



**REFLECTING SUSTAINABLE DEVELOPMENT  
AND  
SPECIAL AND DIFFERENTIAL TREAT-  
MENT FOR DEVELOPING COUNTRIES IN  
THE CONTEXT OF NEW WTO FISHERIES  
SUBSIDIES RULES**

*An Issue and Options Paper*





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

**An Issue and Options Paper**

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The aim of this paper to stimulate discussion by raising issues and options related to potential provisions on special and differential treatment of developing countries in the context of sustainable development and clarified and improved WTO rules on fisheries subsidies.

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## **United Nations Environment Programme**

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For more information regarding UNEP's work on fisheries subsidies, please see <http://www.unep.ch/etb> or contact Anja von Moltke, Economic Affairs Officer, ETB at tel: 41-22-917 81 37, or email [anja.moltke@unep.ch](mailto:anja.moltke@unep.ch)

## Table of Contents

<i>Acknowledgements</i> .....	<i>iii</i>
<i>United Nations Environment Programme</i> .....	<i>iv</i>
<i>Abbreviations</i> .....	<i>vi</i>
<i>I. Introduction</i> .....	<i>1</i>
<i>II. Sustainable Development and Developing Countries</i> .....	<i>3</i>
<i>III. Role of Fisheries in Developing Countries</i> .....	<i>4</i>
A. Fisheries as a Source of Livelihood .....	<i>4</i>
B. Fisheries Contribute to Food Security .....	<i>5</i>
C. Fisheries as a Source of Export Earnings .....	<i>6</i>
D. The Multifunctionality of Coastal Areas .....	<i>8</i>
E. Prospective Importance of Fisheries.....	<i>9</i>
<i>IV. Relevance of the Fisheries Subsidies Negotiations for Developing Countries</i> .....	<i>10</i>
<i>V. Curbing Trade Distorting and Capacity Enhancing Subsidies</i> .....	<i>11</i>
<i>VI. Making Sustainable Development-based S&amp;D Operational in the Fisheries Subsidies Negotiations</i> .....	<i>13</i>
A. Developing Countries' Experience with S&D in the WTO .....	<i>13</i>
B. Developing Countries' Experience with S&D in the SCM Agreement .....	<i>14</i>
C. Possible Elements for S&D Treatment in the SCM Agreement .....	<i>16</i>
<i>VII. Applying the Suggested S&amp;D Elements to Fisheries Subsidies</i> .....	<i>17</i>
A. Possible Elements for Fisheries Subsidies-Specific S&D .....	<i>17</i>
B. Possible Options to Make Fisheries Subsidies S&D Treatment Operational .....	<i>20</i>
Option 1. Definition of a "Subsidy" .....	<i>20</i>
Option 2. "Prior Authorisation" Regime .....	<i>21</i>
Option 3. Positive List Approach to Subsidies that Developing Countries May Apply ...	<i>22</i>
Option 4. "De Minimis" Approach .....	<i>23</i>
Option 5. Sustainable Development-Based S&D Eligibility Criteria Approach.....	<i>24</i>
(a) Only Developing Countries as S&D Beneficiaries.....	<i>24</i>
(b) Sustainable Development-Related Eligibility Criteria for S&D Beneficiaries .....	<i>24</i>
C. Options for Criteria-Based S&D Treatment for Fisheries Subsidies .....	<i>27</i>
D. Preserving the Benefits of S&D for the Beneficiaries.....	<i>28</i>
E. Providing for Positive Measures on Technical Assistance and Capacity Building.....	<i>28</i>
F. Transitioning Out of Fisheries Subsidies S&D Treatment.....	<i>28</i>
<i>VIII. Conclusion</i> .....	<i>29</i>
<i>IX. References</i> .....	<i>30</i>
<i>Annex 1: Categories of SCM-Related S&amp;D Proposals from Developing Countries</i> .....	<i>33</i>
<i>Annex 2: Implementation of S&amp;D Provisions in the SCM Agreement</i> .....	<i>37</i>
<i>Annex 3: Developing Country Categories and S&amp;D Benefits under the SCM Agreement</i> .....	<i>43</i>

## *Abbreviations*

ASCM	Agreement on Subsidies Countervailing Measures
CTE	Committee on Trade and Environment
DMD	Doha Ministerial Declaration
DSU	Dispute Settlement Understanding
DWF	Distant-Water Fleet
DWP	Doha Work Programme
EEZ	Economic Exclusive Zone
FAO	Food and Agriculture Organization
GDP	Gross Domestic Product
GRT	Gross Registered Tonnage
IUU	Illegal, Unreported, and Unregulated
LDC	Least Developed Country
LIFD	Low Income Food-Deficit Countries
NGMA	Negotiating Group on Market Access
NGR	Negotiating Group on Rules
NTB	Non-Tariff Barrier
RFMO	Regional Fisheries Management Organization
S&D	Special and Differential
SCM	Subsidies and Countervailing Measures
SIDS	Small Island Developing State
SPS	Sanitary and Phyto-Sanitary
TBT	Technical Barriers to Trade
UNEP	United Nations Environment Programme
WTO	World Trade Organization



## 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-quarters 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 context of the current Agreement on Subsidies and Countervailing Measures (SCM), 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 agree to negotiations, without prejudging their outcome on:

X X X

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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 (except for aquaculture), such as freshwater or marine fish, crustaceans and molluscs caught or obtained in territorial inland or coastal waters, Exclusive Economic Zones (EEZs), or on the high seas, and whether fresh or frozen, smoked, canned or otherwise processed.

<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.

***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<sup>4</sup> and least-developed<sup>5</sup> 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 S&D treatment 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 will then 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.

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<sup>4</sup> For the purposes of this paper, “developing countries” as those countries that are Member States of the Group of 77 and China or of the Non-Aligned Movement (NAM). All other countries are considered “developed countries.”

<sup>5</sup> For the purposes of this paper, “least-developed countries” as those countries designated as such by the United Nations.

## **II. Sustainable Development and Developing Countries**

The achievement of sustainable development is a fundamental policy and institutional objective of the 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>6</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>7</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.

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

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<sup>6</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>7</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.

### **III. Role of Fisheries in Developing Countries**

Fishing is an economic activity of crucial importance that 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 making and mending nets, as well as in 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 the fish. Women are also predominantly responsible for the link between production and consumption, because of their role in marketing the fish.<sup>8</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 advancement, particularly for women.<sup>9</sup>

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 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

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<sup>8</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>9</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).

social stability makes it a sector of extreme strategic importance in many countries.<sup>10</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 contribution of fish to domestic food security implies that the sustainability of and long-term access to these fish stocks is of great importance to developing countries.

Fish production and trade also contribute largely to household income in developing countries, making the sector a fundamental contributor to food security in the way that the revenue generated from the sale of fish and fish products allows many families to purchase other items of food. In addition, fisherfolk 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>11</sup>. While the world average apparent consumption of fish in 2002 was estimated at 16.2kg per person<sup>12</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>13</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 rich countries, it represents 50% or more of animal protein in several 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%. For governments, fish can be seen as a cheap source of protein that can enormously contribute, even if consumed in small amounts, to the fight against food insecurity and hunger.

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<sup>10</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 in 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>11</sup> FAO, *State of World Fisheries and Aquaculture* (2004), Table 1, Part 1.

<sup>12</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.

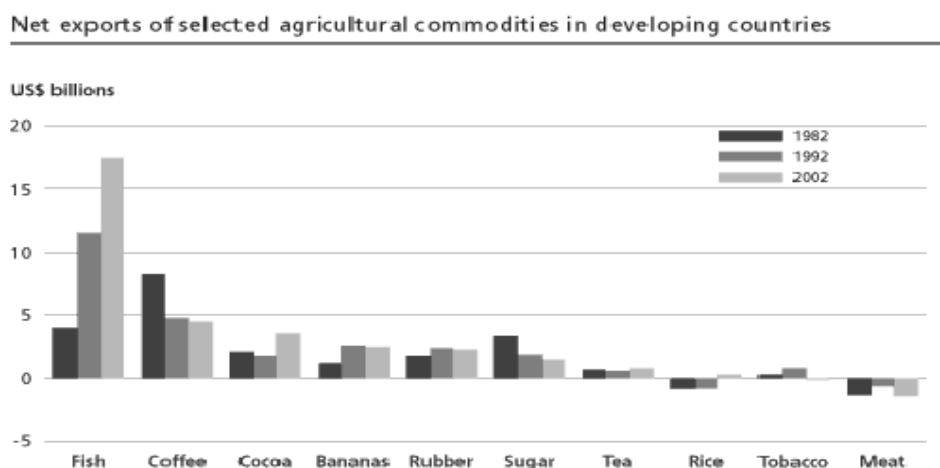
<sup>13</sup> Stefania Vannuccini, *Overview of fish production, utilization, consumption and trade* (based on 2002 data)(FAO, 2004), Appendix I.

### 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 the world production of fish and for 38% of the production that 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>14</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<sup>15</sup> from developing countries as shown by the figure below.

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 is often the major source of export earnings. In fact, fish exports as a total of agricultural exports can be extremely high in several developing nations such as Maldives (99.9%), Seychelles (99%), 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 as well as Bangladesh, Namibia, Senegal, and Panama.<sup>16</sup>

<sup>14</sup> Fish exports less fish imports.

<sup>15</sup> It is worth mentioning that fish products are not defined as agricultural products in the WTO and are not subject to the specific disciplines of the WTO Agreement on Agriculture (see Annex 1 of the Agreement for a list of agricultural products).

<sup>16</sup> Stefania Vannuccini, *Overview of fish production, utilization, consumption and trade* (based on 2002 data) (FAO, 2004), Appendix 6 (*The relative importance of trade in fishery products in 2002*).

The contribution of fish production to developing countries' GDP is estimated to be significant, despite the difficulties in calculating its exact value. The contribution is very high in small island developing states (33.56% for the Maldives) and can be as high as 10% in Cambodia (capture fisheries only) and 5.77% in Laos (aquaculture only).<sup>17</sup> Shrimp production employs about 100,000 workers in Madagascar and corresponds to 7% of GDP.<sup>18</sup> Nevertheless, it is widely accepted that this contribution could be even higher since problems of data reliability difficulties in capturing the economic value of subsistence fishing produce inaccurate estimates

To these earnings, one must also add the substantial earnings derived from compensatory fees paid under access agreements (access fees) that many developing countries have concluded with Distant Water Fishing Nations (DWFN). Several nations in Africa and the Pacific region have settled 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>19</sup> for a single year and their weight within poor nations' overall government financing is often very high. The contribution of financial transfers under access agreements represented more than 60% of overall government revenues in Guinea Bissau.<sup>20</sup>

However, as Table 1 below indicates, there continue to be fewer developing countries than developed countries in the top 20 exporters of fish commodities. Of the top 20 exporters in 2002, only eight were developing countries, accounting for 30.40% of total world fish commodity exports (down from 31.25% in 2001). Twelve were developed countries accounting for 41.10% (up from 40.45% in 2001). Combined, these top 20 exporters accounted for 71.50% of total world fish commodity exports in 2002.

Therefore, while developing countries are now increasingly becoming major exporters of fish products, in competition with both developed and other developing countries for access to global export market opportunities, developed countries continue to capture a dominant share of the global fish commodities export market.

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<sup>17</sup> Shunji Sugiyama, Derek Staples and Simon Funge-Smith, *Contributions of fisheries and aquaculture in the Asia-Pacific region* (FAO, 2004).

<sup>18</sup> World Bank, *Madagascar diagnostic trade integration study* (2003).

<sup>19</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>20</sup> Beatrice Gorez, Coordinator of the Coalition for Fair Fisheries Arrangements (DFFA-CAP)

**Table 1**

<b>Top 20 exporters of fish commodities in 2002 compared to 2001 (US\$ 1 000)</b>			
<b>Country</b>	<b>2001</b>	<b>2002</b>	<b>%</b>
1. <i>China</i>	3 999 274	4 485 274	+ 12.2
2. <i>Thailand</i>	4 039 127	3 676 427	- 9.0
3. Norway	3 363 955	3 569 243	+ 6.1
4. United States of America	3 316 056	3 260 168	- 1.7
5. Canada	2 797 933	3 035 353	+ 8.5
6. Denmark	2 660 563	2 872 438	+ 8.0
7. <i>Viet Nam</i>	1 781 385	2 029 800	+ 13.0
8. Spain	1 844 257	1 889 541	+ 2.5
9. <i>Chile</i>	1 939 295	1 869 123	- 3.6
10. Netherlands	1 420 513	1 802 893	+ 26.9
11. <i>Taiwan Province of China</i>	1 816 865	1 663 821	- 8.4
12. <i>Indonesia</i>	1 534 587	1 490 854	- 2.8
13. Iceland	1 270 493	1 428 712	+ 12.5
14. <i>India</i>	1 238 363	1 411 721	+ 14.0
15. Russian Federation	1 528 022	1 399 369	- 8.4
16. United Kingdom	1 306 042	1 353 123	+ 3.6
17. Germany	1 035 359	1 156 911	+ 11.7
18. France	1 018 843	1 088 572	+ 6.8
19. <i>Peru</i>	1 213 112	1 066 654	- 12.1
20. Korea, Republic of	1 156 132	1 045 672	- 9.6
<b>Sub-total of Top 20 exporters</b>	<b>40 280 176</b>	<b>41 595 669</b>	<b>+ 3.3</b>
Share of Sub-total of Top 20/World	71.7%	71.5%	
<b>Sub-total of Top developing country exporters</b>	<b>17 562 008</b>	<b>17 693 674</b>	<b>+0.75</b>
Share of Top developing country exporters/World	31.25%	30.40%	
<b>Sub-total of Top developed country exporters</b>	<b>22 718 168</b>	<b>23 901 995</b>	<b>+5.21</b>
Share of Top developed country exporters/World	40.45%	41.10%	
<b>World total</b>	<b>56 194 631</b>	<b>58 211 139</b>	<b>+3 .6</b>

**Notes:** Italicized country names refer to developing countries.

**Source of basic data:** Stefania Vannuccini, *Overview of Fish Production, Utilization, Consumption and Trade, based on 2002 data*

## **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) that often constitute fragile social and ecological environments. Protection and management of those areas are extremely important to ensure sustainable human and economic development

In such areas, the cultural heritage associated with the sea and fisheries is extremely rich. 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 beach” and cultural tourism contain huge developmental potential.

In some 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 so far have lacked institutional, financial and human capacity to implement proper management and monitoring schemes of fisheries. Investment in 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, such as the use of bottom trawls, that are not adapted to the tropical water seas of developing countries, 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. Developing country governments therefore have a central role to play in the expansion of their fishing activities by focusing not simply on growth of production, but also on implementing management policies to ensure the long-term sustainable exploitation of their stocks.<sup>21</sup>

## **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 for 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>22</sup>

The growth of fish exports from developing countries whose participation in international fish trade had been modest in the past indicates that the arrival of new entrants in commercial fishing activities could lead to growing competition for fish markets. More specifically, it could be a sign of growing competition among developing country producers for shares in high value markets (mostly, developed countries).

Fishing, particularly artisanal fishing, is an industry that requires relatively little investment and technologies, or investment and technologies that can be accessed relatively easily. 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 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 only a few sectors or on primary commodities.

In addition, since fish is a highly perishable food product, it is predominantly traded in its processed form. This requires investment in infrastructure (refrigeration, smoking, canning, and packaging), transport, market research and distribution. Such value-added activities may have

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<sup>21</sup> The need for a “paradigm shift” towards sustainable management of artisanal fisheries is explored in detail in a forthcoming UNEP paper, authored by Sebastian Mathew from ICSF.

<sup>22</sup> Stefania Vannuccini, *Overview of fish production, utilization, consumption and trade*” (based on 2002 data) (FAO, 2004), pp. 6-7.

very positive spill-over socio-economic effects. Moreover, cheaper operating and labour costs in developing countries may 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>23</sup>

#### **IV. Relevance of the Fisheries Subsidies Negotiations for Developing Countries**

The discussions above identify some of the reasons why fisheries can be so central to sustainable development. Consequently, international rules that impinge on trade of fish products have potential important consequences for developing countries. There are two aspects of fish trade that are currently under negotiations 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 may include, *inter alia*, rules of origin, aspects of customs administration and abuse of anti-dumping, sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT). The negotiating mandate for market access is provided in Paragraph 16 of the DMD.

The second negotiation that directly relates 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.<sup>24</sup>

This paper does not cover the market access aspect of the DWP and concentrates only on the latter negotiations, fisheries subsidies.

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 establishing 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.* disciplines providing appropriate incentives for the reduction of fishing capacity and fishing effort and for the implementation of improved management of stocks) and

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<sup>23</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).

<sup>24</sup> This position was reconfirmed in the new Draft Ministerial Text published after the Hong Kong Ministerial Meeting in December 2005. In the Draft text, the Ministers recalled that "appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns." TN/RL/W/195 Note from Chairman 22 November 2005; Ministerial Text also available at: [http://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/final\\_text\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm)

(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 relates to the design of improved disciplines that promote more sustainable fisheries by effectively curbing effort and capacity-enhancing subsidies. This would hopefully create new market access opportunities for developing countries and would provide an incentive for more competitive industries in subsidising developing countries. The second involves 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, they 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 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 fish stocks, but also distort market access opportunities of developing countries and have thereby a direct consequence for human development in those regions.

Moreover, subsidies have led to overinvestment and to a global, 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>25</sup> The idea that fisheries subsidies could lead to overcapacity and overexploitation seems to be widely accepted in the Negotiating Group on Rules and now needs to be translated into well crafted and tight disciplines.<sup>26</sup>

Furthermore, complex 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 result in increased fishing capacity. Marine insurance, management services and government-to-government access fees can provide significant benefits to the recipient fisheries industry. Because of their complexities, such instruments might have to be discussed in the negotiations so as to achieve rules that prevent “box shifting”<sup>27</sup>. The Negotiating Group on Rules is increasingly aware of these complexities<sup>28</sup>.

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<sup>25</sup> UNEP, *Analyzing the Resource Impact of Fisheries Subsidies: A Matrix Approach* (2004), p. 47.

<sup>26</sup> The new Draft Ministerial Text adopted after the Hong Kong WTO Ministerial in December 2005, for the first time explicitly links fisheries subsidies to overcapacity and over fishing, and acknowledges the need for addressing this link.

In that context, the challenge facing negotiators is to establish improved disciplines on fisheries subsidies. The new disciplines should be efficient in curbing harmful subsidies (e.g. capacity-enhancing programmes) and may also provide incentives for the establishment of stock management schemes.

Some WTO members have proposed a broad-based prohibition, elimination and reduction of fisheries subsidies, particularly the most capacity enhancing and trade distorting of them.<sup>29</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. For developing countries, whose financial, human and institutional capacity to engage in the dispute settlement mechanism is very limited, a broad-based *ex ante* prohibition of harmful subsidies would likely be the most efficient way of tackling trade distorting and capacity enhancing subsidies.

However, while developing countries, which are already actively engaged in international fish trade, would immediately benefit from a broad reduction of fisheries subsidies, new disciplines should still provide for flexibility in order to accommodate legitimate subsidy programmes that developing countries may need in order to pursue their environmental and developmental objectives.

For instance, programmes designed to monitor and manage resources, to retrain fishermen affected by the decommissioning of vessels, or to fight against Illegal, Unregulated, or Unreported fishing (IUU) should ideally not be captured under a broad prohibition. Developed and developing countries alike would benefit from the recognition of the legitimacy of such subsidies, which could, for instance, be explicitly enumerated in a list of authorised subsidies.

Similarly, for many developing countries whose fisheries resources are largely underexploited, subsidies may still have a role to play in supporting small-scale and artisanal fishing; creating fishing capacity where it currently does not exist; and promoting local food security. Some developing countries have in fact suggested that new subsidies disciplines should be compatible with poor countries' development needs.<sup>30</sup> This would, to some extent, include authorising an increase in the fishing capacity of developing countries.<sup>31</sup> Such flexibilities could be provided for as special and differential treatment in favour of least developed and other developing countries.

It must be noted, however, that some developing countries, and particularly those that have a well-established fishing industry, might not necessarily favour the adoption of S&D provisions

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<sup>27</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, subsidising WTO members (mostly 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>28</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>29</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>30</sup> See for instance, TN/RL/W/136 by Antigua and Barbuda, Belize, Fiji Islands, Guyana, the Maldives, Guinea, Solomon Island, and Saint Kitts and Nevis, TN/RL/W/176 and TN/RL/GEN/56 by Brazil, as well as TN/RL/GEN/57 by Fiji, Papua New Guinea and the Solomon Islands.

<sup>31</sup> See, for instance, WTO, *Brazil – Contribution to the discussion on the framework for disciplines on fisheries subsidies*, TN/RL/GEN/56, 4 July 2005, at 4.

that allow other developing countries to expand their fishing capacity. The authorisation of subsidies represents a distortion of trade conditions for the developing countries that are already engaged in international fish trade. Likewise, these developing countries that do not wish or cannot grant subsidies will face increasing competition from other developing countries for high value markets.

The complexity of the issues involved will require S&D provisions that are simple and operational, but which capture the divergent views of developed and developing countries.

## **VI. Making Sustainable Development-Based S&D Operational in the Fisheries Subsidies Negotiations**

In 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 Agreement. This short review provides lessons about systemic failures regarding the operationalisation of S&D. In fact, while the scope of S&D discussions in fisheries subsidies is and should remain specific to the fisheries context, drawing on past experience may offer an improved conceptual S&D framework, which can be used as a guideline for the crafting of new S&D provisions in the fisheries subsidies context.

### **A. Developing Countries' Experience with S&D in the WTO**

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>32</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>33</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 should therefore have varying degrees of obligations commensurate to their levels of economic development. 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.

At its core, therefore, 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

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<sup>32</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>33</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.

implement trade, economic, and development policies.<sup>34</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 mere grants of transition periods and technical assistance).<sup>35</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>36</sup>

These broad concerns of 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>37</sup>. However, these are now at a virtual standstill as members diverge on fundamental issues regarding the mandates.

## **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 have not provided the necessary flexibility for developing countries. This is shown in, for example, the general discussions 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.<sup>38</sup> This is a sign that many developing countries have been dissatisfied with the implementation of S&D provisions contained in the Agreement.

Some of the problems mentioned above stem, for instance, from internal contradictions between Article 27 and the rest of the SCM. While this article states that subsidies may play an important role in developing countries’ economic development, it also severely restricts 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.

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<sup>34</sup> The WTO Secretariat classified the S&D provisions contained in various WTO agreements into six types: “(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) 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 (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>35</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>36</sup> *Id.*, para. 9.

<sup>37</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.

<sup>38</sup> These issues are reflected in the “*Compilation of Outstanding Implementation Issues Raised by Members*” (Job(01)/152/Rev.1, 27 October 2001), the 2001 *Doha Ministerial Decision on Implementation-Related Issues and Concerns* (WT/MIN(01)/17, 20 November 2001, paras. 10.1 to 10.6) and the *General Council Chairman’s proposal with respect to Agreement-specific S&D proposals* (Job3404, 5 May 2003, pp. 30-32).

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.<sup>39</sup>

Among the improvements suggested by developing countries, proposals have been submitted with a view to:<sup>40</sup>

1. Expand the range or extent of subsidies that may be provided by developing countries
2. Expand the range or number of developing countries that may be allowed to provide subsidies
3. Lessen the vulnerability of developing countries providing subsidies to WTO dispute settlement proceedings
4. Minimize the vulnerability of developing countries providing subsidies to the imposition of countervailing measures by other WTO Members

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.

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<sup>39</sup> 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* (WT/DS46/R, 2 August 1999) 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.” (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 (Id., para. 7.89).

<sup>40</sup> Please refer to Annex 1 below for a listing of these proposals according to each category of improvement.

## C. Possible Elements for S&D Treatment in the SCM Agreement

In light of past experience with S&D and in light of the suggestions for improvement of the SCM submitted by developing countries, key elements for crafting more effective and operational S&D can be derived. The advantage of identifying key elements for S&D 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 incorporated in any of the approaches proposed to be used in the current fisheries subsidies negotiations ("top down" or "bottom up"), while at the same time providing sufficient guidance as well as flexibility for negotiators to discuss and fine tune any of the operational details thereof.

The following might be seen as possible key elements for S&D in the SCM Agreement:<sup>41</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 transfer obligations from developed to developing countries could also be an

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<sup>41</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.



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 for 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 S&D Elements to Fisheries Subsidies**

### **A. Possible Elements for Fisheries Subsidies-Specific S&D**

Applying the elements identified above to the fisheries subsidies negotiations, the primary objective of S&D treatment within new subsidies disciplines might therefore be to provide flexibility for developing countries to grant subsidies in the pursuit of their development priorities. Fisheries subsidies S&D treatment may then consist in, *inter alia*, granting developing countries access to instruments that would otherwise be prohibited or actionable under the general disciplines agreed. S&D subsidies would be distinct and separate from other allowed subsidies, such as those contained in a possible 'Green Box'.

To safeguard the sustainability of global fisheries, however, such S&D should not consist of a *carte blanche* to allow developing countries to provide any type or any amount of subsidies to their fisheries sector. Such a *carte blanche* approach may foster a 'race' to subsidisation that could have detrimental effects on fish stocks. Any beneficial development effect that providing fisheries subsidies might have for a developing country would ultimately be negated if, in doing so, domestic fish stocks are depleted.

Moreover, it must also be noted that too wide an authorisation of subsidisation may also put at disadvantage those developing countries that either cannot (*e.g.* because of their limited financial capacity) or do not wish to grant subsidies to their fishing industry. In that sense, WTO Members designing new S&D provisions may wish to have regard to the differences among developing countries whose financial capacity and production potential differ enormously.

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 development objectives, while at the same time ensuring that a harmful increase in capacity and the overexploitation of fish stocks as a result of subsidization programmes do not occur. For instance, it could be decided that programmes should be discontinued depending on certain economic and environmental conditions.<sup>42</sup>

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. Market access: the policy flexibility to adopt measures (including subsidies) designed to enable developing countries 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 be particularly important for WTO Members who have not yet developed their fishing industry to a level commensurate to their economic needs;
2. Sustainable development: 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. Conservation and management: The policy flexibility and the resources needed to conserve, sustainably manage and develop the fisheries resources in their waters 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, measures against IUU, etc.; and
4. Technical and financial assistance: 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.

For the operationalisation of these objectives, new WTO fisheries disciplines should therefore accommodate the policy instruments that are needed by, useful for, and accessible to developing countries. The sustainability of the system would however require an arrangement that is fair for all developing countries, particularly those that will choose not to grant subsidies, and that provides an incentive for the improved management of stocks.

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<sup>42</sup> For example, as the development situation of the S&D beneficiary improves or the environmental condition of the fish stock worsens, a progressive tightening of fisheries subsidies disciplines could take place (leading towards the full application of the general disciplines).

The instruments that would be allowed under the new S&D treatment could be drawn from a list and justified because of their design or public policy purpose. In that sense, S&D-authorized subsidies would be distinct and separate from subsidies authorized under a possible 'Green Box'. In fact, S&D is an instrument that covers the specific needs of developing countries (development), which provides a distinct basis for justification if compared to the 'Green Box' (e.g. conservation, management, effort reduction). This reasoning would also justify the fact that only developing countries Members of the WTO would have access to the subsidies provided under S&D.<sup>43</sup>

Finally, S&D provisions should ideally be simple and transparent and they should also, as for the rest of the disciplines in fisheries subsidies, be compatible with the WTO trade mandate and expertise.<sup>44</sup>

The following list is an illustrative, non-exhaustive list of the instruments that could be authorized under S&D treatment, compiled from negotiating proposals submitted by developing countries to the Negotiating Group on Rules as of July 2005:

- (i) Subsidies for infrastructure development and construction, prevention and control of disease, scientific research and training, and fisherfolk skills retraining;<sup>45</sup>
- (ii) Subsidies or fiscal incentives for domestication and fisheries development;<sup>46</sup>
- (iii) Support for the development of small-scale, artisanal fisheries sectors<sup>47</sup>, provided that the fisheries resources accessible to small-scale, artisanal fisherfolk are not threatened by the fishing activity;<sup>48</sup>
- (iv) Payments received from other governments for access to the EEZ fisheries resources of the developing country;<sup>49</sup> or to its quotas or any other quantitative limits

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<sup>43</sup> "Developing countries" are those WTO Members to whom Article 27 of the SCM Agreement is currently applicable.

<sup>44</sup> The 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>45</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., Antigua and Barbuda, Barbados, Dominican Republic, Fiji, Grenada, Guyana, Jamaica, Papua New Guinea, St Kitts and Nevis, St Lucia, Solomon Islands, and Trinidad and Tobago (TN/RL/GEN/57/Rev.2 13 September 2005 para 16.(iv)

<sup>46</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, and TN/RL/GEN/57.

<sup>47</sup> See e.g. WTO Antigua and Barbuda, Barbados, Dominican Republic, Fiji, Grenada, Guyana, Jamaica, Papua New Guinea, St Kitts and Nevis, St Lucia, Solomon Islands, and Trinidad and Tobago (TN/RL/GEN/57/Rev.2 13 September 2005 para 16.(ii)

<sup>48</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). Note that in its most recent submission, Brazil suggested that support to small-scale and artisanal fisheries could be provided under the 'Green Box', and not necessarily as a S&D measure (see TN/RL/GEN/56 at (ii)(a) 'Green Box'). This was also the option proposed by a group of small island states in an earlier proposal (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). A more recent paper from Fiji, Papua New Guinea and the Solomon Islands, suggests, on the contrary, that assistance to artisanal or small-scale fisheries should be authorized under a S&D heading (see TN/RL/GEN/57/Rev.1, 7 July 2005). For more information on the issue of artisanal fishing and its definition in the context of the current WTO negotiations, please refer to David K. Schorr, *Artisanal Fishing: Promoting Poverty Reduction and Community Development Through New WTO Rules on Fisheries Subsidies* (UNEP, 2005).

<sup>49</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)

- (v) established by a Regional Fisheries Management Organization<sup>50</sup>
- (v) Development assistance to developing coastal states;<sup>51</sup>
- (vi) 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>52</sup>
- (vii) 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>53</sup>
- (viii) Subsidies which increase fishing capacity or effort,<sup>54</sup> and
- (ix) Fuel, bait or ice supplied for fishing activities.<sup>55</sup>

## **B. Possible Options to Make Fisheries Subsidies S&D Treatment Operational**

As pointed out above, the need for appropriate S&D treatment stems from the necessity that new disciplines on fisheries subsidies do not impair the current or future ability of 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. Some of the advantages and disadvantages of each option are discussed below. Different combinations of the options presented could also be envisaged since these options are neither mutually exclusive nor exhaustive.

### Option 1. 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

<sup>50</sup> TN/RL/GEN/79, 16 November 2005, para 5.1 (c)

<sup>51</sup> WTO, *Fiji, Papua New Guinea and the Solomon Islands -- Architecture on Fisheries Subsidies Disciplines*, TN/RL/GEN/57, 7 July 2005; Antigua and Barbuda, Barbados, Dominican Republic, Fiji, Grenada, Guyana, Jamaica, Papa New Guinea, St Kitts and Nevis, St Lucia, Solomon Islands, and Trinidad and Tobago (TN/RL/GEN/57/Rev.2 13 September 2005

<sup>52</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); TN/RL/GEN/79, 16 November 2005, para 5.1.ii (d).

<sup>53</sup> See e.g. *id.*, para. 21(ii)(b).

<sup>54</sup> WTO, *Brazil – Contribution to the Discussion on the Framework for Disciplines on Fisheries Subsidies*, TN/RL/GEN/79, 16 November 2005. In its latest proposal, Brazil suggests that this type of S&D treatment should be accessible only to developing countries which are members of a Regional Fishing Management Organisation. Those subsidies should not allow the enhancement of the Member’s fishing capacity beyond the sustainable level of exploitation defined by the limits established under the RFMO. Specifically, these subsidies must fall within one or the two of the following subsidies: (a) subsidies to fishing vessel construction or repair; and (b) subsidies to vessel modernization or gear acquisition or improvement.

<sup>55</sup> TN/RL/W/176 TN/RL/GEN/56 TN/RL/GEN/79.

under the existing definition of "subsidy".<sup>56</sup> For instance, government-to-government access fees paid under access agreements might not represent a subsidy if the agreed new definition of subsidy covers only government-to-industry direct transfers.<sup>57</sup> Similarly, public investment in fishery-related infrastructure might not be seen as being a subsidy if a new definition covers only payments that benefit only an individual industry, and not all economic actors.<sup>58</sup>

While this option may seem attractive because of its simplicity, such an approach may present several shortcomings in effectively disciplining subsidies that have negative effects over trade, fisheries resources and the environment. Firstly, this option is likely to considerably weaken the SCM agreement by introducing exceptions to the definition of subsidy. Secondly, it would leave many harmful subsidies totally unregulated (beyond the scope of the agreement) and could hence undermine the positive impact that new subsidies disciplines could have on the environment. Furthermore, there might be difficulties in clearly delineating which government transfers relevant only for developing countries would be covered by this approach, and which could give rise to implementation difficulties on the part of developing countries.

### Option 2. "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, 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 only be enhanced notification requirements. Non-notified subsidies would be deemed to be harmful or prohibited. These subsidies would remain actionable under the new disciplines<sup>59</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

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<sup>56</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 that confers a benefit to the recipient. 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>57</sup> Small vulnerable coastal states, in their TN/RL/W/136 and TN/RL/GEN/57 submissions, seem to implicitly argue that the definition of "subsidies" should not cover, *inter alia*, access fees paid pursuant to government-to-government fisheries access agreements.

<sup>58</sup> Also refer to 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.

<sup>59</sup> Criteria to dispute such subsidies could be based on current SCM language of "serious prejudice" for instance.

technical competence. 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 of a burden – both administrative and political – on developing countries, and particularly small developing countries. 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.

### Option 3. 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>60</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, as regards the sustainability of the new disciplines, without further conditionality, such a system could still lead to over-capacity and possible depletion of stocks because it is not contingent 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 or "*de minimis*") 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 of a specific fish product or all fish products.

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.

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<sup>60</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.

In the second option, WTO Members could agree that a well-recognized international organization with technical competence in this area develops and implements 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 have a positive or negative impact on the sustainability of fish stocks as a result of increases in fishing capacity and effort.

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 with such an assessment involves the establishment of a clear causal linkage between maintained subsidies, increases in fishing capacity and effort, and the reduction of fish stocks. A related technical difficulty is a lack of data for certain regions and the regional differences in the quality of the data. The political difficulty is that such an assessment would require new institutional arrangements (see below 5(b)).

#### Option 4. "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 subsidies programmes. In addition to fisheries subsidies that may fall inside any agreed-upon "Green Box", developing countries would be free to provide fisheries subsidies as long as the aggregate amount of support granted does not exceed an agreed "*de minimis*" authorised level (ceiling). Fisheries subsidies authorised under the *de minimis* S&D provision could either be drawn from a positive list, 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 either 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 contingent 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 was 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 greatly on pro-active “peer review” and pressure.

#### Option 5. 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 by developing countries 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 for 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” 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, developing countries may benefit from fisheries subsidies S&D provisions only 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>61</sup>. The determination of such a situation could be based on the result of an independent assessment by a well recognised, competent international agency;

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<sup>61</sup> In this connection, Brazil has suggested that a fishery could be considered “patently at risk” if its status of exploitation is “not known or uncertain”, “overexploited”, “depleted”, or “recovering” according to the FAO or by a competent regional or international authority having jurisdiction over the fishery. TN/RL/GEN/79 Brazil, 16 November 2005.



- (ii) They can present a national fisheries resource management regime<sup>62</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 organisations. 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>63</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.

Firstly, regarding the assessment of the state of their fish stocks, WTO Members may be confronted with the difficulty of identifying and mutually agreeing on an external and technically competent international organisation that would be entrusted with the task of defining the operational parameters for and of undertaking such assessments. A mandate could be given to organisations, such as the FAO, UNEP and RFMOs<sup>64</sup> for the definition of a suitable monitoring mechanism.

Of course, such an arrangement would require strengthening and expanding the mandate and activities of existing organisations or creating innovative international agencies, which may prove to be a politically difficult task and in any case a task that goes beyond the current WTO negotiations.

These assessments of the environmental condition of fish stocks would have to be made frequently and repeatedly, 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 (a picture of the 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.

Naturally, the quality and smooth functioning of this option would very much depend on the quality of the assessments and their acceptance by the WTO Membership. The quality of the assessments, in turn, relies largely on the availability of data on developing country fisheries, on specific species and on regions within a single country. The major obstacle to such assessments is that most regions of the world, in stark contrast with a few others, are not thoroughly monitored or when they are, the quality of the data collected is very uneven. Overcoming this technical difficulty will be a determinant factor in evaluating the success of this arrangement.

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<sup>62</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>63</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.

<sup>64</sup> Regional Fisheries Management Organizations (RFMO).

Secondly, approaches to determine a fair share of world export markets 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>65</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.

Moreover, adopting some limiting parameters may be desirable in order to minimize the risk that better-resourced developing countries may implement S&D flexibilities in a manner detrimental to smaller developing countries. Hence, when a developing country reaches a development level from which it is deemed to be in a position to adopt the full-fledged subsidies disciplines, it would have to phase out current subsidies and refrain from implementing additional schemes.<sup>66</sup> 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 authorised (e.g. "Green Box") subsidies, S&D subsidies would be of conditional access.

Nonetheless, 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 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.

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<sup>65</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>)

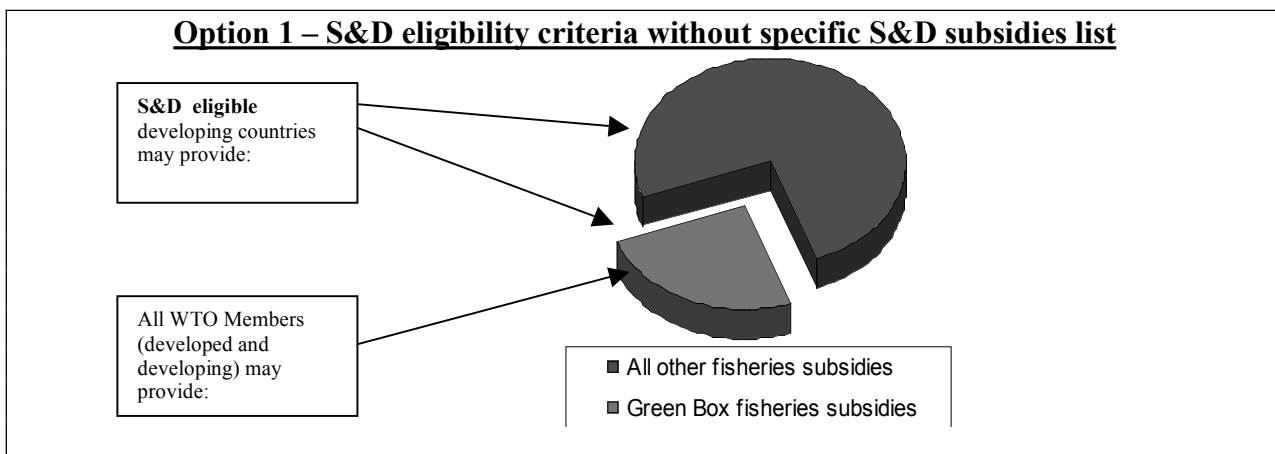
<sup>66</sup> See, e.g., the discussion on transitioning out of S&D treatment in Part VI:F of this paper.

### C. Options for Criteria-Based S&D Treatment for Fisheries Subsidies

The specific 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. In fact, as explained above, the nature of authorised subsidies under the 'Green Box' and those authorised under S&D would be distinct. 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.

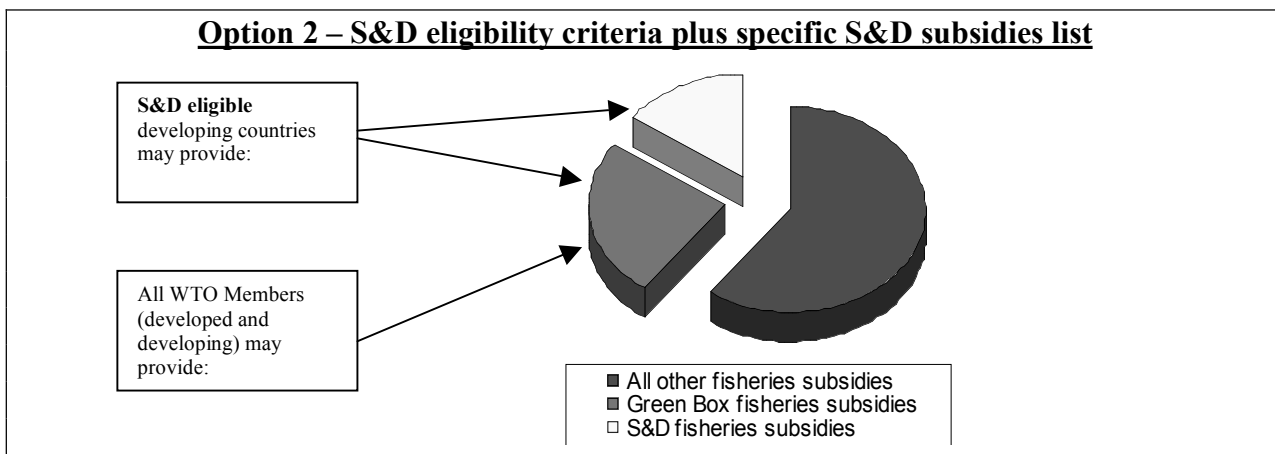
One option could be to allow all developing countries, or only those that meet the sustainable development-based eligibility criteria suggested above, to provide all fisheries subsidies that would otherwise be prohibited or actionable in addition to any agreed-upon subsidies that may be included in any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

**Figure 2**



Another option could be designing an explicit “S&D Box” that would list specific fisheries subsidies, not included in any “Green Box”, that developing countries meeting 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 adequate human, financial and institutional resources, and hence address the development needs of these countries. However, they should not result in IUU fishing, nor should they be allowed to enhance capacity beyond the scientifically determined sustainable level of exploitation.

#### **D. 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, they are not impaired or offset by obligations contained in 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 include their economic and environmental impacts.

#### **E. 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 estimated amount, necessary to develop the beneficiary's domestic fishery industry in line with sustainable development considerations.

#### **F. Transitioning Out of Fisheries Subsidies S&D Treatment**

A fundamental element in ensuring the fairness of fisheries subsidies-specific S&D treatment is the establishment of a transition mechanism that would allow developing countries to gradually move out of S&D treatment towards assuming and implementing more stringent disciplines as and when they are able to do so. Not only is transitioning out of S&D important for the integrity of the S&D concept, but it is also fundamental for the fairness of the system, particularly for smaller developing countries.

In the case of the S&D eligibility criteria suggested above, when a developing country stops to fall under any one of the criteria, 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.

Similarly, should a developing country Member deem itself, or be considered 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>67</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>68</sup>

With respect to the transitioning out of S&D and irrespective of the approach chosen for S&D treatment, 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 offering 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

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<sup>67</sup> Members can negotiate this timeframe. It could be, for instance, 5 years for developing countries and 10 years for LDCs and small vulnerable coastal states.

<sup>68</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.

the negotiations.<sup>69</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>69</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.

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

<b>Category</b>	<b>Relevant Developing Country Proposals or Issues</b>
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 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. 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> tired (Proposal by India, TN/RL/W/4), NGR Chair Compilation</li> <li>- Para. 96, 5<sup>th</sup> tired (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> </ul>

Category	Relevant Developing Country Proposals or Issues
Expansion of the range or extent of subsidies that may be provided by developing countries (cont)	<ul style="list-style-type: none"> <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> <ul style="list-style-type: none"> <li>- Proposal on page 3 thereof</li> </ul>

Category	Relevant Developing Country Proposals or Issues
Expansion of the range or number of developing countries that may be allowed to provide subsidies	<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>
Lessening the vulnerability of developing countries providing subsidies to WTO dispute settlement proceedings	<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 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> </ul>

Category	Relevant Developing Country Proposals or Issues
<p>Lessening the vulnerability of developing countries providing subsidies to WTO dispute settlement proceedings (cont)</p>	<ul style="list-style-type: none"> <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> turrets, NGR Chair Compilation</li> <li>- Prop. 50 (Proposal by African Group), Job3404; Para. 96, 12<sup>th</sup> turret, NGR Chair Compilation</li> <li>- Para. 51 (Proposal by African Group), Job3404; Para. 96, 13<sup>th</sup> turret, NGR Chair Compilation</li> <li>- Prop. 52 (Proposal by African Group), Job3404; Para. 96, 14<sup>th</sup> turret, 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> turret (Proposal by India, TN/RL/W/4), NGR Chair Compilation</li> <li>- Para. 96, 3<sup>rd</sup> turret (Proposal by India, TN/RL/W/4), NGR Chair Compilation</li> <li>- Para. 96, 6<sup>th</sup> turret (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 countries providing subsidies to the imposition of countervailing measures by other WTO Members</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>- Turret 66</li> <li>- Turret 71</li> </ul>

**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</i>	This provision has been invoked in the dispute settlement context. (WT/DS/46/R)

<b>Provision</b>	<b>Utilisation</b>
<p><i>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></p>	<p>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 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><i>Article 27:8</i>  <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).</p> <p>[<u>Note</u>: 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><i>Article 27:9</i>  <i>Regarding actionable subsidies granted or</i></p>	<p>This provision has not been invoked so far</p>

<b>Provision</b>	<b>Utilisation</b>
<p><i>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>in the dispute settlement context.</p>
<p><i>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 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.</p>	
<p><i>Article 27:11</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.  (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).</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>

<b>Provision</b>	<b>Utilisation</b>
<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 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>Four developing country Members have invoked this provision when notifying pursuant to Article 25. (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>  <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</i></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>



Provision	Utilisation
<p><i>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.</i></p>	
<p><i>Article 27.14</i>  <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.</i></p>	<p>No such request has been received by the SCM Committee.</p>
<p><i>Article 27.5</i>  <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.</i></p>	<p>No developing country Member has notified having reached export competitiveness.</p>
<p><i>Article 27.6</i>  <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 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>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 taken place, primarily on the basis of written submissions by Members. (See G/SCM/W/431; G/SCM/W/433; G/SCM/W/435-440; G/SCM/W/443; G/SCM/W/445-448; G/SCM/W/450-451; G/SCM/W/453; G/SCM/W/456-458)</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>

<b>Provision</b>	<b>Utilisation</b>
	<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:

1. Least-developed countries designated as such by the United Nations; and
2. Developing country WTO Members whose GNP per capita is less than US\$1,000 per annum

<b>Category</b>	<b>S&amp;D Benefits under Article 27 SCM</b>
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>70</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>71</sup>
Developing country WTO Members whose GNP per capita is less than US\$1,000 per annum <sup>72</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

<sup>70</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.”

Category	S&D Benefits under Article 27 SCM
	capita per annum level based on the most recent data from the World Bank. <sup>73</sup> Once they reach the US\$1,000 GNP per capita per annum level, or when they attain export competitiveness <sup>74</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 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.

<sup>71</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>72</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>73</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>74</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."







## **Table of Contents**

### **Acknowledgements**

**United Nations Environment Programme**

### **Abbreviations**

### **I. Introduction**

### **II. Sustainable Development and Developing Countries**

### **III. Role of Fisheries in Developing Countries**

### **IV. Relevance of the Fisheries Subsidies Negotiations for Developing Countries**

### **V. Curbing Trade Distorting and Capacity Enhancing Subsidies**

### **VI. Making Sustainable Development-based S&D**

### **Operational in the Fisheries Subsidies Negotiations**

### **VII. Applying the Suggested S&D Elements to Fisheries Subsidies**

### **VIII. Conclusion**

### **IX. References**

**Annex 1: Categories of SCM-Related  
S&D Proposals from Developing Countries**

**Annex 2: Implementation of S&D  
Provisions in the SCM Agreement**

**Annex 3: Developing Country  
Categories and S&D Benefits under  
the SCM Agreement**

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