pursuant to Paragraph 12 of the Doha Ministerial Declaration and Paragraph 13 of the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns. Twenty (20) tirets – from Tirets 64-79, 81, 83, and the three tirets covering LDC proposals – in this compilation were SCM-related.

<sup>31</sup> WTO, *Ministerial Conference – 2001 Ministerial Decision on Implementation-Related Issues and Concerns*, WT/MIN(01)/17, 20 November 2001, paras. 10.1 to 10.6, relating to five issues.

<sup>32</sup> WTO, *General Council Chairman – Proposal on an Approach for Special and Differential Treatment: Agreement-Specific S&D Proposals (Divided into Three Categories)*, Job3404, 5 May 2003, pp. 30-32 (covering eight proposals – Proposal Nos. 46 to 53).

<sup>33</sup> Since no Member had submitted any alternative proposal for the methodology to be used for such calculation, Paragraph 10.1 of the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns took effect and required Members to adopt the methodology specified in WTO Doc. No. G/SCM/38, Appendix 2, for such calculation starting on 1 January 2003.

<sup>34</sup> WTO, *Ministerial Conference – 2001 Ministerial Decision on Implementation-Related Issues and Concerns*, WT/MIN(01)/17, 20 November 2001, para. 10.6. Developing countries, however, had wanted not just a procedure through which requests for extension would be considered on a case-by-case basis but rather a blanket extension of transition periods without need for the submission of any requests for such extension.

<sup>35</sup> WTO, *Secretariat – Implementation of Special and Differential Treatment Provisions in WTO Agreement and Decisions*, WT/COMTD/W/77/Rev.1, 21 September 2001, at pp. 81-82.

<sup>36</sup> India, for example, has stressed that “[t]he experience since the establishment of the WTO has shown that these S&D provisions have been inadequate to meet the concerns of developing countries ...” See e.g. WTO, *India – Proposals on Implementation Related Issues and Concerns: Agreement on Subsidies*

In terms of the structure of the legal text, Article 27 of the SCM Agreement itself seems to contain internal contradictions. While it states that subsidies may play an important role in developing countries' economic development, it does severely restrict the right of developing countries to use subsidies as a developmental policy instrument while further requiring the phasing out of many subsidies that developing countries are actually providing.

In addition, it has been argued that the nature of the SCM Agreement itself is such that S&D provisions can only have a limited scope. The definition of subsidies provided in Article 1 and the illustrative list under Annex I of the SCM Agreement may operate to create an imbalanced situation by forbidding subsidies that could be available to and accessible for poor and resource-constrained countries and authorising those subsidies that can be provided only by richer, essentially developed, countries.

Furthermore, although S&D provisions under Article 27 generally contain "shall" wording and could thus be arguably construed as being mandatory in nature, the imposition of complex eligibility criteria for certain paragraphs (for instance Art.27.4); the existence of exceptions where the provisions do not apply (for instance Art.27.9); and the temporary nature of most of the flexibility allowed, may militate against making Article 27 fully effective, useful and operational for developing countries.

In fact, Article 27 has already been interpreted by a WTO dispute settlement panel as being in essence a limited and conditional exception to the general rule established in Article 31:1 prohibiting export subsidies. In interpreting the meaning of Article 27:2, the panel in *Brazil - Aircraft*<sup>37</sup> stated that "Article 27 does not 'displace' Article 3.1(a) of the SCM Agreement unconditionally ... The exemption for developing country Members other than those referred to in Annex VII from the application of the Article 3.1(a) prohibition on export subsidies is clearly conditional on compliance with the provision in paragraph 4 of Article 27. Thus we consider that, where the provisions in Article 27.4 have not been complied with, the Article 3.1(a) prohibition applies to such developing country Members."<sup>38</sup>

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*and Countervailing Measures/Anti-Dumping Agreement*, TN/RL/W/4, 25 April 2002, pp. 1-2. See also WTO, *India - Intervention by India on the Submission by the United States on Special and Differential Treatment and the Subsidies Agreement*, TN/RL/W/68, 11 March 2003.

<sup>37</sup> WTO, *Panel Report - Brazil - Export Financing Programme for Aircraft*, WT/DS46/R, 2 August 1999.

<sup>38</sup> *Id.*, para. 7.40. This interpretation was not overruled by the Appellate Body in this case. Article 27:4 requires developing countries not listed in Annex VII to, inter alia: (i) phase out their export subsidies over an eight-year period from the entry into force of the WTO Agreement; (ii) not increase the level of their export subsidies; and (iii) eliminate them within a period shorter than the eight-year period provided for in Article 27:4 when the use of such export subsidies is inconsistent with their development needs. It should be noted, however, that the same panel explained that in applying the phrase "use of subsidies inconsistent with its development needs" in Article 27:4, "it is the developing country Member itself which is best positioned to identify its development needs and assess whether its export subsidies are consistent with those needs. Thus, in applying this provision we consider that panels should give substantial deference to the views of the developing country Member in question." *Id.*, para. 7.89.

The concerns of developing countries with respect to the SCM Agreement can be more clearly seen in the various SCM Agreement-related implementation issues and S&D proposals that they have raised. These proposals can be classified into four (4) broad categories (see Annex 1 below for a listing of these proposals according to category):

1. Proposals seeking to expand the range or extent of subsidies that may be provided by developing countries – These respond to concerns raised by developing countries that existing SCM flexibilities are too limited to allow them to provide the range or amount of subsidies that they feel they need to provide in order to promote endogenous development;
2. Proposals seeking to expand the range or number of developing countries that may be allowed to provide subsidies – These respond to concerns that some developing countries may be left out from enjoying the benefits of S&D insofar as their ability to provide subsidies is concerned;
3. Proposals seeking to lessen the vulnerability of developing countries providing subsidies to WTO dispute settlement proceedings – These respond to concerns that existing SCM rules do not provide sufficient safeguards to protect developing countries providing subsidies from being brought to WTO dispute settlement; and
4. Proposals seeking to minimize the vulnerability of developing countries providing subsidies to the imposition of countervailing measures by other WTO Members – These respond to concerns that existing SCM rules do not adequately protect developing countries' exports benefiting from subsidies from being subjected to countervailing measures.

In sum, many developing countries perceive the SCM Agreement and its S&D provisions to be inadequate in providing the necessary flexibility for policy instruments that could be used by resource-constrained developing countries to address their development needs. Moreover, the threat of a dispute within the context of the DSU lurks and has an inhibiting impact on developing countries intending to craft and provide new subsidies. Particularly in view of the importance of the fisheries sector to developing countries, the mandate to improve disciplines on fisheries subsidies provides a timely opportunity to address some of the asymmetries within the SCM Agreement through improved S&D provisions.

#### C. POSSIBLE ELEMENTS FOR S&D TREATMENT IN THE SCM AGREEMENT

The inadequacy of current approaches to S&D shown in the SCM Agreement to effectively address the development needs of developing countries indicates that a different approach might need to be taken. In designing this alternative approach to S&D in the SCM Agreement, especially as it would pertain to fisheries subsidies, identifying key elements for S&D that more closely reflects the concerns that have been expressed by developing countries with respect to the operation of current S&D provisions may help to advance the negotiations.

The advantage of identifying key elements for S&D to serve as the basis for designing

more sector-specific S&D provisions is that these elements may provide the skeleton that can then be fleshed out according to the specific concerns that need to be taken into account in a particular sector. They can also be used and incorporated in any of the approaches proposed to be used in the current WTO negotiations on WTO rules while at the same time providing sufficient guidance as well as flexibility for negotiators to discuss and fine tune any the operational details thereof.

As discussed above, from the experience gathered implementing the SCM Agreement, and from commonalities in developing country proposals to the NGR, the following might be seen as possible key elements for S&D in the SCM Agreement:<sup>39</sup>

1. Positive policy space and flexibility;
2. Positive impact in terms of increased market access opportunities;
3. Mandatory applicability and enforceability;
4. Positive cooperation measures; and
5. Assessment-based and review-dependent implementation.

The maintenance and expansion of domestic policy space and flexibility is a core element of S&D. Operationally, this could be in the form of a lower level of obligations for developing countries, commensurate or adjusted to their current level of economic development, so as to afford them the necessary flexibility to pursue viable development-oriented policy options and encourage institutional and economic innovations capable of fostering industrialization, economic development and social advancement. This could also be reflected in a modest level of expectations with respect to their application and implementation of various multilateral trade obligations and commitments. In addition, longer and qualitatively better transition periods for the implementation of new commitments or obligations by linking the expiration of such periods to objective economic (e.g. debt level, level of industrial development, human development index, etc.), social (e.g. literacy and life expectancy), and environmental sustainability (e.g. environmental and natural resource protection and conservation) criteria.

The utility of S&D provisions for developing countries depends, in large part, on whether such provisions are mandatory in their application and enforceability. Hence, specific S&D provisions could be couched in mandatory language compliance with which can be enforced by developing countries, if needed and as appropriate, through the WTO's dispute settlement system (including notification requirements and the inclusion of these commitments in country schedules).

Positive cooperation among participants in the multilateral trading system would also be a key element in making S&D operational. This can take the form of, for example, the provision of additional, adequate, and predictable financial and technical assistance and capacity-building support from developed to developing countries both in relation to the implementation of new rules or obligations and in ensuring that sustainable development benefits accrue from such implementation. The establishment and implementation of effective and operational positive technology

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<sup>39</sup> These elements are based on, *inter alia*, various developing country submissions to the WTO. See e.g. WTO, *Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe – Proposal for a Framework Agreement on Special and Differential Treatment*, WT/GC/W/442, 19 September 2001, paras. 5, 6, and 15.

transfer obligations from developed to developing countries could also be an important contribution in this area.

Finally, the different levels of economic development of developing countries need to be reflected in the multilateral trade regime, as part of the S&D framework, by making the initial and continued implementation of new trade rules and obligations assumed by developing countries dependent on positive evaluations from a pre-implementation assessment exercise and a periodic implementation review process.

For example, the initial application of new multilateral trade rules or obligations to developing countries could be conditioned on a positive evaluation. This evaluation could be based on a prior assessment of the development impact and implications of such new rules or obligations on developing countries (covering social, economic, environmental impacts and implementation costs). Such prior impact assessment could include looking at how such new rules or obligations facilitate the attainment of defined sustainable development targets. A prior evaluation of the implications of such new rules or obligations with respect to the implementation costs for developing countries is very important. Such prior evaluations could become the basis for determining the extent to which S&D provisions can be availed of and enforced by developing countries.

In addition, the legal and administrative requirements and procedures for making use of such S&D procedures need to take into account and reflect the fact that many developing countries are resource-constrained from the financial, human resource, or technical perspective.

In addition, the continued application by developing countries of both S&D provisions and their general multilateral trade obligations could be subjected to a periodic implementation review mechanism that will look at the economic, social and environmental impact of such trade obligations at the national level with the aim of ensuring that such impacts contribute positively to the sustainable development prospects of the country concerned. Finally, a general review mechanism would be essential as a forum through which systemic implementation-related issues can be addressed and effectively resolved at the multilateral level.

## **VII. APPLYING THE SUGGESTED SCM S&D ELEMENTS TO FISHERIES SUBSIDIES**

### **A. POSSIBLE ELEMENTS FOR FISHERIES SUBSIDIES-SPECIFIC S&D**

To the extent that rules can be tailor-made to fit specific situations, the primary objective of S&D treatment specific to fisheries subsidies disciplines might therefore be providing flexibility for developing countries to provide fisheries subsidies in the pursuit of their development priorities subject to certain economic and environmental conditions.<sup>40</sup> Fisheries subsidies S&D treatment may then consist in, inter alia, granting developing countries access to specific instruments that would be otherwise prohibited or actionable under the general disciplines. However, it must be recognised that developing countries may also undertake a race to subsidisation that could have

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<sup>40</sup> For example, as the development situation of the S&D beneficiary improves or the environmental condition of the fish stock worsens, there could take place a progressive tightening of fisheries subsidies disciplines (leading towards the full application of the general disciplines).

detrimental effects on fish stocks and the environment. Any beneficial development effect that providing fisheries subsidies might have for a developing country will ultimately be negated if, in doing so, domestic fish stocks are depleted.

With this in mind, the fisheries subsidies S&D provision would then need to be focused on assisting developing countries to sustainably develop and manage their viable fish stocks in support of their sustainable development objectives, while at the same time ensuring that the development of excess fishing capacity and the overexploitation of fish stocks as a result of developing country fisheries subsidization programmes do not occur. S&D treatment in the fisheries subsidies area, therefore, could be viewed as an adjustment of the rules to tailor them to the implementation capacity and the specific needs of developing countries to sustainably develop and manage their fish stocks in support of their economic development, food security, and environmental sustainability objectives.

Hence, in designing an appropriate S&D package in the context of the fisheries subsidies negotiations, and taking into consideration both the elements of the S&D conceptual framework discussed above as well as the general thrust of the proposals of developing countries vis-à-vis the SCM Agreement in general, key elements of the fisheries subsidies-specific S&D package may include:

1. The policy flexibility to adopt measures (including subsidies) designed to enable developing countries' fisheries sectors to take advantage of possible increased market access opportunities in other WTO Members' markets while at the same time ensuring that their fisheries are managed in a sustainable manner. This would include, for example, allowing developing countries (especially late entrants to fishing activities and those who have not yet developed their fishing industry to a level commensurate to their economic needs and can do so in a sustainable manner) the flexibility to adopt and provide subsidies or other measures that would otherwise be actionable or prohibited under the new SCM disciplines, or providing developing countries with a wider range or extent of subsidies or other measures that would be automatically deemed to be non-actionable (see additional discussion below);
2. The necessary policy space to support fishing activities with a view of promoting sustainable development-oriented policy objectives, such as the alleviation of poverty in poor regions, the promotion of food security, sustainable utilization of resources, the organisation of small-scale and artisanal fishers into cooperatives, improvement of transport and processing infrastructure, etc;
3. The policy flexibility and the resources needed to conserve, sustainably manage and develop the fisheries resources in their waters (internal waters, territorial sea and EEZ) and on the high seas. This could include, for example, measures that may limit access to specified fish stocks by fisherfolk; impose certain landing, administrative, technical, or other requirements on fisherfolk, etc.; and
4. The inclusion of positive measures that would require WTO Members to provide, in a long-term, sustainable, and adequate manner, technical cooperation and financial assistance to developing countries seeking to put in place within their waters effective and sustainable fisheries resource conservation and management regimes.

It needs to be noted in this regard that some developing countries have, in the context of the fisheries subsidies negotiations, suggested that developing countries be allowed to provide certain types of subsidies as part of S&D treatment. These include, *inter alia*, the following:

- (i) Subsidies for infrastructure development and construction, prevention and control of disease, scientific research and training, and fisherfolk skills retraining;<sup>41</sup>
- (ii) Subsidies or fiscal incentives for domestication and fisheries development;<sup>42</sup>
- (iii) Support for the development of their small-scale, artisanal fisheries sectors, provided that the fisheries resources accessible to small-scale, artisanal fisherfolk are not patently at risk;<sup>43</sup>
- (iv) Payments received from other governments for access to the EEZ fisheries resources of the developing country;<sup>44</sup>
- (v) Assistance to disadvantaged regions within the territory of a developing country pursuant to a general framework of regional development in the sense of Article 8.2 (b) of the SCM Agreement;<sup>45</sup>
- (vi) Emergency relief and adjustment to small-scale, artisanal fisherfolk suffering significant loss of income as a result of reductions in fishing caused by conservation measures or unforeseeable natural disasters;<sup>46</sup>
- (vii) Subsidies or other assistance for community-based fisheries resource or environment management and enhancement activities, projects or programmes – i.e. community-based (CB) IUU fishing detection and prevention; CB property rights definition and delineation; CB environmental resource conservation or enhancement (e.g. coral reef protection or regeneration); etc.

#### B. POSSIBLE OPTIONS TO MAKE FISHERIES SUBSIDIES S&D TREATMENT OPERATIONAL

As pointed out above, the need for S&D treatment stems from the importance of making sure that new disciplines on fisheries subsidies do not impair the ability of

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<sup>41</sup> See e.g. WTO, *People's Republic of China – Proposal from the People's Republic of China on Fisheries Subsidies*, TN/RL/W/9, 20 June 2002, para. 3.

<sup>42</sup> WTO, *Antigua and Barbuda, Belize, Fiji Islands, Guyana, the Maldives, Papua New Guinea, Solomon Islands, St. Kitts and Nevis*, TN/RL/W/136, 14 July 2003, p. 3.

<sup>43</sup> *Id.* See also WTO, *Brazil – Contribution to the Discussion on the Framework for Disciplines on Fisheries Subsidies*, TN/RL/W/176, 21 March 2005, para. 21(ii)(a)(2). In addition to the subsidies listed in (iv) and (v) of this section, the proposal submitted by Brazil further included an exhaustive list of subsidies which, according to the proposal should be permitted to developing countries:

- (a) subsidies to fishing vessel construction or repair;
- (b) subsidies to vessel modernisation or gear acquisition or improvement;
- (c) fuel subsidies
- (d) bait or ice supplied for fishing activities.

<sup>44</sup> WTO, *Antigua and Barbuda, Belize, Fiji Islands, Guyana, the Maldives, Papua New Guinea, Solomon Islands, St. Kitts and Nevis*, TN/RL/W/136, 14 July 2003, p. 3; and WTO, *Brazil – Contribution to the Discussion on the Framework for Disciplines on Fisheries Subsidies*, TN/RL/W/176, 21 March 2005, para. 24(i)(2).

<sup>45</sup> WTO, *Brazil – Contribution to the Discussion on the Framework for Disciplines on Fisheries Subsidies*, TN/RL/W/176, 21 March 2005, para. 24(i)(3).

<sup>46</sup> See e.g. *id.*, para. 21(ii)(b).

developing countries to support their fisheries albeit in an environmentally and economically sustainable manner.

Taking into account the elements suggested above, some of the options available to incorporate S&D treatment in new disciplines for fisheries subsidies are spelled out hereunder. Different combinations of the options presented could also be envisaged since these options are neither mutually exclusive nor exhaustive.

1. Clarifying the Definition of a “Subsidy”

One possible way would be to clarify, in the context of fisheries subsidies disciplines, exactly what kind of fisheries-related government transfers relevant for developing countries would fall under the existing concept of "subsidy".<sup>47</sup> For instance, government-to-government access fees paid under access agreements<sup>48</sup> might not represent a subsidy if the agreed new definition of subsidy covers only government-to-industry direct transfers. Similarly, certain types of public investment in fishery-related infrastructure might be seen as not being a subsidy and therefore would fall outside the scope of the SCM Agreement’s subsidies disciplines.<sup>49</sup>

Such an approach may present several shortcomings in effectively disciplining subsidies that have negative effects over trade, fisheries resources and the environment. Firstly, it could leave many harmful subsidies totally unregulated and could hence undermine the positive impact that new subsidies disciplines could have on the environment. Furthermore, there might be difficulties in clearly delineating what government transfers relevant only for developing countries would be covered by this approach, which could give rise to implementation difficulties on the part of developing countries.

2. Establishing a “Prior Authorisation” Regime

Another option to operationalise S&D flexibilities in favour of developing countries could be through the establishment of a prior authorisation requirement. Developing countries planning to implement a fisheries policy that includes subsidies would have to seek prior agreement of the WTO’s SCM Committee before actually implementing the programmes. A set of minimum requirements concerning the information to be provided could be negotiated. The subsidies that may then require previous authorisation could be drawn from an exhaustive list agreed in advance. For instance,

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<sup>47</sup> The term “subsidy” is explicitly defined in Article 1.1 of the SCM Agreement as involving a financial contribution by a government or any public body with the territory of a Member or any form of income or price support and a benefit is conferred thereby. A recent UNEP study suggests that there are eight (8) basic kinds of fisheries subsidies. These include: (i) subsidies to fishing infrastructure; (ii) management services; (iii) subsidies to securing fishing access; (iv) subsidies to decommissioning of vessels; (v) subsidies to capital costs associated with fishing activities; (vi) subsidies to variable costs associated with fishing activities; (vii) income supports; and (viii) price supports. For a discussion, see UNEP, *Analyzing the Resource Impact of Fisheries Subsidies: A Matrix Approach* (2005), pp. 5-11.

<sup>48</sup> These are normally bilateral agreements between countries in which Country A (which has a distant water fishing (DWF) fleet) pays Country B (in whose internal or territorial waters or EEZ, commercially valuable fish stocks may be found) to allow Country A’s DWF fleet to fish in Country B’s waters or EEZ.

<sup>49</sup> See e.g. the discussion in David K. Schorr, *Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization* (WWF Position Paper and Technical Resource, June 2004), pp. 52-57.

one developing country could apply for a temporary authorisation of a capacity enhancing subsidy. Other WTO Members could request information about the condition of the fishery and the management scheme maintained by the requesting member and could also enquire about the public policy objectives that prompt the design of a subsidy.

A variation of this system could include a list of subsidies for which there would be only enhanced notification requirements. Non-notified subsidies would be deemed to be harmful or prohibited. These subsidies would remain actionable under the new disciplines<sup>50</sup>

While this option may present advantages for a global control over harmful subsidies, it would represent many challenges for the WTO and its Members. Such a mechanism could risk forcing the SCM Committee to undertake its own assessment of the quality and appropriateness of Members' fisheries policy, an activity that might not necessarily be within its mandate or its technical competence.<sup>51</sup> Moreover, the system may impose a significant administrative burden for the organization and its Members, and the number of requests could become unmanageable.

Finally, such a mechanism may place too heavy a burden – both administrative and political – on developing countries, and particularly small developing countries, to justify a priori their provision of fisheries subsidies. Moreover, the complexity of the system could operate as a dissuading factor, offsetting its potential benefits. Similarly, developing countries could also be disadvantaged in a dispute settlement scenario because of their limited human, institutional and financial resources.

### 3. Adopting a Positive List Approach to Subsidies that Developing Countries May Apply

Other options to create built-in flexibilities in the new disciplines could consist in drafting and agreeing to a “positive”<sup>52</sup> and exhaustive list of subsidies that developing countries would be authorised to apply. Such list of subsidies could be directly linked to public policy objectives specific to developing countries, such as support for food security, subsistence and artisanal fishing, and emergency actions.

This option presents the advantage of being easy to implement and manage. However, it places a considerable negotiating burden on developing countries. A related risk is that negotiations result in an overly restrictive list which does not cover the full range of policy instruments that would be compatible with developing countries' specific needs.

Moreover, from the point of view of the sustainability of the new disciplines, without further conditionality, such a system could still lead to over-capacity and possible

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<sup>50</sup> Criteria to dispute such subsidies could be based on current SCM language of "serious prejudice" for instance.

<sup>51</sup> This subtle boundary between the WTO's mandate on trade issues and the much larger environmental issues has been referred to by WWF as "the thin green line".

<sup>52</sup> The term “positive list” is used in this paper in the sense that anything inside the list is allowed and everything else is not allowed. The opposite phrase – “negative list” – would then refer to a situation in which anything inside the list is not allowed and everything else is allowed.

depletion of stocks because it is not conditioned on an assessment of the impact of subsidies over fish stocks. Fisheries that are already overexploited could be further harmed by overinvestment, since the use of such flexibilities would be unlimited within the agreed list. Given the social, economic and environmental importance of fish in developing nations, such a system could jeopardise efforts to deliver more responsible global fish trade and production.

To prevent or address any undesirable impacts on the sustainability of fish stocks as a result of the provision of positive list subsidies, WTO Members could consider: (i) the adoption of a maximum amount of subsidies over a given period of time; or (ii) the adoption of a post-hoc impact assessment mechanism.

In the first option, WTO Members could agree on a quantitative limit (ceiling) for the use of the flexibilities, such as an overall, aggregate level of subsidisation as a share of the total value of production over a period of time. For example, developing countries could be allowed to subsidise up to 30% of their annual production.

It must be noted however that the limitations created by such an option are quantitative, not qualitative. In other words, this type of limitation is not contingent on the state of fish stocks. One option to improve the environmental sustainability aspect of the positive list approach would be to establish a mechanism for technical assessment of the impact of the provision of positive list fisheries subsidies on fishing capacity and effort and their consequent impacts on fish stocks.

In the second option, WTO Members could agree that a well-recognized international organization with technical competence in this area could be requested to develop and implement an impact assessment mechanism to periodically review the environmental state of fish stocks and the level of fishing capacity and effort in countries providing positive list subsidies. In particular, the assessment could also look at the extent to which positive list subsidies are having a positive or negative impact on fish stocks as a result of increases in fishing capacity and effort beyond what the fish stocks can sustain.

Ideally, the results of the assessment should be accepted by the WTO and not be open challenge from WTO Members in any WTO forum (including WTO dispute settlement), so as to avoid Members stepping beyond the WTO trade mandate. Of course, the quality of this option would depend on the technical quality of the assessment undertaken and on WTO Members' wide recognition of its validity. A technical difficulty that such an assessment would raise concerns the establishment of a clear causal linkage between subsidies maintained, increases in fishing capacity and effort, and the reduction of fish stocks.

#### 4. Using A "De Minimis" Approach

WTO Members may also consider the adoption of a "de minimis" level of aggregate amount of support within which developing countries can freely maintain fisheries subsidy programmes. In addition to fisheries subsidies that may fall inside any agreed-upon "Green Box", developing countries would be free to provide fisheries subsidies provided that the aggregate amount of support provided by such fisheries subsidies do not exceed an agreed "de minimis" authorised level. Fisheries subsidies

authorised under the de minimis S&D provision could either be drawn from a positive list, or from the whole universe of subsidies available outside of the “Green Box”, or from the whole universe of subsidies except for subsidies contained in a negative list.

The aggregate amount of support may be defined as an absolute amount, for instance, US\$ 100,000.00, or as a proportion of the total value of production, for instance, 20%. The absolute amount approach would be necessarily arbitrary and may not capture the actual future needs of developing countries. The proportion approach imposes a greater restriction for developing countries whose total production is very low while advantaging countries whose production is already larger.

Members would have to decide whether subsidies beyond the de minimis level would be prohibited or authorised under certain conditions (criteria approach).

Despite the simplicity of this approach, it may still lead to overinvestment and overcapacity, and thus jeopardise the sustainability of fisheries, since access to S&D subsidies would not be dependent upon the existence of a management scheme or the actual state of fish stocks.

Finally, the efficacy of this approach is also greatly dependent on the availability of information about developing countries' overall production and about the amount of subsidies maintained in a given period. Only if this information is easily available would other Members be able to monitor whether the de minimis level is being respected. Consequently, this option would require an enhanced and efficient notification mechanism. Similarly, this option would constitute a greater burden for all other Members since its performance rests to a great extent on pro-active “peer review.”

##### 5. Adopting a Sustainable Development-Based S&D Eligibility Criteria Approach

Finally, WTO members may consider crafting a list of criteria or conditions that would have to be met in order for developing countries to be able to access S&D-related flexibilities. This mechanism would be compatible with aspects of the current SCM S&D structure, which creates categories of developing countries depending on certain criteria (see Annex 3). However, because of the nature of fisheries, WTO Members may consider extending the agreed set of criteria to cover both the environmental and trade aspects of fish production and trade.

The eligibility criteria would have to be designed with the objective of ensuring that: (i) as large a number of developing countries would be rendered eligible to apply S&D with respect to fisheries subsidies; and (ii) it reflects both economic development and environmental sustainability elements so as to ensure that S&D measures provide both environmental and developmental benefits.

In addition, the S&D measures that eligible developing countries could apply could be those subsidies that, depending on the agreement of WTO Members in the course of the negotiations: (i) are included in an exhaustive or indicative list of fisheries subsidies for use by developing countries which would be available and non-

actionable; or (ii) in addition to subsidies generally available to all WTO Members under any agreed “Green Box”, all other fisheries subsidies that would otherwise be prohibited or actionable.

The following discussion could be an example of how to make the sustainable development-based S&D eligibility criteria approach operational.

(a) Only Developing Countries as S&D Beneficiaries

Only “developing countries”<sup>53</sup> may avail of fisheries subsidies-related S&D provisions (in the case of positive measures relating to the provision of technical assistance and cooperation, only developing countries may be the beneficiaries).

(b) Sustainable Development-Related Eligibility Criteria for S&D Beneficiaries

In addition, fisheries subsidies S&D provisions may be availed of by developing countries if they meet the following suggested set of cumulative criteria:

- (i) The fisheries stocks in their internal waters, territorial sea or EEZ are not overexploited, depleted, or recovering – i.e. “patently at risk”<sup>54</sup>. The determination of such a situation could be based on the result of an independent assessment by a well recognised, competent international agency, such as the FAO<sup>55</sup>
- (ii) They can present a national fisheries resource management regime<sup>56</sup> pertaining to fisheries stocks within their internal waters, territorial sea or EEZ that is being or will be implemented and is based on or conforms to the criteria set by international instruments, such as: (a) the FAO’s Code of Conduct for Responsible Fisheries and its various International Plans of Action; or (b) standards or guidelines for fisheries management developed by relevant regional fisheries management organisation. This might have to be accompanied by information or other data laying out and evaluating or assessing the level and effectiveness of implementation of such plan<sup>57</sup>; and
- (iii) Their individual share of total global exports of fish commodities does not exceed a specified and agreed-upon share of such exports.

Regarding the assessment of the state of fish stocks and whether of not a fishery is “patently at risk”, WTO Members may be confronted with the difficulty of identifying and mutually agreeing on an external and technically competent international

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<sup>53</sup> “Developing countries” are those WTO Members to whom Article 27 of the SCM Agreement is currently applicable.

<sup>54</sup> In this connection, Brazil has suggested that a fishery could be considered “patently at risk” if it has been determined as “overexploited”, “depleted”, or “recovering” by the FAO.

<sup>55</sup> A mandate could be provided to FAO, for example, in collaboration with UNEP and other relevant organizations or agencies, to devise an independent assessment mechanism.

<sup>56</sup> Ideally, this could be designed as an “effective management” regime – i.e. one that “combines scientifically-based catch and effort controls, adequate monitoring and surveillance measures and socio-economic incentives for sustainable fishing.” See UNEP, *Analyzing the Resource Impact of Fisheries Subsidies: A Matrix Approach* (2004), p. 45.

<sup>57</sup> While this may not currently exist, a mandate could be provided to international organizations such as the FAO or UNEP to develop mechanisms, in consultation with regional fisheries organizations and their Member States’ fisheries agencies, for such evaluation and data collection.

organisation that would be entrusted with the task of defining the operational parameters for and of undertaking such assessments.

These assessments of the environmental condition of fish stocks would have to be made frequently and periodically, so that at any point in time other WTO Members can have access to an updated list of fisheries that may be overexploited. Moreover, the assessment and the maintenance of the list must be based on purely technical criteria to ensure that the findings are widely recognised by all Members. However, it should be pointed out that such assessments may capture only the state of fisheries at any one point in time (which could then provide a picture of the increase or decline of fish stocks over time), but may not be able to capture or identify the causal relationship and the actual quantitative impact of the provision of fisheries subsidies to the environmental condition of the fish stocks assessed.

Regarding the determination of a fair share of world export markets, approaches to determine the relevant figures could be:

- (i) quantitatively, for instance, in terms of a specific percentage that can be patterned after: (a) for export competitiveness under Art. 27.6 of the SCM Agreement (3.25% of world trade of that product for two consecutive calendar years); or (b) the current percentage share of the developing country with the highest share of exports of fish commodities<sup>58</sup>; or
- (ii) qualitatively, e.g. the way in which GATT Article XVI:3 stipulates that export subsidies should be applied in a manner which results in a WTO Member having more than an "*equitable share*" of world export trade in that product.

This would ensure that fish trade, as well as the resources generated, is undertaken under a legal framework that allows the entry of new participants but imposes certain limits on existing ones, within the context of ensuring that fishing activities occur in an ecologically and economically sustainable way. This would further strengthen the principle that S&D treatment is about adjusting trade rules to the ability of different members to adopt and apply them.

However, it should be noted that this criteria approach may effectively create a new layer of procedural requirements that could eventually operate as a deterrent to the use of the S&D flexibilities by developing countries. If compared to other types of allowed ("Green Box") subsidies, S&D subsidies would be of conditional access.

But subjecting access to fisheries subsidies S&D to certain eligibility criteria may be justified in view of the negotiating mandate under Paragraphs 28 and 31 DMD, which requires, inter alia, that both developing countries' developmental concerns and environmental considerations be taken into account in the fisheries subsidies negotiations. By their very nature, the subsidies that may be permitted under S&D treatment, as compared to other allowed subsidies under the "Green Box", could

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<sup>58</sup> Based on FAO statistics for global fish product exports covering the years 2001 to 2003, this share corresponds to 8.29% and is held by China (see FAO, *Yearbooks of Fishery Statistics: Summary Tables – 2003*, Table A-3 "International trade in fishery commodities by principal importers and exporters" at <http://www.fao.org/fi/statist/statist.asp>)

conceivably have a fishing capacity or effort-enhancing effect, and thus would more directly affect the state of fish stocks.

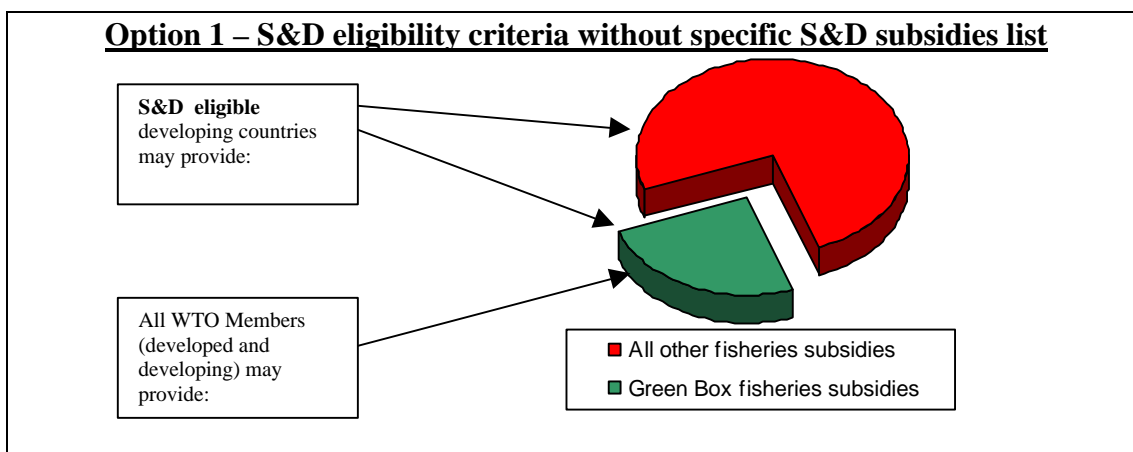
However, to reduce the burden of this approach for developing countries, WTO Members may also consider: (i) drafting clear and simple requirements for the information to be provided pursuant to the criteria, so that developing countries, and particularly those with limited technical and institutional resources, will not find it difficult to provide such information; or (ii) exempting a limited amount of subsidies from the requirements through the adoption of a "de minimis" amount of support that would not be subject to the criteria, and then applying the criteria approach to any fisheries subsidies that developing countries may wish to provide as S&D.

(c) Options for Criteria-Based S&D Treatment for Fisheries Subsidies

The precise kinds of subsidies that could be authorised for developing countries as S&D would depend on the exact list of subsidies which would fall under the prohibited or actionable categories of subsidies. Independent of the specific contents of the various subsidies "boxes" that might be agreed upon in the broader WTO rules negotiations, several options can be looked at in terms of identifying the kinds of fisheries subsidies that developing countries could provide as part of S&D treatment.

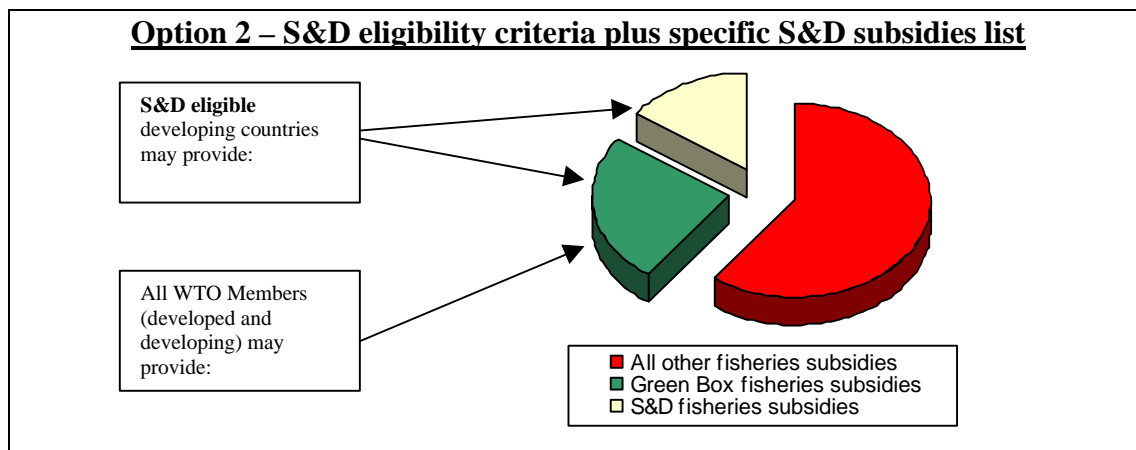
One option could be that of allowing developing countries that meet the sustainable development-based eligibility criteria suggested above to provide all fisheries subsidies that would otherwise be prohibited or actionable in addition to any subsidies that may be included in any "Green Box" that may be agreed-upon.

Figure 2



Another option that could be explored could be that of designing an explicit "S&D Box" that would list specific fisheries subsidies that are not included in any "Green Box" that developing countries that meet the suggested eligibility criteria could provide.

Figure 3



Depending on what WTO Members may agree on, these potential S&D subsidies could, inter alia, include some or all of the subsidies that have been previously suggested by various developing countries in the context of the fisheries subsidies negotiations and others. Such subsidies could, qualitatively, be those that are effective and easily accessible to developing countries lacking in adequate human, financial and institutional resources, and hence addresses the development needs of developing countries. However, they should not result in IUU fishing, nor should they be allowed to enhance capacity beyond the sustainable level of exploitation within the limits of the subsidising developing country's fisheries resource management plan.

(d) Transitioning Out of Criteria-Based S&D Treatment

In the event that any of the S&D eligibility criteria suggested above are no longer present, this could trigger an automatic implementation review procedure under the SCM Committee that would allow the WTO Member concerned to explain and address the reasons for non-compliance with the requisites and, should it wish to do so, bring itself back into compliance with such requisites.

Should a developing country Member deem itself, or is deemed by the SCM Committee pursuant to the implementation review procedure, as no longer eligible for S&D, it could be provided with a certain time period to phase out and eliminate those subsidies programmes that it had provided as part of S&D<sup>59</sup>. Should a WTO Member formerly benefiting from S&D be subsequently in compliance again with the S&D eligibility criteria above, WTO Members could agree that such Member should be able to once again benefit from the flexibility provided by S&D.<sup>60</sup>

<sup>59</sup> Members can negotiate what this timeframe should be. These could be, for instance, 5 years for developing countries and 10 years for LDCs and small vulnerable coastal states.

<sup>60</sup> This would be an arrangement similar to that decided upon by the WTO Ministerial Conference at Doha with respect to developing countries whose GNP per capita falls back below US\$1,000.00. See WTO, *Ministerial Conference – 2001 Ministerial Decision on Implementation-Related Issues and Concerns*, WT/MIN(01)/17, 20 November 2001, para. 10.4.

C. PRESERVING THE BENEFITS OF S&D FOR THE BENEFICIARIES

It might also be important to reflect on the specific relationship between the subsidies authorised under S&D provisions and: (i) on the one hand the dispute settlement mechanism, and (ii) on the other, the imposition of countervailing measures. Improved or clarified disciplines with respect to these two elements may ensure that whatever flexibilities flow from new subsidies disciplines are not impaired or offset by obligations other provisions and agreements.

In the context of improved notification requirements, the current system of periodical review of subsidies programmes (both those inside and outside of S&D) needs to be addressed with a view to looking at their economic and environmental impacts.

D. PROVIDING FOR POSITIVE MEASURES ON TECHNICAL ASSISTANCE AND CAPACITY BUILDING

In addition to the policy space and flexibility to adopt and implement subsidies programmes that would otherwise be prohibited, S&D could also include provisions that may require other WTO Members, especially developed countries, to provide substantial, long-term, and effective technical and financial assistance and capacity-building for the development and implementation of effective resource management systems, including methods and equipment for monitoring and surveillance methods. Such assistance and capacity-building support should be designed and implemented in consultation with the S&D beneficiary and could potentially have some correlation with the amount estimated by the beneficiary as being necessary to develop its domestic fishery industry in line with sustainable development considerations.

E. TRANSITIONING OUT OF FISHERIES SUBSIDIES S&D TREATMENT

Under all of the S&D options discussed above, an essential component of S&D-related policy space and flexibility is the provision of a qualitatively better transition period for developing countries, so as to enable them to adapt to new disciplines and obligations at a pace appropriate to their level of development.

Whereas existing SCM provisions providing for transition periods stipulate a specific timeframe, a new S&D transition period could provide for sustainable development-based quantitative or qualitative parameters for determining exactly when the transition period ends. Such parameters may include, for example: (i) reaching an agreed-upon level of economic development or (ii) reaching a state of fisheries resources beyond which further extraction would lead to overexploitation.

## VIII. CONCLUSION

In conclusion, the creation of an S&D mechanism specifically designed for fisheries subsidies, with the objective of enhancing the flexibility and ability of developing countries to pursue their specific development policies in an economically- and ecologically-sustainable manner, could allow WTO Members through the Negotiating Group on Rules to fulfil the interlinked Doha mandates to: (i) take into account the concerns and needs of developing and least-developed countries and the importance of the fisheries sector to them; and (ii) at the same time, enhance the mutual supportiveness of trade and environment. In fulfilling these mandates, the WTO may

then move closer towards achieving its own institutional objective of promoting sustainable development.

This paper has sought to highlight the twin key messages of ensuring policy space and flexibility for developing countries and that such space and flexibility are used in a manner designed to promote sustainable development. Given the rapid rate at which fish stocks are being depleted globally, and the great dependence of many developing countries on the continued existence of and their access to such fish stocks for their economic development and food security, WTO Members will need to act to address both the causes and the symptoms of this crisis. One way of doing so is through designing an effective S&D mechanism for fisheries subsidies.

It should be noted that the suggestions for an S&D mechanism described in this paper should simply be seen as among the range of possible options that could be considered in the course of the negotiations.<sup>61</sup> These suggestions are necessarily broad and general, and will need further elaboration and operational clarification.

What could be stressed, in parting, is that the following key elements may need to be reflected in any fisheries subsidies-related S&D mechanism that may ultimately be designed:

1. Policy flexibility in favour of developing countries to adopt measures (including subsidies) designed to enable their fisheries sectors to take advantage of increased market access opportunities while at the same time ensuring that their fisheries are healthy and managed in a sustainable manner;
2. The necessary policy space to support fishing activities with a view of promoting sustainable development-oriented policy objectives;
3. The policy flexibility and the resources needed to enable developing countries to conserve, sustainably manage and develop the fisheries resources in their waters (internal waters, territorial sea and EEZ) and on the high seas in pursuit of sustainable development-oriented policy objectives; and
4. The inclusion of positive international cooperation measures among WTO Members for the provision of various forms of technical and financial assistance (including technology transfers) in a long-term, sustainable, and adequate manner to developing countries seeking to put in place within their waters effective and sustainable fisheries resource conservation and management regimes.

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<sup>61</sup> An example of possible alternative options was suggested in David K. Schorr, *Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization* (WWF Position Paper and Technical Resource, June 2004), pp. 99-101.

**ANNEX 1: CATEGORIES OF SCM-RELATED S&D PROPOSALS FROM DEVELOPING COUNTRIES**

Category	Relevant Developing Country Proposals or Issues
Expansion of the range or extent of subsidies that may be provided by developing countries	<p>WTO, <i>Secretariat – Compilation of Outstanding Implementation Issues Raised by Members: Revision</i>, Job(01)/152/Rev.1, 27 October 2001. This compilation has incorporated by reference into the negotiating mandate under the Doha Work Programme pursuant to Paragraph 12 of the 2001 Doha Ministerial Declaration and Paragraph 13 of the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns.</p> <ul style="list-style-type: none"> <li>- Tired 64</li> <li>- Tired 65</li> <li>- Tired 68</li> <li>- Tired 70</li> <li>- Tired 72</li> <li>- Tired 73</li> <li>- Tired 75</li> <li>- Tired 76</li> <li>- Tired 77</li> <li>- Tired 78</li> <li>- Tired 79</li> <li>- Tired 81</li> <li>- 1<sup>st</sup> tired, Proposal of LDCs, 22 October 2001</li> <li>- 2<sup>nd</sup> tired, Proposal of LDCs, 22 October 2001</li> </ul> <p>WTO, <i>General Council Chairman – Proposal on an Approach for Special and Differential Treatment: Agreement-Specific S&amp;D Proposals (Divided into Three Categories)</i>, Job3404, 5 May 2003, pp. 30-32, covering Proposal Nos. 46 to 53</p> <ul style="list-style-type: none"> <li>- Prop. 46 (Proposal by LDCs, TN/CTD/W/4), Job3404, 5 May 2003; Para. 96, 8<sup>th</sup> tired, NGR Chair Compilation</li> <li>- Prop. 47 (Proposal by African Group, TN/CTD/W/3/Rev.2), Job3404</li> <li>- Prop. 52 (Proposal by African Group, TN/CTD/W/3/Rev.2), Job3404; Para. 96, 14<sup>th</sup> tired, NGR Chair Compilation</li> </ul> <p>WTO, <i>Chair of the Negotiating Group on Rules – Compilation of Issues and Proposals Identified by Participants in the</i></p>

	<p><i>Negotiating Group on Rules, TN/RL/W/143, 22 August 2003 (hereafter “NGR Chair Compilation”)</i></p> <ul style="list-style-type: none"><li>- Para. 95 (Proposal by Cuba and Venezuela, TN/RL/W/41 and TN/RL/W/131). NGR Chair Compilation, TN/RL/W/143, 22 August 2003</li><li>- Para. 96, 4<sup>th</sup> tiret (Proposal by India, TN/RL/W/4), NGR Chair Compilation</li><li>- Para. 96, 5<sup>th</sup> tiret (Proposal by India, TN/RL/W/4), NGR Chair Compilation</li><li>- Para. 107 (Proposal by China, TN/RL/W/9), NGR Chair Compilation</li><li>- Para. 110 (Proposal by China, TN/RL/W/9), NGR Chair Compilation</li><li>- Para. 116, 1<sup>st</sup> tiret (Proposal by China, TN/RL/W/9), NGR Chair Compilation</li><li>- Para. 116, 4<sup>th</sup> tiret (Proposal by Antigua and Barbuda, Belize, Fiji, Guyana, Maldives, Papua New Guinea, Solomon Islands, St. Kitts and Nevis, TN/RL/W/136), NGR Chair Compilation</li></ul> <p>WTO, <i>People’s Republic of China – Proposal from the People’s Republic of China on Fisheries Subsidies</i>, TN/RL/W/9, 20 June 2002</p> <ul style="list-style-type: none"><li>- Para. 3</li></ul> <p>WTO, <i>People’s Republic of China – Comments from the People’s Republic of China on the United States Proposal on Fisheries Subsidies</i> (TN/RL/W/77), TN/RL/W/88, 1 May 2003</p> <ul style="list-style-type: none"><li>- Para. 3</li></ul> <p>WTO, <i>Argentina, Chile, Ecuador, New Zealand, Philippines, Peru – Fisheries Subsidies</i>, TN/RL/W/166, 2 November 2004</p> <ul style="list-style-type: none"><li>- Para. 11</li></ul> <p>WTO, <i>Brazil – Contribution to the Discussion on the Framework for Disciplines on Fisheries Subsidies</i>, TN/RL/W/176, 31 March 2005</p> <ul style="list-style-type: none"><li>- Para. 15</li><li>- Para. 21(i) and (ii)</li><li>- Para. 24(i) and (iii)</li></ul> <p>WTO, <i>Antigua and Barbuda, Belize, Fiji Islands, Guyana, the Maldives, Papua New Guinea, Solomon Islands, St. Kitts and Nevis</i>, TN/RL/W/136, 14 July 2003</p>
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	<ul style="list-style-type: none"> <li>- Proposal on page 3 thereof</li> </ul>
<p>Expansion of the range or number of developing countries that may be allowed to provide subsidies</p>	<p>WTO, <i>Secretariat – Compilation of Outstanding Implementation Issues Raised by Members: Revision</i>, Job(01)/152/Rev.1, 27 October 2001. This compilation has incorporated by reference into the negotiating mandate under the Doha Work Programme pursuant to Paragraph 12 of the 2001 Doha Ministerial Declaration and Paragraph 13 of the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns.</p> <ul style="list-style-type: none"> <li>- Tired 67</li> <li>- Tired 83</li> </ul> <p>WTO, <i>General Council Chairman – Proposal on an Approach for Special and Differential Treatment: Agreement-Specific S&amp;D Proposals (Divided into Three Categories)</i>, Job3404, 5 May 2003, pp. 30-32, covering Proposal Nos. 46 to 53</p> <p>WTO, <i>Chair of the Negotiating Group on Rules – Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules</i>, TN/RL/W/143, 22 August 2003 (hereafter “NGR Chair Compilation”)</p> <ul style="list-style-type: none"> <li>- Prop. 53 (Proposal by African Group, TN/CTD/W/3/Rev.2), Job3404; Para. 96, 15<sup>th</sup> tired, NGR Chair Compilation</li> </ul> <p>WTO, <i>Ministerial Conference – 2001 Ministerial Decision on Implementation-Related Issues and Concerns</i>, WT/MIN(01)/17, 20 November 2001</p> <ul style="list-style-type: none"> <li>- Para. 10.1</li> </ul> <p>WTO, Brazil – Contribution to the Discussion on the Framework for Disciplines on Fisheries Subsidies, TN/RL/W/176, 31 March 2005</p> <ul style="list-style-type: none"> <li>- Para. 15</li> </ul>
	<p>WTO, <i>Secretariat – Compilation of Outstanding Implementation Issues Raised by Members: Revision</i>, Job(01)/152/Rev.1, 27 October 2001. This compilation has incorporated by reference into the negotiating mandate under the Doha Work Programme pursuant to Paragraph 12 of the 2001 Doha Ministerial Declaration and Paragraph 13 of the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns.</p>

<p>Lessening the vulnerability of developing countries providing subsidies to WTO dispute settlement proceedings</p>	<ul style="list-style-type: none"> <li>- Tired 74</li> </ul> <p>WTO, <i>General Council Chairman – Proposal on an Approach for Special and Differential Treatment: Agreement-Specific S&amp;D Proposals (Divided into Three Categories)</i>, Job3404, 5 May 2003, pp. 30-32, covering Proposal Nos. 46 to 53</p> <ul style="list-style-type: none"> <li>- Para. 48 (Proposal by Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Pakistan, Sri Lanka, Tanzania and Zimbabwe – TN/CTD/W/1), Job3404; Para. 96, 9<sup>th</sup> tired, NGR Chair Compilation</li> <li>- Prop. 49 (Proposal by African Group – TN/CTD/W/3/Rev.2), Job3404; Para. 96, 10<sup>th</sup> and 11<sup>th</sup> tireds, NGR Chair Compilation</li> <li>- Prop. 50 (Proposal by African Group), Job3404; Para. 96, 12<sup>th</sup> tired, NGR Chair Compilation</li> <li>- Para. 51 (Proposal by African Group), Job3404; Para. 96, 13<sup>th</sup> tired, NGR Chair Compilation</li> <li>- Prop. 52 (Proposal by African Group), Job3404; Para. 96, 14<sup>th</sup> tired, NGR Chair Compilation</li> </ul> <p>WTO, <i>Chair of the Negotiating Group on Rules – Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules</i>, TN/RL/W/143, 22 August 2003 (hereafter “NGR Chair Compilation”)</p> <ul style="list-style-type: none"> <li>- Para. 88 (Proposal by India, TN/RL/W/4), NGR Chair Compilation</li> <li>- Para. 89 (Proposals by Brazil, TN/RL/W/5, and India, TN/RL/W/120), NGR Chair Compilation</li> <li>- Para. 96, 2<sup>nd</sup> tired (Proposal by India, TN/RL/W/4), NGR Chair Compilation</li> <li>- Para. 96, 3<sup>rd</sup> tired (Proposal by India, TN/RL/W/4), NGR Chair Compilation</li> <li>- Para. 96, 6<sup>th</sup> tired (Proposal by India, TN/RL/W/4), NGR Chair Compilation</li> </ul> <p>WTO, <i>Ministerial Conference – 2001 Ministerial Decision on Implementation-Related Issues and Concerns</i>, WT/MIN(01)/17, 20 November 2001</p> <ul style="list-style-type: none"> <li>- Para. 10.2</li> <li>- Para. 10.5</li> <li>- Para. 10.6</li> </ul> <p>WTO, <i>Brazil – Contribution to the Discussion on the Framework for Disciplines on Fisheries Subsidies</i>, TN/RL/W/176, 31 March 2005</p> <ul style="list-style-type: none"> <li>- Para. 24(ii)</li> </ul>
<p>Minimizing the vulnerability of developing</p>	<p>WTO, <i>Secretariat – Compilation of Outstanding Implementation Issues Raised by Members: Revision</i>,</p>

countries providing subsidies to the imposition of countervailing measures by other WTO Members	<p>Job(01)/152/Rev.1, 27 October 2001. This compilation has incorporated by reference into the negotiating mandate under the Doha Work Programme pursuant to Paragraph 12 of the 2001 Doha Ministerial Declaration and Paragraph 13 of the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns.</p> <ul style="list-style-type: none"><li>- Tired 66</li><li>- Tired 71</li></ul>
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**ANNEX 2: IMPLEMENTATION OF S&D PROVISIONS IN THE SCM  
AGREEMENT**

**Excerpt from WTO Secretariat Note Entitled  
“Information on the Utilisation of Special and Differential Treatment  
Provisions”**

**WT/COMTD/W/77/Rev.1/Add.4, 7 February 2002, pp. 37-42**

<b>Provision</b>	<b>Utilisation</b>
<b>Agreement on Subsidies and Countervailing Measures: Provisions under which WTO Members should safeguard the interests of developing country Members</b>	
<i>Article 27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members</i>	
<i>Article 27:15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of 27:10 and 27:11 as applicable to the developing country Member in question.</i>	No such request has been received by the SCM Committee.
<b>Agreement on Subsidies and Countervailing Measures: Flexibility of commitments, of action, and use of policy instruments</b>	
<i>Article 27, paragraph 2(a) The prohibition of paragraph 1 (a) of the Article 3 shall not apply to developing country members referred to in Annex VII. Annex VII (Developing Country Members, referred to in paragraph 2(a) of Article 27) The developing country Members not subject to the provisions of Article 3:1(a) under the terms of Article 27:2(a) are: (a) Least-developed countries designated as such by the United Nations which are Members of the WTO. (b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to Article 27.2(b) when GNP per capita has reached \$1,000 per annum; Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe</i>	
<i>Article 27.4: please refer to following section.</i>	
<i>Article 27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of Article 27:2 through 27:5. The relevant provisions in such a case shall be those of Article 7.</i>	This provision has been invoked in the dispute settlement context. (WT/DS/46/R) In the context of a dispute between a developing country Member and a developed-country Member, the Panel held that Article 27 does not displace Article 3.1(a) of the SCM Agreement unconditionally, but, rather, that the exemption for developing countries from the application of the

Provision	Utilisation
	<p>Article 3.1(a) prohibition on export subsidies is conditional on compliance with the provisions in Article 27.4. This finding was not appealed. A report by the Appellate Body held that, " it is clear that the conditions set forth in paragraph 4 [of Article 27] are <i>positive obligations</i> for developing country Members, <i>not</i> affirmative defences." It concurred with the Panel Report which stated that "it is for the complaining Member to demonstrate that the developing country Member in question is not in compliance with at least one of the elements laid out in Article 27.4." (See WT/DS46/R and WT/DS46/AB/R)</p>
<p>Article 27:8 <i>There shall be no presumption in terms of Article 6.1 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of Article 27:9, shall be demonstrated by positive evidence, in accordance with the provisions of Article 6:3 through 6:8.</i></p>	<p>In the context of a complaint by two developed country Members concerning subsidies provided by one developing country Member, the Panel held that because there was more than 5 per cent subsidization of the product at issue (one of the forms of subsidization referred to in Article 6.1), a serious prejudice claim could be brought against the subsidizing developing country Member on the basis of positive evidence. The Panel went on to find that, on the basis of the positive evidence, the developing country Member's subsidies at issue had caused serious prejudice, through significant price undercutting, to the interests of one of the complainants. (WT/DS54/R-WT/DS55/R-WT/DS59/R-WT/DS64/R). [Note: Pursuant to Article 31, Article 6.1 applied for a period of five years from the date of entry into force of the WTO Agreement, and could have been extended for a further period by consensus of the SCM Committee. At the end of the five-year period, no such consensus was reached.]</p>
<p>Article 27:9 <i>Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in Article 6:1, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.</i></p>	<p>This provision has not been invoked so far in the dispute settlement context.</p>
<p>Article 27:10 <i>Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that: (a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or (b) the volume of the subsidized imports represents less than 4 per cent of the total</i></p>	

Provision	Utilisation
<p><i>imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.</i></p>	
<p><i>Article 27:11</i>  <i>For those developing country Members within the scope of Article 27:2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in Article 27:10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.</i>  <i>(Article 27.10(a): Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that: the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis).</i></p>	<p>Six of the countervailing duty legislative notifications submitted to the Committee include provisions relating to such favourable treatment. Additionally, 27 Members have notified the Committee that the full text of the Agreement on Subsidies and Countervailing Measures has been incorporated into their domestic legal systems.</p>
<p><i>Article 27:12</i>  <i>The provisions of Article 27:10 and 27:11 shall govern any determination of de minimis under Article 15:3.</i></p>	
<p><i>Article 27:13</i>  <i>The provisions of Part III (Actionable Subsidies) shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.</i></p>	<p>The Committee received and discussed one notification made pursuant to this provision. (G/SCM/N/13/BRA and Corr.1)</p>
<p><b>Agreement on Subsidies and Countervailing Measures: Transitional time periods</b></p>	
<p><i>Article 27.2 (b)</i>  <i>The prohibition of Article 3.1(a) shall not apply to: other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in Article 27:4.</i></p>	<p>This provision has been invoked in the dispute settlement context. (WT/DS/46/R) (See comment on Article 27.4 in the following section)</p>
<p><i>Article 27.3</i>  <i>The prohibition of Article 3.1(b) shall not apply to developing country Members for a period of</i></p>	<p>Four developing country Members have invoked this provision when notifying pursuant to Article 25.</p>

Provision	Utilisation
<p><i>five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement. (Article 27:3)</i></p>	<p>(See G/SCM/Q2/IND/5; G/SCM/Q2/NGA/4; G/SCM/Q2/PHL/5; and G/SCM/Q2/SEN/6)</p>
<p><i>Article 27.4</i>  Any developing country Member referred to in Article 27:2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies, and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the eight-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.</p>	<p>At the Fourth Ministerial Conference, in Doha, Ministers agreed on procedures for requests that were made under SCM Article 27.4 for extension of the transition period for export subsidies. The list of the requests for extensions pursuant to Article 27.4, including requests made on the basis of the procedures in G/SCM/39, are identified in G/SCM/40/Rev.1 and Corr.1.</p> <p>Twenty-two requests have been made on the basis of procedures set out in G/SCM/39. Five other requests have been under Article 27.4.</p>
<p><i>Article 27.14</i>  The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with its development needs.</p>	<p>No such request has been received by the SCM Committee.</p>
<p><i>Article 27.5</i>  A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.</p>	<p>No developing country Member has notified having reached export competitiveness.</p>
<p><i>Article 27.6</i>  Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either (a) on the basis of notification by the developing country Member having reached export competitiveness</p>	<p>The General Council's Decision of 15 December 2000 stated that: "The Committee on Subsidies and Countervailing Measures (SCM Committee) shall examine as an important part of its work all issues relating to Articles 27.5 and 27.6 of the SCM Agreement, including the possibility to establish export competitiveness on the basis of a period longer than two years."  Since February 2001, extensive discussions have</p>

<b>Provision</b>	<b>Utilisation</b>
<p><i>or (b) on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purposes of this paragraph, a product is defined as a section heading of the Harmonised System Nomenclature. The Committee is to review the operation of this provision (i.e Article 27:6) five years from its date of the entry into force.)</i></p>	<p>taken place, primarily on the basis of written submissions by Members. (See G/SCM/W/431; G/SCM/W/433; G/SCM/W/443; G/SCM/W/450-451; G/SCM/W/456-458) G/SCM/W/435-440; G/SCM/W/445-448; G/SCM/W/453;</p> <p>Please refer to the introductory part of this section regarding the proposal made by one Member relating to the implementation of Article 27 as it relates to particular issues concerning developing-country Members with a small percentage share of exports in import markets and in global trade</p> <p>In the context of the mandated review of the operation of Article 27.6, it was noted by developed country members and one developing country Member that the Committee on Subsidies and Countervailing Measures had had no experience to date with the operation of the mechanism for determining export competitiveness in a product, as there had been no notification from any Member that it had reached export competitiveness as defined, nor had any Member requested that the Secretariat perform a calculation to determine whether another Member had reached export competitiveness. Three developed country Members contended that the definition of a product as a product section heading under the Harmonised System was too broad.</p>

**ANNEX 3: DEVELOPING COUNTRY CATEGORIES AND S&D BENEFITS UNDER THE SCM AGREEMENT**

A characteristic of S&D provisions in the SCM Agreement is that they effectively provide for different S&D benefits to developing countries on the basis of specific categories of developing countries.

These developing country “categories” and their corresponding S&D “package” are as follows:

Category	S&D Benefits under Article 27 SCM
Least-developed countries designated as such by the United Nations	Allowed to provide subsidies otherwise prohibited under Article 3:1(a) of the SCM Agreement, <sup>62</sup> and are allowed a longer (eight years) transition period to phase-out subsidies prohibited under Article 31:1(b) from the date of the entry into force of the WTO Agreement (other developing countries have only a five-year transition period with respect to subsidies prohibited under Article 31:1(b)); <sup>63</sup>
Developing country WTO Members whose GNP per capita is less than US\$1,000 per annum <sup>64</sup>	Allowed to provide subsidies otherwise prohibited under Article 3:1(a) of the SCM Agreement for as long as they remain below the US\$1,000 GNP per capita per annum level based on the most recent data from the World Bank. <sup>65</sup> Once they reach the US\$1,000 GNP per capita per annum level, or when they attain export competitiveness <sup>66</sup> in a given product, they will then be required to progressively phase-out their subsidies prohibited under Article 3:1(a) over an eight-year period

<sup>62</sup> Paragraph 10.5 of the 2001 Doha Implementation Decision reaffirmed that LDCs “are exempt from the prohibition on export subsidies set forth in Article 3.1(a) ... and thus have flexibility to finance their exporters, consistent with their development needs.”

<sup>63</sup> By virtue of Paragraph 10.5 of the Ministerial Decision on Implementation Issues and Concerns, the phase-out period starts running from the first year a LDC under this paragraph reaches export competitiveness in an industry: “... *It is understood that the eight-year period in Article 27.5 within which a least-developed country member must phase out its export subsidies in respect of a product in which it is export-competitive begins from the date export competitiveness exists within the meaning of Article 27.6.*”

<sup>64</sup> At the time of the conclusion of the Uruguay Round’s conclusion, these were Bolivia, Cameroon, Congo, Côte d’Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe. See SCM Agreement, Annex VII.

<sup>65</sup> Inclusion in the list in Annex VII(b) of the SCM Agreement was clarified by paragraph 10.1 of the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns. This paragraph essentially states that the WTO Members listed in Annex VII(b) will remain in that list until their GNP per capital reaches US\$1,000 in constant 1990 dollars for three consecutive years based on the most recent data from the World Bank. The methodology for calculating constant 1990 dollars is contained in Appendix 2 of G/SCM/38, 26 October 2001, In addition, Paragraph 10.4 of the Doha Implementation Decision clarified that WTO Members listed in Annex VII(b) who may have reached or exceeded the US\$1,000 threshold for inclusion will be re-included in the list should its GNP per capital fall back below US\$1,000.00.

<sup>66</sup> “Export competitiveness” in a given product exists, under Art. 27.6 of the SCM Agreement, “if a developing country Member’s exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years ... either (a) on the basis of notification by the developing country Member having reached export competitiveness, or (b) on the basis of a computation undertaken by the Secretariat at the request of any Member.”

	<p>from the time they reach the US\$1,000 threshold or, with respect to a specific export subsidy that helped them attain export competitiveness in a given product, from the time that they attained such export competitiveness in such given product.</p>
<p>Developing country WTO Members in which GNP per capita is more than US\$1,000 per annum, with two (2) sub-categories:</p> <p>(i) Those developing countries who may benefit from expedited procedures for transition period extension requests under G/SCM/9 – i.e. developing countries providing export subsidy programmes in the form of full or partial exemptions from import duties and internal taxes (which subsidies were in existence not later than 1 September 2001) whose share in world merchandise export trade is not greater than 0.10% and whose total Gross National Income (GNI) for 2000 as published by the World Bank was at or below US\$20 billion;<sup>67</sup> and</p> <p>(ii) Those developing countries that would not be eligible for the procedure set out in G/SCM/9 and whose requests for extension of the transition period would therefore follow the normal procedure set out in Article 27.4</p>	<p>Provided with an eight-year progressive phase out period for the subsidies prohibited under Article 3:1(a) from the date of entry into force of the WTO Agreement.</p> <p>Developing countries falling under this category may request for time-limited extensions of the phase-out period, with such extensions as may be granted being made subject to an annual review by the SCM Committee to determine the necessity of maintaining the subsidies.</p>

<sup>67</sup> In Paragraph 10.6 of the 2001 Doha Implementation Decision, the Ministerial Conference had directed the SCM Committee to extend the transition period for such developing countries with respect to certain export subsidies that they were providing pursuant to the procedures set forth in G/SCM/9, 20 November 2001.

**ANNEX 4: LEGAL INSTRUMENTS RELEVANT TO THE NEGOTIATING  
MANDATE CONCERNING FISHERIES**

**The WTO Doha Ministerial Declaration<sup>68</sup>**  
adopted on 14 November 2001

**Market access for non-agricultural products**

16. We agree to negotiations which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without a priori exclusions. The negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments, in accordance with the relevant provisions of Article XXVIII bis of GATT 1994 and the provisions cited in paragraph 50 below. To this end, the modalities to be agreed will include appropriate studies and capacity-building measures to assist least-developed countries to participate effectively in the negotiations.

**WTO rules**

28. In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31.

**Trade and environment**

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

- (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
- (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.

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<sup>68</sup> WT/MIN(01)/DEC/1

**ANNEX 5: FOOD-DEFICIT DEVELOPING COUNTRIES**

<b>The List of Low Income Food Deficit Countries (FAO)<sup>69</sup></b>	
	China, India
<i>Single Commodity Dependent</i>	Afghanistan, Benin, Burkina Faso, Burundi, Chad, Comoros, Côte d'Ivoire, Cuba, Ethiopia, Ghana, Guatemala, Guinea-Bissau, Honduras, Kenya, Kiribati, Malawi, Mali, Nicaragua, Rwanda, Sao Tome and Principe, Tanzania, Uganda, Vanuatu
<i>Non-Commodity Dependent</i>	Angola, Bangladesh, Bhutan, Bolivia, Cambodia, Cameroon, Cape Verde, Central African Republic, Congo, Dem Republic of, Congo, Republic of, Djibouti, Ecuador, Egypt, Equatorial Guinea, Eritrea, Gambia, Guinea, Haiti, Indonesia, Korea, Dem People's Rep, Laos, Lesotho, Liberia, Madagascar, Maldives, Mauritania, Mongolia, Morocco, Mozambique, Nepal, Niger, Nigeria, Pakistan, Papua New Guinea, Philippines, Samoa, Senegal, Sierra Leone, Solomon Islands, Somalia, Sri Lanka, Sudan, Swaziland, Syrian Arab Republic, Togo, Tuvalu, Yemen, Zambia
<b>WTO's Net Food-Importing Developing Countries – NFIDCs</b>	
Barbados, Botswana, Côte d'Ivoire, Cuba, Dominican Republic, Egypt, Honduras, Jamaica, Kenya, Mauritius, Morocco, Pakistan, Peru, Saint Lucia, Senegal, Sri Lanka, Trinidad and Tobago, Tunisia, Venezuela	

**Source:** Prabhu Pingali and Randy Stringer, *Food Security and Agriculture in the Low Income Food Deficit Countries: 10 Years After the Uruguay Round* (FAO, 2003)

<sup>69</sup> The list of low-income food-deficit countries (LIFDCs) was developed by FAO in the late 1970s to assist in analysing and discussing food security issues. LIFDCs are currently defined as nations that are:

- poor -- with a net income per person that falls below the level used by the World Bank to determine eligibility for IDA assistance. At present, that means that their net income amounts to less than US\$1,395 per person.
- net importers of food -- with imports of basic foodstuffs outweighing exports over the past three years. In many cases, particularly in Africa, these countries cannot produce enough food to meet their all their needs and lack sufficient foreign exchange to fill the gap by purchasing food on the international market.

**Source:** FAO Website (<http://www.fao.org/focus/e/SpeclPr/LIFDCs.htm>)

**ANNEX 6: ACRONYMS**

Distant Water Fishing Nations	DWFN
Doha Development Agenda	DDA
Doha Ministerial Declaration	DMD
Doha Work Programme	DWP
Food and Agriculture Organization of the United Nations	FAO
Illegal, Unreported and Unregulated	IUU
Low-Income Food-Deficit Countries	LIFDCs
Multilateral trading system	MTS
Non-Tariff Barriers	NTBs
Sanitary and Phyto-Sanitary Measures	SPS
Small Island Developing States	SIDS
Special and Differential Treatment	S&DT
Subsidies and Countervailing Measures	SCM
Technical Barriers to Trade	TBT
United Nations Environmental Programme	UNEP
World Trade Organisation	WTO
WTO Negotiating Group on Market Access	NGMA
WTO Negotiating Group on Rules	NGR