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Fishing Subsidies and the World Trade Organization

By Chi Carmody¹

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1. Introduction

In recent years the tremendous increase in the intensity of fishing, the growth of illegal, unreported and unregulated fishing, and the continuation of wasteful harvesting practices have all placed unprecedented stress on the global marine biomass. More troubling still, perhaps, is the lack of accurate scientific information about the problem.² Most statistics that we do have present a grim picture. A study in 2000 by the FAO indicated that 50 percent of the world's fishery resources are fully exploited, 15-18 percent are overexploited, and 9-10 percent of stocks have been depleted or are recovering from depletion.³ UNEP has concluded that "major interventions are required to restore stable stocks."⁴ Even the more optimistic forecasts do not bode well.⁵

Coupled with this picture has been a continuing parade of international disputes about fishing rights. It is hard to say these are any worse than in the past, but it is certain that countries are more willing to assert their claims using the language of resource

¹ Assistant Professor, Faculty of Law, University of Western Ontario, London, Ontario, Canada. The writer would like to thank Moritaka Hayashi and Chusei Yamada for their comments, and the Japanese Society of International Law and Yuji Iwasawa for inviting him to present a version of this article at the JSIL Biannual Conference at Hosei University, Tokyo, Oct. 13, 2002.

² James C.F. Wang, HANDBOOK ON OCEAN POLITICS AND LAW 114 (1992) (noting that "the exercise of determining what is maximum sustainable yield is "at best a bad guess by frustrated scientists.")

³ Food and Agriculture Organization, *The State of the World's Fisheries* (2000).

⁴ UNEP Workshop on the Impacts of Trade-Related Policies on Fisheries and Measures Required for their Sustainable Management, WT/CTE/W/205 at 1 (May 8, 2002).

⁵ Matteo Milazzo, *Subsidies in World Fisheries: A Reexamination*, World Bank Technical Paper No. 406 (April 1998); Ronald P. Steenblik & Gordon R. Munro, *International Work on Fishing Subsidies – An Update* (April 2001) ("Despite the many improvements in management systems that have been introduced, the state of the world's fisheries remains worrisome.")

depletion and exhaustion, and major scientific bodies have concurred in this opinion.⁶ The countries of the Caspian Sea Basin continue to fight over a dwindling supply of sturgeon and other resources.⁷ The European Community now questions the continued financing of its combined fishing fleet in the face of strong evidence of the disappearance of traditional fisheries.⁸ Japan itself has been locked in a dispute with Australia and New Zealand over Southern Bluefin Tuna, and draws fire from many South Pacific countries about its fishing practices in the region.⁹

One response to these situations has been the announcement by the World Trade Organization (WTO) during the Doha Ministerial Conference in December 2001 that WTO member countries would “aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.”¹⁰ Subsidies are well-known policy instruments in the WTO. However, the idea of clarifying and improving disciplines on fishing subsidies in order to deal simultaneously with issues of trade, the environment and development, is new. Traditionally, subsidies on primary products were permitted by international trade rules under the broad rubric of supply security.¹¹ Today that policy is under scrutiny as stocks disappear. The WTO’s proposal to clarify and improve disciplines on fisheries subsidies is frank recognition that

⁶ See Food and Agriculture Organization, *The State of the World’s Fisheries* (2000) OECD, *Review of Fisheries in OECD Member Countries* (2001).

⁷ In January 2002, the deputy foreign ministers of the Caspian littoral states signed a joint communiqué on the legal status of the Caspian Sea. However, Iran continues to insist that prior treaties dating from 1921 and 1940 that it signed with Russia should be the basis of a new legal regime. This would provide for use of the sea in common, or that its floor and water basin should be divided into equal shares.

⁸ The European Community’s Common Fisheries Policy (CFP) has been criticized as promoting overfishing. In 2000 the Commission rejected this characterization, noting that the bulk of subsidies now offered were for transitional purposes away from fishing.

⁹ *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, 38 I.L.M. 1624 (provisional measures); 39 I.L.M. 1359 (2000) (jurisdiction and admissibility).

¹⁰ See WTO Doc. WT/MIN(01)/DEC/1 (Nov. 20, 2001), Arts. 28, 31.

¹¹ Under the proposed International Trade Organization (ITO) primary products were to be governed by a separate regime of inter-governmental commodity agreements with supply- and demand-management criteria. See *Havana Charter*, Art. 57(f). GATT provisions reflecting this concern remain. See for instance GATT Art. XI:2 allowing for import and export prohibitions on primary and GATT Art. XVI:3 concerning subsidies on primary products, which prohibited subsidization resulting in a contracting party having “more than an equitable share of world export trade.”

current exploitation patterns of the world's fisheries are unsustainable.

This article argues that the attempt to improve subsidy disciplines in the WTO can and must be pursued, but that such an effort has to go hand-in-hand with the question of enhanced management of the wealth of the seas in other fora. The proposal is hardly a novel suggestion. Both intergovernmental and non-governmental organizations have periodically pushed for the WTO to become more involved in conservation efforts, and the real question now seems to be how the WTO will do so: either by recognizing that its existing disciplines on subsidies are adequate, as some WTO members – including Japan – now argue¹², by interpretative strategies that employ the existing treaty language in progressive ways, or by amendment of its basic instrument, the *WTO Agreement*.¹³

The position I take here is that the WTO's existing effects-based disciplines on subsidies are inadequate in a situation where we have little real information about the subsidies' *effect*. In addition, purely interpretative strategies will not work because the necessary words to interpret are not in the treaty's text. The remaining alternative is an amendment to the *WTO Agreement* that gives expression to a precautionary approach for fisheries management in the form of *act*-based responsibility, that is, the right to take trade sanctions against the subsidization of certain egregious fishing practices. The precautionary approach mandates that we go beyond the strict requirement for evidence and respect the growing consensus in international opinion and practice – indeed in international law itself – for an end to environmentally destructive fishing practices.

At the same time, however, I argue that we should be wary of proposals that

¹² For an exposition of Japan's position see *Japan's Basic Position on the Fisheries Subsidies Issue*, WTO Doc. TN/RL/W/11 (July 2, 2002) ("Those who insist that fisheries subsidies distort trade should first make every effort to correct the alleged trade distortion by applying the relevant provisions of the existing [SCM] ... As long as no convincing explanation is made as to the special nature of the fisheries sector with regard to trade distortion, we cannot help being cautious about dealing with fisheries subsidies in a distinct manner based on trade distortion.")

¹³ 33 I.L.M. 1125 (1994).

conceive of fishing rights solely as property and that give the WTO a role in their enforcement akin to its enforcement of intellectual property rights under the *Agreement on Trade-related Aspects of Intellectual Property* (TRIPS).¹⁴ It may be that the WTO will one day have a role in enforcing sustainable fishing practices, but to equate these in all situations with property rights ignores the fact that current evidence for doing so is inconclusive. Just as our conception of global intellectual property protection may be much more uneven and contextualized than it was when TRIPS was concluded only a short time ago, so too may be our understanding of fishing as a property right today.¹⁵ If we are to take anything from the WTO's experience with TRIPS, it should be that a balanced model of rights to exploit marine resources is necessary. This will involve more than a monolithic, one-size-fits-all approach to exploitation, preservation, and enforcement of marine resources and more awareness of possibilities for a varying regime of open access, catch limitation, and quota, depending on the specific conditions present. We may even recognize the utility and necessity of retaining fishing subsidies in some instances.

This paper therefore intends to review the issues and provoke debate about the effort to restrain fishing subsidies under the *WTO Agreement*. Explicit mention in the *Doha Declaration* of disciplines on fishing subsidies means that negotiations on the subject *will* proceed. Indeed, they have already begun. Japan, as the world's leading

¹⁴ 33 I.L.M. 1125 (1994). The disciplining of subsidies in many respects presents an even more compelling case for protection than the protection of intellectual property under TRIPS. Intellectual property is, at base, about the use of knowledge. That knowledge may not be gained in a regime of loose protection, but any loss is usually speculative since what is known is, by definition, not yet known. When it comes to fish and marine resources, however, human beings are very aware that what we lose in the exploitation of animate resources becomes irretrievable without sustainable use. Nevertheless, this paper takes the position that while the conception of fishing rights as property rights is appropriate in some cases, a regime of rights-based protection would not be appropriate in all cases.

¹⁵ See for instance the *Report of the U.K. Commission on Intellectual Property Rights* (Sept. 16, 2002), available at www.iprcommission.org/text/documents/final_report.htm.

importer of seafood products,¹⁶ is a key stakeholder in these discussions and will be central to the development of a common position, a position which, given the WTO's careful tradition of consensus, all countries must ultimately support.

2. Fishing, Overfishing, and the WTO

International law traditionally provided for the freedom to fish.¹⁷ This meant that the vessels of one country were free to fish off the coast of another, usually outside the three-mile territorial sea. Since the Second World War, however, this principle has been replaced by the acceptance of a new legal regime for fishing based on national claims of exclusive economic and fishery zones (EEZ) of up to 200 nautical miles.¹⁸ That new regime is now enshrined in Art. 57 of the U.N. Convention on the Law of the Sea (UNCLOS).¹⁹ UNCLOS Art. 61(1) gives coastal states the right to determine the allowable catch of living resources in its economic zone, a right which is associated with the duty under UNCLOS Art. 62 to give other states access to the surplus allowable catch. UNCLOS does not spell out the method by which countries are to determine the catch, but it does require them to promote "the objective of optimum utilization of the living resources in the EEZ."²⁰ It also encourages states fishing on the high seas, that is, the area outside of EEZs, to take cooperative conservation measures with other states by determining the allowable catch on the high seas collectively, normally through regional fisheries commissions.²¹

¹⁶ In 2000 Japan ranked first among importers of fisheries commodities, importing \$15.5 billion-worth of product. In the same year Canada was the world fifth-largest exporter, exporting \$2.8 billion worth of product. See *FAO Fisheries Yearbook 2000*, Table A-3, available at ftp.fao.org/fi/stat/summ_00/Yb91taba3.pdf.

¹⁷ James C.F. Wang, *HANDBOOK ON OCEAN POLITICS AND LAW* 110 (1992).

¹⁸ These EPZs and EEZs were originally meant to conserve fish stocks, predominantly for the fishing industry of the adjacent coastal state. *Ibid.*, 111. See also William T. Burke, *THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND* 6 (1994).

¹⁹ 21 I.L.M. 1477 (1982).

²⁰ UNCLOS Art. 62(1).

²¹ UNCLOS Art. 118-119.

The UNCLOS regime provides considerable impetus to countries to conclude agreements with each other in order to allow for fishing both within and beyond the EEZ. The result has been an expansion in the number of bilateral and regional agreements since the 1970s accompanied by a substantial increase in the global fishing take. Fishers today harvest 94 million metric tons of fishery commodities, almost fifty percent more than they did in 1970.²² Much of the increase has come about because of the growth of subsidized fleets and significant improvements in fishing technology, which together work to increase the intensity of the catch.

Fishing itself is a matter of economics. Like agriculture, mining, and forestry, fishing involves the extraction of wealth out of a natural resource that is essentially free. Fish lie in lakes, rivers, seas and oceans, and, when available, are taken at will. All that fishing fleets need to do is equip themselves for the task, sail to the site, and fish. The problem that this presents, of course, is one of ownership: the resources of all are the responsibility of none. In a situation where fishers seek to maximize their incomes there will be a powerful incentive to exploit the resource to the point of depletion. In several notable instances this has already happened. The statistics presented above, for instance, do not reveal that while world fishing ship tonnage has continued to climb the annual global catch remains about where it was in 1990 and is increasingly composed of poorer stock. Fishing therefore presents a classic scenario of tragedy of the commons.²³

²² World commercial catch in 1970 was 62 million metric tones: see *FAO Yearbook of Fisheries* (1970).

²³ The phrase "tragedy of the commons" was popularized by Garrett Hardin in his 1968 article, *The Tragedy of the Commons*, where he described the central problem as follows: "the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another.... But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit -- in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all." See 162 *SCIENCE* 1243-48 (1968).

One alleged contributor to this state of affairs is government subsidies.²⁴ Subsidies cover many phases of fishing operations today, from subventions for fisheries infrastructure, such as boats, harbours, and bridges, to monies for maintenance and ongoing operations, such as distant-water fishing, to decommissioning subsidies, such as unemployment insurance and worker transition funds. Government assistance also comes in several forms, including outright grants, bounties, and tax treatment. The diversity of measures and the range of their forms make subsidies hard to identify.

In the World Trade Organization there has been periodic discussion on the issue of fisheries subsidies in the Committee on Trade and Environment (CTE), where a number of NGOs have submitted briefs.²⁵ Undoubtedly attracted by the prospect of an institution “with teeth”, these same NGOs began lobbying in the late 1990s to place the issue of fishing subsidies on the WTO’s agenda. This effort was ultimately successful. Ministers meeting at the Doha Ministerial Conference in November 2001 agreed to proceed with negotiations on fisheries subsidies, which are now taking place principally in the Rules Negotiating Group in order to respect the functional architecture of the *WTO Agreement* and the importance of the *WTO Agreement on Subsidies and Countervailing Measures* (SCM). In addition, fisheries products may also figure in market access negotiations, that is, multilateral negotiations to lower tariff and other barriers on fish products.

The decision to place fishing subsidies on the Doha agenda is innovative from at least two perspectives. First, there is some uncertainty about the WTO’s legitimacy in

²⁴ World Wildlife Fund, *Hard Facts, Hidden Problems: A Review of Current Data on Fishing Subsidies* (2001); Gordon Munro & Ussif R. Sumaila, *Subsidies and their Potential Impact on the Management of the Ecosystems of the North Atlantic* (2002).

²⁵ For discussion see *Submission from New Zealand*, WTO Doc. WT/CTE/W/204 (March 19, 2002).

relation to the subject. The WTO is “the common institutional framework for the conduct of *trade relations* among its Members”.²⁶ The institution has no direct mandate or prior competence in marine resource management.²⁷ Rather, its rules have traditionally regarded fish as a primary product, something to which only loose subsidy disciplines originally applied.²⁸ A number of bases for the WTO’s involvement in fisheries are therefore proposed. There is undoubtedly a trade-related aspect. Approximately one-half of all fish caught worldwide are sold in international commerce.²⁹ There is also a development nexus. Developing countries have a large share of global trade in fisheries products, a share which has increased dramatically in recent years with growing demand for fish in developed countries, the exhaustion of proximate stocks to developed markets, the growth of distant water fishing, and the introduction and intensification of aquaculture in the developing world.³⁰ Finally, there is an evident environmental nexus, one which prompted NGOs to prod governments and that eventually led to the reference to fishing subsidies in the *Doha Declaration*.³¹ This has led to WTO involvement being described as promoting a trilateral “win-win-win” solution. Nevertheless, there have also been calls for the adoption of a holistic and integrated approach to fisheries management

²⁶ WTO Agreement, Art. II.

²⁷ The Preamble of the WTO Agreement refers to “optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so ...”. Several GATT and WTO cases have dealt with the nexus of trade and the environment, and in particular, concerning fish and other marine products. See *United States - Prohibition of Imports of Tuna and Tuna Products from Canada* (Feb. 22, 1982); *Canada – Measures Concerning Exports of Unprocessed Herring and Salmon* (March 22, 1988); *United States – Restrictions on Imports of Tuna* (1991) (complaint by Mexico; unadopted); *United States – Restrictions on Imports of Tuna* (1994) (complaint by the EC; unadopted); *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS/58, 61 (1998).

²⁸ See definition given to “primary product” in Note B to the Ad Note to GATT Art. XVI:3, which is “any product of farm, forest or *fishery*, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.”

²⁹ Food and Agriculture Organization, *State of the World Fisheries and Aquaculture* (1996).

³⁰ *FAO Fisheries Yearbook 2000*.

³¹ The World Wildlife Fund’s Endangered Seas Campaign raised consciousness and awareness of fishing subsidies and their detrimental effects in the mid-1990s. Later, the issue was adopted and forwarded by the government of Iceland.

worldwide, one which goes well beyond the institutional capacity of the WTO.³² The real issue therefore appears to be whether it is best to involve the WTO at all.

A second perspective asks what the WTO can reasonably hope to accomplish? To recall, the exact wording of the *Doha Declaration* states that negotiators will “aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.” In the careful language of diplomacy this may mean no more than that things should stay as they are. However, the term “clarify and improve” suggests that existing WTO rules about subsidies may either be subject to some specific interpretative instrument clarifying their role, like the *Declaration on the TRIPS Agreement and Public Health*³³, or, more provocatively, that they may be improved through the development of an entirely separate set of sector-specific rules. Whether either of these options could ever become a reality requires some consideration of the nature of existing WTO subsidy disciplines.

3. Subsidies and the Fisheries Sector

Subsidies are a benefit bestowed by government on the production, sale, or consumption of a good, service, or intellectual property that make production, sale, or consumption more attractive.³⁴ Throughout economic history they have been accepted as necessary in scenarios of “market failure”, that is, situations where the open market does not adequately price an activity. The appropriate price is, in turn, often more than some monetary value. Instead, it is a construct of economic, social, and cultural assessments about the desirability of something.

³² For an “ecosystems approach” to marine conservation management see M. Belsky, “Marine Ecosystem Model: The Law of the Sea’s Mandate for Comprehensive Management” 22 L. SEA INST. PROC. 115 (1989).

³³ 41 I.L.M. 775 (2002).

³⁴ See J. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 757ff (1995).

With conversion of much of the world to capitalism and the gradual retreat of governments from active participation in the marketplace, subsidization has come under greater scrutiny. The shift in attitude has been mirrored in the development of international trade rules. The *WTO Agreement* takes a much firmer stand against subsidies than its predecessor, GATT.³⁵ Whereas the original GATT only sought to restrain countries from obtaining “more than an equitable share of world export trade” in primary products through subsidization,³⁶ the *WTO Agreement on Subsidies and Countervailing Measures* now provides a comprehensive scheme of limitation.

Subsidies are now defined under the SCM as a financial contribution or support by government bestowing a benefit in some form.³⁷ They are subject to a sliding scale of scrutiny and remedy. At the beginning are export subsidies, which are regarded as policy instruments most disruptive to international trade and therefore subject to expedited review and the remedy of withdrawal.³⁸ Whether withdrawal means no *further* bestowal and is purely prospective, or requires some form of taking back and therefore retrospective, has not been definitively resolved in WTO dispute settlement.³⁹ Next in consideration are actionable subsidies, that is, certain types of official behaviour which

³⁵ GATT Art. XVI:1 stated that “If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, or the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidy.”

³⁶ The term “primary products” is defined in Note Ad Section B to GATT Art. XVI:3 as “any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.”

³⁷ SCM Art. 1.1 requires that there be 1) financial contribution or price/income support and 2) that a benefit is thereby conferred in order to found a subsidy. In addition, SCM Art. 1.2 requires that a subsidy be specific in order to be actionable under the agreement.

³⁸ SCM Art. 4.7.

³⁹ See *Australia – Subsidies provided to Producers and Exporters of Automotive Leather*, WT/DS126/R (May 25, 1999) (resulting in repayment of the subsidy bestowed); but see *Brazil – Export Financing Program for Aircraft*, WT/DS46/AB/R (Aug. 2, 1999) (subsidy to be withdrawn, but no definitive result).

result in distortion to world markets either through supply or demand side modifications.⁴⁰ The remedy is one of eliminating the subsidy *or* its effects.⁴¹ Finally, there is the category of permissible subsidies, which allows the granting of subvention for broad research, environmental, national development, or other non-actionable purposes.⁴² Here the remedy is one of attenuation of the subsidy's effects.⁴³

In addition to the spectrum of WTO permissible action, countries are also free under the SCM to take countervailing duty measures *in their own domestic markets* against subsidized foreign goods that are injuring or threaten to injure domestic producers. Countervailing action is limited in situations where *both* WTO retaliation and countervail are contemplated; the SCM prohibits their simultaneous use in the market of the importing member.⁴⁴

Three points can be made about the above taxonomy in relation to fishing subsidies:

i. *Subsidies as a Legitimate Tool of Government Policy*

First, the form of subsidy rules reveals that the ultimate policy goal of the SCM is not the removal of *all* subsidies, but merely those that distort international trade. Indeed, there are a number of subsidies that may be highly beneficial. In relation to fishing, for example, government funding to create reefs that eventually attract marine life can be considered in this category. For this reason a category of "green subsidies" was agreed to during the Uruguay Round for research, environmental, national development, and other general purposes, although the category technically expired in January 2000 and have not

⁴⁰ SCM Arts 5-6.

⁴¹ SCM Art. 7.8.

⁴² SCM Art. 8. This category of permissible subsidies formally expired Jan. 1, 2000 by virtue of SCM Art. 31.

⁴³ SCM Art. 9.

⁴⁴ SCM Footnote 35.

yet been replaced.⁴⁵

The wording of Art. 28 of the *Doha Declaration* is broadly consonant with this position. The language indicates that there may be valid policy concerns overriding the preoccupation with conservation, such as artisanal, aboriginal, or adaptive fishing subsidies, that may merit continuing subsidization. These are likely to be small-scale and represent a minimal derogation from the overall goal of environmental protection.

Artisanal fishing has been defined as “any small-scale fishing that is not sport-fishing. It includes both subsistence and small-scale commercial fishing.”⁴⁶ In this respect its aim is primarily to put food directly on the community table. The utilitarian aspect of artisanal fishing for regional development purposes should be evident. It is already regarded as environmentally friendly in certain national legislation. An exception for subsidies used in connection with properly defined artisanal fishing would reconcile trade, environment and development priorities in line with the expressed concern that the WTO should take “*into account the importance of [fishing] to developing countries.*”

Another area where subsidies should continue to be regarded as presumptively legitimate are in relation to aboriginal fisheries. This would involve programs aiming to promote the traditional fishery of aboriginal communities. Definition of what constitutes “aboriginal” differs from country to country, but enhanced concern and awareness about aboriginal rights both at the national and international levels should be enough to sustain such policy instruments provided that they are, again, consistent with a conservation

⁴⁵ Footnote 23 of the SCM states that “It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of [SCM Art. 8] does not in itself restrict the ability of Members to provide such assistance.”

⁴⁶ Timothy J. H. Adams & Paul J. Dalzell, *Artisanal Fishing* (Paper presented at the East-West Center Workshop on Marine Biodiversity Issues in the Pacific Islands) (University of Hawaii, November 1994).

mandate.⁴⁷

Finally, there is a category of adaptive fishing subsidies, namely, those applied for some wider restorative purpose connected with environmental protection. This could include subsidies to allow worker transition, the reconversion of fishing boats and equipment to other uses, and for environmental abatement and reparative programs such as the building of reefs, breeding and restocking programs, surveillance and enforcement. The category would replicate the non-actionable subsidies for adaptive purposes set out in SCM Art. 8.1(c).

ii. *Subsidies as Generic or Sector-Specific*

A second point to be made is that existing rules about subsidies under the SCM are generic. They apply to virtually all types of activity regardless of their character or nature. Thus, the disciplines apply to primary and secondary products, including fish.⁴⁸ Sector-specific subsidies are exceptional and have been expressly negotiated. Currently they exist only in relation to agriculture and civil aircraft.⁴⁹ The comprehensiveness and primacy of the SCM's general disciplines now lead some countries to argue that sector-specific rules for fishing subsidies are unnecessary. The counter-observation posited by others is that fishing, like agriculture, is a primary industry long-subject to international agreement which should develop autonomous rules in order account for its unique characteristics.

What would these unique characteristics be? A casual view of the international

⁴⁷ *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, ILO Convention No. 169, 28 I.L.M. 1382 (1989); *Draft Universal Declaration on Indigenous Rights*, 34 I.L.M. 541 (1995).

⁴⁸ As noted above, fishery products were contained in GATT's original subsidy discipline in Art. XVI, which prohibited the obtaining through subsidization of more than an "equitable share" of world trade in a primary product. See *supra* note 28.

⁴⁹ *WTO Agreement on Agriculture* Arts. 6-9 subjects WTO member countries to previously agreed domestic support and export subsidy commitments. The *Agreement on Trade in Civil Aircraft* of 1979 Art. 6 also provides that in their support for civil aircraft programmes GATT/WTO member governments would "seek to avoid" adverse effects on trade in civil aircraft contrary to the 1979 Tokyo Round SCM.

fishing industry does not appear at first glance to reveal any distinctive feature meriting sector-specific subsidy disciplines. Moreover, the integrated nature of the industry poses problems for disaggregating and identifying government financial support that has some discernible effect on world trade. Existing definitions of subsidies under the SCM are concerned primarily with fairly direct subsidies, that is, subsidies which are involved in the *immediate production* of the good. Thus, for instance, rebates on the interest charged for the purchase of a passenger jet are a subsidy under the SCM, but it is less clear if interest rebates on machinery used to *make* the passenger jet would so qualify, and even less clear if an exemption from road tolls for a company that transports some of the jet's component parts would be subject to discipline.⁵⁰

Partly due to this ambiguity, new grounds of argument are being developed by those countries that support clarified and improved fishing subsidy disciplines. In an April 2002 Issues Paper forwarded by eight WTO members, notable for its inclusion of both prominent developed and developing countries (Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines, and the United States) (hereinafter the "Eight-Country Issues Paper") the signatories note that "a distinctive feature of fisheries sector subsidies is the effect that over-capacity and over-fishing by subsidized producers can have in limiting other producer's access to the shared resource."⁵¹

It is hard to agree with the observation that fisheries are unique in that their exploitation impoverishes all other producers with access to the resource. Notwithstanding the statement of the Appellate Body in the *Shrimp-Turtle* decision

⁵⁰ Answers to the scenarios are suggested in Annexes to the SCM.

⁵¹ Submission from Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines and the United States, *The Doha Mandate to Address Fisheries Subsidies: Issues*, TN/RLW/3 (Apr. 24, 2002).

about sea turtles as an “exhaustible natural resource”⁵² this view is based on the exaggerated view that fish are in all cases a fixed and limited resource, when this is only true for some species under certain conditions. Fish should be generally available for those with the right to fish them, a right which can be restricted either by limits on the number of fishers, by the size of the catch, or both.⁵³ Moreover, limitation on the resource is not *only* characteristic of fish. Indeed, it can be plausibly argued that to the extent fish are animate and reproduce they are much less limited than coal, iron ore, or other primary products whose supply diminishes daily as the earth’s fixed supply is consumed.

In the current early phase of the negotiations some countries favour the inclusion of indirect but explicit subsidies (i.e. government loan guarantees on the purchase of fishing vessels, financial compensation for fleet access of distant waters) while others have proposed as disciplines the failure to charge costs of fisheries management services to the fishing industry, or the failure by governments to adequately enforce sustainable fishing practices. In addition, UNEP has observed that “WTO notification of subsidies is very patchy and incomplete.”⁵⁴ Further definition of which subsidies are to be prescribed would conceivably assist in their notification and reduction.

iii. *Subsidies and the Theory of State Responsibility: Act versus Effect*

A third point is that the basis of state responsibility under the SCM is either *act* or *effect*. Subsidization contingent on export performance or the use of domestic over

⁵² *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, paras. 57-64 (Oct. 9, 1998).

⁵³ This position is taken in the *International Plan of Action - IUU*, which indicates that “States should adopt measures to ensure that no vessel be allowed to fish unless so authorized, in a manner consistent with international law for the high seas, in particular the rights and duties set out in articles 116 and 117 of the 1982 UNCLOS Convention, or in conformity with national legislation within areas of national jurisdiction.” See Art. 44.

⁵⁴ *Chairman’s Summary*, UNEP Workshop on the Impacts of Trade-Related Policies on Fisheries and Measures Required for their Sustainable Management, WTO Doc. WT/CTE/W/205 at 4 (May 8, 2002).

imported goods are *acts* that undoubtedly distort international trade. To borrow a term from U.S. antitrust law, they are objectionable *per se*.⁵⁵ We do not worry about their effect because their negative effect is presumed. In contrast, prejudice to the rights of other countries can only be ascertained in most other instances where there is some demonstration of a subsidy's *effect* on international trade. Thus, where a subsidy on a product is above a certain amount, where it is granted to cover losses sustained by a particular company or industry, or where it covers corporate debt, *and* where negative effects on either supply or demand side are demonstrated⁵⁶, then – and only then – does the *WTO Agreement* require a country to withdraw the subsidy or its effect.

The distinction between act-based responsibility and effect-based responsibility under the SCM is important to bear in mind inasmuch as it reflects the central aim of the international trading system, which is to preserve government policy latitude to subsidize while minimally distorting international trade. This suggests that if we are to prioritize other goals under the WTO system, such as the environment or development, we must be prepared to apply *per se* standards in order to likewise overcome evidentiary hurdles and condemn certain kinds of unwanted behaviour. This, in turn, requires the adoption of a shared value among trading countries that *certain acts alone*, such as overfishing, are detrimental. It is this key premise that must be accepted for detrimental fishing subsidies to become actionable under the WTO system.

Where could such a shared value be found? We know that the *WTO Agreement*

⁵⁵ Per se offences arose out of *Sherman Act* litigation, which first articulated a “rule of reason” with regard to all-embracing statutory language. Section 1 of the Act prohibits “every contract, combination ... or conspiracy in restraint of trade ...” Interpreted literally, such a sweeping interdiction would prevent virtually every form of business combination. As a result courts developed the rule of reason, which only applies the full strength of the Act’s prohibition to business combinations which are *unreasonable*. Nevertheless, reasonableness is a malleable concept heavily dependent upon context. The job of enforcing a “rule of reason” standard can be onerous as parties try to prove or disprove what is reasonable. In light of this difficulty and the evidently uncompetitive effect of certain behaviour, courts developed the doctrine of *per se illegality*, which presumes that an activity has a detrimental effect, thereby obviating the need for exhaustive proof of detriment.

⁵⁶ SCM Arts. 6-7.

seeks to allow “optimal use of the world’s resources in accordance with the objective of *sustainable development*” and to “protect and preserve the environment and to enhance the means for doing so.”⁵⁷ This language is preambular and therefore only aspirational, but it has been referred to by WTO panels and the Appellate Body in support of the position that trade and the environment should be mutually reinforcing.⁵⁸

Another source of shared values is the precautionary principle. This principle, which mandates erring on the side of conservation in circumstances of scientific uncertainty⁵⁹, only “finds reflection” in the *WTO Agreement* at present, but it is increasingly expressed in other documents of international law relating to the use of marine resources. A precautionary “approach” is expressly mentioned in Art. 6 of the U.N. *Straddling Stocks Agreement*.⁶⁰ That article says in part:

1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.
2. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.

Likewise, growing concern about the state of global fisheries has led to adoption by the FAO of a *Code of Conduct for Responsible Fisheries*⁶¹ in 1993 and, within that normative framework, the *International Plan of Action to Prevent, Deter and Eliminate*

⁵⁷ See language contained in the WTO Preamble.

⁵⁸ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, paras. 57-64 (Oct. 9, 1998).

⁵⁹ Principle 15 of the *Rio Declaration*, 31 I.L.M. 874 (1992) states that “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

⁶⁰ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, Aug. 4, 1995, U.N. Doc. A/CONF.164/37 (1995), available at 34 I.L.M. 1542 (1995) [hereinafter *Straddling Stocks Agreement*].

⁶¹ Food and Agriculture Organization, *Code of Conduct for Responsible Fisheries*, Oct. 31, 1995, FAO Doc. 95/20/Rev/1.

Illegal, Unreported and Unregulated Fishing in 1999.⁶² Both documents are voluntary, but they are clearly supportive of a *per se* methodology grounded in precaution.⁶³ For instance Art. 6.5 of the *Code* indicates:

States ... should apply a precautionary approach widely to conservation, management and exploitation of living aquatic resources in order to protect them and preserve the aquatic environment, taking account of the best scientific evidence available. The absence of adequate scientific information *should not be used* as a reason for postponing or failing to take measures to conserve target species, associated or dependent species and non-target species and their environment.⁶⁴

The *International Plan of Action* also expressly mentions the withholding of subsidies for certain kinds of activities, as opposed to dealing with their effects:

States should, to the extent possible in their national law, avoid conferring economic support, *including subsidies*, to companies, vessels or persons that are involved in IUU fishing.⁶⁵

Other documents dealing specifically with marine resources, such as the *Jakarta Mandate*⁶⁶ and UNCLOS,⁶⁷ can be said to be broadly supportive of a precautionary position.

Nevertheless, using either the *WTO Agreement's* "soft" version of the precautionary principle or the somewhat harder versions contained in other instruments raises the problem that the principle itself remains vague and is potentially disruptive.⁶⁸

⁶² *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, P 66 (June 23, 2001), available at www.fao.org/fi.

⁶³ See Laurent A. Ruessmann, *Putting the Precautionary Principle in Its Place* 17 AM. U. INT'L L. REV. 905 (2002).

⁶⁴ Italics added.

⁶⁵ Italics added.

⁶⁶ See *Jakarta Ministerial Statement on the Implementation of the Convention on Biological Diversity*, UNEP, CBD Conference of Parties, Decision 11/10: Conservation and Sustainable Use of Marine and Coastal Biological Diversity, in Report of the Second Meeting of the COP to the Convention on Biological Diversity, Annex II, Decision II/10, U.N. Doc. UNEP/CBD/COP/2/19 (1995). In Decision II/10 the Conference of the Parties observed that "The work [of the Secretariat on marine and coastal biological diversity] should not be impeded by the lack of full scientific information and will incorporate explicitly the precautionary approach in addressing conservation and sustainable use issues."

⁶⁷ UNCLOS Art. 119(1) requires signatories to develop conservation measures taking into account, among other factors, "fishing patterns".

⁶⁸ Ambiguity in the precautionary principle has led the European Community to issue a communication on its application and use. See Communication from the Commission: The Precautionary Principle COM (2000) 1 Final (Feb. 2, 2000). For further analysis see Jan Bohanes, *Risk Regulation in WTO Law: A Procedure-Based Approach to the Precautionary*

In recent work, for instance, Shigeki Sakamoto has voiced concern that “[t]he introduction of a precautionary principle to high seas fishing without reservation due to scientific uncertainty in the state of the marine ecosystem could lead to an immediate termination of fishing operations and immense economic dislocation.”⁶⁹ Sakamoto’s concern is understandable, but my point here is: what if we don’t? Focusing on the cost of shutting down a fishery ignores the potentially catastrophic cost of it remaining open. To take one – admittedly extreme – example from my country, the collapse of the ground cod fishery in Eastern Canada has left thousands of people without jobs and cost the Canadian government millions of dollars in adaptive expense. In other words, we risk having economic dislocation one way or the other. Allowing WTO action to be taken against detrimental fishing subsidies consistent with the precautionary principle does not contemplate the closure of any fishery in the short term and should help to ensure that at least some fish remain in the long run.

iv. Interpretative Strategies

The foregoing analysis of subsidies under the SCM also suggests an amendment to the *WTO Agreement* adding categories of prohibited subsidy would be the most appropriate option given the need to distinguish between “good” and “bad” subsidies and to provide for act-based responsibility. Nevertheless, it is useful to consider what advantage interpretative methodologies are likely to offer.

An interpretative method presupposes that there is *already* something to interpret. Hence in *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*⁷⁰ the

Principle, 40 COL. J. TRANSNAT’L L. 323 (2002).

⁶⁹ Shigeki Sakamoto, “*The Unsettled Issue of the Southern Bluefin Tuna Case* in Chi Carmody et al., (ed.), *TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES* (2002).

⁷⁰ WT/DS58/AB/R (Oct. 11, 1998).

Appellate Body interpreted the word “*exhaustible*” in the term “exhaustible natural resources” of GATT Art. XX(g) in the light of other international law instruments to include sea turtles. In that case the definitional issue was whether the existing treaty wording, *exhaustible*, could encompass an *animate* creature. Likewise in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*⁷¹ the panel adopted conclusions of the World Health Organization in regard to the carcinogenic risk posed by asbestos usage in its interpretation of the “like products” test in GATT Art. III:4. Here again, the panel focused on the definition of elements generally accepted in relation to *existing* treaty language. More recently the WTO Ministerial Conference at Doha issued a *Declaration on the TRIPS Agreement and Public Health*⁷² affirming “that the [WTO] Agreement can and should be *interpreted* and implemented in a manner supportive of WTO Members' right to protect public health.”⁷³

In the case of fisheries subsidies, the possibility of interpretative strategies in relation to existing language appear limited because there currently exist no categories of act-based responsibility apart from the export or import-substitution subsidies listed in SCM Art. 3, and therefore no categories which could be interpreted absent any evidence of effects. As already noted, it is *the absence of evidence* that is one of the hallmarks of marine resource conservation, requiring the adoption, as opposed to the interpretation, of an act-based standard. In the fisheries context modifications could be made in the form of a protocol adding categories to SCM Art. 3, amendments to the causation requirements in SCM Arts. 5-6, or a new basic agreement changing the SCM in some other way. Given their scope, it is unlikely that these would be purely interpretative.

⁷¹ WT/DS135/R.

⁷² WT/MIN(01)/DEC/2 (Nov. 20, 2001).

⁷³ *Ibid.*, Art. 4.

4. Property in the Pelagos: Fishing as a Right

During the 1980s and early 1990s it became fashionable to speak of “privatizing” domestic fishing regimes, part of a worldwide trend towards the privatization of public resources. This thinking has translated into the adoption of privatized regimes for marine resource management, either in whole or in part, in several countries, including Canada,⁷⁴ Iceland, New Zealand, and the United States.⁷⁵ The reasoning behind privatization is straightforward: if fisheries are privatized, those with the right to fish will have a specific interest in the fishery and will pay greater attention to renewal of the resource. In this way, sustainable fishing will become a reality.

So far, however, the result of this trend is mixed. There is some evidence among implementing countries such as Iceland and New Zealand that limiting the right to fish to licenced operators which have quota does restore the biomass. Thus, some success has been report in Icelandic waters where, for instance, stocks of halibut are said to be recovering in the aftermath of privatization. Similar experience is reported in New Zealand.

The results must nevertheless be considered against considerable countervailing evidence suggesting that privatization is no panacea.⁷⁶ To begin with, the introduction of privatization can be detrimental to the environment because fishers will often be tempted to overfish during the run-up period, knowing that pre-privatization catch will be the principal determinant of their quota under the new regime. Additionally, once

⁷⁴ Brian Lee Crowley (ed.), *TAKING OWNERSHIP: PROPERTY RIGHTS AND FISHERY MANAGEMENT ON THE ATLANTIC COAST* (1996).

⁷⁵ Michele Territo, *The Precautionary Principle in Marine Fisheries Conservation and the U.S. Sustainable Fisheries Act of 1996*, 24 VERMONT L. REV. 1351(2000).

⁷⁶ See for instance a recent report by Munro and Sumaila, which indicates that such schemes are not generally effective in reducing capacity over the long run and that they are likely to destabilize the fishery. In these situations, these schemes threaten the ability of the resource manager to control the total harvest. See Gordon R. Munro & Ussif R. Sumaila, *Subsidies and their Potential Impact on the Management of the Ecosystems of the North Atlantic* (2002).

privatization is implemented, experience has shown that:

i) mechanisms for policing fishing activities are insufficiently developed in most countries, leading to widespread mis- and underreporting of catches;

ii) quotas may be environmentally unsound in that they encourage “highgrading”, that is, the practice of throwing overboard low-value species caught as a by-product of the catch. Fishers thus can maximize the value of their in-quota catch;

iii) privatization means that quota assumes property-like attributes, which can be used as an asset in some countries for securing a line of credit. Fishers thus are encouraged to overfish in order to maximize the value of the fish they catch and, consequently, the value of their quota;

iv) transferability of quota in some cases allows for the concentration of quota in the hands of a few key operators, often with serious socio-economic consequences for the onshore communities that traditionally depended upon fishing for their livelihood. The situation is often accentuated by deepwater fishing fleets which have little allegiance or concern for the territories where they operate. As a result, the seas can be decimated and domestic populations denied access to traditional sources of fish. This is already happening in several countries, such as Mauritania.

Despite the potential negative outcomes, there is at least some room to contemplate property-based rights, both in countries and under conditions where it has appeared to date to work, and where detrimental side effects can be mitigated by community-centered quotas based on “days of fishing”, transferability restrictions, and other equitable principles. Fine-tuning, rather than abolition, may ultimately be the wiser option for a property-based marine regime.

Given privatization, it might seem attractive to draw an analogy between fishing rights and intellectual property rights and to consider whether the WTO should be enlisted in the task of enforcing fishing rights much in the same way that it has intellectual property rights under the *Agreement on Trade-Related Aspects of Intellectual Property*. However, the diversity of geographic and socio-economic conditions around

the world means that no single model of fishing rights will apply to any one country. Whereas there is reasonably broad consensus about the extent and intensity of intellectual property rights in international law, no such understanding has yet been reached regarding fishing in international law. It is, for instance, generally agreed that a patent requires a standard period of exclusivity to reward the inventor. Hence, TRIPS Art. 33 provides that a patent's term of protection shall be at least 20 years from the date of filing. TRIPS likewise provides detailed requirements concerning patentable subject matter, the nature of the rights conferred in a patent, compulsory licencing, and the burden of proof in certain patent proceedings. There is no equivalent consensus regarding the specific common elements of sustainable fishing practices. Fish populations differ around the world, as do fishing communities and harvesting practices. The Malagasy government's regulation of artisanal fishing in the Mozambique Channel is likely to differ substantially from Kiribati's regulation of the Pacific tuna fleet in its waters or Britain's restrictions on squid trawling off the Falkland Islands. In contemplating the common elements of a sustainable management system, the following words are apposite:

Ideally, a fisheries management system should be tailor-made for each unique circumstance because the fishery is a complex biological, economic and social system with many tiers. Species vary widely with respect to their behaviour, abundance, distribution and market value. The length of the fishing seasons varies not only by species, but also by area and from year to year. Fishers hold different types of licences, work from boats of different sizes, use different types of gear, belong to different organizations, and invest different amounts of time and money. The complexion of the operation changes notably from one area to the next, and the social circumstances vary enormously. Fish processing too, is as diverse as the harvesting sector. The fishery defies simple generalizations; thus, a one-system-fits-all approach is not the best approach.⁷⁷

⁷⁷ Standing Committee on Fisheries (Senate of Canada), *Privatization and Quota Licencing in Canada's Fisheries* (1998).

It is important to recognize that this statement was contained in the conclusions of a Canadian Senate Committee examining legislation that proposed to privatize Canada's fishery. The point here is that these comments about diversity were made in the context of a *single* country; it would not at all be inapposite to extrapolate them to the entire world.

5. Conclusion

The decision of the Doha Ministerial Conference to employ the WTO as a tool in the creation of a sustainable fishery worldwide is a potentially useful, but complex, one. The institution only has an indirect mandate in the environmental field. It is questionable whether this initiative alone will provide the relief required to restore the world's fisheries. Nevertheless, the current situation is of sufficient gravity, and the position and practice of states in terms of treaties and custom sufficiently uniform, for the precautionary principle to inspire an end to environmentally harmful fishing subsidies. This will, of course, not mean an end to *all* fishing subsidies, but only those which are presumed to be environmentally harmful.

In this early stage of the negotiations some countries have put forward the view that existing WTO subsidy disciplines are sufficient for the task of creating an environmentally sustainable fishery. This paper has attempted to demonstrate that that cannot be correct, principally because of the lack of evidence about the harmful effect of fishing subsidies handicaps their analysis under the existing effect-based rules of the SCM. The principal proposal made here, therefore, is that these practices should be prohibited *per se*. This, in turn, will probably require some form of amendment to the *WTO Agreement*. It is a position that will be resisted by those who insist on evidence and

who complain that act-based subsidy disciplines will undercut domestic sovereignty. However, such a complaint cannot be taken seriously. The overwhelming evidence is of a serious decline in fisheries worldwide, and even where there is no evidence as such, public opinion is concluding in favour of a precautionary principle or approach. Time will soon come for action. An end to environmentally detrimental fishing subsidies would be a good beginning.