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ARTICLE

THE FISHERIES SUBSIDIES NEGOTIATIONS IN THE WORLD TRADE ORGANIZATION: A "WIN-WIN-WIN" FOR TRADE, THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

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INTRODUCTION

In November 2001, trade ministers from more than 140 countries met at the Fourth Ministerial meeting of the World Trade Organization (hereinafter “WTO”) in Doha, Qatar to establish an ambitious agenda for new global trade talks. Among the decisions made in Doha was a commitment to begin negotiations that “aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.” The negotiations represent a

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1 WT/MIN(01)/DEC/1 (Nov. 20, 2001) (Ministerial Declaration, adopted on Nov. 14, 2001) (Doha Declaration), para. 28. While the negotiations on fisheries subsidies are taking place in the WTO Negotiating Group on Rules (the WTO negotiating group addressing the negotiating mandate for clarifying and improving disciplines under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) more generally), the Doha Declaration expressly acknowledges the link to the WTO’s work

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considerable milestone for the WTO. The preamble to the Marrakesh Agreement establishing the WTO states that its goals include “the optimal use of the world’s resources in accordance with the principles of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so.” By launching a trade negotiation based on concerns for environmental conservation and sustainable development -- not merely traditional trade concerns -- the WTO took a concrete step toward realizing that goal.

The United States has long been a strong advocate of WTO action on harmful fisheries subsidies, and a successful outcome of those negotiations is a key element in the United States’ trade and environment agenda. Subsidies that contribute to overfishing and overcapacity not only distort trade; they also contribute to depletion of the world’s fisheries resources and make it more difficult for developing countries to develop their own fisheries resources to feed their people. As U.S. Trade Representative Robert B. Zoellick has stated, “[b]y improving WTO disciplines on harmful fisheries subsidies, we can give a concrete, real world demonstration that trade liberalization benefits the environment and contributes to sustainable development.” Significantly, environmental non-governmental organizations such as the World Wildlife Fund (hereinafter “WWF”) have identified work on improving subsidy disciplines as a high priority and pressed for the WTO to address the issue.

To achieve a successful outcome in the negotiations, the United States is working closely with a broad coalition of de-
veloped and developing countries, including Australia, Argentina, Chile, Ecuador, Iceland, New Zealand, Peru, and the Philippines. Most recently, the European Communities has weighed in on the side of improving disciplines, drawing in large part on its difficult experience in reforming its Common Fisheries Policy. China, too, has played an active role, generally supporting the proponents' efforts. It should be noted, however, that several key WTO Members – notably Japan and Korea – continue to question the link between subsidies and environmental harm and argue that the problems of the fisheries sector are better addressed in other fora.

This paper provides a brief overview of the fisheries subsidies issue and its history in the WTO. It then reviews the key elements of the United States' position in the WTO negotiations and identifies some of the principal issues WTO Members will have to address in considering improved disciplines on fisheries subsidies.

I. THE SUBSIDIES PROBLEM AND WHY THE WTO IS ADDRESSING IT:"TOO MANY BOATS CHASING TOO FEW FISH"

According to the UN Food and Agriculture Organization (hereinafter “FAO”), over twenty-five percent of the world's fisheries are overexploited and depleted, and other fisheries are likely to suffer similar declines if present trends continue. Overcapacity and overfishing have many causes (prominently including ineffective fisheries management regimes in many cases), and a multifaceted approach is clearly needed. The United States is actively addressing the fisheries management aspects of the problem in a number of fora, including the FAO and international and regional fisheries management organizations.

For some time, however, there has been broad consensus that high levels of government subsidization to the fisheries

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7 See TN/RL/W/88 (China) (May 1, 2003).
8 See TN/RL/W/52 (Japan) (Feb. 6, 2003), TN/RL/W/69 (Korea) (Mar. 18, 2003).
sector play a significant role — at the very least, in exacerbating management failures and in making solutions more difficult. While obtaining precise data concerning subsidy levels presents numerous challenges – in part because of lack of transparency in subsidy regimes, in part because of definitional uncertainties and other technical complexities – the general scale of subsidization is reasonably clear. Global levels of subsidies are conservatively estimated at between ten and fifteen billion dollars annually.10 Since the total value of world capture (wild) fishery harvests have fluctuated between seventy and eighty billion dollars from 1993 to 1999, it is reasonable to conclude that these global levels of subsidies constitute between fifteen and twenty percent of aggregate dock-side revenues.11

The United States believes that subsidies at these high levels operate to reduce fixed and variable costs, enhance revenues and mitigate risks. They therefore encourage even more added effort and investments in overfished and depleted fisheries, which tend to predominate in the developed world. Further, once a fishery is overfished, subsidized vessels turn to previously unexploited or uneconomic fisheries or go further offshore, often to the fishing grounds of developing countries. Overfishing on the part of subsidized distant water fleets thus makes it more difficult for developing countries — already strapped for resources — to develop their own fisheries.12

Shortly after the founding of the WTO in 1994, the WTO Committee on Trade and Environment (hereinafter “CTE”) — a

10 The United States has used this estimate in framing the issues in the WTO. See TN/RL/W/21 (United States) (Oct. 15, 2002) at 3, paras. 7-9 and sources cited therein. This informational paper, submitted by the United States in the first phase of the Doha negotiations, provides a brief review of the most frequently cited efforts by intergovernmental bodies to estimate global levels of subsidization (see citations in note 15, infra). See also WT/CTE/W/167 (Note by the Secretariat) (Oct. 16, 2000); R. Steenblik and P. Wallis, “Subsidies to Marine Capture Fisheries: the International Information Gap,” in FISHING IN THE DARK: A SYMPOSIUM ON ACCESS TO ENVIRONMENTAL INFORMATION AND GOVERNMENT ACCOUNTABILITY IN FISHING SUBSIDY PROGRAMMES (World Wildlife Fund, 2001) (available on file with the author, amattice@ustr.gov.) at 30 (concluding that a very rough estimate of subsidies to the fishing industry is around $15 billion a year, based on a combination of estimates from the OECD and APEC studies); World Wildlife Fund Technical Paper, HARD FACTS, HIDDEN PROBLEMS: A REVIEW OF CURRENT DATA ON FISHING SUBSIDIES (Oct. 2001) (on file with the author); D. Pauly, et al., “Towards sustainability in world fisheries,” NATURE, No. 418, 689-695 (Aug. 8, 2002) (on file with the author).


12 Id. at para. 10.
non-negotiating body created to explore the environmental implications of trade – began discussions on the role subsidies play in the fisheries sector. During the same period, the FAO began to give considerable attention to the role of subsidies. The FAO International Plan of Action (hereinafter “IPOA”) (1999) adopted an International Plan of Action on the Management of Fishing Capacity, which called upon FAO members to reduce and progressively eliminate subsidies that contribute to overcapacity. Studies by other intergovernmental organizations, including the World Bank, the Organization for Economic Cooperation and Development and the Asia Pacific Economic Cooperation (hereinafter “APEC”) forum, attempted to estimate the levels of subsidies worldwide. The United Nations Environmental Programme (hereinafter “UNEP”) also began work on the environmental aspects of fisheries subsidies.

As more attention was focused on subsidies, advocates of reform – including environmental groups such as WWF -- began to focus increasingly on action in the WTO as an important part of an overall solution. The WTO is the intergovernmental institution with the expertise in subsidies as they affect the world trading system. Moreover, while outcomes in other or-

13 The United States contributed actively to these discussions, including through a 1997 analytical paper that explored the environment and trade benefits of removing subsidies in the fisheries sector. WT/CTE/W/51 (United States) (May 19, 1997). See also WTO Committee on Trade and Environment, Note by the Secretariat, WT/CTE/W/80 (Mar. 9, 1998).


ganizations are voluntary (such as the FAO International Plans of Action), WTO rules on subsidies are binding and potentially enforceable through the WTO dispute settlement system.

For these reasons, including fisheries subsidies in a new round of WTO negotiations became a key objective of the United States and other like-minded WTO Members. These Members – known colloquially as the “Friends of Fish” -- began to work together informally as the WTO Third Ministerial meeting at Seattle in 1999 approached. At the WTO High Level Symposium on Trade and Environment (March 15-16, 1999), the United States sought trade and environment “win-wins:” areas in which trade liberalization held particular promise for yielding environmental benefits. As the United States emphasized, “[t]his is an important way that the WTO can, within its mandate, be part of the solution to the world’s pressing environmental problems – helping to level up environmental protection.” The United States identified fisheries subsidies as one of three such “win-wins” and called for the WTO to “move from talk to action.” Prior to the Seattle meeting, the United States joined with other “Friends of Fish” in proposing that as part of a new WTO round “Members agree to eliminate subsidies that contribute to fisheries overcapacity, in view of the fact that they distort trade, seriously undermine sustainable utilization of fish stocks and hamper sustainable development.”

When WTO Members were unable to launch a new round of negotiations in 1999, work on the issue continued in the CTE. The United States and other like-minded countries continued to press for WTO negotiations on fisheries subsidies as a key part of the trade and environment agenda. Other countries, such as Japan and Korea, retained doubts that the WTO was the proper forum to address fisheries issues; rather, they argued that the issues should be addressed in the context of im-

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19 Id. at 1.
20 Id. at 3. The other two potential “win-wins” were environmental goods and services and the elimination of agricultural export subsidies. Id.
21 WT/GC/W/303 (Australia, Iceland, New Zealand, Norway, Peru, Philippines and the United States) (August 6, 1999) at 1, para. 2.
proving fisheries management regimes (for example, through work in the FAO). These countries also questioned whether fisheries subsidies presented problems that were sufficiently unique to justify consideration in a distinct negotiation.22

In July 2000, the United States presented a paper in the CTE that reviewed in some detail the international debate on the environmental and trade implications of fisheries subsidies.23 The United States sought to identify the general types of subsidy programs that could have harmful effects on the environment and cause trade distortions, i.e., those that reduced fixed and variable costs and/or supported incomes and prices, and to distinguish programs that did not have such harmful effects, e.g., those that facilitated the transition to sustainable fisheries.24 In response to Japan and Korea, the United States observed that while the degree of environmental harms caused by subsidies could depend upon the management regime, the large majority of environmentally-harmful subsidies were given to fleets that operated under less than perfect management, and thus had undesirable implications to one degree or another for resource conservation.25

A. OVERVIEW OF RELEVANT PROVISIONS OF THE WTO SCM AGREEMENT

The subsequent successful inclusion of fisheries subsidies in the Doha negotiation thus followed years of extensive debate in the CTE. Before turning to a discussion of the United States' specific contributions to date, it may be useful to provide a brief overview of the current framework for addressing subsidies under the WTO Subsidies and Countervailing Measures ("SCM") Agreement. Article 1 of the SCM Agreement de-

22 See WT/GC/W/221 (Japan) (June 28, 1999); WT/CTE/W/173 (Japan) (Oct. 23, 2000).
23 WT/CTE/W/154 (United States) (July 3, 2000).
24 Id. at 3-5.
25 Id. at 2. The United States distinguished between open access fisheries (those with no effective controls on inputs – e.g., on the number of fishers, the type of gear used, and so on, nor on outputs (the size of the catch) or on participation); regulated open access fisheries (limits on inputs and/or outputs, and possibly some restrictions on participation), and rights-based fisheries (those that have limits on the outputs for the fishery and specified harvest rights for individual participants or well-defined communities). Id. at note 1.
fines a subsidy as a “financial contribution” provided by governments in the form of:

- Direct transfer of funds (e.g., grants, loans, equity infusions);
- Potential transfer of funds (e.g., loan guarantees);
- Forgone government revenues (e.g., fiscal incentives such as tax credits);
- Provision of goods or services (other than general infrastructure);
- Payments to a funding mechanism or to a private body to perform any of the above; or
- Price or import support programs (other than tariffs).26

The subsidy must also confer an economic “benefit” on the recipient.27

Once a subsidy falls within the scope of the SCM Agreement, it can be classified as “prohibited” or “actionable.”28 (A third category of “non-actionable” subsidies, including limited provision for non-actionable “environmental” subsidies, expired in 1999 when WTO Members failed to extend it).29 Different sets of rules and remedies apply to each category. Further, to be “actionable,” a subsidy must meet a “specificity” test, as set forth in Article 2: the subsidy must be “specific to an enterprise or industry or group of enterprises or industries” (as opposed to being broadly distributed in a country).30

The category of “prohibited” subsidies are those presumed to cause trade distortions. This category is currently quite limited (i.e., to those subsidies conditioned on export, or those contingent upon the use of domestic over imported goods), and a WTO Member may neither “grant nor maintain” them.31 In con-

26 WTO SCM Agreement, Article 1.1(a)(1)-(2).
27 Id., Part I (General Provisions), Article 1.1(b).
28 Id., Part II, Articles 3-4 (Prohibited Subsidies); Part III, Articles 5-7 (Actionable Subsidies).
29 Id., Part IV (Non-Actionable Subsidies), Articles 8-9 (expired pursuant to Article 31 (Provisional Application). The expired provisions making certain “environmental” subsidies non-actionable was limited to assistance to promote adaptation of existing facilities to “new environmental requirements imposed by law and/or regulations” (e.g., concerning pollution control), subject to specified conditions. See Article 8.2(c).
30 Id. at Articles 1.2, 2.
31 Id. at Articles 3.1(a)-(b), 3.2. A “prohibited” subsidy under Article 3 is “deemed” to be “specific” under Article 2. Id., Article 2.3.
contrast, "actionable" subsidies are not directly prohibited; they may, however, be challenged by WTO members under national countervailing duty laws (subject to provisions of the SCM Agreement) or through WTO dispute settlement procedures upon a demonstration of "adverse effects:"
"injury" to a domestic industry, "nullification or impairments" of its benefits under the General Agreement on Tariffs and Trade 1994, or "serious prejudice." These terms are defined in detail through other provisions. For example, "serious prejudice" arises when certain harms are demonstrated (e.g., loss of market share, price undercutting).

The above framework is often referred to in WTO parlance as the "traffic light" system, with prohibited subsidies considered "red light," actionable subsidies "yellow light," and (the now expired) non-actionable subsidies "green light." To add to the imagery, another now expired provision within the category of actionable subsidies (Article 6.1) created a "dark amber" category: i.e., subsidies that fell into four specific categories were presumed to cause "serious prejudice." The effect of the "dark amber" provision was to shift the burden of proof to the subsidizing government. That is, instead of the complaining government's having to prove harm, the subsidizing government must prove that the subsidy did not cause one of the enumerated harms to trade.

Significantly, the "dark amber" and "green" categories were linked together, as they both applied for five years and needed a consensus of WTO Members to be extended, pursuant to Article 31 (which did not occur). The linkage suggests that if WTO Members consider reviving a "green" of non-actionable subsidies in the current negotiations, it should be balanced by a "dark amber" category of strengthened disciplines.

Another provision relevant to the fisheries negotiations is Article 25, which requires WTO Members to provide notifica-
tions of their subsidies falling within Article 1 to the WTO Committee on Subsidies and Countervailing Measures and allows Members to make written requests to other Members for information about such subsidies.\(^{37}\) Many observers have noted that the notification system, to date, has generally not been effective in obtaining transparency and reliable data on fisheries subsidies.\(^{38}\)

B. THE UNITED STATES’ CONTRIBUTION TO THE DOHA NEGOTIATIONS TO DATE

Consistent with the approach in other negotiating groups, the work on fisheries subsidies in the WTO Negotiating Group on Rules in the first phase of the Doha negotiations has consisted of efforts to identify issues that WTO Members will need to address in clarifying and improving disciplines on fisheries subsidies, including identifying the gaps in the current WTO rules. As part of this first phase, eight of the leading proponents of the negotiations, including the United States, submitted a paper in April 2002 that sought to identify in broad outline the reasons why the existing SCM Agreement had not been effective in disciplining fisheries subsidies.\(^{39}\)

As the paper explained, the existing SCM rules (e.g., Article 6.2, Article 16) are designed to address certain types of market distortions associated with subsidized products (such as effects on price and market share in competing markets). A distinctive feature of fisheries subsidies, however, are such subsidies operate to limit non-subsidized participants’ access to shared fisheries resources. That is, subsidies enable subsidized producers to increase their catches to levels beyond those that would otherwise be the case, with the result that non-subsidized producers are limited to lower levels – and in extreme cases there may be no fish to catch because the stock has been depleted. It may, however, be difficult in the fisheries context to determine which industries have been affected and by how much: i.e., “[i]f subsidized fishers deplete a shared

\(^{37}\) Id. at Part VII (Notification and Surveillance), Article 25.

\(^{38}\) See WWF, FISHING IN THE DARK and HARD FACTS, HIDDEN PROBLEMS (cited supra note 11).

\(^{39}\) TN/RL/W/3 (Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines, and the United States) (Apr. 24, 2002).
stock, all other fishers lose access to that stock, not merely those competing alongside the subsid[i]zed product at mar­
et. 40 Thus, it may also be difficult to demonstrate price effects and loss of market share in a particular market in the manner contemplated by the current rules. The paper also noted the “poor quality of fisheries notifications under the SCM Agree­ment, and the inaccessibility of information on government program[s] in the fisheries sector.”41

In this first phase, however, those Members less enthusi­astic about the fisheries negotiations (principally Japan and Korea) continued to deny that there was a significant linkage between fisheries subsidies and harmful trade and conserva­tion effects. These Members appeared to question the Doha mandate itself, arguing both that fisheries subsidies should be subsumed in the broader negotiations on subsidies generally and that the environmental aspects of the problem should be relegated to the regular (non-negotiating) sessions of the CTE.42 In October 2002, the United States contributed an informational paper intended to help meet these objections by reviewing the substantial work done in other fora concerning the adverse trade and conservation effects of fisheries subsidies.43 Japan and Korea remained unconvinced.

However, the ministers at Doha – and later world leaders at the Johannesburg World Summit on Sustainable Develop­ment – had already made clear that the nature of the fisheries subsidy problem required a WTO contribution. It thus became increasingly important to move the discussion forward toward initiating a constructive debate on possible solutions. Accord­ingly, the United States submitted a significant paper in March 2003 (introduced by United States Ambassador to the WTO Linnet Deily).44

The United States suggested that the most useful starting point for such a dialogue would be to consider an adaptation of the existing so-called “traffic light” system in the SCM Agree­ment. The U.S. paper specifically proposed consideration of:

40 Id. at 3-4 (paras. 9-16); see also TN/RL/W/12 (New Zealand) (July 4, 2002).
41 Id. at 3 (para. 8).
42 See, e.g., TN/RL/W/69 (Korea) (March 18, 2003); TN/RL/W/17 (Korea) (Oct. 2, 2002); TN/RL/W/52 (Japan) (Feb. 6, 2003); TN/RL/W/11 (Japan) (July 2, 2002).
43 TN/RL/W/21 (cited in note 11, supra).
A possible expansion of the "red light" category of the subsidies prohibited under the WTO rules to include fisheries subsidies that directly promote overcapacity and overfishing, or have other direct-trade distorting effects (see SCM Agreement, Article 3).

Creation of a "dark amber" category of fisheries subsidies that could either supplement or be independent of the red light approach. That is, subsidies in this category could be presumed to be harmful unless the subsidizing government could affirmatively demonstrate that no overcapacity/overfishing or other adverse trade effects have resulted from the subsidies. If the presumption were not rebutted, the subsidy would be actionable and thus subject to challenge. The "dark amber" category could be modeled on the now expired Article 6.1 of the SCM Agreement (see discussion, supra).

Improvements to the quality of fisheries subsidy notifications under WTO rules (see Article 25 of the SCM Agreement). Such improvements could include provision for more detailed fishery-specific information, including information about relevant management regimes, in order to make notifications of fisheries subsidies under the SCM Agreement more complementary of existing fishery-related information (e.g., on capacity) submitted in other fora.

Seeking ways to draw upon the relevant expertise in other international organizations (such as the FAO) and obtain the views of non-governmental groups, including the fisheries industry and environmental conservation groups.45

The United States also made clear that the target of the negotiations should be harmful subsidies, i.e., those that promote overcapacity and overfishing. The paper acknowledged that other government programs may help to reduce overcapacity and overfishing and contribute to fisheries sustainability, and that these latter programs should not be the focus of improved disciplines.46

Following the United States’ paper, other Members came forward with their own suggestions on ways to move forward in the fisheries subsidy negotiations prior to the September 2003 WTO Ministerial meeting in Cancun, Mexico. Significantly, in

45 Id. at 2-3. paras. 5-8.
46 Id. at 1, note 1.
April 2003, the European Communities weighed in on the fisheries subsidies issue for the first time by presenting a submission that proposed a prohibition on "capacity enhancing" subsidies and, in addition, a category of "permitted" subsidies (presumably non-actionable or "green light"). The EC further suggested that the WTO Secretariat should keep a "scoreboard" of subsidy notifications received, which would be made publicly available. Chile also presented a paper, suggesting "red light" and "amber light" categories, with a potential shift of the burden to the subsidizing Member in the latter case if that Member had not met its notification requirements. Thus, while Japan and Korea remained skeptical, the fisheries subsidies negotiations received a renewed momentum, and there appeared to be an emerging consensus (at least among proponents of the negotiations) that a "traffic light" approach should be explored.

II. CURRENT ISSUES AND STATUS

At Cancun, WTO Members were unable to reach agreement on ways to move forward in the Doha negotiations overall. As of the date of this article, negotiations on fisheries subsidies (as in other areas) have not resumed, as Members continue taking stock of the Cancun outcome. There are indications, however, that the negotiating groups will resume meeting in 2004. It should be noted that the WTO negotiations are a "single undertaking;" that is, results must be achieved in all areas of the negotiations, not merely regarding fisheries subsidies, and must be applicable to all Members.

When the fisheries subsidies negotiations resume, they are likely to move into a more technical phase. One issue to be addressed is how best to develop improved and clarified disciplines on fisheries subsidies that are clear and easily enforceable, yet recognize the many unique features of fisheries (in-
cluding the role of fisheries management schemes) and complement the work of other organizations such as the FAO. It is important both that the WTO contribute constructively to an overall solution, and that it stay within the bounds of its expertise.

Another issue is how to distinguish between harmful subsidies that contribute to overcapacity and overfishing and subsidies that do not have such harmful effects. As indicated above, the United States recognizes that many government fisheries programs have positive rather than negative effects on fisheries resources. At the same time, an open-ended “green light” category could offer many opportunities for abuse. For that reason, the United States has suggested determining the scope of improved disciplines before considering whether carefully targeted exceptions are needed.

Finally, as instructed in the Doha Declaration, WTO Members will need to “tak[e] into account the importance of the [fisheries] sector to developing countries.”\textsuperscript{51} As the negotiations proceed, Members should be prepared to discuss how improvements in fisheries disciplines might apply to developing countries.

Although these issues will likely prove difficult, the negotiations offer the United States and other WTO Members an historic opportunity to help improve the state of the world’s fisheries – and to demonstrate, more broadly, that trade liberalization and environmental protection can and should be complementary goals. For these reasons, the fisheries subsidies negotiations are likely to remain a significant part of the United States’ trade and environment agenda.

\textsuperscript{51} Doha Declaration at para. 28.