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The Best of Texts, The Worst of Texts

Will the first draft of new WTO rules on fisheries subsidies be strong? Or will governments just settle for the “weakest common denominator”?



June 2006

This critique was written by WWF Senior Fellow David K. Schorr, with editorial assistance from Aimee Gonzales.

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The Best of Texts, the Worst of Texts:

Will new WTO rules on fisheries subsidies be strong?
Or will governments just seek the “weakest common denominator”?

Table of Contents

Introduction	1
I — The Prohibition: A Solid Barrier. . . or Just Swiss Cheese?	2
1. It's not just the boats . . . (the “effort” issue)	3
2. It's not just “tonnes” and “kilowatts” . . . (the “capacity” issue)	3
3. It's not just the factory ships . . . (the “artisanal fishery” issue)	5
4. It's not just the deep blue sea . . . (the “inland waters” issue)	6
5. It's not just the cash . . . (the “foreign access” issue)	7
6. Please don't feed the pirates . . . (the “IUU” issue)	8
Conclusion to Part I	8
II — Beyond the Prohibition: Real Rules or Laissez-faire?	9
The proposal of Brazil	10
The proposal of Argentina	12
The proposal of the United States	12
The proposal of New Zealand	13
The proposal of the European Communities	13
The proposal of Japan, Korea, and Taiwan	14
Conclusion to Part II	15
III — Enforceability and Transparency: Got Teeth?	16
Enforceability	16
Transparency	18
Conclusion to Part III	20
Overall Conclusion	20
Appendix A — The International Character of Some Inland Fisheries	22
Figure 1: Map of Colombian Amazon Basin	22
Figure 2: Migration patterns of Atlantic salmon	23
Figure 3: Migration patterns of Pacific salmon	23
Figure 4: Lake Victoria showing international boundaries	24
Appendix B — Treatment of Permitted Subsidies	25
Table B-1: Brazil	25
Table B-2: Argentina	26
Table B-3: New Zealand	27
Table B-4: European Communities	28
Table B-5: Japan, Korea, & Taiwan	29
Table 1 — Strength of proposed prohibitions	2
Table 2 — Strength of positions on “permitted” subsidies	10
Table 3 — Strength of positions on enforcement and transparency	20

Introduction

The crucial first draft of new WTO rules on fisheries subsidies is due to be released in just a few weeks. In preparation, governments have tabled a series of technical proposals to say how the new rules should work. The mandate under which they are negotiating—set out by trade ministers at the high-level WTO meeting in Hong Kong last December—is clear: WTO members have committed to adopt rules prohibiting fisheries subsidies that contribute to overcapacity and overfishing, and to do so in a manner that is enforceable, that increases transparency, and that provides effective special treatment for developing countries.¹

This is a tall order, but one which governments have repeatedly promised to fulfill. Indeed, the WTO fisheries subsidies have been identified as a top global priority for achieving sustainable fisheries, and WTO delegations have called the talks “ground-breaking”, “urgent,” and “a unique opportunity”.

Despite the lateness of the hour, and the fact that governments have submitted dozens of formal papers since the fisheries subsidies negotiations began in 2001, only a handful of delegations have so far proposed actual legal language for the new rules: Argentina, Brazil, the European Communities, Japan, New Zealand, and the United States. And in most cases, these texts address only particular sections of the new rules.

Still, these few texts are an important indicator of how WTO delegations are thinking, now that the time has come to transform rhetoric into legal terms. The also will be among the leading sources on which the forthcoming draft text will need to draw.

So how do they stack up? Are we heading for a “win-win’-win” or just more “spin-spin-spin”?

The following pages briefly analyze the recent proposals, seeking to identify the areas where governments are moving towards rules that will really confront subsidized overfishing, and where they are not. Ultimately, the key questions are simple and few:

- Will governments in fact ban the most damaging fisheries subsidies?
- Will governments ensure that the remaining fisheries subsidies are subject to effective rules to ensure they do not encourage overcapacity and fishing?
- Will governments make the rules enforceable, including through mandatory disclosure of useful information about fisheries subsidies programmes?

With the clock ticking, the proposals now on the table give cause for both hope and fear. Read generously and in combination, they contain the seeds of robust and effective new disciplines; read narrowly and separately, they lead towards rules so full of gaps and weaknesses that they would appear designed to fail.

¹ Ministerial Declaration on the Doha Work Programme, 18 December 2005 (WT/MIN(05)/DEC 22 December 2005), Annex D, ¶ 9.

I — The Prohibition: A Solid Barrier. . . or Just Swiss Cheese?

The real-world impact of the new WTO fisheries subsidies rules will depend first on the strength and scope of the ban called for by ministers in Hong Kong. Which subsidies will fall within its prohibition and which will not?





To meet the Hong Kong mandate, the new prohibition will have to cover the full range of subsidies that directly contribute to overcapacity and overfishing. With limited exceptions (including in the context of special treatment for developing countries), this means the ban must be broad enough to cover, at a minimum, subsidies for:

- vessel construction or repair
- vessel modification (including “modernization” and “renovation”)
- acquisition or improvement of fishing gear
- acquisition of fuel, ice, bait, or other inputs to fishing activities
- offsetting other operating costs, such as wages and insurance
- production *per se* (e.g., price supports, or subsidies contingent on fishing)

In addition, an effective prohibition must apply to all relevant fisheries, without arbitrary limitations based on geography or other factors.

Table 1 — Strength of proposed prohibitions
(not considering special treatment for developing countries)

		NZ (+ US?)	Brazil (+Arg?)	EC	Japan et al
Capacity- enhancing	Vessel Construction				
	Vessel Modification				
	Engines				
	Gear			?	?
Effort- enhancing	Fuel				
	Other variable costs				
	Price supports				

 = prohibited
 = usually prohibited
 = sometimes prohibited
 = permitted

As illustrated in Table 1, only the draft text offered by **New Zealand** proposes a prohibition that would fully meet the foregoing test. Taken separately, each of the other proposals now in play (with the possible exceptions of **Argentina** and the **United States**²) excludes one or more of these subsidy types, or otherwise limits the scope of its proposed ban in ways that would leave dangerous gaps in the new rules. The six most critical of these gaps are discussed in the following pages.

² **Argentina** has submitted proposed legal text covering only “special and differential treatment” for developing countries. However, Argentina’s explanatory statements directly endorse the broad “prohibition defined by exclusion” approach taken by New Zealand and Brazil. The Argentine submission also strongly implies that a ban should cover subsidies for “fishing vessel construction and modernization and gear acquisition” and for “fishing effort” (subject to S&DT). Similarly, the **United States** has submitted a proposal limited to subsidies for decommissioning, but has strongly supported New Zealand’s approach. **Table 1** thus considers the US and Argentine positions as on a par with the approaches of New Zealand and Brazil, but with question marks to reflect the absence of a specific textual proposal.

1. It's not just the boats . . . (the "effort" issue)

One of the most troubling and obvious gaps in the current proposals is the failure of the **EC** and **Japan** to prohibit subsidies that directly support fishing activity, or "effort" as it is called in the technical jargon of fisheries management. These proposals in effect accept one half of the Hong Kong mandate—the reference to "overcapacity"—while ignoring the call to end subsidies that directly contribute to "overfishing".

But the dual reference in Hong Kong to "overcapacity and overfishing" is hardly accidental. These paired words capture the two ways that fisheries subsidies most directly cause resource-depleting production distortions: by lowering the "fixed" costs of productive capital, and by lowering the "variable" costs of production itself. These twin consequences of fisheries subsidies have been repeatedly identified by governments and independent experts alike as the root dangers which new WTO rules are meant to confront.³

Ultimately, of course, it is overfishing that we are aiming to stop—a goal that has been explicit from the earliest days of the WTO discussion of fisheries subsidies, and is reflected in several of the recent submissions. Even if overcapacity has been correctly identified as a problem in its own right—and as one critical link between fisheries subsidies and unsustainable fishing—it is plain nonsense to propose rules that discourage overcapacity while allowing the direct subsidization of overfishing itself. Particularly given the fact that it will take many years, at the least, to reduce global fishing fleets to a sustainable level of capacity, a WTO ban that does not cover subsidies to the variable costs of production is less than half of what the situation—and the Hong Kong mandate—demands.

2. It's not just "tonnes" and "kilowatts" . . . (the "capacity" issue)

The proposals by the **EC** and **Japan** not only ignore the entire "effort" half of the equation, they are also dangerously weak on the question of fishing capacity—and in this they are not entirely alone. Although both proposals give the impression of banning several kinds of "capacity-enhancing" subsidies, the terms they employ are vague and incomplete, and reflect an artificially limited approach to "capacity" that is common to most of the proposals now on the table.

The ambiguity of the proposal from the **European Communities** is particularly troubling, and makes the likely impact of their proposed ban very hard to ascertain. The problems arise from the broad and vague terms of EC proposed Article 3, which would exempt a class of "permitted" fisheries subsidies from the EC's proposed ban as well as from the current disciplines of ASCM Part III (the amber box) and Part V (national countervailing duty actions).

For starters, EC Art. 3:1(a) creates an exemption for any kind of fishing subsidy (including, e.g., building new fishing vessels), so long as it is

contingent upon a reduction in fishing capacity or . . . provided for the specific purpose of mitigating the negative social and economic consequences of reductions in capacity.

The second half of this clause—introduced by the disjunctive "or"—does not directly require that a permitted subsidy be capacity-reducing or even capacity-neutral. Read literally, it might even allow subsidies that significantly increase capacity in a fishery, so

³ TN/RL/W/77 (US March 19, 2003), ¶ 3; TN/RL/GEN/79/rev.3 (Brazil March 2, 2006); TN/RL/GEN/100 (New Zealand March 03, 2006), ¶ 1; TN/RL/W/169 (US March 12, 2004); TN/RL/W/115 (Chile 10 June 2003).

long as the underlying policy motive were to help some part of the fishing industry respond to the hardships of capacity reduction elsewhere.

But perhaps this is merely loose drafting. Perhaps the core intentions of the EC are better reflected in EC Art. 3:1(b), which allows a range of subsidies “subject to a non-increase in capacity.” But the details of EC Art. 3.1(b) raise questions about its likely practical effect.

First, the scope of this exemption includes subsidies to “modernization” of vessels, in contrast with subsidies to the “renovation” of vessels, which are prohibited by the EC’s ban. The EC does not offer a definition of either term, but formal documents used within the EC system, as well as fisheries management literature, makes clear that “modernization” is a broad concept that can include outfitting vessels with new engines, refrigerators, or even new fishing nets.⁴ Certainly, permitting subsidies for “modernization” effectively narrows the effect of the EC’s proposed ban on subsidies to vessel “renovation” to the extent that there is any overlap between these two terms.

The proposal of **Japan** appears more comprehensive in its initial scope, since its ban would include subsidies to vessel “modification”—a term that would seem to comprise both “modernization” and “renovation”. But Japan’s ban only applies only to subsidies that would breach certain capacity-related limits.

And so the ultimate strength of the prohibitions proposed by both the EC and Japan would depend heavily on the effectiveness of the capacity-related conditions they employ. But here again, the proposals are weak, and in fact share a shortcoming common to several of the proposals currently on the table—the desire to equate “fishing capacity” with three simple physical attributes of fishing boats: vessel weight, hold volume, and engine power.

But the truth is that fishing capacity is much more than just how much a vessel weighs, or holds, or thrusts. Capacity, as the FAO has succinctly put it, is “the ability of a vessel or fleet of vessels to catch fish.”⁵ All significant capital inputs to fishing—including (in addition to hulls and engines) fishing gear, fish-finding technology, refrigerators, and machines for sorting or cleaning fish—can be essential elements of capacity. And any subsidy that materially reduces the cost of such inputs makes a vessel or fleet of vessels able to catch more fish. The bottom line is that the proposals of the EC and Japan leave the door well open to subsidies that do exactly that.⁶

Delegations say they are merely seeking rules that can be implemented on the basis of clearly measurable factors. But it makes no sense—and in some cases may border on the disingenuous—to propose that the WTO, with its deep technical expertise and mandate, adopt a weak rule in the name of oversimplified econometrics.

⁴ See, e.g., UK Marine Fisheries Agency, *Notes for Guidance for applicants applying for EU Fisheries Grants in England Vessel Modernisation*, document FIG 29(GN) (3/05); LITHUANIAN NATIONAL DEVELOPMENT PLAN FOR THE IMPLEMENTATION OF EU STRUCTURAL FUNDS SINGLE PROGRAMMING DOCUMENT 2004-2006, PROGRAMME COMPLEMENT, p. 152; See also Lindebo, *Technological progress and capacity estimations: Management implications for the Danish cod trawl fishery* (Danish Institute of Agricultural and Fisheries Economics (SJFI) 2001), pp. 8-9.

⁵ *Measuring Capacity in Fisheries* (Pascoe & Gréboval, eds.) (FAO 2003), p. 4.

⁶ Even subsidies to hulls and engines that do not result in more tonnes or kilowatts can increase fishing pressure. Apart from the fact that such subsidies increase the incentives to fish by reducing costs, they may increase the efficiency of the vessel itself. EC policy is turning towards permitting subsidies to support the purchase of more fuel-efficient engines, so long as certain limits to engine power are met. But a new engine that allows a vessel to increase its range or time at sea obviously increases its capacity to fish.

3. *It's not just the factory ships . . . (the "artisanal fishery" issue)*

Another set of subsidies some governments would exempt from a new ban are supports for "small scale" or "artisanal" fishing. **Japan** (along with **Korea** and **Taiwan**) in particular has proposed a nearly total exemption from WTO disciplines (including most current ASCM rules) for all subsidies to fishing carried out on vessels below a certain (still unspecified) size. **New Zealand**, **Brazil**, and **Argentina** have proposed some kind of special treatment for "artisanal" fisheries, but suggest a far more limited approach. In the first place, all three would equate "artisanal" with "subsistence", thus narrowing this exemption to activities at the very lowest end of the commercial scale.⁷ Second, none of the three would give even this slim category of subsidies the *carte blanche* proposed by Japan. And, finally, Brazil and Argentina would offer the exemption only to developing countries, in the context of "special and differential treatment."

The issues raised by these proposals are obviously serious ones. Many other delegations—including **India** (which has submitted a detailed paper dedicated to the subject), **Small Island Developing States**, and the **United States**—have indicated the need for some kind of separate and gentler treatment of artisanal fishing.⁸ And it is clear that the positions of many delegations are driven by a strong concern for the welfare of communities that are among the poorest and most economically vulnerable in the world. It is no wonder, then, that the artisanal fishing question has been a leading focus of the informal and quasi-formal international dialogue that has accompanied the fisheries subsidies negotiations in a variety of parallel fora.⁹

The compelling humanitarian dimension of this issue must not, however, provide a well-meaning gloss over misguided policy, or a cynical excuse for weak WTO rules. The small technological or economic scale of a fishery does not make it safer to subsidize—inappropriate subsidies can do real damage to artisanal fisheries.¹⁰ Moreover, the increasing physical and commercial interplay between artisanal fishers and their international competitors means that subsidies to artisanal fisheries can have much more than local consequences.¹¹ In short, small scale fishing is not necessarily less competitive or more sustainable than large scale fishing.

Yet, there is something different about "artisanal" fisheries—something that may make subsidies to them more necessary, and more in need of special consideration under new WTO rules. But this something is certainly not the size of artisanal vessels, nor is it the subsistence nature of artisanal fishing *per se*. What is different is the special difficulty artisanal fishing communities face in rising out of subsistence poverty to sustainable commercial activity. Subsidies may be particularly needed to help catalyze the necessary economic and logistical transformations—to form local banks and companies, or to allow more centralized landing, processing, and distribution, for example.

But the perils of subsidies in the absence of good fisheries management cannot be ignored, no matter what the economic or social context. Even subsidies to artisanal

⁷ In fact, the latest iteration of Brazil's proposal drops all references to "artisanal" and "small scale" altogether, focusing directly on "fishing activities related to the subsistence of the fishermen and their families."

⁸ TN/RL/W/203 (India, 6 March 2006); TN/RL/GEN/57/Rev.2 (Antigua and Barbuda, et al, 13 September 2005); TN/RL/W/77 (United States, 19 March 2003).

⁹ See, e.g., the proceedings of workshops on fisheries subsidies listed on UNEP's website at <http://www.unep.ch/etb/events/index.php> and at the website of the International Centre for Trade and Sustainable Development, <http://www.ictsd.org/dlogue/2005-05-09/2005-05-09-prog.htm>.

¹⁰ See, e.g., Dahou, "Support Policies to Senegalese Fisheries" in *Fisheries and the Environment* (UNEP 2001).

¹¹ See, Schorr, *Artisanal Fishing: Promoting Poverty Reduction and Community Development Through New WTO Rules on Fisheries Subsidies* (UNEP 2005), pp. 7-9.

fishing should be subject to disciplines to help ensure their sustainability. And it is in that context—in crafting a basic “sustainability screen” for subsidies to artisanal fishing—that special treatment under new WTO rules should be considered.¹²

In short, the proposal of **Japan, Korea, and Taiwan** to make “artisanal” mean “small scale” (and “small scale” mean “small boats”)—and then to give such fisheries virtual *carte blanche* under new subsidy rules—should be rejected out of hand. The approach of **New Zealand, Brazil, and Argentina** provides a better starting place, but will require some further development to avoid a misstep.

4. It's not just the deep blue sea . . . (the “inland waters” issue)

A fourth gap in the new rules would result from inappropriate geographic limits on which fisheries would be covered. In particular, **Brazil** (with the vocal support of **India**) has proposed rules that would not cover subsidies affecting “inland” fisheries.¹³ The **European Communities** similarly restrict the scope of their draft rules to “marine” capture fisheries,¹⁴ and **Japan** would extend its limited prohibition only to “capture fisheries at sea.”¹⁵ Although marine capture fisheries should be the central focus of the WTO’s new fisheries subsidies rules, the arbitrary exclusion of “inland” or “non-marine” fisheries would be both illogical and dangerous.

While many inland fisheries are local, isolated, and more purely “national” than even the most coastal marine fisheries, this is not universally the case. Sometimes inland fisheries are fundamentally *international* in character—constituting a shared resource that can only be sustainably managed on a cooperative basis. As graphically illustrated in Appendix A, this can be so in at least two ways:

- Inland fisheries can be inseparably **connected with international marine fisheries**, especially when they involve “diadromous” fish that divide their lifecycles between fresh and salt water. The case of salmon is classic. On the east and west coasts of North America, and in Northern Europe, salmon are born, and later return to spawn, in rivers many miles inland. But these same fish also spend large portions of their lives in the open ocean, where they range across multiple EEZs and into the high seas. Whether they are fished in rivers, estuaries, bays, or on the deep sea, salmon remain a highly migratory international stock.
- Some purely “inland” fisheries are found in **international river systems and lakes**, and can involve commercially valuable species that migrate or straddle across international borders. The catfish of the Amazon and the Nile Perch of Lake Victoria are two leading examples of heavily traded international “inland” stocks.¹⁶

¹² For example, if constraints on data collection make assessment of an artisanal fishery data especially difficult, artisanal fisheries might be allowed more time to comply with rules that required such data to be in place before subsidies are granted.

¹³ TN/RL/GEN/79/Rev.3 (Brazil, 2 June 2006), Annex Art. 1.2; TN/RL/W/203, (India, 6 March 2006), ¶ 2. Brazil would define inland fisheries as “fisheries which are carried out in freshwater or estuaries and whose target species are those that spend all or part of their life-cycle therein, as defined by the United Nations Food and Agriculture Organization (FAO).”

¹⁴ TN/RL/GEN/134, (EC, 24 April 2006), Annex Art. 1.1.

¹⁵ TN/RL/GEN/114 (Japan, Korea, & Taiwan, 21 April 2006)

¹⁶ For example, the dourada (*Brachyplatystoma flavicans*) and piramutaba (*Brachyplatystoma vaillantii*) are two species of commercially valuable catfish living in **the Amazon River**. During their lifecycles, these fish may swim up to 3300 kilometers, spending parts of their lives in Colombia, Ecuador, Peru, and Brazil. Barthem & Goulding, *The Catfish Connection: Ecology, Migration, and Conservation of Amazon Predators* (Columbia U. Press, 1997). While also used for local consumption, these fish are heavily traded, and have been described as “the mainstay of the commercial export fishery in Colombia”. Diaz-Sarmiento & Alvarez-

The international biology of some inland fisheries can also be compounded by competitive and other commercial relationships that link production trends in inland fisheries with production trends in marine fisheries.

In any case, a blanket carve-out for “inland fisheries” would allow harmful subsidies to continue flowing into some highly competitive and biologically sensitive international fisheries, and is clearly inconsistent with the basic orientation of the WTO fisheries subsidies talks. At a minimum, subsidies affecting inland fisheries having an international character should be considered “fisheries subsidies” subject to new WTO disciplines, including the new prohibition where appropriate.

5. It's not just the cash . . . (the “foreign access” issue)

A fifth potential gap in the new fisheries subsidies rules relates to the treatment of subsidized access to foreign fisheries. This issue is both important and politically sensitive. While subsidies for foreign access have had a sad history of negative impacts on fisheries and developing country fishing communities, access payments have also been a critical source of hard currency for many host countries. As a consequence, a significant number of **small island and “small vulnerable economy” coastal states** have argued emphatically that government-to-government payments for foreign access should be explicitly excluded from any WTO definition of “fishery subsidy”.¹⁷ **Japan** (joined by **Korea** and **Taiwan**) has effectively proposed a similar exclusion.¹⁸

WWF strongly supports the right of all countries, and especially developing countries, to receive international payments for foreign access to their fisheries. Indeed, WWF has worked for years to help ensure that access arrangements promote sustainable fisheries and provide fair returns to host countries. At no time has WWF intended to characterize access payments as subsidies *paid to host countries* or to host country industries. However, the vocabulary employed by WWF and others has contributed to some understandable confusion and concern on this point.

The correct focus of new rules on subsidized access is *not* the payments made by one government to another in return for fishing rights. These government-to-government payments are not subsidies, and should be excluded from the scope of new WTO rules. As has now been clearly proposed by both **New Zealand** and **Brazil**, the only subsidy in question arises when the government of a “distant water fleet nation” (DWFN) transfers foreign fishing rights to its own national distant water fleet (DWF). If a government transfers these rights without recovering the commercial value from its industry, it provides a beneficial “financial contribution” that falls clearly within the current WTO definition of a subsidy.¹⁹ The existence and amount of this access subsidy does not depend on any government-to-government payment, or on whether such a payment is ultimately financed through fees collected from the national DWF. Even if no government-to-government payment takes place—for example, where access is procured in exchange for reciprocal fishing rights or the extension of a foreign aid relationship—the onward transfer of the acquired fishing rights to a national fleet can constitute a subsidy.²⁰ Similarly, even where a DWF repays its flag state for the full amount of any government-to-government access fee, it may still enjoy a significant subsidy in cases where that fee reflects only a portion of the commercial value of the

Leon, “Migratory Fishes of the Colombian Amazon”, in Carolsfield et al (eds.), *Migratory Fishes of South America* (World Fisheries Trust/IRDC/World Bank, 2004).

¹⁷ TN/RL/GEN/57/Rev.2 (Antigua and Barbuda; et al, 13 September 2005).

¹⁸ TN/RL/GEN/114/rev.1 (Japan, Korea, & Taiwan, 2 June 2006).

¹⁹ See SCM Art. 1.1(a)(1)(iii).

²⁰ The value of the subsidy would likely be computed on the basis of a constructed market value for the access granted, based on, *inter alia*, the fair commercial value of the fish licensed for harvest minus the cost of production and a reasonable return on investment.

access it acquires.²¹ This is not merely a theoretical case—several studies have shown that the fees commonly paid by developed countries for access to developing country fisheries commonly amount to only a fraction of the value of the access obtained.²²

Of course, this does not mean that all subsidized access should be prohibited by a new WTO ban. Subsidized access should be prohibited only where fish stocks are already in trouble, or where a fishery fails to meet international standards for minimum adequate management.²³ In addition, WWF supports the proposal made by **New Zealand** for WTO rules to increase the transparency of access arrangements, many of which are multi-million dollar deals that are kept all but secret, despite their direct impact on the international terms of trade in fish.

6. Please don't feed the pirates . . . (the "IUU" issue)

Finally, there is a class of harmful fisheries subsidies which has received substantial international attention, but which has been overlooked by most of the formal WTO proposals so far: subsidies to illegal, unreported, and unregulated (IUU) fishing.

The fact that subsidies do reach the pockets of pirate fishers is generally acknowledged, and is understood to be a serious problem. When heads of state met at the 2001 World Summit on Sustainable Development in Johannesburg, they called for successful completion of the WTO fisheries subsidies talks, citing among other priorities the need to eliminate subsidies to IUU fishing. The problem has also been mentioned in a number of WTO submissions. But so far, only the paper by **Japan** (accompanied by **Korea** and **Taiwan**) contains a proposed solution.

The Japanese proposal would explicitly prohibit subsidies to IUU fishing, as well as to vessels flying "flags of convenience" (*i.e.*, flags of states that do not abide by the rules of regional fisheries management organizations governing the fisheries in which the vessels fish).

WWF strongly supports the call by Japan to prohibit subsidies to IUU fishing explicitly. In fact, WWF has previously proposed rule elements that would go beyond a simple statement of prohibition, to include barring pirate enterprises from receiving future subsidies and requiring the withdrawal of entire subsidy programmes where a programme or a fishery has been tainted by a pattern of IUU abuse.²⁴ WWF urges WTO members to join the Japanese position on this issue, and to help strengthen it with provisions designed to ensure its effectiveness.

Conclusion to Part I

In accordance with the Hong Kong mandate, WTO members are now heading towards prohibiting a range of harmful fisheries subsidies. But, as the foregoing discussion makes clear, the proposals now on the table leave the eventual scope and quality of the ban in doubt.

²¹ If, for example, a DWFN secures access to \$20,000,000 worth of fish in exchange for an access fee of \$1,000,000, it will be passing on a substantial subsidy to its national fleets even if those fleets pay the government the full \$1,000,000.

²² See Mwikya, *Fisheries Access Agreements: Trade and Development Issues* ICTSD Issue Paper No. 2 (April 2006), and sources cited therein.

²³ At a minimum, access subsidies should not be allowed where the fishery involves a migratory or straddling stock, unless that stock is under adequate formal international management (including effective catch limits).

²⁴ See *Healthy Fisheries, Sustainable Trade* § V.C.5 for a discussion of the limited but important role the WTO can play in the fight against IUU fishing.

The trend in the proposals so far is generally towards a broad ban accompanied by carefully enumerated exceptions. Whether the form of the ban is a “prohibition defined by exclusion”—as proposed by New Zealand, Brazil, and Argentina—or a more positive statement of scope is obviously a non-trivial issue. The safer and better course may well be the “negative list” approach. But whatever the form, the exclusion of major categories of capacity- and effort-enhancing subsidies, as effectively proposed by the EC and Japan, should be considered a “non-starter.” While the econometric and definitional challenges involved in shaping a solid prohibition are real, governments must not opt for simplistic rules over effective ones.

Beyond the basics of capacity and effort, care will also be needed to avoid riddling the new prohibition with loopholes. Issues such as “artisanal” fishing and “inland” waters raise important and legitimate questions, but the solutions governments adopt must be carefully crafted to prevent misguided policy and weak WTO rules.

Finally, the difficult and urgent issues surrounding subsidized access to foreign fisheries and subsidies to IUU fishing must not be ignored. In both cases, the WTO has a limited but important role to play in helping create more transparent and equitable conditions for the international exploitation of global fisheries.

II — Beyond the Prohibition: Real Rules or Laissez-faire?

Obviously, not all fisheries subsidies will or should be banned under new WTO rules. In fact, a considerable range of subsidies will remain permitted, in at least three categories:

- (i) Subsidies that serve important industrial or social policy goals and are considered to pose only a lesser or indirect risk of causing overcapacity or overfishing;
- (ii) Subsidies that are likely to help combat overcapacity or overfishing; and
- (iii) Subsidies that are needed to promote the sustainable development of developing country fishing industries and communities.²⁵

But these subsidies are neither necessarily small nor risk-free. In fact, when granted in the context of poor fisheries management, any subsidy that significantly reduces costs or increases returns to fishing enterprises can encourage overcapacity and overfishing.²⁶ And even well-intentioned subsidies—such as vessel buy-back programmes—can have negative consequences if not properly designed and monitored.

To end subsidized overcapacity and overfishing, then, new rules will need to provide effective conditions and limits on subsidies falling outside the scope of a new prohibition. To do this, two kinds of controls will be needed, first to impose *ex ante* **conditions** on exemptions, and second to impose *ex post facto* **limits** on exempt programmes. More specifically:

Exemptions from the prohibition should usually be made conditional on the fisheries context in which they are granted, so that subsidies are not allowed in situations where there would be an elevated risk of overcapacity or overfishing; and


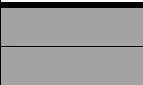
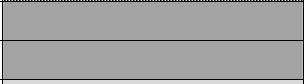
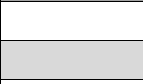

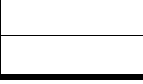
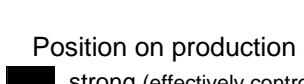
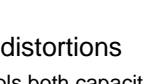
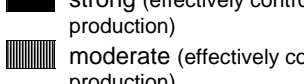
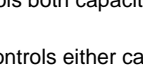
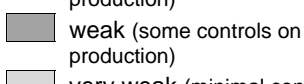
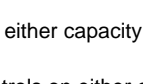
²⁵ These categories correspond roughly to subsidies that under standard WTO subsidies vocabulary might be considered, respectively, “actionable” (amber box), “non-actionable” (green box), and subject to “special and differential treatment” (S&DT).

²⁶ See Porter, *A Matrix approach to analyzing the resource impacts of fisheries subsidies*. (UNEP 2004).






Exempt subsidies should, except in the case of S&DT,²⁷ be subject to challenge if they do inadvertently cause production distortions through increased capacity, effort, or catches.

The proposals currently on the table offer a patchwork of approaches to these two necessary constraints. Viewed separately, they are generally weak, or at best incomplete, as is summarized in Table 2. This weakness may result in part from the fact that the fisheries subsidies talks have only recently begun to focus on issues beyond the scope of the new ban itself.²⁸






Table 2 — Strength of positions on "permitted" subsidies

	Conditions	Disciplines
Argentina		
Brazil		
New Zealand		
United States		
European Communities		
Japan		

Position on fisheries context conditionality

-  strong (applies both biological and regulatory conditions where relevant)
-  moderate (applies both biological and regulatory conditions, but incompletely)
-  weak (applies some biological or regulatory conditions)
-  very weak (applies minimal biological or regulatory conditions)
-  no evident support

Position on production distortions

-  strong (effectively controls both capacity and production)
-  moderate (effectively controls either capacity or production)
-  weak (some controls on either capacity or production)
-  very weak (minimal controls on either capacity or production)
-  = no evident support

But the news is not all bad. The proposals taken collectively contain some positive indicators. First, there is broad agreement that exemptions to a prohibition should not be granted unconditionally. Second, the strong rhetorical support in earlier submissions for disciplining production distortions suggests a number of governments may intend to strengthen their positions on this question. And third, the current proposals offer some important ideas that could be elements of a robust rule.

The proposal of Brazil

The proposal of Brazil is the most detailed, and contains a number of very interesting and positive facets. As evident in Appendix Table B-1, however, it is also inconsistent in its approach, and suffers from some significant weaknesses.

On the positive side, when it comes to subsidies that are directly effort- or capacity-enhancing, Brazil would give developed countries only very limited exemptions from the ban. For most other subsidies, Brazil would grant exemptions only if they meet a kind of "no increase in capacity" rule. In principle, this is a robust start. Moreover, Brazil is the

²⁷ S&DT = "special and differential treatment" for developing countries.

²⁸ This, along with the polarized nature of the initial "top down" vs. "bottom up" debate, may also account for the otherwise curious fact that the Hong Kong mandate is silent on how—or even whether—new WTO rules should impose disciplines on fisheries subsidies falling outside an eventual prohibition. But the formal inattention to this issue should not be misinterpreted: as earlier negotiating papers and now the recent textual proposals demonstrate, most governments have known all along that the subsidies exempted from a ban would need to be disciplined if they were to be kept from doing harm.

only delegation so far explicitly to require withdrawal of subsidies failing to meet the conditions for exemption. Importantly, Brazil also rightly proposes that developed countries bear the burden of proving the subsidies they grant have met the conditions for exemption (in essence creating a new form of “dark amber” rule).

Brazil has also clearly endorsed the application of “fisheries context” conditionality to identify the real-world situations in which no exemptions from a prohibition should be allowed. Brazil concentrates on the biological elements of such conditions, employing the concept of a “patently at risk” fishery to make the poor health of a fish stock grounds for keeping it within the strictures of the new ban. Finally, Brazil has imposed imaginative limits on some of the exemptions it allows, such as a (partial) bar against using S&DT to grant simultaneous capacity- and effort-enhancing subsidies to a single vessel.

But Brazil applies its innovative thinking unevenly. For example, it imposes its “patently at risk” condition only on exemptions for capacity-enhancing subsidies, and only on developing countries. But surely if a fishery is too heavily exploited to allow capacity-enhancing subsidies, then effort-enhancing subsidies would be at least as dangerous. Similarly, there are classes of subsidies—subsidized foreign access and job preservation subsidies,²⁹ for example—where some kind of fishery context conditions ought to apply to developed countries as well. And even where Brazil’s “patently at risk” test does apply, it is only partially effective because it focuses only on biology and ignores the question of fisheries management. History has too often shown that even an underexploited fishery is “at risk” for rapid overexploitation if it is inadequately managed.

Brazil’s proposal is also missing important elements of a robust rule. Among the most obvious is its failure to deal sufficiently with the problem of production distortions, and in particular to recognize the competitive injury done when subsidized vessels obtain an unfair (and unsustainable) share of fisheries catches.

Many delegations—including Brazil—have noted the need for new rules to confront competitive distortions at the level of production, and not just the level of international sale.³⁰ Indeed, a senior government official from Brazil recently had this to say about the fisheries subsidies negotiations:

Negotiators need to go beyond the usual trade related effects. For the first time at the WTO we must face a production distortion effect.³¹

This imperative arises because—as governments have repeatedly stated—traditional WTO rules focus on the interests of exporters, and thus are of little help to fishermen who have been prevented from catching fish to sell.³²

As discussed above, Brazil’s proposal does make use of a “no increase in capacity” test for some of the exemptions it would allow. Although Brazil’s version of this test (focused on limited factors such as vessel weight) is weak and inconsistently applied, it at least starts to grapple with the kind of production distortions that relate to the problem of

²⁹ “Job preservation” subsidies are supports such as unemployment payments that are long term (or iterative) and not connected to capacity reduction or alternative employment programmes.

³⁰ See, e.g., TN/RL/GEN/138 (Argentina, 1 June 2006), ¶ 2; TN/RL/W/176 (Brazil, 31 March 2005), ¶ 17.2; TN/RL/W/77 (United States, 19 March 2003), ¶ 4; TN/RL/W/3 (Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines and the United States, 24 April 2002), esp. ¶ 9.

³¹ Statement of José Fritsch, Special Secretary for Aquaculture and Fisheries, at the joint ministerial public event on fisheries subsidies, WTO ministerial in Hong Kong, December 2005 (full statement available at www.panda.org/about_wwf/what_we_do/policy/news/index.cfm?uNewsID=54340).

³² The “common resource” nature of wild fish creates an unusual potential for production subsidies to cause immediate distortions of international commerce—one of the facts that underlie the need for special disciplines on production subsidies in the fisheries sector.

overcapacity. But what about overfishing? A strong rule against production distortions needs to focus not only on how subsidies can increase productive capital, but also on how they can increase production itself. Accordingly, a “no increase in catch share” rule should be added to “no increase in capacity” as a limit on permitted fisheries subsidies, at least in the case of developed countries.

The proposal of Argentina

Particularly when viewed in combination with the positive elements of Brazil’s proposal, the proposal of Argentina is also an important and welcome addition to the mix. Although limited to suggesting legal text on S&DT for developing countries, it makes at least two critical contributions, as can be seen in Appendix Table B-2. First, it proposes a solid approach to adding the “management dimension” to the conditions for exemption from a new fisheries subsidies ban. Other proposals have made gestures in this direction by requiring, for example, that vessels benefiting from permitted subsidies be licensed and registered.³³ Argentina would flesh out this idea by looking to the UN Code of Conduct for Responsible Fisheries for a comprehensive set of basic—and minimal—international standards for the management of fisheries. Further work is needed to show how these can be applied in practice in the context of a WTO rule, but the direction is appropriate and clear: towards, for example, requiring governments to conduct science-based surveys of their stocks and their fleets as a prerequisite to granting fisheries subsidies (the elemental “count your fish before you build your boats” rule).

Second, Argentina has been forthright in setting out guiding principles for crafting S&DT provisions, and has translated these into a proposal for gauging when developing countries have the “room to grow” that would justify their use of capacity- and effort-enhancing subsidies. The concepts of “surplus” EEZ stocks and underutilized international quotas are both good ones, although they too obviously require some elaboration.

Like all of the proposals so far, Argentina’s also has its share of weaknesses and inconsistencies. For example, Argentina’s rule does not include an element of biological conditionality, such as Brazil’s “patently at risk” concept—yet both a biological and a regulatory dimension must be included in the “fisheries context conditions” in order to avoid dangerous exemptions to an eventual ban. And although Argentina mentions the need to confront production distortions, its legal text relies only on elements of the existing amber box to define adverse effects, ignoring the need for a new means to challenge subsidies that cause harmful increases in capacity or catch share.³⁴ But these and more detailed criticisms that could be offered do not detract from the fundamentally positive character of Argentina’s contribution.

The proposal of the United States

The United States has submitted a textual proposal that focuses on the treatment of “decommissioning” subsidies, and otherwise addresses only how the implementation of new fisheries subsidies disciplines should be reviewed, and how WTO panels might engage the advice of individuals and institutions with fisheries expertise. The general approach of the United States is clearly in line with that of New Zealand, but the degree to which the positions of these governments overlap or diverge in detail is still unknown.

³³ TN/RL/GEN/79/Rev.3 (Brazil, 2 June 2006), Annex Art. 4.3; TN/RL/GEN/138 (Argentina, 1 June 2006), S&DT Art. X.2;

³⁴ In fact, as reflected in the footnotes to Appendix Table B-2, Argentina leaves somewhat unclear the degree to which even existing amber box provisions apply to subsidies permitted under S&DT.

With regard to placing conditions and limits on “permitted” subsidies, the indications from the US so far are hopeful. The US sets out detailed preconditions for exempting decommissioning subsidies from the eventual ban. Moreover, the character of these preconditions is important to note. They begin with specific requirements to guarantee that qualifying programmes will lead to the permanent retirement of vessels and associated fishing rights—requirements that appear to turn on both the design of the programmes (*ex ante*) and their actual impacts (*ex post*).

In addition, the US would exempt decommissioning subsidies only in the context of “fisheries management control measures designed to prevent over-fishing in the targeted fishery.” This constitutes a clear call for what WWF has termed “fisheries context conditionality”, with an emphasis on the regulatory condition of the fishery. The US proposal is thus entirely consistent with Argentina’s proposal to require basic compliance with the UN Code of Conduct as a condition to exemptions.

On the question of confronting “production distortions”, however, the US proposal is oddly silent. This is in contrast with the repeated emphasis the US has previously given to the problem of production distortions in the fishery sector.³⁵ WWF urges the United States and other Members to move forward with proposals on this important subject.

The proposal of New Zealand

The proposal of New Zealand, which is clearly the strongest so far with regard to the scope of its prohibition, is candidly incomplete with regard to the conditions and limits that should apply to subsidies exempted from the ban. Although New Zealand has now offered a list of potential exemptions that includes a number of sensitive and important categories (see Appendix Table B-3), in most cases it has said only that it remains “interested in exploring” provisions to prevent circumvention of the new disciplines, indicating that “exemptions from the prohibition should not result in overall increases to fishing capacity or effort.”

Still, New Zealand’s text is not completely devoid of concrete ideas about conditions and limits on permitted subsidies. With regard to subsidies for disaster relief and for improving vessel safety, for example, New Zealand conditions its proposed exemptions on the avoidance of increased capacity.³⁶ In addition, New Zealand joins the US in setting out detailed preconditions for decommissioning subsidies (essentially adopting the US text).

In any case, the real impact of New Zealand’s proposal will depend heavily on the conditions and limits on permitted subsidies it ultimately supports. If those conditions and limits are not strong, substantial classes of fisheries subsidies will escape New Zealand’s prohibition, including subsidies to infrastructure (e.g., port refrigeration facilities), job preservation (e.g., unemployment insurance), and industrial R&D. Given New Zealand’s obvious interest in strong and effective rules, the indications that it is “ready to talk” about disciplines on permitted subsidies points hopefully forward.

The proposal of the European Communities

The proposal of the European Communities also provides some support for conditioning and limiting fisheries subsidies that fall beyond an eventual prohibition. As evident in Appendix Table B-4, EC Articles 3 (“Permitted Subsidies”) and 6 (“Developing Country

³⁵ See, e.g., TN/RL/W/3 (24 April 2002); TN/RL/W/77 (19 March 2003).

³⁶ As noted above, New Zealand’s approach to defining capacity may suffer the same weaknesses as other proposals have shown. In the case of the exemption for vessel and crew safety, for instance, New Zealand adopts a test based on only hold volume and engine power.

Members”) repeatedly condition the right to subsidize on avoiding increased (or, in the case of developing countries, unduly increased) capacity. Further, Article 6 explicitly suggests that a WTO rule might include *ex post facto* limits that involve findings of increased capacity.

But on closer look, the EC’s proposed articles turn out lopsided and very incomplete. EC Article 3, for instance, purports to impose capacity-related conditions on at least some of the subsidies it permits. But—beyond the ambiguities and gaps in these conditions that have already been discussed—these conditions apply only to subsidy categories enumerated in the article.³⁷ These would exclude the entire range of subsidies to fishing effort (including subsidies to fuel, bait, and other variable costs, price supports and subsidized foreign access), as well as subsidies to infrastructure, processing, and the social safety net, among others. In the absence of any kind of residual rule (amber box or otherwise), such subsidies could be used without precondition or limit of any kind, other than those imposed by existing SCM rules.

Moreover, some of the subsidy types covered by EC Article 3 are not subject to meaningful WTO discipline even if they fail to meet the conditions the EC has set out. This is the case for Article 3 subsidies that do not also fall within the scope of the EC’s proposed ban, including subsidies for “product development”, for promoting “environmentally friendly fishing operations”, and for any aspects of “modernization” that are not within the scope of the term “renovation”. Since EC Article 3 is a form of new “green” box, its legal effect is to relieve WTO members of certain SCM obligations. Where no new prohibition otherwise apply, failing to meet the conditions of EC Article 3 simply leaves a subsidy subject to a status quo that has proved impotent against subsidized overfishing and overcapacity.

The EC’s treatment of developing countries is also problematic, although it contains some innovative ideas. The EC would free developing countries from all new fisheries subsidies disciplines except where it has increased its fishing capacity “to an extent that it is an impediment to the sustainable exploitation of fishery resources worldwide.” This proposal has at least two flaws. First, the *carte blanche* treatment it offers is inappropriate and unnecessary, and goes far beyond what any developing country delegation has so far proposed for S&DT. Second, it proposes a rule that would require the WTO to decide when a given increase in capacity is “unsustainable”—thus requiring a judgment of environmental policy that falls beyond the legitimate competence of the multilateral trade system.³⁸

The proposal of Japan, Korea, and Taiwan

Similarly discouraging is the proposal of **Japan, Korea, and Taiwan** (detailed in Appendix Table B-5), which starts by leaving numerous subsidies outside its ban. In addition to exempting capacity-enhancing subsidies that meet certain fairly thin criteria (see discussion above), many important subsidies escape Japan’s ban unconditionally.

³⁷ The precise scope of the article is sometimes hard to discern. For example, what is the effect of the clause “in the context of conservation measures”? Assuming it is intended as a distinct category of subsidies (and not a second precondition, beyond the “non increase in capacity” clause), it presumably does not mean “any subsidy granted to a fishery where there are applicable conservation measures”, but rather connotes some kind of direct relationship between a conservation measure and a subsidy (such as a subsidy to offset a temporary reduction in catches as a result of the establishment of a marine protected area).

³⁸ Read literally, EC Article 6 also appears to create an odd imbalance: the extra protections of EC Art. 3 (which exempts the subsidies it enumerates from challenge under SCM Parts III or V) would only be enjoyed by developed countries and developing countries that are causing an impediment to sustainable fisheries exploitation. Perhaps the EC proposal rests on the assumption that developed countries are already causing such an impediment, although it is unclear why this should be rewarded with the freedoms of a new green box.

This would include, among others the subsidies proposed for exemption (presumably with appropriate conditions and limits) by New Zealand—*i.e.*, infrastructure, job preservation, and industrial R&D—as well as subsidies to processing (e.g., filleting, canning, etc., at sea or on shore). Moreover, the proposal fails to control any of these permitted subsidies with new disciplines related to production distortions or otherwise, and in many cases even removes most of the disciplines that apply under the current WTO Subsidies Code. For least developed countries and developing countries with *de minimis* fishing activities (as yet undefined), Japan offers a rule to release them from new fisheries subsidies disciplines altogether.

Fortunately, the proposal of Japan, Korea, and Taiwan is alone in its extremity. As noted above, all of the other proposals, and much of the discussion that has unfolded at the negotiating table, acknowledge the basic need for effective conditions and limits on fisheries subsidies falling outside the new ban.

Conclusion to Part II

In technical if not political terms, the treatment of fisheries subsidies falling outside an eventual ban presents the most difficult questions for the remaining negotiations. It is the area in which success depends most on the willingness of governments to be innovative, and will directly challenge their willingness to bring factors relating to sustainability and production into the new rules.

The rhetoric and analysis over the course of the talks so far have set a firm basis for giving the sustainability and production dimensions the attention they deserve. And the recent textual proposals contain a number of suggestions and building blocks for how this might be done. Still, considering the imminence of a first chair's draft, this aspect of the negotiations remains technically underdeveloped.

It is critically important, therefore, that governments reinforce the principles and basic concepts that disciplines on permitted fisheries subsidies must contain, including:

- setting conditions on permitted subsidies that look to basic facts about the biological and regulatory health of the affected fisheries; and
- setting limits on permitted subsidies by making them subject to challenge (where appropriate) if they cause production distortions.

These fundamental ideas have been intrinsic to much of the dialogue over new fisheries subsidies rules within the WTO. Governments must not be daunted by the technical challenges they raise, or by the innovations they require. Rather, the scattered collection of elements already present in the recent proposals should be rationalized and strengthened into a coherent approach. Whether governments are able to meet this challenge will, in the end, have a deep impact on the effectiveness of the fisheries subsidies disciplines they adopt.

III — Enforceability and Transparency: Got Teeth?

Even if governments get the prohibition right, and if they craft disciplines on permitted subsidies that deal correctly with sustainability and production, they will still accomplish little or nothing if they fail to make the rules enforceable in practice. Doing this will depend on two factors, both explicitly recognized as priorities by the Hong Kong mandate:

- enforceability *per se* (*i.e.*, creating legal consequences for rule-breaking, and institutional mechanisms for enforcement procedures); and
- transparency (*i.e.*, the required disclosure by Members of information sufficient to gauge compliance).

As with the discussion of permitted subsidies—perhaps even more so—the technical talks on enforceability and transparency has lagged behind. It is, in truth, too early to judge the direction of the negotiations on these points. Instead, WWF will offer only a few comments on what has been proposed up to now.

Enforceability

Very little has been put forth on enforceability to date. The contributions of the recent proposals on this subject can be summarized as follows:

- **New Zealand** has drafted its proposed rules in the form of amendments directly to the body of the current SCM. This implies that the existing SCM enforcement mechanisms would apply—*i.e.*, New Zealand’s prohibition would be enforceable in accordance with SCM Art. 4 (“Remedies”). However, it is not clear whether Art. 4 would cover challenges to a claimed exemption under New Zealand’s separate Annex of non-prohibited subsidies.³⁹
- The **United States** has indicated its assumption that Articles XXII and XXIII of GATT 1994 (as elaborated and applied by the Dispute Settlement Understanding) will apply.⁴⁰ It has also proposed a provision saying that a WTO panel hearing a case on a fisheries subsidy “should” seek advice from fisheries experts, and “may” establish an expert advisory panel or consult with other intergovernmental bodies. The US also proposes regular review of the operation of the agreement, in consultation with expert bodies such as the FAO or other regional fisheries management organizations.
- **Brazil** is the only Member thus far to have proposed text on enforcement provisions (Brazil Art. 6—“Monitoring”). However, the proposed language is relatively thin technically, and will likely need to be supplemented in order to function on a par with existing SCM enforcement provisions. In addition, Brazil has adopted the US language on seeking advice from experts, taking the US text verbatim except for replacing “should seek advice” with “may seek advice”.

³⁹ For example, it might be a stretch to consider that Art. 4 creates a “cause of action” against a decommissioning subsidy on the grounds that fishing rights associated with the affected vessels were not permanently retired.

⁴⁰ Arguably, any rules articulated in the context of the SCM—including in a new annex to it—would also fall within the scope of SCM Art. 30, which make the “consultations” and “nullification and impairment” provisions of the GATT applicable to the SCM. Note, however, that SCM Art. 30 was not seen by its drafters as a sufficient description of the SCM’s enforcement rules and procedures.

- **Argentina** makes no mention of enforcement, apart from mentioning its support for the US proposal for a review mechanism. Argentina's general support for the approaches articulated by New Zealand and Brazil raises the hope that Argentina will support strong enforcement provisions.
- The **European Communities** have previously indicated the importance they attach to the enforceability of new fisheries subsidies disciplines,⁴¹ but have made no significant technical suggestions other than in relation to transparency and notification (see below), and to propose formal reviews of the agreement every five years.
- **Japan, Korea, and Taiwan**, like New Zealand, have drafted their text as amendments to existing SCM articles, which would likewise be enforceable through current SCM mechanisms.

Clearly, then, these proposals are moving towards fulfilling the Hong Kong mandate to make new fisheries subsidies enforceable. There is still some ways to go, however, to clarify the legal consequences and practical enforcement mechanisms that will apply.

What remains less certain is the quality of the institutional mechanisms governments will adopt to ensure the proper involvement of experts and intergovernmental bodies with fisheries expertise. As noted above, the **United States, Brazil, and the European Communities** all contemplate use of expert input. But the proposals all remain weak in two ways:

First, the texts do not actually require consultation with experts and relevant fisheries authorities. The **United States** goes furthest in this regard, saying that panels "should" seek such advice. If the replacement of "should" with "may" was a purposeful bit of drafting, **Brazil** apparently thinks even the soft instruction proposed by the US goes too far. But in truth it does not go far enough. As WWF has previously argued,⁴² consultation with appropriate experts and authorities should be mandatory, and where a factual question lies within the authority of an existing intergovernmental fisheries management organization, the WTO should be required to give deference to the findings of that body.

Second, the proposals fail to call for a standing body of experts to assist the WTO where no existing fisheries management organization has jurisdiction over the issues at hand. The **European Communities** have suggested that the existing SCM Permanent Group of Experts ("PGE") be used for that purpose, at least insofar as they have proposed that the PGE determine whether a developing country has increased its fishing capacity "to an extent that it is an impediment to the sustainable exploitation of fishery resources worldwide."⁴³

But the EC's suggestion is doubly troubling. For starters, it posits a WTO rule that turns on a sensitive and complex question of environmental policy—precisely the kind of judgment that WWF has repeatedly argued lies beyond the competence and legitimate authority of the WTO. Then, the EC would give the power to make this judgment to a body consisting entirely of trade experts.

A far better idea would be to create a Permanent Group of Fisheries Experts in the manner that WWF has previously proposed.⁴⁴ This PGFE should be established in cooperation with the FAO, UNEP, and major regional fisheries management bodies, and should consist of individuals the majority of whom are nominated by those bodies. Such an expert group would be the best mechanism to assist the WTO in the conduct of

⁴¹ TN/RL/W/178 (11 April 2005).

⁴² *Healthy Fisheries, Sustainable Trade*, § V.I.

⁴³ TN/RL/GEN/134 (European Communities, 24 April 2006), proposed Art. 6.1.

⁴⁴ *Healthy Fisheries, Sustainable Trade*, § V.I.4(c)(ii).

fisheries-related disputes, and to help the SCM in its periodic reviews of the new fisheries subsidies disciplines.

Transparency

Fisheries subsidies must be brought out from under the veil of secrecy that shrouds them. The enforcement of new WTO disciplines—and the rationalization of fisheries subsidy policies generally—depends entirely on the quality and availability of information about what programmes exist, who gets the benefits, and how the benefits are used. Today, many governments themselves do not even know which fisheries are affected by the subsidies they provide. It is no wonder that a broad group of WTO delegations have said that new fisheries subsidies disciplines must require “a far greater level of transparency than under current rules.”⁴⁵

In order to accomplish this important goal, new notification rules for fisheries subsidies will have to have two key characteristics:

- (i) They will have to have real **teeth**—*i.e.*, there must be significant legal consequences in the case of failures to notify, such as an automatic requirement to withdraw unnotified subsidies; and
- (ii) They will have to require Members to provide **information** necessary to evaluate whether the conditions for exemption from a ban have been met. Assuming Members adopt robust new rules, this will require notifications to include information such as:
 - the specific fisheries affected
 - basic information about the biological and regulatory condition of the fisheries affected
 - subsidy amounts on a per vessel, per fleet, and per fishery basis;
 - specific descriptions of how subsidies are actually applied; and
 - identification of specific enterprises receiving subsidies.

While many WTO Members have joined the calls for dramatically improved transparency of fisheries subsidies, the textual proposals to date on transparency have been sparse. The texts of New Zealand, Argentina, and Japan are silent on the matter. The references to transparency in the other proposals, once again, raise both hopes and concerns.

The **United States** (which puts forward draft text only on the “non-prohibited” treatment of decommissioning subsidies) proposes that “Members would be required to explain in their notifications how the programmes meet each of the specified conditions for the exception,” and goes on to indicate that new disciplines should include “revised fisheries notification requirements.” WWF applauds this proposal for the scope of information it requires, and urges Members to extend its underlying approach to the new fisheries subsidies disciplines generally. Obviously, however, even such appropriate requirements will be of little use if they are not combined with new “teeth” for notification provisions.

The **European Communities** have long been a leading voice in favor of stricter and more effective WTO notification rules—perhaps because their own domestic laws have

⁴⁵ TN/RL/W/196 (Brazil; Chile; Colombia; Ecuador; Iceland; New Zealand; Pakistan; Peru and the United States, 22 November 2005), ¶ 14.

also made them leaders in the actual transparency of their subsidy programmes.⁴⁶ Consistent with previous submissions regarding the SCM generally, the text proposed by the EC is notable for its direct call to make all non-notified fisheries subsidies automatically prohibited. Here again, WWF calls on Members to give full support to such a rule.

It is curious and unfortunate, therefore, that the EC proposal is so weak in two of its other transparency provisions. First, the EC makes no move towards improving the kind of information about fisheries subsidies that Members will be required to notify. This would risk continuing the tradition of hollow notifications, and would ignore the special information needs on which enforcement of fisheries subsidies rules will depend. Second, the EC makes an idiosyncratic proposal that would allow WTO Members to escape SCM notification requirements altogether if they have in place a subsidies monitoring system that “transposes” the SCM requirements into domestic law.

Even at its best, such a proposal would run a strong risk of tolerating substandard national notification regimes. Moreover, it would radically decentralize global information about subsidies programmes, replacing the WTO’s easily accessible repository with documentary collections in hundreds of governmental offices around the globe. Moreover, the EC would not even require governments to produce public notifications of specific subsidy programmes. Instead, Members would be allowed to produce only “periodic ex-post reports.” None of this is a recipe for increased transparency; rather, it raises the real possibility of allowing the WTO notification system to take a step backwards.

Finally, the proposal of **Brazil** again shows imagination and some real sensitivity to the issues at stake, but fails to take its ideas to their logical conclusion. Brazil proposes a two-tier system which would include both mandatory and voluntary reporting provisions. On the mandatory side, Brazil would require Members to notify all permitted fisheries subsidies in advance of their implementation, in accordance with current SCM notification rules.⁴⁷ On the voluntary side, Brazil’s text states that “Members shall make every effort” to include in their notifications certain information about the biological and regulatory condition of the fisheries affected by their subsidies.⁴⁸ Brazil would also create a system under which Members could, in some but not all cases, “pre-challenge” another Member’s notification, if it believed the programme would fail to comply with the conditions set out for enjoying an exemption from Brazil’s proposed ban.

WWF strongly supports Brazil’s call for Members to produce information about the biological and regulatory condition of subsidized fisheries. If coupled with a requirement to produce fisheries-specific information about the subsidies themselves, this would be a big step in the right direction. But taken at face value, Brazil’s approach would nevertheless fall far short of guaranteeing the kind of improved transparency that is necessary. It makes no provision for enforcement of notification rules, and leaves improvements in the content of notifications entirely to the “best efforts” of Members. What is needed here is not only innovation, but innovation with teeth.

⁴⁶ This is not to say that the transparency of EC fisheries subsidies is adequate. The EC programmes are “more transparent than most”, but that is not saying much. Substantial improvements in the transparency of even EC subsidy programmes is urgently needed.

⁴⁷ Brazil’s text says “*mutatis mutandis*”, but presumably this refers only to the adjustments necessary to require notification in advance of implementation.

⁴⁸ Among the information to be reported would be the conservation status of the stocks, the nature of any quantitative limits or monitoring imposed by a relevant regional fisheries management organization, and any applicable national management measures, such as limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas.” TN/RL/GEN/79/Rev.3 (2 June 2006), proposed Article 5.2.





Conclusion to Part III

As noted above, the questions of enforcement and transparency have only begun to receive the serious attention of fisheries subsidies negotiators, and so the positions of many governments remain to be developed. This is visible in the many blanks that appear in Table 3:





Table 3 — Strength of positions on enforcement and transparency

	Enforcement		Notifications	
	Teeth	Experts	Teeth	Data
Argentina		?	?	?
Brazil			?	
New Zealand		?	?	?
United States				
European Communities		?		?
Japan		?	?	?

Position on enforceability

-  strong (proposes mechanisms for rules enforcement / mandatory involvement of fisheries authorities & experts)
-  moderate (position implies support for enforceable rules / non-mandatory involvement of authorities & experts)
-  weak (inconsistent support for enforceable rules / minimal support for involvement of fisheries authorities & experts)
-  no evident support / position not stated

Position on improved notifications

-  strong (proposes significant consequences for non-notification / calls for fisheries-specific data about subsidies and condition of fisheries)
-  moderate (position implies support for enforceable notification rules / calls for substantial improvement in data reported)
-  weak (has made rhetorical gestures on enforceability / some support for improvement in data reported)
-  no evident support / position not stated

The clarity of the Hong Kong mandate, the rhetoric of many governments—and even the imaginative and bold elements of the few transparency-related texts tabled so far—all suggest that governments may be prepared to “do the right thing” on these critical issues. On the other hand, there are disturbing hints that even leading delegations may have what it takes to step up to bat, but not to take a swing. The real-world effectiveness of future fisheries subsidies disciplines hangs in this balance.

Overall Conclusion

The textual proposals for a new fisheries subsidies prohibition all take as their starting point the negotiating mandate of Hong Kong. Perhaps it is no surprise, therefore, that they are relatively consistent in their overarching rhetoric—claiming unanimously to oppose subsidies that contribute to overcapacity and overfishing.

And, in truth, any fair observer of the fisheries subsidies negotiations would find that much more than good rhetoric has come forward. The reason so many ministers and delegations have praised these negotiations with words such as “groundbreaking” “urgent” and “a unique opportunity” is that real political will and technical innovation has been evident at (and alongside) the negotiating table over the course of many months.

But the good news so far has been mainly preliminary. Now the proverbial tire meets the road. And with time speedily passing, it remains unclear whether good intentions will be translated into effective international law.

These are, in fact, the “best of times and the worst of times” for the world’s fisheries. Never have they been so badly depleted, leaving so many communities facing economic and nutritional crises; but neither have fisheries previously enjoyed so much forward-thinking scientific and political attention. The talks at the WTO—recognized by world leaders as a vital part of getting fisheries back on a sustainable path—reflect both these realities.

The textual proposals on fisheries subsidies that have been submitted so far contain laudable steps in much needed directions. But they remain far from what it will take to form WTO rules that deliver real results.

The initial “chair’s draft” on fisheries subsidies that will soon issue from the negotiating process will be an important milestone. Governments should do their utmost to ensure that it takes the best, and not the worst, of the texts on the table so far.

Appendix A — The International Character of Some Inland Fisheries

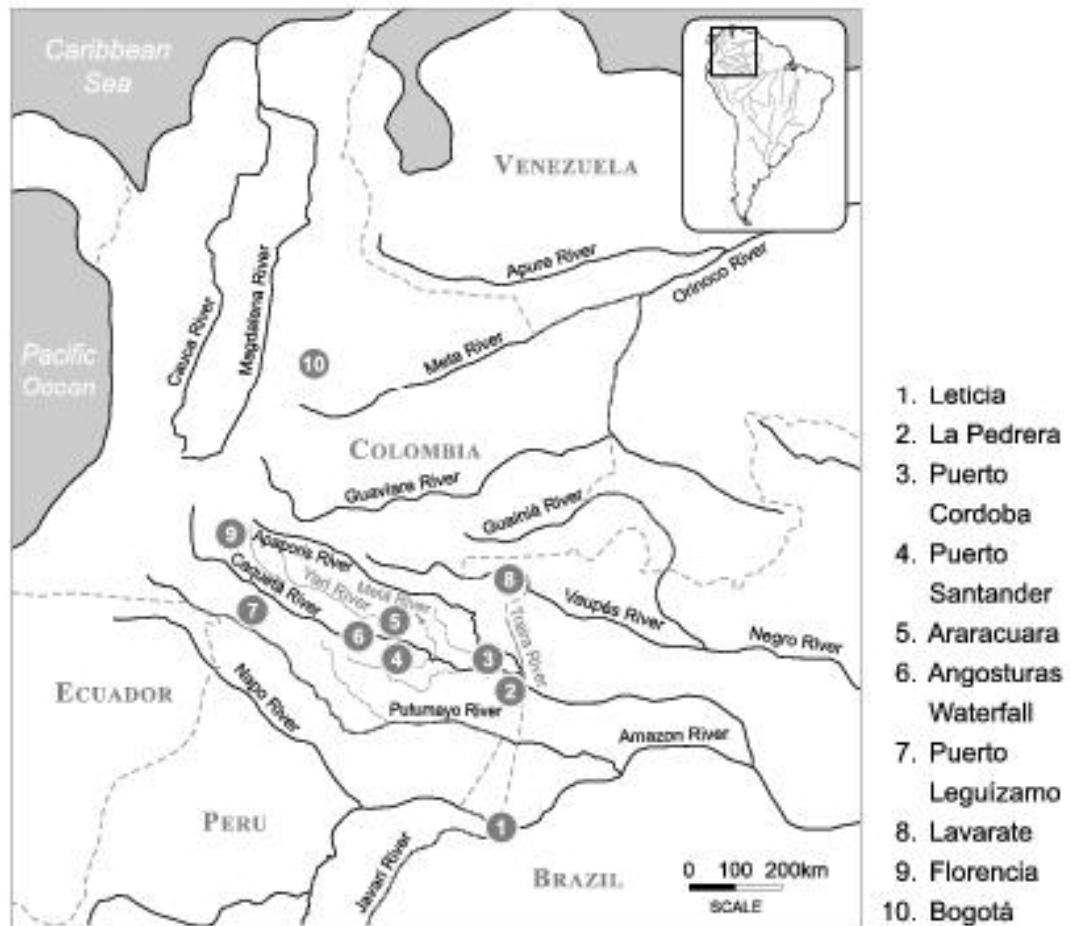


Figure 1: Map of Colombian Amazon Basin

(from Diaz-Sarmiento & Alvarez-León, "Migratory Fishes of the Colombian Amazon" in Carolsfield et al (eds.), *Migratory Fishes of South America*, World Fisheries Trust/IRDC/ World Bank, 2004).

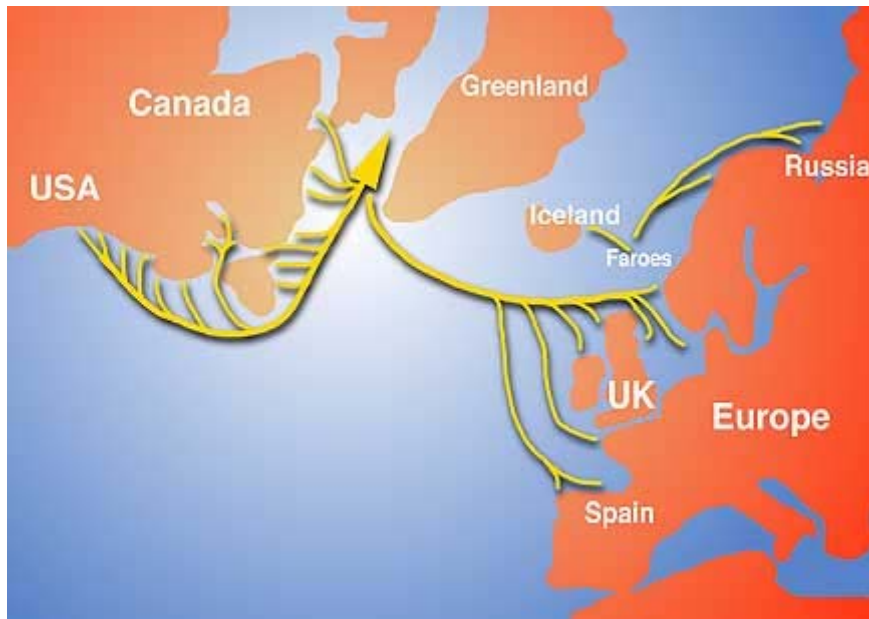


Figure 2: Migration patterns of Atlantic salmon
 (from website of Atlantic Salmon Foundation, <http://www.asf.ca/Overall/atlsalm.html>)

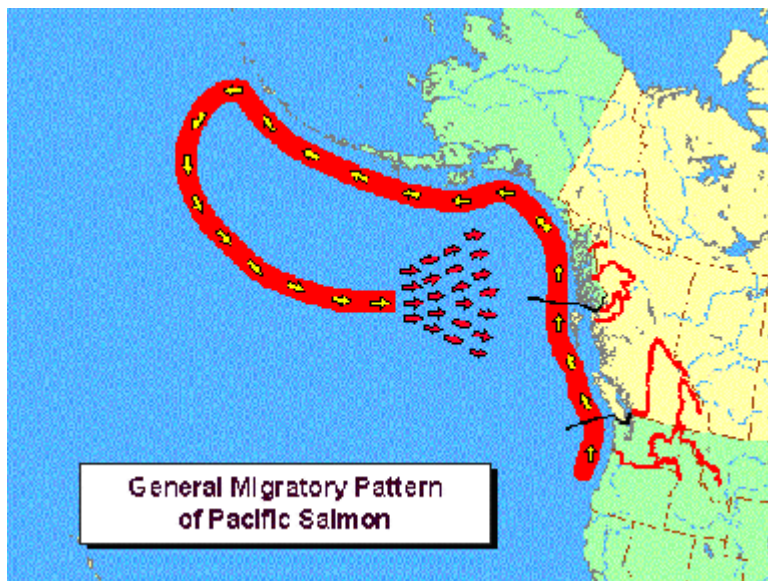


Figure 3: Migration patterns of Pacific salmon
 (from Canadian Department of Fisheries and Oceans 1998)

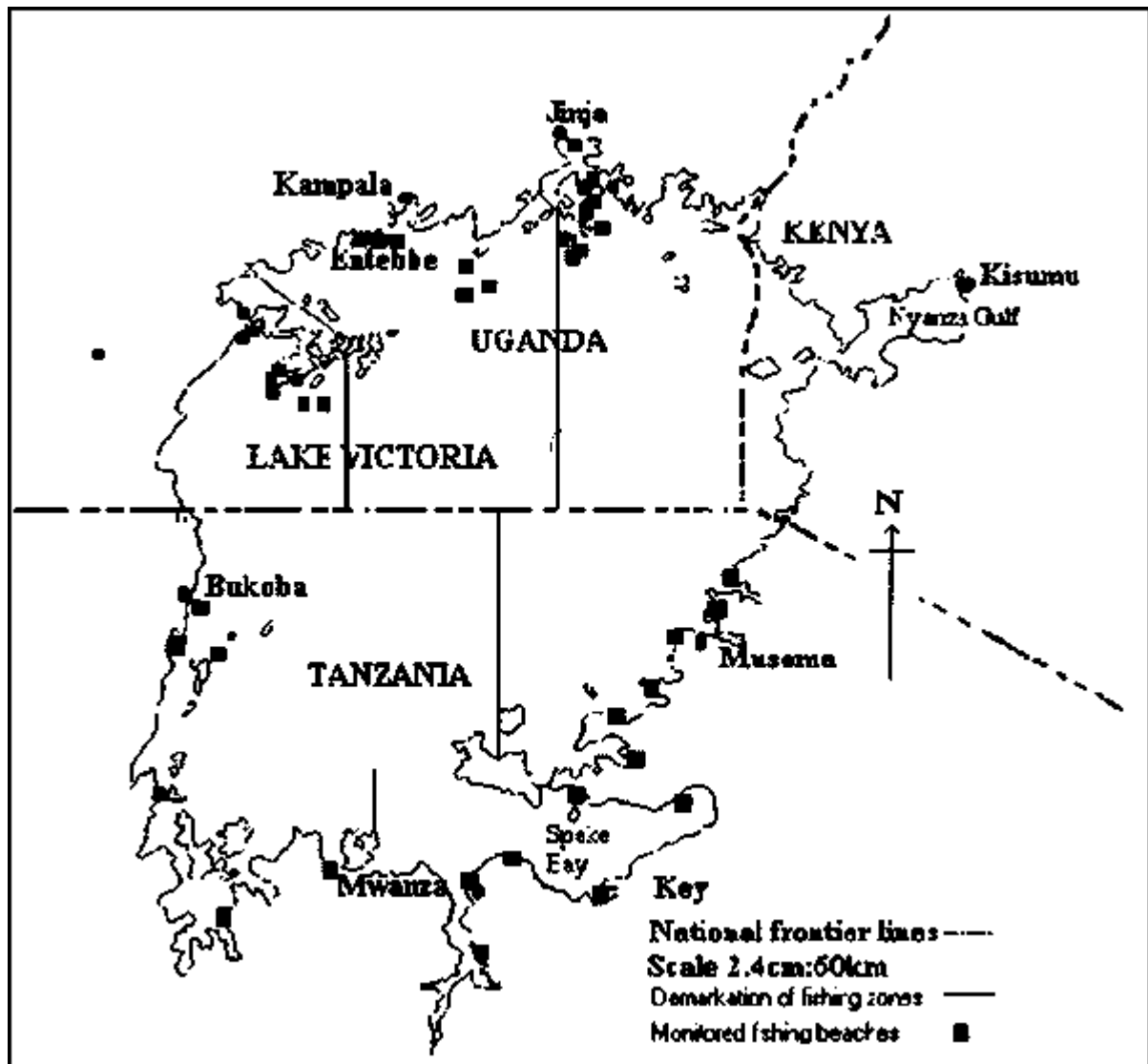


Figure 4: Lake Victoria showing international boundaries

From Cowx 2003, "Case Study : Improving Fisheries Catch Statistics in Lake Victoria" in *New Approaches for the Improvement of Inland Capture Fishery Statistics in the Mekong Basin* (FAO 2003), p. 105. Cowx also has this to say about Lake Victoria:

Over 30 million people live in the Lake Victoria Basin and depend directly or indirectly on the lake's resources. Fisheries contribute up to 3% to the GDP of the riparian states and they are major sources of income, food, employment and foreign exchange earnings. Fish from Lake Victoria is the most important source of affordable protein in East Africa and the most important source of freshwater fish on the African continent. The fishery is diverse and highly dispersed and fragmented with about 1 500 landing sites and more than 120 000 fishers. The lake is also important in conservation terms because of the great biodiversity of endemic fish species. Additionally, the lake is an important moderator of regional climate.

Id.

Appendix B —Treatment of Permitted Subsidies

Table B-1: Brazil Treatment of Subsidies Falling Beyond the Prohibition

Subsidy Type	Treatment for Developed Countries		Treatment for Developing Countries ⁴⁹	
	Conditions for Non-prohibition ⁵⁰	Disciplines Applied ⁵¹	Conditions for Non-prohibition ¹	Disciplines Applied ²
Vessel construction	“inland” fisheries or in case of natural disaster, subject to non-increase in weight, volume, or engine power beyond <i>status quo ante</i> ⁵²	mandatory withdrawal if subsidizer fails to prove fulfillment of conditions	affected fisheries are not “at risk”. vessels must be licensed and registered	mandatory withdrawal upon proof of non-fulfillment of conditions
Engines				vessels may not also receive subsidies to variable costs other than fuel
Other vessel modification			none	none
Gear			none	vessels may not also receive subsidies to construction, modification, gear
Fuel				
Other variable costs			(not covered by S&DT—same conditions & disciplines as for developed countries)	
Price Supports				
Foreign access	non-increase in weight, volume, or engine power	current red & amber boxes + subsidy subject to mandatory withdrawal if subsidizer fails to prove conditions have been met	non-increase in weight, volume, or engine power	mandatory withdrawal upon proof of non-fulfillment of conditions
Job preservation	none	current red + amber boxes only	none	current red + amber boxes only
Social welfare				
Infrastructure	non-increase in weight, volume, or engine power	mandatory withdrawal if subsidizer fails to prove fulfillment of conditions	non-increase in weight, volume, or engine power	mandatory withdrawal upon proof of non-fulfillment of conditions
Processing			non-increase in weight, volume, or engine power + non-circumvention criteria	
Industrial R&D				
Decommissioning				
Management	(excluded from definition of “subsidy”)		(excluded from definition of “subsidy”)	
Enviro R&D	none	current red + amber boxes only	none	current red + amber boxes only
Other enviro	non-increase in weight, volume, or engine power	mandatory withdrawal if subsidizer fails to prove fulfillment of conditions	non-increase in weight, volume, or engine power	mandatory withdrawal upon proof of non-fulfillment of conditions
IUU fishing	not explicitly banned	none	not explicitly banned	none

Based on TN/RL/GEN/79/Rev.3 (2 June 2006)

⁴⁹ In addition to complete exemption from new disciplines for subsidies to subsistence fishers, and a special exemption for “assistance to disadvantaged regions.”

⁵⁰ Not including notification requirements.

⁵¹ In addition to current ASCM red and amber boxes.

⁵² The “disaster recovery” exception applies to all prohibited subsidies, but is only reflected in this chart cell, where it is most significant.

Table B-2: Argentina
Treatment of Subsidies Falling Beyond the Prohibition

Subsidy Type	Treatment for Developed Countries		Treatment for Developing Countries	
	Conditions for Non-prohibition	Disciplines Applied	Conditions for Non-prohibition	Disciplines Applied
Vessel construction	Argentina's proposed text is limited to S&DT for developing countries, but "assumes that the general structure of the disciplines is based on the establishment of a 'prohibition defined by exclusion' with limited exceptions. . . . compatible with the proposals submitted by New Zealand and Brazil"	Argentina's proposed text is limited to S&DT for developing countries, but "assumes that the general structure of the disciplines is based on the establishment of a 'prohibition defined by exclusion' with limited exceptions. . . . compatible with the proposals submitted by New Zealand and Brazil"	surplus EEZ stocks, replacement of foreign vessels, or unused high seas quota ⁵³ + vessels licensed & registered + "management . . . in keeping with the FAO Code of Conduct"	none? -or- current amber & red boxes only? ⁵⁴
Engines				
Other vessel modification				
Gear				
Fuel				
Other variable costs				
Price supports	NOTE, however, that Argentina's submission strongly implies the prohibition should cover all directly capacity-enhancing and effort-enhancing subsidies. It also states that subsidies for the adoption of environmentally friendly fishing gear should be "in the category of permissible subsidies, which all Members may apply"	NOTE, however, that Argentina's submission strongly implies the prohibition should cover all directly capacity-enhancing and effort-enhancing subsidies. It also states that subsidies for the adoption of environmentally friendly fishing gear should be "in the category of permissible subsidies, which all Members may apply"	(not covered by S&DT—same conditions & disciplines as for developed countries)	
Foreign access			none	current amber box
Job preservation			(these categories not included in Argentina's S&DT proposal, and Argentina has not clarified whether they should be included within the scope of a new prohibition)	
Other social welfare				
Infrastructure				
Processing				
Industrial R&D				
Decommis-sioning				
Management				
Enviro R&D				
Other enviro			(subsidies for environmentally friendly gear should be permitted to all Members)	
IUU fishing			(not discussed by Argentina)	

Based on TN/RL/GEN/138 (1 June 2006)

⁵³ Argentina's proposed text frames these conditions in terms of the intention of the underlying policy. WWF assumes that Argentina intends these conditions to be legally binding, and urges Argentina to clarify this question.

⁵⁴ Argentina's proposal is silent regarding limits on these subsidies. It appears that the effect of the proposed text is to exempt the relevant subsidies from the new ban. Nothing is said about protection from challenge under existing SCM rules. However, this interpretation is clouded by the explicit mention of SCM Art. 6.3 in the exemption Argentina provides for certain effort-enhancing subsidies. Is the latter reference adding a discipline, or limiting the disciplines that would otherwise apply under SCM Parts II and III? Similarly, Argentina refers to the current amber box in its treatment of access subsidies, although in the context of the debate on that issue, this reference could be understood as indicating "access subsidies" should be considered within the scope of the SCM.

**Table B-3: New Zealand
Treatment of Subsidies Falling Beyond the Prohibition**

Subsidy Type	Treatment for Developed Countries		Treatment for Developing Countries	
	Conditions for Non-prohibition	Disciplines Applied	Conditions for Non-prohibition	Disciplines Applied
Vessel construction	(banned except per general exemptions for disaster recovery, worker safety, and artisanal fisheries—discussed separately)		“New Zealand is also aware that appropriate Special and Differential Treatment provisions will need to be developed”	
Engines				
Other vessel modification				
Gear				
Fuel				
Other variable costs				
Price supports				
Foreign access	none	(provisions to prevent “circumvention” and “overall increases” to capacity or effort “to be discussed)		
Job preservation				
Other social welfare				
Infrastructure				
Processing	(banned except per general exemptions for disaster recovery, worker safety, and artisanal fisheries—discussed separately)			
Industrial R&D				
Decommis-sioning	permanent removal of vessels and associated harvesting rights + existence of certain “fisheries management control measures”	(provisions to prevent “circumvention” and “overall increases” to capacity or effort “to be discussed)		
Management	(excluded from definition of “subsidy”)			
Enviro R&D ⁵⁵	none	(provisions to prevent“ circumvention” and “overall increases” to capacity or effort “to be discussed)		
Other enviro				
IUU fishing	not explicitly banned	none		

Based on TN/RL/GEN/141 (6 June 2006) and TN/RL/GEN/100 (3 March 2006)

⁵⁵ Including research to support management

**Table B-4: European Communities
Treatment of Subsidies Falling Beyond the Prohibition**

Treatment of Subsidies Failing Beyond the Prohibition				
Subsidy Type	Treatment for Developed Countries		Treatment for Developing Countries	
	Conditions for Non-prohibition	Disciplines Applied	Conditions for Non-prohibition	Disciplines Applied
Vessel construction	contingent on, or to mitigate negative social effects of, capacity reduction	current red box	no increase in capacity “to an extent that it is an impediment to the sustainable exploitation of fishery resources worldwide”	none
Engines ⁵⁶	contingent on, or to mitigate negative social effects of, capacity reduction			
Other vessel modification ⁵⁶	-or-			
Gear ⁵⁶	non-increase in “capacity”			
Fuel	none (not banned)	current red & amber boxes	none (not banned)	current red & amber boxes, as modified by ASCM Art. 27
Other variable costs				
Price supports				
Foreign access				
Job preservation				
Other social welfare				
Infrastructure				
Processing	none (not banned; also “permitted” subject to non-increase in “capacity”	current red & amber boxes -or- current red box only (if “permitted”)	none (not banned)	current red & amber boxes, as modified by ASCM Art. 27
Industrial R&D ⁵⁷				
Decommis- sioning				
Management ⁵⁸				
Enviro R&D				
Other enviro	not explicitly banned	none	not explicitly banned	none
IUU fishing				

Based on TN/RL/GEN/134 (24 April 2006)

⁵⁶ Category assumed to fall within scope of terms "renovation" and "modernisation", per EC proposed Arts. 2:1(b) and 3:1(b).

⁵⁷ Category assumed to fall within scope of term "product development", per EC proposed Art. 3:1(b).

⁵⁸ The EC have not specifically addressed management services. Here, they are assumed to be "subsidies" that fall within the final clause of EC proposed Art. 3:1(b) ("subsidies that promote more environmentally friendly fishing operations").

Table B-5: Japan, Korea, & Taiwan
Treatment of Subsidies Falling Beyond the Prohibition

Subsidy Type	Treatment for Developed Countries		Treatment for Developing Countries	
	Conditions for Non-prohibition	Disciplines Applied	Conditions for Non-prohibition	Disciplines Applied
Vessel construction	vessels are licensed + new vessel has <50% of “sum of” weight, hold volume, and engine power of vessels withdrawn	current red + amber boxes	none, for LDCs and DCs with <i>de minimis</i> catch share; others have extended phase-in of non-increase criteria	current red + amber boxes
Engines	vessels are licensed	current red + amber boxes		
Other vessel modification	+ non-increase in weight, volume, or engine power			
Gear				
Fuel	none	current red + amber boxes	(no applicable S&DT provisions—obligations same as for developed countries)	
Other variable costs				
Price supports				
Foreign access	none (green box)	current red box		
Job preservation				
Social welfare				
Infrastructure	none	current red + amber boxes		
Processing				
Industrial R&D				
Decommissioning	modest non-circumvention criteria	current red box		
Management	(excluded from definition of “subsidy”)			
Enviro R&D	none (green box)	current red box		
Other enviro				
IUU fishing ⁵⁹	(banned without exception)			

Based on TN/RL/GEN/114/Rev.1 (2 June 2006)

⁵⁹ Includes subsidies to "flags of convenience", per Japan's proposed Art. 3.1(c)(4).

WWF's mission is to stop the degradation of the planet's natural environment and to build a future in which humans live in harmony with nature, by:

- conserving the world's biological diversity
- ensuring that the use of renewable natural resources is sustainable
- promoting the reduction of pollution and wasteful consumption



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