




Towards Rational Disciplines on Subsidies to the Fishery Sector

A Call for New International Rules and Mechanisms



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Fishery Subsidies¹

■ Introduction

“Too many boats, too few fish.” This curt description of the world’s overtaxed fisheries has become practically axiomatic, and has contributed to a growing series of international talks aimed at improving fishery management. But even as negotiators make welcome progress towards better cooperative management regimes, they have largely ignored one of the underlying forces that drive overfishing in the first place: huge government payments that promote excess harvesting capacity and reward unsustainable fishing practices. These subsidies, many of which are administered in open violation of existing international trade rules, constitute a profound failure of both economic and environmental policy.

Fortunately, fishery subsidies have begun to receive increased attention in recent years, both at the national level and within fora such as the United Nations (UN) Commission on Sustainable Development (CSD), the Food and Agriculture Organization of the United Nations (FAO), the World Trade Organization (WTO), the Organisation for Economic Cooperation and Development (OECD), and the Asia-Pacific Economic Cooperation (APEC). But these processes are still preliminary in nature, and the energies dedicated to them are small in proportion to the economic and environmental stakes. The various efforts also remain relatively isolated from one another, despite the need for a well-integrated response.

As the world fisheries crisis continues to deepen, more vigorous and better unified action to discipline fishery subsidies is required. Those subsidies that fall within the ambit of existing international trade rules should be brought into prompt compliance with them. Meanwhile, the time has come to begin the serious diplomatic work of crafting new international norms and mechanisms aimed at a more proactive and comprehensive solution. Several events on the international calendar in 1999 will offer concrete opportunities to launch such new, multidisciplinary talks. With sufficient will, a binding agreement to eliminate harmful fishery subsidies could be in place by the year 2001.

This paper begins with a short review of the nature of the fishery subsidies problem based on existing data, including the scale of subsidization, the consequences for the sustainability of global fisheries, and the relationship to international trade. Part II reviews current disciplines on fisheries subsidies, focusing on the operation of WTO rules, and culminating in an evaluation of the gaps in the current rule system. Finally, Part III makes a direct call for new international action to confront the fishery subsidies problem. Various options for pursuing new norms and disciplinary mechanisms are set forth, along with identification of some immediate opportunities for progress.

Throughout, this discussion paper should be understood as a preliminary foray. It is offered as a work in progress, and as a starting place for concrete international dialogue. Many aspects of this issue deserve further elaboration and debate, and will demand

imaginative and supple thinking by all stakeholders. But the bottom line is clear: effective disciplines on fishery subsidies are needed now, and the opportunities for pursuing them are upon us.

■ I. The Nature of the Problem

A. THE SCALE OF SUBSIDIZATION TO THE FISHERY SECTOR

The practice of providing governmental support to the fishery sector is widespread among major fishing nations. While precise data remain elusive – obscured by endemic lack of transparency in subsidy regimes as well as by the definitional uncertainties and logistical complexity of the issue – the basic facts are not much in doubt. Governments around the world are providing tens of billions of dollars in subsidies annually to the fishery sector, for a wide variety of purposes, and in many different forms. While smaller in absolute amount terms than, for example, subsidies to the agricultural sector, these payments are conservatively estimated to be roughly 20-25 per cent of the annual revenues of the commercial fishing industry.² Subsidies commonly granted to the fishery sector include:³

- grants, low-cost loans, loan guarantees, or tax incentives to promote vessel construction or repair, or acquisition or modernization of fishing gear
- price supports for fish and fish products
- grants, low-cost loans, or other financial benefits to support the transportation or processing of fish or fish products
- income or wage supports, or unemployment or other social benefits for fishermen and their families
- export promotion programmes
- provision of discounted or free marine insurance
- governmental promises to reimburse vessel owners for fines or impoundments imposed by foreign authorities
- construction or maintenance of port facilities
- construction or maintenance of housing or other community infrastructure specifically for fishermen
- provision of fuel or of tax credits or other rebates to offset the cost of fuel
- provision of access rights to domestic fisheries, or payment or subsidization of payments for access to foreign fisheries⁴
- government campaigns to promote consumption of fish and fish products
- grants to support research and development of fishery technology
- grants to support fisheries management
- vessel buy-back programmes
- worker retraining.

Various efforts have been made to categorize these diverse subsidies for ease of analysis.⁵ For the immediate purposes of this paper, the key theoretical distinction is between those subsidies that promote unsustainable fishing (especially by encouraging overcapacity or excess effort) and those that promote a transition to sustainable fisheries (especially by encouraging reductions in capacity and effort, or by encouraging environmentally responsible fishing techniques). This distinction is not

easy to apply. Is an income support programme helping a depressed fishing community adjust to new limits on the available resource, or is it artificially maintaining the work force for an oversized national fleet? Is a vessel buy-back programme truly reducing total effective capacity, or is it just a shell game that moves boats around while promoting additional investments in fishing capital? Is a gear modernization programme helping fleets adopt cleaner fishing practices, or is it just underwriting operating costs? Questions of this kind will have to be confronted in detail by any serious scheme to reduce harmful fishery subsidies. This paper, however, focuses on the rule system at a broader level, and asks whether current rules provide even an adequate framework for distinguishing “good” from “bad” fishery subsidies – and if not, how the rules might be improved. As a general matter, there appears to be general agreement that “capacity enhancing” subsidies greatly outweigh “capacity reducing” or “conservation” subsidies in the fishery sector.⁶

The total value of fishery subsidies (in terms of dollars spent or governmental revenues forgone) has also been subject to various estimates or calculations. One commonly cited figure – based on data published by the FAO in 1992 – puts annual fishery subsidies in the range of US\$54 billion.⁷ But the FAO figure is not a direct estimate of known subsidies. Rather, the FAO calculated the difference between the gross revenue to the worldwide commercial fishing fleets (value of landed catch) and their total estimated annual operating and capital costs. The result was a “deficit” of US\$54 billion. The portion of this deficit met through government support has been speculated to range from half to all.⁸ The FAO itself concludes that “[s]ubsidies are presumed to cover most of this deficit.”⁹ One observer has set forth technical arguments to show that the FAO figure is simultaneously overinclusive and underinclusive, and that the US\$54 billion figure “could be off in either direction, depending upon how one resolves uncertainties both in data and in definition.”¹⁰ The WTO Secretariat has succinctly concluded: “Even if these figures are not universally accepted, they cannot be ignored.”¹¹

A more direct effort to calculate fishery subsidies – perhaps the most comprehensive such effort to date – was recently published in a World Bank technical paper authored by Mateo Milazzo, an official of the United States National Marine Fisheries Service.¹² Through United States embassy and other sources, Milazzo was able to gather public data about the budgets and practices of fisheries agencies from selected fishing country governments. Analysing these budgets against a careful scheme he devised for defining and categorizing subsidies, Milazzo concludes that worldwide fishery subsidies total between US\$14.5 and US\$20.5 billion annually.¹³ Milazzo’s bottom line excludes subsidies aimed at reducing overcapacity and excess fishing effort, which (as noted above) may not always be as environmentally benign as they purport to be, and which in any case ought to be subjected to the disciplines of a new fishery subsidies regime, as discussed below. Moreover, Milazzo admits having omitted potentially significant sources of governmental support from the scope of his review, and concludes that his estimates “probably err on the low side, perhaps by a considerable margin.”¹⁴

These and other efforts to examine fishery subsidization are all necessarily general and imprecise. Exercises are now under way in various fora (including the FAO, the OECD, APEC, and domestically within the United States) that may add substantially to the

available data. For the moment, it is safe to assume that subsidies to the fisheries sector amount to tens of billions of dollars per year – a staggering level in an industry whose total revenues are in the range of US\$70-80 billion.¹⁵

B. THE CONSEQUENCES FOR SUSTAINABILITY

The data and methodologies for linking fishery subsidies with overcapacity (and overcapacity with unsustainable fishing practices) also remain far from satisfactory. But subsidization on the scale described above unavoidably raises the level of industry-wide capitalization and fishing effort, with consequent pressures on the resource base.¹⁶ That conclusion pervades the literature from both official and non-governmental sources, and has not met serious refutation.¹⁷ Nevertheless, there appears to be reluctance in some quarters to admit that subsidies constitute a significant obstacle to the achievement of sustainable fisheries. This resistance takes the form of two arguments, neither of which is commonly made explicit in formal dialogue, but which appear to influence at least some official thinking.

First, some actors resist the notion that fishery subsidies actually cause overcapacity. This attitude is evident, for example, when governments deny that ship building subsidies increase fleet capacity beyond some unstated (and presumably “market driven”) equilibrium point.¹⁸ But this argument simply strains credence.¹⁹ Subsidies to the fishery sector have gone hand in hand with a dramatic expansion of fishing capacity, and with the collapse or threatened collapse of many of the world’s principal commercial fisheries.²⁰ No doubt, further empirical work to establish the precise nature of the links between subsidization and overcapacity should be a high international priority. But this work is needed to help inform the implementation of new subsidies disciplines, not to demonstrate that fisheries subsidies make a significant contribution to overcapacity. Debate over this latter point is merely diversionary, and should not be allowed to stand in the way of progress towards the establishment of new norms and practices.

A second argument – raised a bit more explicitly (and sensibly) than the first – is that overcapacity is a symptom of rent seeking in an open access regime, not of subsidization per se. According to this view, sustainability can be best ensured through proper fisheries management, leaving adjustments to capacity (and perhaps to levels of subsidization) to follow. This argument is also something of a canard. There is no question that the fundamental cause of overfishing is the failure to limit access and otherwise manage fishing effort. But this hardly means that subsidies on the order of 20-25 per cent of industry revenues ought to be ignored. The scope of the fisheries crisis requires the use of every tool reasonably available to reduce unsustainable fishing effort. Fisheries management regimes will not reach their full potential overnight. And even the best management regimes will be subject to problems of compliance and long-term political stability. Capacity-enhancing subsidies will only serve to maintain artificially large constituencies whose interests do not always lie with the smooth functioning or longevity of management regimes.

In addition, disciplining fisheries subsidies would promote progress towards improved management regimes. Clarification of the economic issues surrounding subsidies would contribute to more transparent and rational approaches to management, and would help highlight the need for husbandry of marine resources. Similarly, the

subsidies discussion would bring new participants to the fisheries issue – including government financial agencies – whose perspectives and political weight could prove helpful. At the international political level, agreeing new management regimes will depend in part on the ability of fishing nations to negotiate the allocation of fishing rights. A shared view of the legitimate levels of government support for fishing fleets and communities would help establish the proper context for such allocations. This last point also bears an obvious relationship to important questions of international equity, particularly where the evolution of developing-country fisheries is concerned. And finally, environmentally positive subsidies will likely be required to assist in the transition to sustainability. International cooperation on the definition, provision, and administration of those subsidies would be a useful input into discussions about improved management.

C. THE “TRADE” IMPACTS

The impact of fishery subsidies on international trade flows is also a recurring question, particularly in relation to discussions about the appropriate role of the WTO in the search for better fishery subsidy disciplines. Here again, current empirical knowledge is thin: the “trade” consequences of fishery subsidies are even less well documented than the “environmental” consequences, and are in some senses more speculative.²¹ But these uncertainties do not provide a basis for considering fishery subsidies a low priority trade issue, for several reasons.

First, the absolute magnitude and relative scale of fishery subsidies suggest they must have significant impacts on the international market.²² While the fishery sector is not especially large in comparison to the global economy, its economic and social importance are not slight. For example, fish trade represents a significant source of foreign currency earnings for many developing countries – a dependency that is increasing steadily.²³ And with trade in marine resources continuing to grow, the trade impacts of fishery subsidies will only increase. In any case, concern with the trade implications of fishery subsidies has been rising.²⁴ The recent commitment by APEC to address fishery subsidies as a priority trade issue is further evidence of this growing consensus.²⁵ As the WTO Secretariat recently put it:

“Although the precise identification and quantification of subsidies in the fisheries sector has not yet been fully undertaken, consensus exists that fisheries subsidies are widespread, trade distorting and undermine the sustainable use of fish resources.”²⁶

■ II. Existing Disciplines on Fishery Subsidies

Currently, the only direct legal disciplines applicable to subsidies to the fishery sector are those contained in national countervailing duty laws and in the rules of the WTO system.²⁷ Since it is the underlying thesis of this paper that effective disciplines on fishery subsidies can best be achieved through multilateral cooperation at the global level, the potential for increased use of national countervailing duty laws will not be considered further here, even though their future use could conceivably help generate momentum for new global disciplines. The potential relevance of regional trade agreements is discussed in Part III.A.2, below.

A. CURRENT WTO RULES – OVERVIEW AND BACKGROUND

The multilateral trading system has long considered subsidies as potential non-tariff barriers to trade. Although initial limits on subsidies under the General Agreement on Tariffs and Trade (GATT) (1947 version) were relatively weak, the rules have undergone steady evolution, particularly since the 1970s. At present the core multilateral subsidies disciplines are set forth in the WTO's Agreement on Subsidies and Countervailing Duties ("Subsidies Agreement"), except for agricultural subsidies, which are covered by the Uruguay Round Agreement on Agriculture ("Agriculture Agreement").²⁸

Historically, the treatment of subsidies by the multilateral trading system has always reflected a strong tension, between efforts to devise a rules-based system for removing international market distortions on the one hand, and a desire on the part of major industrialized countries to maintain subsidies to politically powerful domestic sectors – principally extractive sectors such as agriculture, but also nationally sensitive industrial sectors, such as aircraft manufacture. Two early results of this tension embodied in GATT were the distinctions between "export" subsidies and general "domestic" (or "production") subsidies, and between subsidies on "non-primary" products and those on "primary" products, with much weaker controls on the latter than on the former in both cases.²⁹ For example, a subsidy to the harvesting of fish would have been subject to looser control than a subsidy to fishing vessel construction, and in both cases the control would have been relatively light unless the subsidy related rather narrowly to the achievement of an export advantage.

The Agriculture Agreement put an end to the primary/non-primary product distinction, and substantially strengthened the disciplines over domestic production subsidies, but maintained special treatment for agriculture by crafting an agreement that simultaneously protects agricultural subsidies from attack and provides a structure for efforts to control and phase them out. Despite some obvious similarities between agricultural and fisheries subsidies, fisheries products were specifically excluded from the terms of the Agriculture Agreement.³⁰ Thus, since 1994, fishery subsidies have been subject to the improved controls of the Subsidies Agreement, but left out of any framework for their specific control and reduction.

B. CHALLENGING SUBSIDIES UNDER THE WTO SUBSIDIES AGREEMENT

The question of what constitutes a "subsidy" for purposes of trade disciplines has always been a difficult one.³¹ Article 1 of the Subsidies Agreement took a step towards clarifying this debate by defining "subsidy" as any *benefit* conferred on an industry as a result of:

- a *direct transfer* of government funds (e.g. grants, loans, equity infusions, etc.) or potential direct transfers (e.g. loan guarantees)
- *forgone government revenue* (e.g. tax credits or rebates)
- the provision of *goods or services* other than "general infrastructure" (e.g. a fishing net, not a navigational buoy)
- payments to any *private funding mechanism* by which any of the foregoing is accomplished
- *price or income support* generally.

To be covered by the Subsidies Agreement, a subsidy must also be “specific to an enterprise or industry or group of enterprises” (as opposed to available to or for the benefit of a broad class of actors), as set forth in Article 2 of the Agreement.

Once a subsidy falls within the general scope of the Subsidies Agreement, it can be classified as “prohibited”, “non-actionable” (i.e. authorized), or “actionable.” The only subsidies prohibited outright by the Agreement are those conditioned on export performance or on the inclusion of domestic parts or labour in the production of a good. Under Article 3 of the Agreement, these “red light” subsidies are prohibited because they are considered intentional and direct trade distortions. Article 4 of the Agreement provides for possible dispute resolution and eventual sanctions against countries found to maintain prohibited subsidies. Based on currently available information, it appears that only a fraction of subsidies to the fishery sector fall within this prohibited category, since most fishery subsidies do not focus directly on exports.³²

On the flip side, Article 8 of the Subsidies Agreement protects three classes of “non-actionable” (or “green light”) subsidies from attack: (1) assistance for certain research activities (2) assistance to *disadvantaged regions* within the territory of the subsidizing government pursuant to a general framework of regional development; and (3) assistance to promote *adaptation of existing facilities to new environmental requirements* under certain conditions. As with prohibited subsidies, the significance of non-actionable subsidies is unclear for the fishery sector. Oddly, the environmental category (the “green light for green subsidies”) may be the least applicable of the three. The terms of the Subsidies Agreement appear to restrict that category to subsidies for retrofitting industrial plants with pollution abatement equipment. Subsidies designed to help achieve sustainability through fishing capacity reductions (such as vessel buy-back and worker retraining programmes) would not qualify. Even subsidies for environmentally motivated fishing gear modifications may fall outside the “green for green” box, which applies only to technology adopted specifically to meet new legal requirements, and which may be limited to equipment designed to reduce “pollution” (rather than e.g., to reduce bycatch).³³ The non-actionable categories for research and regional development, on the other hand, may have broader application to some fishery subsidy programmes.

Between the protected “green light” subsidies and those falling into the prohibited “red light” category, Article 6 of the Subsidies Agreement establishes a broad middle class of “actionable” (or “amber light”) subsidies. With regard to these, the rules are nuanced and complex, reflecting an uneasy balance between a desire to allow the use of subsidies as a legitimate tool of domestic policy, and the fear that domestic subsidies can purposefully or inadvertently cause trade injuries. Actionable subsidies are not directly prohibited by the Subsidies Agreement, but may be subject to disciplinary actions under national countervailing duty laws (within limits imposed by the Subsidies Agreement) or under the dispute resolution process of the WTO itself. A successful challenge before the WTO can lead to a WTO recommendation calling for the removal of the challenged subsidy or, alternatively, to the imposition of countervailing duties against the offending member.

In order to prevail in a WTO dispute, a party complaining against an actionable subsidy must show that it has suffered “injury” to its domestic industry, “nullification or

impairment” of its benefits under GATT (especially the benefits it received as a result of tariff bindings), or “serious prejudice” to its interests. All of these are terms of art within GATT/WTO practice. The first two generally require a showing of some kind of trade-related harm to the complainant.³⁴

Under the new Subsidies Agreement, however, the “serious prejudice” language offers an easier test. While in most cases, “serious prejudice” also depends on showing a harm to a trade interest (such as international market displacement or price undercutting), certain classes of subsidy raise a presumption in favour of the complainant that such harm exists. Under Subsidies Agreement Article 6.1, such a presumption arises when:

- the value of the subsidy exceeds 5 per cent ad valorem
- the subsidy covers operating losses sustained by an industry or (when not a “one-time” measure) by an enterprise
- the subsidy is a direct or indirect forgiveness of government-held debt.

In these cases, serious prejudice is deemed to exist unless the subsidizing party can prove that its subsidy does *not* cause one of the enumerate harms to trade.

This burden-shifting device is of special relevance to the discussion of fishery subsidies, for two reasons. First, many fishery subsidies may qualify for the “serious prejudice” presumption, making the Subsidies Agreement a more attractive disciplinary tool, even in cases where distortions to trade may be uncertain or difficult to prove. Second, as discussed in Part III.A.3 below, the presumptions raised by Article 6.1 are evidence of an important trend in the development of the GATT/WTO rule system that bears on whether the WTO’s mandate properly extends to disciplining of fishery subsidies even when the principal harm is not provable trade distortion.

These very characteristics of the “serious prejudice” presumption may account for the evident hesitation of WTO negotiators in crafting it: the burden-shifting device was enacted only on an experimental basis. Under Article 31 of the Subsidies Agreement, the provisions of Article 6.1 apply for only five years after the entry into force of the WTO Agreement (i.e. until 31 December 1999), unless they are extended by the WTO members.³⁵

The potential for action against “amber light” fishery subsidies remains untested. It appears that many – and, depending on how certain definitional issues are resolved, perhaps nearly all – types of fishery subsidies fall within the “actionable” category. That is to say, most fishery subsidies are “benefits” granted by a government to a “specific” enterprise or industry; and most fall outside the “green light” and “red light” categories.³⁶ It is beyond the scope of this paper to provide a detailed, case-by-case analysis of how different subsidies would be treated. Table 1 gives a very rough first cut at how various kinds of subsidies to the fishery sector might fare. Apart from a subsidy’s qualifications for “green light” or “red light” treatment, the main sticking points appear likely to be whether a subsidy is specific,³⁷ whether the benefit is a “good” or a “service,”³⁸ and whether the “benefit” conferred is to the fishermen.

Of course, there is also some distance between showing that a subsidy is “actionable” and proving that it is causing injury, nullification or impairment, or serious prejudice

Table 1. Whether certain classes of fishery subsidies would be “actionable” under the WTO Subsidies Agreement³⁹

“Unlikely”	“Uncertain/possibly”	“Likely”
Payments for port facilities	Support for general shipbuilding (where only effect on fishermen is challenged)	Grants/loans/guarantees to fishermen for:
Reduced fees for access to domestic waters (for some foreign nationals, in comparison with others) ⁴⁰	Support for fish processing industry (where only effect on fishermen is challenged)	- vessel/gear construction - vessel/gear purchase - vessel/gear repair - vessel/gear decommission - fisheries management
Granting trade benefits to foreign coastal states in return for access rights for grantor’s nationals	Purchase of access rights to foreign coastal waters or	Price supports for fish products Wage supports for fishermen (if “specific”)
Relaxed regulatory requirements (other than forgoing fees)	Reduced fees for access to domestic waters (for own nationals, in comparison to fees for foreign nationals) ⁴¹	Discounted marine insurance, or a policy to absorb liabilities
	Income supports/worker retraining for fishermen leaving industry	Grants or tax breaks to cover fuel costs (if “specific” to fishery sector)

under Articles 5-6. This is of special concern for fishery subsidies because there may be significant cases in which a trade distortion is difficult to demonstrate, despite the presence of a clear harm to “sustainability.” Such cases are at the nub of questions about the bounds of the WTO’s role on the fishery subsidies issue (discussed in Part III.A.3, below). The current level of knowledge about fishery subsidies does not allow an easy guess at how many of them actually cause demonstrable trade effects and how many do not. As noted above, many observers think it clear that fishery subsidies do commonly cause trade distortions. Moreover, aggregate subsidies totalling at least 20-25 per cent of sectoral revenues suggest that the 5 per cent ad valorem test for establishing serious prejudice may not be difficult to meet.⁴²

In sum, the Subsidies Agreement appears to create significant opportunities for challenges to fishery subsidies, although substantial questions about the legal limits on such challenges remain. At the same time, it is clear that several classes of important fishery subsidies appear “unlikely” to be disciplined under these rules, while some environmentally beneficial subsidies remain subject to attack. In any case, the effectiveness of disciplines under the foregoing rules depends on the willingness of WTO members to litigate them.

C. THE NOTIFICATION OBLIGATION

Article 25 of the WTO Subsidies Agreement requires that every WTO member formally notify the WTO of each subsidy granted by it (within the meaning of Articles 1-2), whether the subsidy is prohibited, actionable, or non-actionable. This broad notification requirement is much more than a clerical procedure. It is a fundamental substantive obligation which the inaugural chair of the WTO Subsidies Committee called “of critical

importance to the effective operation of the Agreement.”⁴³ As just noted above, policing the Subsidies Agreement disciplines is left in large measure to individual WTO members acting either at the national level (through countervailing duty cases) or through WTO dispute resolution. The principal aid provided by the multilateral system to this adversarial mechanism (apart from adjudication services) is the requirement of transparency in national subsidy policies and the provision of information to affected members. The notification requirement also helps impose self-discipline on subsidy policies at the national level. Market distorting subsidies are often maintained (sometimes long after their originally intended life) as a result of political pressures raised by local constituencies. In the face of these pressures, mandatory transparency in national policy making can help generate a context for more rational outcomes.

The notification obligation also provides one of the most important tools that the WTO can offer in the service of reducing environmentally irrational fishery subsidies. Even if Article 25 is construed to require only information allowing analysis of a subsidy’s “trade effects”, the mere cataloguing of extant subsidies provides a significant information set. At present, in fact, Article 25 notifications do constitute the single richest source of currently available public information about particular subsidies granted to the fishery sector, and to this extent the notification requirement has begun to prove its potential worth.

In light of the importance of Article 25, it is especially disturbing to note that compliance with it remains profoundly unsatisfactory. The poor performance of WTO members in this regard can be revealed both through a comparison of the notifications to date with what is generally known about the level of fisheries subsidization, and through an examination of the current notifications on their own faces.

A juxtaposition of Article 25 notifications for the year 1996 with the data reported in the 1998 World Bank technical paper by Mateo Milazzo suggests that only a fraction of current fishery subsidies have been duly notified. Milazzo’s paper provides a good frame of reference because his numbers are quite conservative and because – with one exception (what he calls “resource rent” subsidies) – he includes only subsidies that meet the definitions of Articles 1-2. A review of WTO Article 25 notifications containing data relevant to 1996 reveals a total of approximately US\$792 million in monetized subsidies to the fishery sector.⁴⁴ Milazzo calculates total annual subsidies for the period including 1996 at approximately US\$11-13.5 billion, not including “resource rent” subsidies not likely to be covered by the Subsidies Agreement (and thus arguably not reportable under it). Milazzo also includes Russia and China in his analysis, but does not give bottom line figures for how much each contributed to fishery subsidies in 1996. Based on Milazzo’s figures for the European Union (EU) and Japan (the two largest subsidizers), it seems reasonably conservative (i.e. overestimating) to deduct US\$1 billion to account for the fact that Russia and China are not WTO members. All this gives an adjusted figure based on Milazzo of US\$10-12.5 billion for 1996.

Putting these figures together, the best evidence currently available suggests that something on the order of 7-8 per cent of global fishery subsidies granted in 1996 that should have been notified to the WTO actually were notified. Put another way, less than one fishery subsidy dollar in ten was reported. If Milazzo’s very conservative numbers are low by even 12 per cent, the number would be less than one in twenty.

A few country cases also illustrate the problem. Japan has one of the world's most heavily subsidized fishing fleets – Milazzo finds a minimum of US\$885 million annually in Japanese subsidies⁴⁵ – and a history of heavy governmental participation in industrial policies. But for the period including 1996, Japan reported only two particular subsidies to its fishing industry: one modest grant to support “pre-commercial” research and development for ship construction (totalling approximately US\$7 million in 1996); and one law granting vessel owners an additional 20 per cent depreciation on their boats for tax purposes (Japan's notification offers no estimate of the taxes forgone).⁴⁶ For the United States, Milazzo estimates up to US\$69 million annually in some years⁴⁷ – a figure which may be low by a substantial amount – and the United States Congress thinks fishery subsidies are high enough to have warranted a federally appointed task force to investigate them. But the United States notified only a single fishery subsidy for 1996 (a tax exemption on fuel), for which it reported no amounts.⁴⁸ The EU, which appears to be more fully in compliance with Article 25 than most WTO members, still appears to have failed to notify hundreds of millions of dollars in annual fishery subsidies.⁴⁹

Additionally, the majority of WTO notifications that have been submitted provide only the barest responses to the WTO's standard questionnaire. In most cases, it is essentially impossible to know what actual use was made of the subsidy, under what precise legal authority it was granted, or what likely market impact (not to mention impact on fisheries) the grant may have. Here again, EU member states have generally done better than average, but are still far from satisfactory. The information given by the EU for subsidies granted at the EU-level itself is remarkably scant.

On a worldwide basis, all of this is evidence of a stunning disregard for the Subsidies Agreement's transparency requirements. The bottom line is that the vast majority of current fishery subsidies are maintained in outright violation of one of the WTO's central rules for disciplining them.

D. GAPS IN THE CURRENT SYSTEM

The WTO Subsidies Agreement holds important potential as a tool for reducing harmful fishery subsidies. Compliance with the obligatory notification requirements of Article 25 would mark real and helpful progress towards transparency in national fishery subsidy policies; vigorous pursuit of cases against “prohibited” and “actionable” subsidies would bring pressure against particular subsidy regimes while raising international attention to the issue generally. But the WTO rule system in its present state cannot produce a sufficient response to the fishery subsidies problem. Several shortcomings of the status quo suggest the need for new norms and new mechanisms for their implementation.⁵⁰

1. The Current Definition of “Subsidy” Is too Narrow

As noted above, the WTO Subsidies Agreement excludes several classes of subsidy that may make an important contribution to overcapacity and excess fishing effort. A proper fishery subsidies regime will need a mandate to examine and discipline all forms of government support to the fishery sector that may have significant negative implications for sustainability. In particular, in addition to those subsidy classes now considered actionable by the WTO rule system, subsidies arising out of the underpricing of access rights should be included.⁵¹ Ambiguities in the current rules should be resolved in favour of including payments for (or discounts on) access fees. New rules should reconsider the

“specificity” and “infrastructure” tests to allow the disciplining of any subsidies that have a real bearing on overcapacity or excess effort (such as some fuel subsidies and income support programmes that might otherwise be excluded).

2. Current Distinctions Between Legitimate and Illegitimate Subsidies Are Inapt

Obviously, a new rule system will have to articulate differences between desirable and undesirable classes of fishery subsidies different from those in the current rule system. How this precisely should be done depends in part on the legal function the definitions will fill, including whether the definitions are for the purpose of implementation through an adversarial dispute process, or otherwise. One way or another, new definitions need to be supplied for classifying fishery subsidies in terms of effect on capacity, effort, and sustainability, and not simply in terms reflecting a concern with trade distortions.

3. The Current System Lacks an Affirmative Obligation to Discipline Subsidies that Detract from Sustainability

Current rules lack a general affirmative obligation to eliminate fishery subsidies that detract from sustainability. While Article 28 of the WTO Subsidies Agreement does require phasing out subsidies that are inconsistent with the terms of the Agreement that were in place at the time of a member’s accession to the WTO (an “anti-grandfather” clause), that obligation has been interpreted in practice to apply only to “prohibited” subsidies.⁵²

4. The Current System Lacks a Mechanism for Phasing Out Subsidies that Detract from Sustainability

One key structural decision for a new fishery subsidies regime will be whether to rely on articulating basic obligations to reduce harmful subsidies, or to go further by negotiating planned phase outs of particular subsidies (e.g. with national schedules identifying subsidies in some detail) or classes of subsidies (no schedules, but fairly detailed obligations, with target dates). The advantages and disadvantages of these alternate approaches need further elaboration. But either way, a clear mechanism will be needed for reducing harmful subsidies on a cooperative, time-limited basis.

5. The Current System Relies Too Heavily on National Rights and Adversarial Process

The current system is rooted in a model that focuses on protecting the interests of individual countries (or their citizens) in disputes over rights that vest in the national government. The result is a system that tends to ignore harms to the commons, and is implemented principally through an adversarial process. A regime aiming principally at harms to the sustainable use of global resources obviously must be somewhat different. To the extent it continues to rely on adversarial disputes for enforcement and continued rule development, individual states must have better standing to vindicate communal rights. Moreover, a good fishery subsidies regime will likely need to depend more on collective action than on classic dispute settlement for enforcement and implementation. This will require creating mechanisms for organic action (joint monitoring and enforcement), possibly including provisions to allow binding decisions to be taken by a conference of parties based on something less than unanimous consent. Similarly, the remedies or “sanctions” available for disciplinary use under a new regime may need to include denial of communal goods (such as

fishery access rights or rights to participate in international process). Trade sanctions are also likely to remain available.

6. Current Notification and Transparency Rules Are Inadequate

Current WTO transparency rules for subsidies – apart from being commonly ignored – are not properly focused or structured for fishery subsidies disciplines. Reporting requirements need to be altered to allow the classification of the effects of particular fishery subsidies (especially in terms of impact on fishing capacity and effort), and to expose them more directly to full scrutiny in their operation. Elements of the WTO Agreement on Technical Barriers to Trade, among other international instruments, may provide some guidance for national and international procedures on notification and openness of domestic rule making processes. Failure to comply with new notification and transparency requirements should be punishable through the disciplinary mechanisms, including sanctions.

■ III. A Call for the Negotiation of New International Rules and Mechanisms

From the preceding discussion two basic facts emerge: fishery subsidies are a significant contributing cause of global overfishing; and existing international norms, even if fully implemented, cannot provide sufficient disciplines to reform them. The urgency of the worldwide fisheries crisis makes this an unacceptable situation. The question is not, therefore, whether new international disciplines are required, but only how the international community should proceed towards them.

Before considering this practical question, it may be useful to confront the objections of some who claim to agree on the need to reform fishery subsidy policies, but who urge that new international rules are necessary or timely. Unlike the challenges to managing international fisheries or transnational fish stocks, the fishery subsidies problem is ultimately one of national policy. As momentum towards domestic subsidy reform slowly grows in some major fishing nations – and as progress towards improved fisheries management regimes promises reductions in some of the forces that spur subsidization – some may question the need for new rules and structures at the international level. These questions, however, have more the ring of excuse-making than of well-founded doubt. As observers and officials of various nationalities will privately concede, unilateral reduction of subsidies will be difficult, in some cases impossible, in the face of entrenched constituencies and increasing competition for access to fishery resources and markets. Although not simply about “competitive subsidization” in the classic mercantilist manner (promoting exports, resisting imports), the domestic forces that retard subsidy reforms are partly rooted in (and even more often politically expressed as) competitiveness concerns. The case of agriculture is instructive. There, economic and political forces already provide strong motives for reining in domestic subsidies, even on a unilateral basis. Yet international pressures (and negotiating structures) have proved an essential complement to national efforts at reform. In the case of fisheries, where the domestic budgetary pressures against subsidies are much lower, and where the geopolitics of international access to resources (and not just access to markets) is at stake, the need for an international vehicle is all the greater.

Others who resist calls for new international rules may concede the eventual need for them, but argue that the issue is not yet ripe for diplomatic action. These protests, too, have a dilatory sound. The basic components of new fishery subsidy disciplines are not hard to envision, nor are they wholly different from disciplines crafted for subsidy reforms in other sectors. While increasing the knowledge base about how fishery subsidies function will be necessary, the required studies (a good number of which are now already under way) can easily proceed in parallel with formal negotiations, particularly considering the likelihood that new rules would take several years to complete. There is no good reason not to begin diplomatic activity now.

A. THE FORM OF THE SOLUTION

But in what direction should new diplomatic efforts be directed? One factor retarding the prompt development of new fishery subsidy disciplines is the absence of an international forum willing to take broad responsibility for managing the issue. The interdisciplinary nature of the subject appears to place some piece of its management beyond the traditional mandate or expertise of every international organization that might conceivably play this role. Unfortunately, the international community is not yet well organized to deal efficiently with subjects that so thoroughly cross the boundaries between trade and environmental policies. A review of the various potential forms (and fora) for a new fishery subsidy regime will help elucidate this problem, and may help suggest plausible answers.

Hypothetically, there are at least half a dozen potential formal approaches to devising new fishery subsidy disciplines, a number of which have been the subject of preliminary scholarly attention.⁵³ The range of theoretical options includes:

1. incorporating new disciplines into new or existing regional fishery management agreements
2. incorporating new subsidy disciplines into new or existing regional trade agreements
3. making various modifications to the WTO system, including through (a) modifications to the Subsidies Agreement, (b) incorporation of fishery subsidies into an expanded Agreement on Agriculture, or (c) negotiation of a new WTO sectoral agreement
4. adding a protocol to an existing global environmental treaty
5. negotiating a new, free-standing global agreement
6. taking a “multifaceted” approach through parallel and coordinated developments in multiple international fora.

These options are briefly reviewed in turn below. At the outset, however, it may be helpful to note that any new fisheries subsidy regime will require at least three distinct components: a norm building process; a formal set of legal obligations; and an apparatus for monitoring and enforcement. It may be that these diverse functions should be shared across several of the potential institutional loci discussed below.

1. Regional Fishery Management Regimes

There will inevitably be a link – formal or not – between any new rules to reduce fishery subsidies and rules to manage fisheries through direct limits on capacity, access, or effort. Open access to fisheries is in some senses a precondition (or one of several important motives) for the current massive levels of subsidization to the fishery sector.⁵⁴

As a matter of political reality, the reach of cooperative efforts to reduce fishery subsidies will depend in some measure on how fishing nations judge the optimal levels at which to maintain their fleets. These judgments will in turn be driven partly by calculations of short-term economic opportunity, rather than of pure environmental responsibility. So long as the domestic social, political, and economic costs of reducing capacity in one fishery can be offset (or are perceived to be offset) by shifting effort to another fishery, pressures to discipline subsidies will be reduced. Conversely, so long as subsidies remain high, pressures from (and very likely the effective power of) heavily subsidizing nations to maintain or increase access to desired fisheries will remain strong.⁵⁵ In short, there is a feedback loop between the strength of (and need for) rules about access and the strength of (and need for) rules about subsidies.

In addition, management regimes may relate to subsidies disciplines in at least two other ways. First, the crafting of detailed subsidy rules, or the implementation (including enforcement) of them, will likely depend in part on information and judgments about how particular subsidy regimes are operating, including their possible links to overcapacity or excess effort. Fishery management bodies will often be the best located to collect and analyse such information, or to make such judgments. Second, management regimes may at times be fora through which efforts to improve fishing practices are developed or disseminated. These practices themselves may be the objects of environmentally friendly subsidies, and regional fishery management bodies may be closely involved with – or even recipients of (or conduits for) – some of them.

All of this may suggest a formal role for fishery management regimes in the crafting and implementation of new subsidy rules. But it does not necessarily mean the best approach is to devolve either the chore of negotiation or the legal locus of the rules themselves to the regional management regime level. On the contrary, several factors militate in favour of a more global approach.

First, fishery subsidies – like the economics of commercial fisheries generally – are often global in nature. While in some cases it may be possible to identify particular subsidies or subsidy classes, the effects of which are limited to specific fisheries, that is not the case for many others. Both politically and practically, subsidy programmes with broad geographic impacts would prove difficult to discipline one fishery at a time. The globalization of markets for fish products adds to this dynamic. Moreover, where a harmful subsidy regime is not fishery-specific, it might be a difficult legal exercise to discipline it through localized obligations.

Formally locating fishery subsidy disciplines at the regional management level would also inevitably result in a sub-optimal patchwork of obligations. Fishery management regimes are in very different stages of maturity in the various places where they exist. Moreover, some portions of commercial fishery resources – those that fall within the exclusive economic zones of individual coastal states and do not involve migratory or straddling stocks – lie beyond the purview of such regimes altogether.

Finally, it is doubtful fishery management regimes (particularly those still being born) are best suited to host negotiations over new subsidy rules. Negotiating and implementing new subsidies rules would likely draw management bodies into

negotiations and debates that relate to questions of international trade law and policy. Politically and practically, regional management bodies may lack the expertise or disposition to deal with such issues effectively. Indeed, the consequence of locating new fishery subsidies rules at the level of management regimes would doubtless be the injection of trade ministry officials into the operation of those regimes. All parties concerned would likely be better off if management experts and trade experts mingled on someone else's turf.

The foregoing leads towards the conclusion that fishery management regimes will likely have an important role to play in the implementation of new subsidies disciplines, but rather than acting as the locus for new norms and disciplinary mechanisms themselves, these regimes may better be limited to providing information and monitoring services to an external disciplinary apparatus.

2. Regional Trade Agreements

Given the attractiveness (discussed in the preceding section) of tying fishery subsidy disciplines closely to facts at the local level – in combination with the trade-related nature of the problem and the conclusions just reached about the limited potential of regional fishery bodies – regional trade fora emerge as an interesting level at which fishery subsidy regimes might be organized. This interesting prospect is reinforced by the fact that trade and environmental concerns have so far achieved their most advanced integration in connection with some regional trade agreements (particularly the North American Free Trade Agreement (NAFTA)), and that one such forum (APEC) is currently host to the only active negotiations aimed at improving fishery subsidy disciplines.⁵⁶

Once again, however, a few factors similar to those discussed above weigh against this notion, and for a more global solution. First, the global nature of the fishery subsidies problem would escape comprehensive solution through regional trade agreements much as it would through fishery management regimes. Regional trade fora may enjoy greater geographical coverage than individual fisheries regimes, but still may be unable to bring all of the right parties to the table, especially considering that distant water fleets from outside a region may participate in some local key fisheries. Still, regional trade fora may at times create interesting tactical opportunities for the governments involved. For example, it is impossible to imagine a meaningful solution to the fishery subsidies problem that does not include the EU. But the conversation in APEC may help create conditions under which global fishery subsidies negotiations that include the EU are more likely to succeed.

Second, as with fishery management regimes, it is not likely that most regional trade fora can or will take significant steps on fishery subsidies issues. Regional trade fora are very diverse in their level of organization and effectiveness. Along with the fact that the “trade impacts” motive for addressing fishery subsidies is generally weaker than the “environmental” motive, this makes it extremely unlikely that the fishery subsidy issue could be seriously taken up by more than a few of them.

In this regard, it is interesting to note one obvious difference between the organization of the international trade system and that of international fisheries management. In the trade system, the real normative action is ultimately at the global level of the WTO; in

the fishery management system, much of the norm building, and nearly all of the implementation, is at the level of the regional fisheries. Oddly, this means that the relevance of regional trade fora to the fishery subsidies issue can sometimes be sharply reduced, while at other times it can be strengthened. Regional trade agreements probably cannot be the loci of any comprehensive or lasting solution to the fishery subsidies problem. But, precisely as a result of the dynamic between these regional fora and the multilateral trade system, they can sometimes be significant stepping stones towards a global solution. The current APEC sectoral liberalization initiative (including the fishery subsidies talks) is a case in point. The outcome of the regional talks is intended for quick translation into the WTO system. If the APEC initiatives do not move successfully into the WTO, they will be for the most part neutered. If they do move to the multilateral level, however, they may prove very influential in shaping the global outcome.

In short, regional trade regimes are not likely to be the proper level for organizing for an eventual fishery subsidies regime. But they obviously can serve as catalysts for global action. Moreover, they can be excellent hosts for some of the additional empirical research and analysis this topic so badly requires. And fora such as NAFTA and APEC offer interesting potential for creating integrated structures for management of an issue at the trade-environment nexus. The bottom line is that such fora hold interesting promise as potential incubators of new fishery subsidy rules, and – unlike regional fishery management regimes – should be carefully considered as fora for active negotiations, pending more comprehensive diplomatic action at the global level.

3. New Elements within the WTO System

It is difficult to imagine a solution to the fishery subsidies problem that does not include a significant role for the WTO. At a minimum, that role should include full implementation of existing notification obligations, judicious handling of any fishery subsidy cases brought before it under the Subsidies Agreement, and some level of participation in negotiations over new rules and mechanisms. However, the question remains whether the WTO should serve as legal locus of new fishery subsidy disciplines, or even as the institutional mechanism for administering and enforcing them. Without offering a conclusive response to this question, the following considerations may be of use.

To start with, even if new fishery subsidy rules are located wholly outside the WTO, certain adjustments to WTO rules and practice will be needed. The current tensions between the WTO and multilateral environmental agreements would likely be brought to the fore by an environmental regime focused on subsidies, especially if such a regime were not universally adopted, and had recourse to trade measures as a tool of enforcement. A healthy fishery subsidies regime outside the WTO, therefore, would require clarification of the WTO rules. The formation of such a regime would be an excellent opportunity for a first experiment in forging institutional links between the WTO and a multilateral environmental agreement system – to avoid redundancy, to cooperate as useful, and to give careful definition to the mutual limits of their dispute resolution mechanisms.

But the broader question is whether such a minimal WTO role is optimal. It is true that the concerns driving international attention to fishery subsidies are presently focused more on the environmental dimensions of the issue than on trade. Moreover, the

international policy and market failures associated with overfishing (including irrational subsidies) are of a kind appropriately addressed through environmental treaties. Even so, there are good reasons to contemplate a more direct role for the WTO on the fishery subsidies issue. First, fishery subsidies do cause trade distortions, and so the WTO may already have substantial work to do on the issue. Second, some aspects of a new fishery subsidy regime would be similar to familiar WTO turf. The WTO has experience with handling subsidies-related disputes (although the WTO's own capacity to deal with the expanded mandate of the new Subsidies Agreement is not yet well tested) and with negotiating subsidies disciplines (e.g. the Agriculture Agreement). The operations of the WTO Subsidies Committee (including oversight of the notification process) could also provide the seed of a structure for a fuller notification and monitoring system on fishery subsidies. Finally, the WTO system offers a ready-made process for binding dispute resolution and – as discussed below – a plausible context for near-term negotiations to forge new fishery subsidies rules.

All of these points, however, beg a fundamental question: would broader involvement in the fishery subsidies issue entangle the WTO in environmental matters beyond its appropriate mandate? This question can be broken into two parts. First, would deeper involvement in the issue inevitably require the WTO to make judgments of environmental policy? Second, would it be appropriate for the WTO to take cognizance of issues other than of environmental policy that lie beyond a traditional concern with “trade” distortions?

The first question may be dispositive – there is wide agreement in both the environmental and trade communities that the WTO should not be engaged in making environmental policy (although there is, of course, some difference of views regarding whether the WTO might already be so engaged). So it is well to ask what kinds of judgments administration of new fishery subsidies disciplines might require. This paper has gone back and forth – perhaps too loosely – between talking about subsidies that “encourage overcapacity and excess effort” and subsidies that “detract from sustainability”. Whether a subsidy detracts from sustainability obviously calls for an environmental judgment. But the first formula seems more like the kind of straightforward (i.e. impossibly complex) economic issue with which trade institutions grapple every day. Given a definition of “capacity” and “effort”, and of how much capacity is “over” and how much effort “excess”, it becomes an empirical question whether a given subsidy is for or against.

The problem, of course, is that even impossibly complex questions can get complicated sometimes. What happens if a subsidy designed to promote technological alternatives to driftnets turns out to enhance capacity in an already overcrowded fishery? Whether, on balance, such a subsidy is good or bad policy would be a consummately environmental judgment. But perhaps no international fishery subsidies regime should make such judgments itself in any case, but rather should look to fisheries management bodies for the job.

No final resolution to this first question of WTO propriety will be offered here. This paper proposes only that the potential advantages to a deeper WTO involvement in the fishery subsidies issue are great enough to require further thought, and that it appears

at least plausible that the kinds of interventions the WTO would be called upon to make, may be separable from environmental policy making

The second question posed above – regarding the scope of the WTO’s trade-oriented mission – arises not because of the “environmental” character of the fishery subsidies problem, but because many of the economic harms caused by fisheries subsidies are not expressed in classic distortions of international trade. The rapid worldwide depletion of a vital natural asset base obviously causes international economic injuries. While these injuries may be experienced at the national level, they are diffuse, and similar to injuries that might result from free market forces in an “open access” fishery regime. As noted above, the multilateral trading system has traditionally focused on creating and enforcing trade obligations that run between national governments. In the case of fishery subsidies, the interests run more fundamentally between individual nations and the shared interests of the international community. Harms to such common interests are not likely to be cognizable by traditional WTO rules, even if they are precipitated in part by the kind of irrational governmental market meddling that the WTO was designed to help prevent.

The evolutionary direction of the multilateral trading system, however, suggests that the system has been growing steadily away from being a simple arbiter of national rights, towards being a guardian of a well-functioning international market per se. Perhaps the best example of this trend is the Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS agreement), which creates obligations running far deeper than necessary simply to avoid measurable injuries to individual trade interests.⁵⁷ Article 6.1 of the WTO Subsidies Agreement (the “presumption of serious prejudice” clause discussed in Part III.B, above) is also an example of this trend insofar as it seeks to discipline certain subsidies in the absence of a provable harm to an individual nation’s trade interests. The preamble to the WTO charter itself similarly reflects this evolution from “arbiter” to “guardian”,⁵⁸ and specifically notes the communal interest in “allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development”. If it is possible to insulate the WTO from entanglement in environmental policy making, its evolutionary path suggests it may not be out of character for the WTO to address the kind of “not-strictly-trade” economic injuries associated with fishery subsidies.

In sum, there are good reasons to explore locating new fishery subsidy rules – or at least some of them – within the WTO system. Of the specific options for accomplishing this listed in the introduction to this Part IV.A, the negotiation of a new WTO sectoral agreement appears the most attractive. A simple effort to amend the Subsidies Agreement would be more suitable in order to make WTO rules conform to the operations of a fishery subsidies regime located mainly outside the WTO. Similarly, the notion of integrating fishery subsidies into the WTO Agriculture Agreement might have made sense ab initio, but today would run an unacceptable risk of ensnaring fishery subsidies disciplines in the politics and elaborate technical skein of the agricultural subsidies issue.

None of the foregoing is meant to propose the idea of the WTO taking charge of fishery subsidies on its own. Just as a regime located outside the WTO would require active participation by the trade system, a fishery subsidies regime within the WTO would

have to be crafted and administered with the direct participation of key environmental bodies. Indeed, such an agreement would have to have a hybrid character quite different from anything in the current WTO system.

4. A Protocol to an Existing Global Environmental Agreement

Another option that has been proposed for structuring new fishery subsidies disciplines is the negotiation of a protocol to some existing global environmental treaty.⁵⁹ An in-depth exploration of this approach is beyond the limits of time and space imposed on this paper. However, a few thoughts for the future may be ventured.

First, the attraction of attaching fishery subsidies disciplines to an existing international regime lies in the efficiency of building upon (and avoiding conflicts with) previously agreed norms and structures, and in the opportunity to capture any political momentum associated with recent norm-building processes. Existing international environmental processes may tend to be attractive more for the latter than the former reason. In particular, a good fishery subsidies regime will require administrative and enforcement mechanisms that are stronger than those currently available in many environmental treaty systems. Attachment of a strong and enforceable fishery subsidies regime to an existing environmental treaty could coincide with a strengthening of such treaty's structures for implementation. The question is whether the achievement of such structures would be more likely or less than in "free-standing treaty" context.

Second, as noted throughout this discussion, any new subsidies regime (or any significant aspects of one) located outside the WTO would have to be reconciled with current WTO rules (or vice versa). At a minimum, a regime outside the WTO should be given priority over WTO rules, in the event of conflict between them. Far better would be a formal cooperation and integration between the rule systems.

Third, given the obvious trade-related aspects of the fishery subsidies issue, it is unlikely that a protocol could be negotiated without the active engagement of trade agencies, and very possibly of the WTO itself. The consequences of this for the operation of the agreement to which a fishery subsidies protocol might be attached should be weighed in considering this approach.

5. A Free-Standing Fishery Subsidies Agreement

The interdisciplinary nature of this issue, as well as the need for an integrated solution involving various international actors and institutions, make the notion of a free-standing, hybrid-like agreement attractive in principle. The key question is whether an approach that does not seek the benefit of the "efficiencies" noted in the previous two subsections would have as good a chance of coming to fruition. In addition, the simple question whether such a free-standing agreement would involve too much redundancy with existing processes should be considered. Apart from these obvious issues, the second and third points raised in the previous subsection also apply to the free-standing agreement approach.

Additionally, a new "free-standing" agreement would not be likely to be wholly divorced from some institutional base. At a minimum, the negotiations themselves would almost

certainly emerge from one of the international processes currently seized with the fishery subsidies issue. It would also be unusual for a treaty of the kind proposed to be administered entirely outside the framework of some existing international institutional structure. In effect, “free-standing” really means independent of any existing trade or environmental treaty mechanisms. One question, then, is whether any international institution falling outside these categories could successfully host a new fishery subsidies regime. A provocative answer might be the OECD.

Several characteristics of the OECD make it an interesting potential choice. First, its technical staff have far deeper experience and expertise on fishery subsidies (and similar issues) than any other international organization.⁶⁰ As the shop where much of the technical work was done preceding the Agriculture Agreement, the OECD has an immediate and highly relevant history. The investigative and monitoring functions of the organization also suggest potential for the kind of detailed surveillance that a good fishery subsidies regime will require. The OECD has also arguably proven better at carrying out an integrated technical discussion around issues of trade and environment than any other international body.⁶¹ Finally, despite a close cultural relationship with the multilateral trade system, the OECD might carry less institutional baggage to the role of host than others.

These qualities, however, may be thoroughly counterbalanced by other considerations. First, the OECD is first and foremost a club of developed economies. While the lion’s share of fishery subsidies are granted by OECD countries, some key players (e.g. China) fall beyond this generalization. Moreover, developing countries – particularly coastal states – have a heavy stake in the outcome of fishery subsidies negotiations, whether or not they are subsidizers themselves. As indicated above, any fishery subsidies regime will become, at least in part, an instrument of fisheries management policy. To the extent outcomes in such a regime can be manipulated to direct effort away from some fisheries and towards others, all coastal nations have an obvious stake – and poorer coastal nations an obvious disadvantage. Moreover, as discussed above, some of the most significant forms of destructive fishery subsidization come in the form of inappropriate deals by “northern” distant water fishing nations for access to “southern” coastal fisheries. Whether or not such access agreement subsidies are disciplined by a fishery subsidies regime (as opposed to a separate normative system), the outcome of fishery subsidies negotiations will doubtless have a bearing on them.

In short, the OECD could not appropriately or effectively host a fishery subsidies regime without a substantial change in its modus operandi to offer a process that gave full and equal participatory rights to all stakeholder nations. Despite recent trends towards broader inclusiveness, it is not clear the OECD is up to this challenge.

A second impediment might also be the OECD’s posture on the trade environment issue, despite the positive comments offered several paragraphs ago. The ability of the OECD to host a technical conversation on the trade-environment link has never been translated into practice in a political context. On the contrary, the recent history of the negotiations for a proposed multilateral agreement on investment, hosted by the OECD, were little short of a fiasco in this regard.

Thus, the OECD probably remains best suited to providing technical input into the fishery subsidies conversation. But as the institution continues to reach for new roles – as a forum for major binding agreements like the multilateral agreement on investment, as a “not-just-northern” voice, and even as a leader in integrating policy among the various areas of expertise housed within its cloistered walls – a more expansive and active role for the OECD should not be dismissed out of hand.

6. Parallel, Coordinated Processes

This paper has presumed – naively, some would say – that broad, new, and binding rules to discipline fishery subsidies can be successfully negotiated in the next few years. A far more plausible outcome is for the current fishery subsidy activities in various international fora to proceed in parallel, without much motion towards a “unified field theory” of fishery subsidies reductions. With less pessimism, it might also be argued that this is consistent with an optimal approach in which various pieces of the international system do their respective parts.

The foregoing discussion makes clear that any workable system to discipline fishery subsidies will have to be multifaceted in function, and the product of a tighter brand of inter-institutional coordination than is now common among international bodies. The principal danger in accepting arguments in favour of letting “a half-dozen flowers bloom” is that such an approach simply may fail to achieve the level of effectiveness for which this paper calls. At a minimum, it is worth insisting that a “multifaceted” answer really will require better working relationships among international institutions – and in particular across the trade-environment divide – than currently exist.

Perhaps the institutional inertia weighing against a more “unified” outcome should not be added to the political inertia already too much in evidence on the fishery subsidies issue itself. On the other hand, success at forging new working relationships among relevant international organizations could add to the political salience of the project. Such an approach would also be consistent with the growing realization that better integration between environmental and economic policy making is one of the important new frontiers of international governance.

NEXT STEPS

If a new international instrument to discipline harmful fisheries subsidies is to be crafted in the near term, the first crucial step will be to forge international agreement on the scope and institutional location of the necessary negotiations. Two key opportunities for a well-integrated discussion of both the “environmental” and “trade” issues involved are coming up in the next year. First, it appears likely that trade ministers and environment ministers of WTO member countries will be convened together in a high-level meeting to be hosted by the WTO in the spring of 1999. This meeting would provide an excellent setting for preliminary decisions about the need for and structure of new international fishery subsidies work. The issue would also offer the WTO a unique concrete opportunity to demonstrate its readiness to move beyond its traditionally insular operating style.

A second opportunity will arise almost simultaneously, at the seventh session of the CSD, set for April 1999. A principal focus of this next CSD session will be the

sustainable development of the world's oceans and seas. While the CSD has not traditionally attracted delegations represented at the ministerial level, it has a direct mandate to grapple with the need for institutional coordination on issues related to sustainable development.

Of course, progress at either of these opportunities depends primarily on the will of national governments, and of the various intergovernmental institutions they attend. With attention to the issue growing, the time is ripe for action. Governments can and should agree to use the months ahead to explore the potential for an integrated approach to disciplining fishery subsidies, and to commit themselves to a formal process to negotiate for binding results. Failure to do so will only delay effective attention to a set of international policies that all know – and most admit – is in dire need of reform.

■ References

1. This discussion paper was drafted by David Schorr, Director, Sustainable Commerce Program, WWF-US. The paper is indebted to work previously brought forward by Gareth Porter and Mateo Milazzo, among others. The advice of Scott Burns, Charlie Arden-Clarke, Konrad von Moltke, and Aaron McLoughlin – as well as the valuable input of Ronald Steenblik and the research assistance of Prabhu Patel – is gratefully acknowledged.
2. Based on estimated total annual subsidies of US\$15-20 billion and annual revenue (based on FAO figures for “first sale” of landed fish) of US\$80 billion. See Milazzo, *Subsidies in World Fisheries: A Reexamination* World Bank Technical Paper No. 406 (World Bank, April 1998) (hereinafter referred to as Milazzo): 16 and 74.
3. See generally FAO Fisheries Department, Marine fisheries and the law of the sea: a decade of change (Special chapter (revised) of *The State of Food and Agriculture 1992* FAO Fisheries Circular No. 853 (Rome, 1993) (hereinafter referred to as *FAO Special Chapter*): 23; Stone (1977) Too many fishing boats, too few fish: can trade laws trim subsidies and restore the balance in global fisheries? *Ecology Law Quarterly* 24 (hereinafter referred to as Stone): 515; Porter, *Fishing Subsidies, Overfishing and Trade*, UNEP/WWF workshop on the role of trade policies in the fishing sector (UNEP, June 1997): 15-20; Milazzo: 18-35; WTO, Committee on Trade and Environment, Note by the Secretariat in GATT/WTO Rules on Subsidies and Aids Granted in the Fishing Industry WTO Doc. No. WT/CTE/W/80 (9 March 1998) (hereinafter referred to as *WTO Secretariat Note*): paras. 30-33 (including list of subsidies) and Annex II, para. 4. The types of subsidies listed here are often conferred in addition to tariff and other border measures designed to protect domestic fishing industries from import competition.
4. The provision of fishery access rights constitutes a subsidy if access fees are set lower than necessary to cover the costs of resource extraction not otherwise borne by the fishermen. See, *FAO Special Chapter* 23; Milazzo: 56-57; Stone: 526. These subsidies can be provided through low fees charged by a domestic government to its own nationals, or by a coastal state government to foreign nationals, or through payment of access fees by governments to coastal states on behalf of their nationals. For an in-depth study of how reduced access fees have functioned as subsidies to European fishing fleets operating off the coasts of Africa, see Porter (1997) Euro-African fishing agreements: subsidizing overfishing in African waters, in *Subsidies and Depletion of World Fisheries: Case Studies* WWF.
5. See, e.g. *FAO Special Chapter* 23-24; Stone: 523-29; Milazzo: 9-14.
6. See, e.g. Milazzo: 74 (estimating that “environmental” fishery subsidies are roughly 5 per cent of the total).

7. *FAO Special Chapter* 32, 50-53. The figures cited refer to the period circa 1988-1989.
8. See, e.g. Porter: 21 (“more than half”); Shand (1977) *Human Nature: Agriculture Biodiversity and Farm-based Food Security* (an independent study prepared for the FAO), Rural Advancement Foundation International (<http://www.fao.org/sd/edpir>) footnote 27 and accompanying text, citing full US\$54 billion as representing subsidies.
9. *FAO Special Chapter* 32.
10. Stone: 518. Stone accepts the FAO’s formulation that “most” of the US\$54 billion deficit is likely covered by subsidies. *Ibid.*: 517 and notes 48-49. Porter: 21, similarly finds the FAO numbers may be off in either direction, but concludes that worldwide fishery subsidies are likely in the US\$16-20 billion range.
11. *WTO Secretariat Note* Annex II, para. 5.
12. Milazzo.
13. *Ibid.*: 73.
14. Specifically, in most cases Milazzo reviewed only government budgets for departments responsible for fisheries – ignoring other government agencies that might provide subsidies to the fishery sector – and, with occasional exceptions, did not include subsidies provided by governmental entities at the subnational (or sub-EU) level. Milazzo also reports that he exercised “prudence and caution” in his overall approach. *Ibid.*
15. *Ibid.*: 16 and 74 (citing FAO figures).
16. Porter has surveyed a number of ways in which subsidizing the extraction of natural resources can degrade the environment, including through: (1) overcapitalizing the productive sector; (2) altering incentives away from environmentally friendly technologies; (3) misallocating resources by underpricing natural inputs; (4) making it profitable to harvest even at very low or negative unsubsidized marginal returns; (5) encouraging overconsumption; and (6) reducing public revenues available for proper management of a resource (especially to the extent that revenues generated by the resource are a significant source of funding for its management). Porter: 7-9.
17. See, e.g. *WTO Secretariat Note* Annex II, para. 3 (quoting the FAO’s conclusion that “as the opportunities for an increased catch from fishery resources have declined considerably, a continuation of the high subsidies can only lead to greater and greater economic distress as well as further depletion of stocks”); WTO Committee on Trade and Environment, *Environmental and Trade Benefits of Removing Subsidies in the Fisheries Sector (Submission by the United States)* WTO Doc. No. WT/CTE/W/51 (19 May 1997), (hereinafter referred to as *Submission by the United States*) paras. 8-9 (“Subsidies tend to exacerbate the over fishing [sic] and overcapitalization common in the world’s commercial fisheries ... most subsidies in fisheries have a negative impact from a conservation standpoint ...”) (see also *ibid.* paras. 18-19); WTO Committee on Trade and Environment, *Item 6: The Fisheries Sector (Submission by New Zealand)* WTO Doc. No. WT/CTE/W/52 (21 May 1997), (hereinafter referred to as *Submission by New Zealand*) para. 7 (“By providing additional revenue or reducing costs, the returns from fisheries are inflated beyond normal economic levels of exploitation. In the case of a fisheries resources [sic], the normal economic rate of exploitation will often be above the long term sustainable biological rates of yield”); Asian Development Bank, *Draft Working Paper on the Bank’s Policy on Fisheries* (18 January 1996), para. 55 (“Incentives in the form of subsidies and protection can lead to overexploitation of fishery resources, lower harvest, and economic inefficiency”); United Nations Commission on Sustainable Development, *Protection of the Oceans, All Kinds of Seas, Including Enclosed and Semi-enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of their Living Resources (Report of the Secretary-General)* Doc. No. E/CN.17/1996/3 (12 February 1996), para. 21(c) (“Governments are urged to reduce subsidies to the fishing industry and abolish incentives leading to over-fishing”).
18. It is common, for example, to find fishery subsidy notifications to the WTO in which subsidizing governments deny that subsidies totalling tens of millions of dollars (including subsidies to

- shipbuilding, port facilities, fish marketing, or income support to “idled” fishermen) lead to any international market distortions – tantamount to denying that these subsidies create effective capacity beyond some natural or market-driven level. See, e.g. European Communities, *Updating Notifications Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures* WTO Doc. No. G/SCM/N/25/EEC (12 March 1998): 364 et seq. (reporting fishery subsidies from Spain for the period around 1996).
19. See *Submission by New Zealand* para. 9 (“Some countries also argue that their [sic] is no systemic link between subsidies and over-capacity. From an economic theory perspective this is a difficult argument to maintain. It is difficult to understand how the artificial inflation of fishers [sic] returns does not affect their level of activity and thus affect the health of the marine environment.”)
 20. See Milazzo: 4-8; Steenblik and Wallis (1998) *The OECD’s Programme of Work in the Area of Fishery Policies* OECD, Sec. 2.2.
 21. The trade impacts are more speculative in two respects. First, unlike with the link between subsidies and overcapitalization – where the absence of precise causal analysis is to some degree compensated by the simple correlation between subsidies and the explosive growth of the world’s fishing fleets – no dramatic “macro” trend in fish-based trade flows has an obvious link to current subsidies. Second, the entire economics of the link between domestic (as opposed to export or anti-import) subsidies and trade distortions is hotly debated, as is evident in the nuanced approach to the subject of the WTO system and its antecedents (see discussion in Part II.B of this paper).
 22. Milazzo: 74-75, notes the equivalence of fishery subsidies, in relative terms, to agricultural subsidies that are commonly decried as serious market distortions and barriers to trade.
 23. FAO Fisheries Department (1997) *The State of World Fisheries and Aquaculture (1996)* FAO: 7. Nearly a quarter of the developing countries that rely on single commodity exports depend on seafood for 40-80 per cent of their export earnings; *Submission of the United States* para. 15.
 24. See, e.g. *Submission by the United States* paras. 13 and 18; *Submission by New Zealand* paras. 7, 10-12.
 25. APEC is the only international forum in which negotiations are currently under way to increase the disciplines applied to fishery subsidies (see discussion in Part III.A.2 of this paper).
 26. WTO Committee on Trade and Environment, *Environmental Benefits of Removing Trade Restrictions and Distortions (Note by the Secretariat)* WTO Doc. No. WT/CTE/W/67 (7 November 1997), para. 93.
 27. Various international environmental instruments may also have a bearing on the legitimacy of environmentally harmful fishery subsidies. See, e.g. the Convention on Biological Diversity, the UN Convention on the Law of the Sea (including the related Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks), the FAO Code of Conduct for Responsible Fisheries, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and Agenda 21. Although a number of these speak directly to the overcapacity issue, none contains specific binding obligations to reduce environmentally harmful fishery subsidies, and this paper will not deal further with them. They may, however, contribute to a body of emerging international environmental norms constraining national fisheries policies generally, including the use of subsidies. In addition, the FAO is currently negotiating a proposed new Plan of Action on Fishing Capacity that may include new norms (probably non-binding) relating to fishery subsidies.
 28. Also applicable to subsidies is Article XVI of GATT. Since, for present purposes, the obligations of the Subsidies Agreement are both broader and stricter, the legal relevance of GATT Article XVI will not be analysed here.
 29. See especially GATT Articles XVI:2 and XVI:3. For an authoritative discussion of the development of GATT subsidies law, see John Jackson (1989) *The World Trading System: Law and Policy of International Economic Relations* Massachusetts Institute of Technology: Ch. 11.
 30. *Uruguay Round Agreement on Agriculture*, Annex I (Product Coverage), 1.(i) (excluding “fish and fish products”). One observer has reported that the exclusion was intended to allow major fish importing

- nations to maintain tariff-quotas on fish imports. McCleod (1996) *Market Access Issues for the New Zealand Seafood Trade*/New Zealand Fishing Industry Board: 73 (cited in Porter: 36).
31. Jackson titles his chapter *The Perplexities of Subsidies in International Trade*.
 32. See Porter: 37 (such subsidies are “not significant in the fisheries sector”). But see Stone: 529 and notes 109-110 (“Such practices have certainly taken place in the fisheries context”). Article 27 of the Subsidies Agreement exempts developing countries from Article 3 prohibitions, although with time limits on the exemption in some cases. Some developing countries have notified otherwise prohibited fishery subsidies in accordance with that rule. See e.g. G/SCM/N/6 (Notification of Singapore, 8 May 1995) (tax relief for fish exports, conditioned on certain minimum export sales).
 33. Article 8.2(c) (iv) refers to the “reduction of nuisances and pollution”. Bycatch reduction would strain this definition, and clearly was not in the minds of the drafters. Still, the general spirit of the “green for green” box should allow such an expansion of its meaning. Otherwise, this might be better called the “green for brown” box.
 34. Under general GATT jurisprudence, “nullification or impairment” may be presumed (without a showing of injury) in cases where a GATT rule has been violated. But, by definition, “actionable” subsidies per se do not violate any WTO rules. Standard GATT jurisprudence suggests the principal relevance of the “nullification or impairment” language would be to any subsidy having an impact on the conditions of international competition for any product subject to a GATT tariff binding, in cases where the subsidy was granted (or substantially changed) after that binding became effective. See, e.g. *The Australian Subsidy on Ammonium Sulphate (Chile v. Australia)* BISD II:188 et seq. (1952), para. 12; *EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins (U.S. v. E.U.)*, 37th Supp. BISD 86 (1991), paras. 144-148.
 35. The Article 31 sunset provision also applies to the “green light” subsidies category.
 36. On the coverage of Articles 5-6 in the fishery context, see generally, Stone: 523-37; Porter: 35-39.
 37. E.g. if a fuel subsidy is granted to more than just the fishery sector (see Porter: 37 and note 148); or if a port facility is for use by more than just fishermen (see Stone: 524, who also considers that such facilities might be “infrastructure” within the meaning of Article 1.1(a)(1)(iii)).
 38. Stone raises this question with regard to payment of access fees. *Ibid.*: 525.
 39. The categorizations here are roughly based on Stone and Porter, as well as on the author’s own knowledge. No rigorous defence of them will be provided.
 40. This is the case of a foreign government effectively subsidizing nationals of another country. The Subsidies Agreement does not contemplate actions against such subsidies, although nothing on the face of Article 1 rules out such an interpretation.
 41. The purchasing or granting of access rights is listed here as merely “possibly” actionable in deference to the analyses of both Stone and Porter. The author would otherwise have placed these important classes of fishery subsidy in the “likely” to be actionable column. Porter: 37, assumes that a “transfer of funds” or a “revenue forgone” within the meaning of Article 1.1(a)(1)(i)-(ii) requires a transfer to or non-collection from the producer whom the subsidy allegedly benefits. He concludes that such subsidies are not covered by the Subsidies Agreement. Stone: 525, appears to make the same assumption, but considers that the subsidy might still qualify as a “good or service” provided to the producer within the meaning of Article 1.1(a)(1)(iii). However, there is nothing on the face of either Articles 1 or 2 requiring that the transfer or forgone revenue be granted to the producer, and GATT/WTO jurisprudence sometime recognizes actions against subsidies paid to parties other than the ultimate beneficiary (e.g. in “upstream” subsidies).
 42. The Subsidies Agreement provides that multiple subsidy programmes can be aggregated in calculating the overall rate of subsidization to a given product. Subsidies Agreement Annex IV, 6. Porter and Stone agree that the 5 per cent ad valorem rule is the most interesting of the Article 6.1 clauses. Porter: 39; Stone: 530.

43. WTO Committee on Subsidies and Countervailing Measures (5 May 1995). *Minutes of the Meeting Held on 22 February 1995* WTO Doc. No. G/SCMM/1: para. L.
44. This figure was derived by reviewing all of the notifications collected and reported in the *Note by the Secretariat*. In the case of the EEC Notification, information in a more recent comprehensive notification (WTO Doc. No. G/SCM/N/25/EEC (12 March 1998)) was also reviewed. Several of these notifications failed to provide any monetized amount for the subsidy (see, e.g. Notification by the Philippines, WTO Doc. No. G/SCM/N/3/PHL (15 April 1996); Notification by Japan, WTO Doc. No. G/SCM/N/25/JPN (17 November 1997) (hereinafter referred to as Notification by Japan): 32 (“Additional Depreciation on Fishing Boats”); Notification of the United States, WTO Doc. No. G/SCM/N/16/USA (26 September 1997) (hereinafter referred to as Notification of the United States) (“Commercial Fishing Exemption from Deficit Reduction Rate Component of Excise Tax on Motor Fuels”). The inadequacy of these notices makes it appropriate not to count them in the total. For consistency with Milazzo, the total does include a portion of subsidies identified for general shipbuilding in the relevant period. Again relying on notices listed in *Note by the Secretariat* there were roughly US\$2.7 billion of such subsidies notified for 1996. Following Milazzo: 52, 10 per cent (US\$27 million) have been counted towards the total for subsidies to the fishery sector.
45. Milazzo: 19, 39, 68. These figures do not include significant “unbudgeted” or “cross-sectoral” subsidies, for which precise numbers are hard to extract from Milazzo’s analysis.
46. Notification by Japan: 22, 32.
47. Milazzo: 25, 30, 41.
48. Notification of the United States.
49. Milazzo reports at least US\$895 million in EU subsidies at the EEC level, not including two large categories of subsidy that Milazzo finds difficult to quantify: 22, 38, 67. The EU Notification for the period 1996, above, totals approximately US\$592 million.
50. In referring to the “shortcomings” of the present system, it is not intended to criticize the drafters of the WTO accords for failing to do what they manifestly did not consider doing. These “shortcomings” arise from a comparison of the WTO rules with what is needed in the future, not with what might have been wished in the past. The discussion that follows draws in part on Stone: 523 et seq.; Milazzo: 75-81; and Porter: 40-44.
51. The problems arising out of implicit subsidies provided by coastal states to foreign distant water fleets are especially difficult analytically. In the end, positive obligations regarding access fees may best be dealt with through codes of conduct or model agreements that establish some kind of theoretical baseline. Still, failure to administer proper access fees should remain within the purview of any system to discipline subsidies.
52. It would be tempting to include within the class of subsidies inconsistent with the Agreement all subsidies that are actionable and cause one of the harms enumerated in Article 5. Similarly, Article 32.5, which requires WTO members to bring their domestic laws into conformity with the provisions of the Agreement, might be interpreted as requiring the removal of subsidies that cause adverse effects. These proposed interpretations, however, conflict with the clear meaning of Article 5, which allows actionable subsidies to be maintained until successfully challenged.
53. See, e.g. Milazzo: 81; Stone: 520-22; Porter: 41-44.
54. See Part I.B of this paper (concluding that international action to discipline fishery subsidies is necessary, even if management failures are in some senses the more fundamental problem).
55. To the extent allocation of fishing rights is based on market mechanisms (e.g. individual transferable quotas), subsidies obviously increase the ability of national fleets to purchase access. To the extent allocation of fishing rights depends on non-market-based solutions, high subsidies may increase the ability and the will of governments to negotiate terms favourable to their own nationals. By raising the domestic stakes, high subsidies will tend to strengthen a country’s will to achieve its terms. High

subsidies also may add to the ability of a nation to achieve its terms by creating conditions under which it can sweeten a negotiating pot (e.g. with indirect payments for access, or with commercial opportunities), or by maintaining fishing communities or fishing patterns whose existence helps legitimize claims to access.

56. At present, the APEC “Early Voluntary Sectoral Liberalization” initiative for fisheries defines the goal for subsidies only in terms of bringing APEC members into prompt compliance with WTO rules, possibly including through acceleration of developing country adherence, despite longer timelines allowed under the Subsidies Agreement.
57. The TRIPS agreement creates broad obligations to maintain certain aspects of an open and well-functioning intellectual property rights regime at the national level. The terms of the TRIPS agreement can be enforced for “nullification or impairment” arising from breach of these obligations – claims of a kind that receive presumptions of injury under traditional GATT law (much like those created under Subsidies Agreement Article 6.1). See above. It is interesting to note that TRIPS Article 64.2 disallows cases under of the broader “non-breach” type of nullification or impairment for the first five years of the Agreement – again paralleling the experimental character of Subsidies Agreement Article 6.1.
58. The preamble’s repeated references to the multilateral trading “system” are interesting in this regard.
59. See, e.g. Porter: 42-43.
60. The only potential rival would be the United Nations Conference on Trade and Development, which – for political reasons if none other – could not be a serious candidate to host a subsidy regime aimed at disciplining subsidies maintained mainly by major industrialized countries.
61. Unfortunately, this may be due as much to the failure of bodies such as the WTO’s Committee on Trade and Environment as to any progress achieved at the OECD. Still, the analytic work on trade and environment performed by the OECD has been a welcome effort at reaching the substance of problems at the trade-environment nexus.