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S&DT FOR DEVELOPING COUNTRY FISHERIES SUBSIDIES: TECHNICAL REFINEMENTS + REPLIES TO CHAIR'S QUESTIONS

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At the direction of the Chair of the Negotiating Group on Rules, the upcoming negotiating session on fisheries subsidies (14-15 June) will focus on S&DT. WWF welcomes this focus, and continues to support appropriate and effective S&DT as an essential element of new fisheries subsidies disciplines. In this technical paper, WWF recapitulates and refines its views on S&DT, and seeks to answer the questions distributed by the Chair on 18 May. WWF's specific advice to Members is summarized in the text boxes, below. Given the complexity and high state of flux characterizing the S&DT discussion, however, WWF reserves the right to modify its views as the issues are further clarified.

Framework and Order of Discussion

The discussion of S&DT to date has had several focal elements, including:

- (i) the basic scope and purpose of S&DT for fisheries subsidies, and the general conditions and limits these imply (with a focus on fisheries conditions and the avoidance of subsidized overcapacity and overfishing);
- (ii) possible additional special rules for subsidies to artisanal fisheries; and
- (iii) possible treatment of subsidized access to foreign EEZs for distant water fleets

The Chair's questions of 18 May emphasize the first and second of these, and imply an order of discussion beginning with the second (artisanal fisheries). However, WWF urges Members to consider carefully the order of negotiation. Governments have not yet clearly articulated how or why subsidies to artisanal fisheries are distinct from other pro-development subsidies they may wish to employ in their fisheries sectors. Until there is a basic level of agreement on the scope and operation of S&DT, a discussion of artisanal fisheries (or of subsidized access) is likely to face unnecessary technical and political hurdles. In addition, a premature discussion of artisanal fisheries could weaken eventual general S&DT provisions, or, conversely, result in artisanal fisheries provisions that are dangerously overbroad.

→ WWF urges Members to seek agreement on the general scope and operation of S&DT first, before turning to detailed consideration of the artisanal fisheries or subsidized access issues.

→ WWF believes that most "artisanal fisheries" concerns can and should be dealt with through general S&DT language.

The next section of this paper follows the questions posed by the Chair on 18 May, but begins with the issue of general S&DT rather than artisanal fisheries.

Special and Differential Treatment, Generally

Basic Objective, Scope, and Operation of S&DT (Chair's 1st Bullet)

WWF notes the language of the Hong Kong ministerial declaration, which calls on Members to make S&DT “an integral part” of new disciplines on fisheries subsidies. The economic, social, and industrial challenges facing fishing communities in many developing countries are not likely to be resolved anytime soon. Moreover, as discussed below, the fisheries-related conditions and limits that should apply to S&DT for fisheries subsidies should in themselves prevent qualifying subsidies from having international impacts inconsistent with the remedial purposes of S&DT.

→ WWF urges Members to avoid debating the “static” or “dynamic” nature of S&DT for fisheries subsidies, and to craft appropriate fisheries-related conditions and limits rather than set arbitrary time limits on fisheries subsidies S&DT.

In the context of fisheries subsidies, two phrases have been frequently repeated in the discussion of S&DT: “Room to Grow” and “No Blank Cheque”. WWF believes that these continue to be the essential concepts that should guide Members in their discussions. Where developing countries fishing industries have “room to grow”, public investment to support sectoral development should be allowed, including through capacity- and effort-enhancing subsidies. However, this right to S&DT should be conditioned on affirmative demonstrations that the requisite “room to grow” in fact exists, and on effective fisheries management to ensure that industrial development does not outstrip the carrying capacity of fisheries resources or harm marine ecosystems.

“Room to Grow” and “Exploitable Capacity” (Chair's 2nd Bullet)

The concept of “room to grow”¹ in a fishery must mean that subsidized increases in fishing capacity or effort will not lead to overfishing or overcapacity. This concept has two elements: biological and industrial.

Biologically, “room to grow” exists only when target fish stocks are underexploited (i.e., have significant potential to support expanded fishing without exceeding maximum sustainable yield (MSY) or more conservative target reference points).

Industrially, “room to grow” exists only where total fishing capacity in a fishery is substantially below 100%—i.e., where there is significant potential for expansion in total capacity without exceeding conservative estimates of full capacity levels.

Except under very rare circumstances, a fish stock that is approaching (or exceeding) full exploitation is—by definition—subject to fishing capacity that is approaching or exceeding 100%. Similarly, in the absence of transient and unpredictable exogenous factors, the fishing fleets targeting a given stock cannot be substantially below 100% capacity unless the target stock is underexploited. Thus, evidence of stock health is a critical consideration in examining “room to grow”. But an underexploited stock is not by itself sufficient evidence of “room to grow”; since an underexploited stock can be rapidly depleted where excess fishing capacity exists. Thus, both the biological and industrial measures are necessary elements of “room to grow”.

¹ The Chair's memorandum refers to the concept of “exploitable capacity”. The term “capacity” in this phrase apparently refers not to fishing capacity, but rather to the limits on sustainable exploitation (or “carrying capacity”) of target fish stocks. WWF thus understands the Chair's phrase as equivalent to the biological element of “room to grow”.

The main challenge is to give “room to grow” a functional definition. In WWF’s view, a workable definition must be tied as directly as possible to the avoidance of overfishing and overcapacity, while maintaining sufficient flexibility to accommodate the variety of legitimate approaches to defining and measuring these dangers. This would imply adopting a vocabulary drawn from existing international instruments dealing with the problems of overfishing and overcapacity. The vocabulary of UNCLOS, of the U.N. Code of Conduct, and of the FAO biannual *State of World Fisheries and Aquaculture* reports should be considered potential sources of terminology. Concepts such as “non-endangered species”, on the other hand, should be avoided. The word “endangered” generally refers to an imminent threat of biological extinction—a condition far more severe (and more vaguely defined) than “overexploited” or even “depleted”. Moreover, the term “non-endangered” has little or no history of application in fisheries management practice, and thus could not be interpreted with the benefit of the significant international fisheries experience associated with terms such as “underexploited”.

Another question is the extent to which a definition of “room to grow” should require quantitative rather than qualitative judgments. Here, a meaningful difference exists between the biological and industrial elements. There is a lot more practical international experience with defining and measuring the biological status of fish stocks than with defining and measuring the capacity status of fishing fleets. Consequently, the international vocabulary related to stock status is more refined—and more deeply integrated into already existing normative language—than the vocabulary of fleet status.

To put this more concretely, the term “underexploited” (as used by the FAO)² has a layered meaning traceable to (but not completely bound by) the quantitative notion of “maximum sustainable yield.” Thus, a dispute over whether a fishery is “underexploited” could proceed in the context of meaningful precedent and well-developed theory. There is no similarly well-developed term to describe a fishery that is “under capacity”—and indeed this phrase itself is far less frequently employed.

This means that accepted international terms related to biological status can be used in new WTO rules without a great deal of modification, but that the industrial element of “room to grow” would likely need a more detailed and original statement. This more detailed statement could be directly quantitative (e.g., referring to percentages of fishing capacity) and/or more precisely defined (e.g., “where quantitative assessments provide convincing evidence that total fleet capacity is substantially below full capacity, such that subsidized expansion of fleet capacity or effort will result in no significant risk of overcapacity or overfishing.”)

→ WWF urges Members to include both biological and industrial elements in any rule describing the “room to grow” necessary to support capacity- or effort-enhancing subsidies.

→ Regarding the biological element, WWF urges Members to employ terms drawn from existing international fisheries management instruments and practice (such as the FAO term “underexploited”).

→ Regarding the industrial element, WWF urges Members to adopt a clearly articulated definition that (i) requires Members to provide affirmative evidence of a science-based capacity assessment and (ii) sets a clear standard (qualitative or quantitative) for defining the degree of “under capacity” necessary to support capacity- or effort-enhancing subsidies.

² NOTE — The use of terms drawn from FAO practice does not necessarily imply the use of FAO classifications of specific stocks.

Management-related Criteria

(Chair's 3rd, 4th & 5th Bullets)

WWF welcomes the broad support given by many Members for including criteria related to the adequacy of fisheries management in various aspects of proposed fisheries subsidies disciplines. WWF does not believe the application of such criteria can be limited to the conditions associated with S&DT, but follows the Chair's lead in discussing them in that context here. The following comments are intended to apply to all non-artisanal fisheries (artisanal fisheries are discussed separately, below).

As a starting point, WWF believes the question is no longer *whether* but *how* management-related sustainability criteria are to be integrated into new WTO rules. Even recent papers that purport to reject this view (such as the current submission from Japan, Korea, and Taiwan) end up relying on the use of at least some basic elements of management-related criteria. Moreover, sufficient progress has now been made in discussing the practicalities of sustainability criteria that efforts to hide behind the mantra of "this can't be done at the WTO" have an increasingly hollow ring.

Test of success:

The challenge is to adopt management-related sustainability criteria that are meaningful and effective. To meet this "meaningful and effective" standard, the criteria must:

1. Explicitly include all key elements necessary to a functional fisheries management system, including
 - Assessment of fish stocks and fishing fleets;
 - Establishment of appropriate limits on fishing and/or fishing capacity; and
 - Surveillance and enforcement of those limits.
2. Require affirmative showings and adequate transparency in the administration of management regimes to demonstrate that the necessary elements of management are being actively implemented in practice;
3. Provide flexibility to accommodate legitimate differences in approaches to fisheries management in accordance with diverse local circumstances and policy judgments;
4. Be sufficiently explicit to make implementation of the criteria reasonably predictable and free from undue conflict over the interpretation of terms employed in new WTO rules; and
5. Include new institutional mechanisms to provide for the mandatory engagement of a neutral and independently selected body of experts to assist in the interpretation and application of the criteria (the CITES-FAO relationship provides a useful starting place for the design of such a mechanism).

These five tests of success imply some immediate and obvious responses to questions raised by the Chair. First (regarding the Chair's third and fifth bullets), criteria that look purely to the existence of regulations on paper, or that can be fulfilled entirely through "self-declaration" by Members, without requiring affirmative proofs of actual implementation, will lack credibility, and would be greeted by WWF as an effort to evade meaningful disciplines. Second, (regarding the Chair's fourth bullet), "proxy measures" that seek to replace explicit management-related criteria with simplistic "bright lines" drawn on the basis of vessel size or other uni-dimensional fisheries characteristics would similarly be tantamount to a purposeful failure to meet the Hong Kong mandate.

Approach to drafting:

Criteria that meet the foregoing tests will need to be drafted in a manner that is as simple as possible, without leaving too much to the interpretation of future dispute processes. One approach would be to include the following elements:

1. Broad references to existing international standards of responsible fishing;
2. Supplemental provisions to enhance the precision and predictability of the rules, including:
 - a. Elaboration (either in the body of new ASCM rules or in an accompanying illustrative annex) of the basic elements of management related criteria (including explicit reference to and elaboration of the elements in the first “test of success”, above); and
 - b. Enumeration of several specific administrative mechanisms that must be in place to allow adequate management to occur, such as vessel registries, fishing license programs, and catch documentation schemes or other means of measuring outputs; and
3. Balanced use of judgments by competent international bodies, such as the FAO and RFMOs, without making those judgments legally decisive. For example, the listing of a fishery as “overexploited” or the finding that a vessel or fleet is engaged in IUU fishing or its equivalent by a competent international body could shift a legal burden or raise a legal bar requiring clear and convincing evidence to refute the findings.

→ WWF urges Members to adopt meaningful and effective criteria that meet the five-part test articulated above.

→ WWF urges Members to use a “mixed approach” to drafting these criteria, as suggested in the three-part approach articulated above.

The Burdens of Compliance

(Chair’s 6th & 7th Bullets)

The last two questions raised by the Chair regarding general S&DT touch on possible negative impacts of sustainability criteria (“room to grow” + management-related provisions). The Chair’s sixth question, as WWF understands it, rests on the assumption that sustainability criteria could constrain the use of fisheries subsidies by developing countries in ways that might impede their development. The Chair’s seventh question suggests that care must be taken to ensure that the criteria themselves do not entail “overly burdensome” administrative costs.

Regarding the first of these questions, no government has yet argued that its development goals require the freedom to grant subsidies likely to cause overfishing or overcapacity. The question is thus not one of “balancing” developmental goals against fisheries management conditionalities *per se*, but whether the conditionalities at issue are properly crafted to avoid forcing developing countries into the wrong management policies—*i.e.*, into an inefficient allocation of governmental resources.

The criteria proposed by WWF would, at least for non-artisanal fisheries, require several steps as a prerequisite to the granting of capacity- or effort-enhancing subsidies, including:

- Science-based assessment of the biological status of target fisheries and of the capacity of fleets fishing thereon;
- Regulatory action to establish target reference points (TRPs) and associated controls on fishing and/or fishing capacity; and
- Mechanisms for monitoring and enforcement (including vessel registries, licensing systems, and tracking of catches).

Are there circumstances in which such requirements are inappropriate? If the answer can ever be “yes”, it would be under circumstances that, in WWF’s view, define the “artisanal” case. And even then, it seems unlikely that subsidized increases in capacity or effort can favor sustainable development in the complete absence of reliable judgments about stock and fleet status or in the context of a wholly unregulated fishery.

The key to avoiding inappropriate criteria is to articulate standards that balance flexibility with effectiveness. The approaches to drafting noted above can lead towards this result.

A similar argument can be made in reply to the Chair’s seventh bullet. Where public resources are available to subsidize fishing capacity and effort, it seems clear that there are sufficient resources to administer a management system that meets the “flexible yet effective” test, and to notify the subsidies to the WTO.

→ WWF urges Members to impose rigorous but flexible sustainability criteria on all permitted subsidies (including S&DT), while using the concept of “artisanal fisheries” to adapt such criteria, as discussed below.

An Additional Comment Regarding International Fisheries

The increasing activity of developing country fishing fleets targeting international stocks in their own EEZs, or moving to fisheries on the high seas and in foreign EEZs, raises questions about the scope of S&DT and the conditions applicable to it.

With regard to the first, WWF endorses a concept of S&DT that hinges on the right of a coastal state to exploit the fisheries resources within its territorial waters and EEZ. The concept of “room to grow” should not apply beyond those waters. The condition of worldwide fishery resources does not support the subsidized “export” of fishing capacity, even by developing countries. The only possible exception to this rule might be in cases where a developing country has an underexploited right to catch quotas under an effective RFMO (see next paragraph).

With regard to migratory or straddling stocks within a developing country’s own EEZ, the basic rule of “no subsidies without adequate management” suggests that subsidized fishing on such stocks should not be allowed unless an effective RFMO or other cooperative mechanism is in place to manage the fishery. In such cases, the management in question should fulfill the same criteria as those set forth above for domestic regimes. This would include the setting of enforceable science-based limits on fishing on the target stocks.

→ WWF urges Members to limit S&DT to fishing operations within the territorial waters and EEZs of developing countries.

→ WWF urges Members to disallow all capacity- or effort-enhancing subsidies on any international stock not subject to effective international management meeting the kinds of sustainability criteria set out above.

Artisanal Fisheries

General Discussion

Why are special provisions for artisanal fisheries necessary?

Is it because governments wish to give artisanal fisheries kinds of subsidies they would not grant to other parts of their fishing industry? This does not seem to be the case. So far, no Member has identified a class of subsidies that it wants to use uniquely in its artisanal sector. Developing countries will likely prefer S&DT that allows all of the kinds of subsidies they wish to employ, without regard to the sector or sub-sector to which the subsidies are granted.

The need for distinct treatment of the artisanal sub-sector, therefore, must relate to the conditions and limits that may apply to subsidies authorized via S&DT. Here, the distinction may make good sense, particularly with regard to the application of sustainability criteria.

The modern tools of fisheries management—such as science-based stock and capacity assessments, imposition of catch limits, licensing and vessel registration—can pose special challenges for fisheries that:

- i. are geographically diffuse and remote (lots of very small boats, with decentralized landing sites linked to multiple small local markets, often in areas where communication and transportation infrastructure is rudimentary);
- ii. have a history of traditional, community-based management systems (i.e., not easily integrated into centralized command and control regulatory systems);
- iii. target multiple species simultaneously; and
- iv. employ low levels of technology, both for fishing and for monitoring and reporting fishing activity.

Fisheries having this set of characteristics may require more flexibility in the definition of sustainability criteria than those set forth above for S&DT generally. The narrower requirements of vessel registry, licensing, and catch documentation may pose particular difficulties as long as these characteristics endure. (It should be recalled, however, that many subsidies to artisanal fisheries are intended precisely to change some or all of these conditions.)

→ WWF urges Members to define artisanal fisheries as fisheries having characteristics such as those just listed, such that modern, data-based command and control or market-based approaches to fisheries management are inapplicable.

→ In such fisheries, sustainability criteria should be adapted and possibly subject to phase-in periods, but not altogether waived.

Specific Replies to Questions from the Chair

The foregoing discussion implies clear answers to the questions on artisanal fisheries posed by the Chair, as follows:

- (first bullet): There is no basis for treating “small-scale mechanized” fleets differently from larger industrialized fleets, as the standard use of the former term covers many fisheries that do not have the characteristics set forth above. The concept of “subsistence”, on the other hand, may be useful as part of a general description of many artisanal fisheries, but would at best be a factor to consider or a proxy for the other characteristics listed above.
- (second bullet): The criteria discussed above include some of the possible factors listed by the Chair for defining artisanal fisheries, but exclude others. Obviously, vessel size taken alone reveals nothing about the organizational characteristics of a fishery that make it a case for specially adapted sustainability criteria.
- (third bullet): While it is perhaps plausible to find fisheries that would meet the characteristics set out above in fisheries in developed countries, this would be a rare occurrence. Moreover, developed countries have the resources required to improve communications and monitoring much more rapidly than most developing countries. For these reasons, and in order to avoid creating loopholes, special treatment for artisanal fisheries should be restricted to developing countries as a special case of S&DT.
- (fourth bullet): Artisanal fisheries should not be granted a “blank cheque” for fisheries subsidies. History has already demonstrated that subsidies to artisanal fisheries can have significant negative impacts on both resources and international competition. The only difference in treatment should be the necessary adjustments to sustainability criteria themselves.
- (fifth bullet): If the definition of artisanal fisheries were expanded beyond the concepts set forth above, it would seem necessary to impose on them the same degree of conditionality applicable to S&DT generally.
- (sixth bullet): The concept of “*de minimis*” is generally problematic. Unless it is given a very particular (and unusual) definition, it is also especially inapplicable in the artisanal fisheries context, because even very small subsidies can radically transform the nature and scale of fishing undertaken by an “artisanal” fleet. It costs very little (compared to most government programs, but not perhaps to an artisanal fisherman’s income) to put an outboard motor on a pirogue (sea-going canoe). But doing so can turn an inshore artisanal fleet into an offshore or even international fleet, and can have significant impacts on fisheries resources.

Subsidized Access to Foreign EEZ Fisheries

As noted at the outset of this paper, a third issue that has received significant attention in relation to S&DT is the question of subsidized access. Although the Chair's memorandum of 18 May does not raise this issue, WWF offers the following synopsis of its current position.

WWF has long recognized both the importance and the sensitivity of the subsidized access issue. The importance of the issue stems from the history of access subsidies that are linked with overcapacity and overfishing by distant water fleets active in the EEZs of developing countries. In light of the unbalanced negotiating power of developing and developed countries, access subsidies are also routinely associated with access arrangements that are far more favorable to developed country distant water fleets than to developing country host states. Failure to address the subsidized access issue would thus constitute a significant gap in any new WTO fisheries subsidies disciplines, and would leave those disciplines shy of meeting the entire mandate issued by ministers in Hong Kong.

On the other hand, WWF fully appreciates the importance of access fees to the national economies and development strategies of many small and vulnerable coastal developing countries, and recognizes that WTO fisheries subsidies rules must not be allowed to threaten these critical "north-south" financial transfers.

WWF—like several Members—proposes that government-to-government payments for access, no matter what the form, should be excluded from the definition of "fishery subsidy." WWF applauds the approach proposed by several members that would treat as a fishery subsidy only the onward transfer of access rights to domestic distant water fleets, unless the full value of those rights is paid back by the recipient fleets.

Beyond this narrow definition of "access subsidy". WWF also seeks new WTO disciplines that clearly permit such subsidies, and that impose on them a few basic conditions. Specifically, WWF proposes rules that require:

1. The notification of the subsidy by governments transferring subsidized access rights to their domestic fleets, with the notification to include a declaration of the value of the access granted; and
2. The transfer of subsidized access to any fishery involving an international stock (straddling or highly migratory) only if that stock is subject to management by an effective RFMO.³

In calling for these conditions, WWF seeks to avoid any direct treatment of the government-to-government aspects of access arrangements. Thus, unlike some of the proposals now before the NGR, WWF is not calling for WTO notifications to include the terms of the government-to-government arrangements that may underlie the "onward transfer" of access rights. WWF calls only for notification of the onward transfer itself.

Further, WWF proposes a method of calculating the value of the resulting subsidy that focuses directly on the value of the transferred rights rather than on factors that inevitably would require examination of the terms of government-to-government deals. The U.S.

³ Apart from this "international stocks" criterion, WWF has not so far called for applying sustainability criteria to subsidized transfers of access rights. WWF notes with interest the proposals of some members to move in that direction, but thinks such proposals must be examined to ensure that they do not condition one government's right to subsidize entirely on the actions of another government. In the case of international stocks, this would not be the case, since the subsidizing government would have to be a party (or cooperating non-party) to the RFMO regime required by the rule.

(the only delegation so far to include a specific proposal on this important point) has called for equating the value of the subsidy with “the cost the fleet would otherwise have to pay for access to the fisheries resources.”⁴ But this approach is flawed both because it moves towards direct examination of government-to-government agreements and because it depends on the possibility of constructing a theoretical market price for the access itself. The reality, however, is that access arrangements—including those to which private fleets and coastal states are the only formal parties—are almost always negotiated in the context of complex international political relationships that may involve diplomatic, economic, cultural, and even military considerations far beyond commercial realities in the fisheries sector. As a general matter, no “arms length” price for “private access” to foreign EEZ fisheries can be meaningfully calculated.

In contrast, WWF calls for valuing the subsidized transfer of access rights through a constructed value of the rights themselves—*i.e.*, through a calculation based on the market value of the fish allowed to be taken under the transferred rights, with adjustments for the cost of fishing and a reasonable return on investment. This approach simultaneously avoids any need to examine the posture of the coastal state and focuses on the real economic value of the access granted.

WWF notes with concern the opposition of some developing countries (as expressed in the paper just submitted by the “ACP Group”) to including even the onward transfer of subsidized access rights within new WTO disciplines. WWF remains convinced that rules can be crafted that protect the financial flows associated with access agreements while also limiting the often-demonstrated ability of developed country governments to use subsidized access for their domestic distant water fleets in ways that are inequitable and unsustainable. WWF will study with care the arguments put forth by the ACP Group in the hope of advancing towards a balanced result.

→ WWF urges Members to continue dialogue around the “subsidized access” issue, defining the subsidy at issue to be the onward transfer of access rights from a government to its domestic distant water fleets.

→ WWF urges Members to examine carefully the basis for valuing access subsidies, and the conditions to be placed on them, to ensure that new disciplines make a significant contribution to preventing unsustainable and inequitable access arrangements without giving the WTO the authority to review government-to-government access agreements.

⁴ TN/RL/GEN/145 at Attachment Art. 2.2(i).