

International Environmental Law Committee Newsletter

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MESSAGE FROM THE CHAIR

Jane Luxton
King & Spalding LLP

Greetings to members of the International Environmental Law Committee. It is an honor to introduce myself as the 2006-07 chair of the Committee and to welcome you to the first issue of the IELC Newsletter produced by our new Newsletter vice chair, Jim Rubin, with assistance from our Membership vice chair, Tom Redick, and several committee members. Jim, Tom and I, along with a distinguished and diverse group of vice chairs, began our tour of duty in August 2006.

I hope you will visit our committee's Web site, which has been partially updated with more to come, thanks to the hard work of our Technology vice chair, John Spinello. The Web site can be accessed at www.abanet.org/environ/committees/intenviron. There you will find information about the programs and public service projects organized by our Programs and Public Service vice chairs, respectively, Carlos Fernandez and Teresa Maurea Faria. In the coming months, you will see the work of our *Year in Review* vice chair, Lakshman Guruswamy, and additional contributions from our vice chairs at large: Bill Thomas, David Hunter, Ken von Schaumburg and Vail Thorne. We are all enthusiastic about our roles in the leadership of the committee. We are also very interested in your input on proposals for programs, newsletter articles, public service projects and member outreach, so I

encourage you to contact any of us with your feedback and ideas (our e-mail addresses are displayed on the website). International environmental law is an exciting and growing field, and I urge you to join the committee and become part of our list serve if you have not already done so.

And now, a few words about this issue of the newsletter. The Fall newsletter reviews important developments in several related areas of increasing significance: marine resources conservation, multilateral/regional trade matters relating to the marine environment and biotechnology. These areas are experiencing significant economic growth and receiving greater regulatory focus around the world—particularly in the European Union (EU)—and in multilateral fora. Authors from the government and private sectors provide timely and informative reports on these important subjects.

Russell Lamotte analyzes new developments in the international protection of marine genetic resources and efforts to address destructive fishing practices such as bottom trawling. Issue editor Brett Grosko traces two important and recent developments in international fisheries policy—World Trade Organization (WTO) negotiations to discipline fish subsidies and the EU's reform of its Common Fisheries Policy. Craig Thorn and Jillie Richards discuss the relationship between the WTO and the Biosafety Protocol, and the significance of the recent WTO panel decision regarding the EU's regulation of biotechnology. And Peter Oppenheimer and Ole Varmer describe the recent international and

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James W. Rubin, Editor
Brett Grosko, Issue Editor**

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U.S. government efforts to protect the world's most famous shipwreck, the RMS *Titanic*, from disturbance and misguided salvage.

I hope this issue provides useful perspectives on some emerging issues facing international environmental lawyers in fall 2006. If you have questions or would like to expand the dialogue about these issues—or have ideas for additional articles for the newsletter—please contact Jim Rubin (jrubin@hunton.com) or me (jluxton@kslaw.com). We welcome your input in the newsletter and your participation in the activities of the committee.

**THE CARTAGENA PROTOCOL ON
BIOSAFETY AND THE
WORLD TRADE ORGANIZATION**

**Craig Thorn
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The Cartagena Protocol on Biosafety (BSP or Protocol), a supplementary agreement to the Convention on Biological Diversity (CBD), was adopted in January 2000 and entered into force in September 2003. As of this writing, 135 countries have ratified the BSP, and many of those countries are now considering implementing legislation. A large majority of countries that are party to the Biosafety Protocol are also members of the World Trade Organization (WTO). Since several WTO Agreements contain disciplines that are relevant to trade in products of agricultural biotechnology, those countries must understand the relationship between the WTO and the BSP in order to avoid adopting legislation that violates their WTO obligations.

This article will discuss a recent WTO panel ruling on biotech products and the relationship between WTO disciplines and the BSP.

WTO Dispute Settlement Panel Ruling

A recent report by a WTO dispute settlement panel (Panel) might provide some guidance. On Sept. 29,

2006, the Panel hearing the complaint by the United States, Canada and Argentina against the European Union (EU) regarding the EU's operation of its pre-marketing approval system for biotech products released its final report. *See* WT/DS291/R, WT/DS292/R, WT/DS293/R, *available at* www.wto.org. The Panel ruled in favor of the complaining Parties with respect to nearly every measure challenged, and it made a particularly interesting finding regarding the relevance of the BSP.

The EU had asserted as a part of its defense that the CBD and the BSP were rules of international law relevant to the interpretation of the WTO Agreements at issue in the case—*i.e.*, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the General Agreement on Tariffs and Trade (GATT) and the Agreement on Technical Barriers to Trade (TBT). The EU maintained that the arguments of the complaining Parties ignored the rules of international law reflected in the BSP regarding the precautionary principle and risk assessment.

The EU, Argentina and Canada have all ratified the CBD; the United States has signed the CBD but not ratified it. The EU was the only Party to have ratified the BSP; Argentina and Canada have signed but not ratified it; the United States has neither signed nor ratified.

Invoking Article 31 of the Vienna Convention on the Law of Treaties, the Panel rejected the EU's argument on the relevance of the BSP. Although the Panel agreed with the EU that the BSP qualified as a "rule of international law" (*EU—Biotech Products* ¶ 7.67), it found that it could not apply the BSP to the case because not all the disputants were Parties to the BSP (¶ 7.71). The Panel found that the only rules of international law which are relevant to the interpretation of WTO Agreements are those which actually govern "relations between WTO Members" (¶ 7.68). That is, each disputant must be a Party to the external international law/agreement in order for that agreement to have relevance.

We do not yet know if the EU intends to appeal this ruling. However, if it stands, the findings have

important implications for the applicability of BSP rules to trade between WTO Member countries. Most significant exporters of biotech commodities are not parties to the BSP.

The Savings Clause

The negotiators of the CBD and the BSP were aware of the possibility that those agreements might overlap with other international agreements, especially trade agreements. CBD negotiators dealt with the issue explicitly by including a "savings clause" in Article 22(1):

The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.

The inclusion of a similar clause in the BSP became a matter of some controversy and was among the last issues decided by negotiators. The language that was finally accepted appears in the preamble and is clearly the result of compromise:

The Parties to this Protocol,

...

Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,

Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,

Understanding that the above recital is not intended to subordinate this Protocol to other international agreements, . . .

These provisos are important to an analysis of the legal relationship between the BSP and the WTO. The WTO Appellate Body has stated that WTO rules cannot be "read in clinical isolation from public international law" and has frequently cited the Vienna

Convention on the Law of Treaties when interpreting WTO agreements in the context of formal trade disputes. Article 30 of that Convention, which pertains to the application of successive treaties relating to the same subject matter, reads in part as follows:

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

The CBD savings clause places that Agreement, in all but the most critical circumstances, in the category described by paragraph 2 above. The CBD must be interpreted in a manner consistent with WTO rights and obligations pertaining to trade, except in cases where biological diversity is threatened. The comparable language in the BSP is more equivocal, and it appears in the preamble rather than in the text of the agreement itself. Nonetheless, it seems to provide a valid basis for WTO panels and the Appellate Body to conclude that negotiators of the BSP did not intend for that Agreement to automatically supercede WTO rules.

There is certainly no ambiguity regarding the rights and obligations of WTO Members who are not parties to the BSP. Article 30.4(b) of the Vienna Convention reads:

When the parties to the later treaty do not include all the parties to the earlier one: . . . as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

In other words, trade relations between Parties to the BSP that are WTO Members and non-Parties that are WTO Members are governed exclusively by the WTO Agreements.

The EU officials arguing the WTO case cited above did not maintain that the BSP superceded the WTO Agreements. They argued merely that the BSP and the CBD must be taken into account in the interpretation of WTO rules, pursuant to Article 31 of the Vienna Convention. However, as indicated above, the Panel disagreed even with this more narrow interpretation of the relevance of the BSP.

Ensuring WTO Consistency of Biotech Regulations

Fortunately for countries that are parties to the BSP as well as WTO Members, it is possible to implement fully the BSP without violating WTO obligations. However, doing so requires paying close attention to the differences between the relevant agreements.

There are at least two fundamental differences in orientation between the Protocol and WTO rules that policy makers must consider in developing a WTO-consistent biosafety regime. First, the Protocol is essentially a process-based agreement—*i.e.*, it regulates a category of products simply because they have been produced using a particular production method. WTO rules are, for the most part, product-based—*i.e.*, they focus on the end product rather than the production process. The WTO does not expressly prohibit the regulation of particular production methods, but it requires that decisions taken under regulatory regimes established to regulate the products of a particular production method (*e.g.*, biotechnology) be justified on the basis of the characteristics of the end product.

Second, BSP and WTO rules approach regulation from opposite directions. Several provisions in the BSP define the *minimum* permissible amount of regulation of products of biotechnology, while the WTO rules define the *maximum* permissible amount. WTO rules require that measures be no more trade restrictive than necessary to fulfill their objective (*see* SPS Article 5.6, TBT Article 2.2, GATT Article XX).

These points are relevant to many of the issues that have arisen as BSP Parties have begun to implement the Protocol. Below is a discussion of two implementation issues in the light of WTO rules.

Handling, Transport, Packaging and Identification

Article 18 of the Protocol establishes requirements for handling, transport, packaging and identification for shipments of living modified organisms (LMO). The interpretation of this provision has been high on the agenda of the Parties to the BSP.

Article 18.2(a) requires exporters to clearly identify any shipments of commodities for food, feed or processing that may contain LMOs. They must also provide a contact point for further information. At this point, BSP Parties also have agreed to be flexible with respect to the type of documentation provided—*e.g.*, commercial invoice, annex to commercial invoice, etc.—pending a decision on detailed requirements. Current procedures are not likely to have a significant effect on trade and would therefore probably be considered WTO-consistent. However, certain Parties continue to advocate moving beyond the “may contain” standard. They favor requiring exporters to list precisely all LMOs contained in each shipment. Such a requirement would be significantly more burdensome to traders.

Unless the Party imposing such a restriction could demonstrate a scientific rationale, based on the characteristics of the individual LMOs covered, the measure would almost certainly be judged WTO-inconsistent. Method of production is not a sufficient justification under the SPS Agreement for imposing restrictions on handling, packaging or transport of a product. Under the rules of the SPS Agreement, measures maintained for SPS-related purposes must be, *inter alia*, based on a proper risk assessment and supported by sufficient scientific evidence (SPS Article 5.1 and 2.2). Moreover, WTO rules do not permit members to discriminate between like products (GATT Article III.4, TBT Agreement Article 2.1). If the LMOs in question have been examined and approved for use, and there is no scientific reason to restrict their use, any additional requirements pertaining to handling, packaging or transport would be inconsistent with WTO rules.

While the Protocol does not address labeling, many countries are considering establishing labeling

requirements as a part of their biosafety regimes. While labeling for consumer information purposes is permissible under WTO rules, the TBT Agreement requires, *inter alia*, that such labeling be non-discriminatory and “no more restrictive than necessary to fulfill a legitimate objective” (TBT Article 2.2). Mandatory labeling of LMOs for food, feed and processing for consumer information purposes can be burdensome and costly and can have a significant negative effect on trade. On the other hand, a system that allows voluntary labeling of non-LMO products can provide the same information to consumers in a much less trade-restrictive manner.

The Role of Precaution

Some commentators have described Article 10.6 of the BSP, which refers to the precautionary approach as defined in Principle 15 of the Rio Declaration on Environment and Development, as an “operationalization” of the “precautionary principle.” They contend that this principle permits regulators to impose restrictions on a product if there is not complete scientific certainty regarding that product’s safety.

While the precautionary principle has been a frequent topic of discussion in the WTO, the international community has not agreed on a definition of the principle, and a large majority of WTO Members has opposed amending or interpreting WTO rules to incorporate such a broad, open-ended concept (see G/SPS/R/18). In *EC-Hormones*, the WTO Appellate Body did not recognize the precautionary principle as a general principle of international law and stated that it did not “override” SPS Agreement obligations. In the *EC-Biotech Products* report cited above, the Panel confirms the Appellate Body finding.

The SPS Agreement does incorporate important elements of precaution. Article 5.7 of the SPS Agreement provides:

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as

from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

This provision permits members on a temporary basis to adopt regulatory restrictions in cases where information is incomplete. The WTO Appellate Body identified four obligations that accompany that right, each of which must be met to maintain consistency with Article 5.7. A measure must be: “(1) imposed in respect of a situation where ‘relevant scientific information is insufficient’; and (2) adopted ‘on the basis of available pertinent information’.” Further, such measures may not be maintained unless Members: (1) “seek[] to obtain the additional information necessary for a more objective assessment of risk”; and (2) “review[] the . . . measure accordingly within a reasonable period of time.” *Japan—Agricultural Products II* ¶ 89.

The right to act under BSP Article 10.6 is less qualified. Biosafety regulators who act on the basis of the Article 10.6 without taking into account the qualifications contained in Article 5.7 of the SPS Agreement risk violating their country’s WTO obligations.

Conclusion

There are a number of other elements of the BSP that have the potential to restrict international trade—*e.g.*, provisions regarding advance informed agreement, liability and redress, risk assessment and risk management, socio-economic considerations. The SPS, TBT and GATT Agreements contain rules that are relevant to all of these issues. In order to avoid the possibility of violating their WTO obligations, biosafety regulators must be aware of those rules and take them into account as they develop their regulatory infrastructure.

RECENT DEVELOPMENTS CONCERNING FISHERIES SUBSIDIES

Brett Grosko
NOAA

I. Introduction

Negotiations in Geneva and Brussels among numerous countries have resulted in several notable written proposals at the World Trade Organization (WTO) and a European Union (EU) agreement that could impact trade and fisheries law practitioners. First, in November 2001, in the Qatari capital of Doha, WTO Members included in the new round of trade negotiations a specific mandate to “clarify and improve” WTO rules regarding fisheries subsidies, “taking into account the importance of this sector to developing countries.” Their goal was to improve the effectiveness of subsidy disciplines in the WTO Agreement on Subsidies and Countervailing Measures (ASCM) as they apply to fisheries. Accordingly, since 2001 WTO Members have held a series of meetings within the WTO’s Negotiating Group on Rules. Earlier this year, Members submitted their first textual proposals in the fisheries negotiations. However, when WTO Members were unable to agree in July on key elements in other negotiating areas (primarily agriculture), the Doha round (known as the Doha Development Agenda or DDA) was suspended indefinitely. (The DDA negotiations are a “single undertaking”; that is, results must be achieved in all areas of the negotiations and apply to all Members.) The specificity of the fisheries subsidies proposals, however, represents significant progress in the debate on how to address problems presented by the most harmful fisheries subsidies.

Second, in June 2006, the EU announced that it had reached an agreement concerning the terms of the European Fisheries Fund (EFF). The EFF will have a budget of approximately €3.8 million and function as part of the Common Fisheries Policy. The EFF will determine the amounts and types of subsidies that will be granted to EU fishermen from 2007 to 2013.

This article briefly summarizes the key aspects of the Members’ WTO proposals and the EFF accord.

II. WTO Talks

One year after the 2001 Doha announcement, at the World Summit on Sustainable Development (WSSD) in Johannesburg, South Africa, world leaders committed their nations to “[m]aintain[ing] or restor[ing] [fish] stocks to levels that can produce the maximum sustainable yield...on an urgent basis and where possible not later than 2015.” To achieve this goal, countries agreed to eliminate “subsidies that contribute...to over-capacity...while completing the efforts undertaken at [the] WTO to clarify and improve its disciplines on fisheries subsidies...” In December 2005, at the Hong Kong Ministerial, WTO Members reaffirmed their original goal, this time with greater detail. Echoing their WSSD commitments, WTO Members called for the prohibition of fisheries subsidies that contribute to over-capacity and over-fishing (WTO ministerial declarations, the ASCM, and all country proposals are available at www.wto.org).

A. Preliminary Observations

The WTO negotiations are significant for at least two reasons. First, by recognizing the role that subsidies play in contributing to over-capacity and over-fishing, WTO Members implicitly acknowledged that trade policy could be part of the solution to a significant environmental problem. This has a number of implications. For example, because the WTO’s international scope matches up with subsidies’ worldwide effect and the organization has expertise regarding subsidies, the WTO is an appropriate forum for these talks. Moreover, while efforts to address fisheries subsidies in other fora are voluntary, the WTO has an effective dispute settlement system imposing significant consequences for failure to abide by the rules. Should WTO Members reach an agreement on stronger rules, the WTO could potentially make a significant contribution to addressing the crisis of overfishing and improving ocean governance.

Second, the talks marked the first time that many environmental groups took the position that the WTO is the appropriate venue for handling an ecological issue. Many such groups had long considered the WTO too tainted by its alleged commercial bias to

legitimately deal with environmental matters. In contrast, environmentalists and free traders jointly called for an end to harmful subsidies under WTO auspices. This alliance proved that environmental and free trade interests can be mutually supportive.

1. Textual Proposals

In the first half of 2006 WTO Members put forth a number of written text proposals. The proposals have come in the form of amendments or as an annex to the ASCM. At the same time, several overarching approaches have emerged—an ambitious “Top Down” method, which generally prohibits broad categories of subsidies but has specific exceptions, and a narrower “Bottom Up” approach, which regulates more specific categories of subsidies. Proponents of stronger rules generally favor the top down approach. Significantly, proponents of this approach include both developed and developing countries—an unusual alignment in the WTO. Strong supporters of new rules include New Zealand and the United States as well as Argentina, Chile, Ecuador, Iceland and Peru. In the past year, Brazil has also played an important role. There have also been detailed proposals on specific issues, generally within the context of the top down approach. The various approaches can be summarized as follows:

“Top Down” Approach

New Zealand has been the most aggressive in trying to cover as broad a swath of subsidies as possible. Its proposal would define and prohibit an extensive set of subsidies and then exclude several categories through a list of exemptions. New Zealand proposes to clarify that the ASCM prohibits all subsidies “confer[ring] a benefit directly or indirectly” on anyone “engaged in the harvesting, processing, transport, marketing or sale of the fish and fisheries products” The proposal then carves out subsidies tending to support or increase:

- (a) aquaculture;
- (b) vessel decommissioning and license retirement (provided that fishing capacity is permanently removed—*i.e.*, vessels are scrapped, fishing rights retired and fishery management control measures in place);

- (c) fisheries management research;
- (d) stock enhancement and conservation-related measures (including by-catch reduction measures);
- (e) access to the fisheries resources of developing countries;
- (f) certain infrastructure payments, *e.g.*, port or transport infrastructure;
- (g) certain social insurance programs, *e.g.*, early retirement or worker retraining programs;
- (h) natural disaster relief, provided that the subsidy does not result in restoring fishing capacity above its pre-disaster level;
- (i) artisanal (traditional) fishing; and
- (j) vessel and crew safety, provided that the subsidy results in no increase in vessel capacity.

Addressing a weakness under the current ASCM—Members’ infrequent notification to others of their subsidies—New Zealand also proposes that Members would have to notify other Members of subsidies before they could be considered exempted.

Brazil similarly begins by casting a wide net. Its ASCM annex would cover any subsidy “given to or on behalf of fishing interests,” with “fishing interests” defined as “the interests of any company and/or person linked . . . directly or indirectly, to harvesting activities of wild capture fisheries.” However, the scope of its proposal is somewhat narrower than New Zealand’s because it focuses only on harvesting activities. New Zealand’s text would include additional aspects of the industry such as fish processing, marketing and sale. This distinction has been an important fault line in the debate at the WTO.

Brazil’s text then exempts a number of subsidy types, including, but not limited to: (a) government-to-government payments for foreign exclusive economic zone (EEZ) fishery access rights (provided no further transfer of those rights is made); (b) fisheries resource and environmental management (including research); (c) social safety nets, including retraining or early retirement schemes; and (d) vessel capacity reduction programs, provided that the vessel is scrapped, all associated rights are revoked and any future rights are

relinquished. Subsidies falling under categories (a) and (d), and several others, are subject to an additional requirement, namely that they may not result in an overall increase in gross tonnage, fish hold volume or engine power.

Brazil also conditions the exemption of some subsidies on how well the targeted fishery is managed. Brazil has introduced this concept in the context of Special and Differential Treatment for developing countries (S&DT). Brazil would allow developing countries to subsidize for vessel construction, repair or modernization. Such subsidies would not be allowed, however, if the targeted fishery is “patently at risk.” Brazil defines a “patently at risk” stock as one the Food and Agriculture Organization (FAO) considers “overexploited,” “depleted,” or “recovering.” Brazil would not apply this concept to developed countries.

Brazil also would exclude most inland fisheries and aquaculture subsidies from the prohibition.

“Bottom Up” Approach

The EU has adopted a less aggressive approach than Brazil or New Zealand. The EU proposes more tailored categories of prohibited subsidies—those going to new vessel construction, the “renovation” of existing vessels and the permanent transfer of fishing vessels to other countries.

The EU then provides for several exemptions from these categories, which would presumably no longer remain actionable under the existing WTO rules. These would allow subsidies designed to reduce fishing capacity and those designed to mitigate the “negative social and economic consequences of reductions in capacity.” Provided no increase in capacity results, exemptions would also allow for those subsidies furthering (a) conservation; (b) vessel “modernization,” *e.g.*, improvements of working conditions and safety; and (c) environmentally-friendly fishing practices. It is not entirely clear how the EU would distinguish between “modernization” and “renovation.”

As for developing countries, the EU calls for exempting them entirely, as long as the country does not increase

fishing capacity to the point where it would lead to unsustainable exploitation.

Prior to June 2004, Japan maintained that Members should tackle overfishing in the context of fishery management policies instead of by disciplining subsidies at the WTO. Japan then reversed course and agreed that fishing subsidies can contribute to the fish stock depletion. Earlier this year, Japan joined with Taiwan and South Korea in making a joint proposal that is more akin to the EU's method than that of Brazil or New Zealand. These countries' joint proposal would on its face ban five broad types of subsidies: those supporting (a) vessel construction; (b) vessel modification; (c) shipbuilding yards; (d) overseas transfers; and (e) illegal, unreported and unregulated fishing.

However, their draft later curtails the scope of the modification and construction categories significantly. For example, a modification subsidy would be permitted if (a) the subsidy-granting government has in place an effective license system; and (b) the modification does not increase gross tonnage, fish hold volume or the vessel's engine power (capacity). A modification meets condition (b) if its purpose is to improve crew safety or working conditions and neither the vessel's fish hold volume nor engine power increases as a result. In other words, a Member need not meet the "gross tonnage" prong of condition (b) if the modification subsidy aims to improve crew safety or working conditions.

A construction subsidy, meanwhile, would be allowed if the granting government maintains in place an effective license system and the subsidy results in a vessel or vessels of equal capacity being withdrawn. The new vessel's gross tonnage, fish hold volume and engine power may not be more than 50 percent of each of the gross tonnage, fish hold volume and engine power of the withdrawn vessel.

Japan, Taiwan and South Korea also would carve out six types of non-actionable subsidies such as those for vessel decommissioning, unemployment relief and foreign water EEZ access fees.

Like the EU, it appears Japan, South Korea and Taiwan would not want to see subsidies curtailed for fishing effort such as bait, nets and fuel.

Finally, Japan, Taiwan and South Korea's proposal also includes S&DT language based on various transition periods and threshold production levels. However, under their proposal, China presumably would not qualify. China has been a WTO Member since 2001 and is, by far, the world's largest fish producer. It and other developing countries account for a significant part of global fish production. Indeed, according to FAO, China reported fisheries production of 16.6 million tons in 2002, nearly double that of Peru, the next largest producer.

Proposals on Particular Issues

The United States generally supports New Zealand's proposed framework. Its text proposal focuses on a sub-issue, fleshing out an important element of that framework—vessel capacity reduction (buyback) programs.

The United States' buyback proposal recognizes that buyback programs can be important policy tools, but also can contribute to overfishing. The United States would therefore require that the subsidy-granting country do *all* of the following before such a subsidy is allowed: (a) scrap or otherwise prevent the receiving vessel from being used for fishing anywhere in the world, (b) revoke any fish harvesting rights associated with the vessel, (c) ensure that the vessel owners and any holders of fish harvesting rights associated with the vessel relinquish any claim to any present or future harvesting rights and (d) have in place fishery management control measures designed to prevent overfishing.

The U.S. proposal also suggests text providing for a periodic review of any agreement the parties reach, and explaining how and when a panel called on to resolve disputes between the parties could request fisheries experts' input.

Argentina's proposal, on the other hand, focuses on the critical area of S&DT. Argentina's concern is that

S&DT should be “designed to be consistent with the priorities of development, poverty reduction, and ensuring means of subsistence and improved food security for developing and least developed countries.” Argentina proposes to realize these goals by allowing subsidies in developing countries for vessel construction, repair, modernization or gear acquisition or improvement (*i.e.*, subsidies targeting fishing *capacity*). Argentina would also, with several caveats, allow for (a) inputs increasing fishing effort, such as fuel, bait or ice; and (b) artisanal fisheries.

Argentina appears to recognize, however, that subsidies in developing countries can still lead to overfishing and trade distortions. Accordingly, in order to take advantage of subsidies tending to increase fishing effort, the Member would have to ensure that it manages the targeted fisheries pursuant to the 1995 FAO’s Code of Conduct for Responsible Fisheries (FAO Code). For subsidies tending to increase fishing *capacity*, in addition to following the FAO Code, the Member would have to ensure that: (a) the subsidy’s purpose is to help develop that nation’s fisheries (three formulae are offered to ascertain this) and (b) every fishing vessel constructed or modernized holds a valid fishing license and is registered under a national registration system.

While limited to S&DT, Argentina’s proposal also states that it is consistent with New Zealand’s and Brazil’s approach, *i.e.*, one involving a broad prohibition defined by an exhaustive set of limited exclusions.

Argentina’s proposal suggests that those supporting it understand the importance of disciplining subsidies supporting fishing effort, and not just capacity.

III. Recent Developments in the European Union

Meanwhile, the EU has also taken an important step in defining which kinds of subsidies will be granted within its territory. These developments take on particular significance in light of the suspension of the WTO Doha Round.

A. The Common Fisheries Policy (CFP)

As part of its drive to create a common market promoting sustainable development, the EU established and has operated the CFP since 1983. Analogous in some ways to the Common Agricultural Policy, the CFP’s purpose is to conserve fish stocks in EU waters and the environment, create a positive economic climate for European fleets and ensure the supply of high quality food.

By the 1990s, it became increasingly clear that the CFP had not prevented overfishing in EU waters. Instead, data suggested that the size of European stocks had been halved in the previous 25 years and that fishing effort in EU waters was 40 percent higher than levels the resource could sustain.

Accordingly, in 2002 the EU launched negotiations designed to reform the CFP, which led to the enactment of three regulations. Among other measures, the regulations halted aid to vessels targeting other countries’ distant water fisheries and subsidies for new vessel construction by the end of 2004 (*see* www.europa.eu). The regulations also restricted aid for vessel modernization designed to improve worker safety, working conditions, hygiene and product quality in areas over the main deck. Such subsidies could only be issued if the vessel’s ability to catch fish did not increase as a result.

B. Recent Attempts to Reform the CFP

From 2000 to 2006, the CFP was underwritten by a centralized fund known as the Financial Instrument for Fisheries Guidance (FIFG). In 2004, the EU began discussing a new fund, the European Fisheries Fund (EFF) to replace the FIFG. On June 19, 2006, after two years of discussions, and with a new budgetary period set to begin in January 2007, European fisheries ministers adopted the EFF. The EFF is designed to underpin the CFP and help implement the 2002 changes, and will operate from 2007 through 2013. According to the EU, the EFF will have the positive effect of extending aid and compensation for the temporary and permanent cessation of fishing activities. The EU points out that this can include activities such

as reassigning vessels to non-fishing activities, or closing fisheries to protect public health or because a targeted fishery contains a high number of juvenile or spawning fish. Similarly, the EU notes that the EFF will continue to support aquaculture to help shift production away from capture fisheries. The EFF does not provide aid for vessel construction.

Other observers are more critical. Some have noted that support for temporary cessation of fishing has in the past led to the retention of fishing capacity that, when reactivated, has contributed to overfishing. They also disapprove of new moneys included for engine replacement, which qualifies as vessel modernization.

Whether the overall effect is positive or negative in terms of effects on European stocks, the EFF promises to play a significant role in determining the EU's future positions at the WTO and other fora where fisheries subsidies are discussed.

IV. Conclusion

The debates within the EU and at the WTO have moved beyond considering *whether* fisheries subsidies should be reduced and into defining *which* subsidies should be curtailed. This question involves determining which ones most undermine efforts to restore global fisheries, and what is politically feasible.

Political reality, not surprisingly, largely determines countries' positions. Within the EU, major fishing nations and/or subsidy recipients such as Spain and Portugal, along with newer members such as Poland, pushed hard for the retention of subsidy amounts and categories. The United Kingdom and others are reported to have lobbied for reductions. Meanwhile, within the WTO, major fishing subsidizers such as Japan, South Korea and Taiwan appear inclined to retain subsidies, even for vessel construction under some circumstances. The EU, while not providing an exemption for vessel construction, would like to maintain vessel modernization subsidies, consistent with its EFF package. New Zealand, on the other hand, provides few if any subsidies to its fishing industry, and is campaigning to level the playing field.

Economic interests promise to remain part of the landscape. Although the outcome is uncertain, especially given the suspension of the Doha round, upcoming elections in the United States and possible expiration of U.S. trade promotion authority in mid-2007, these debates are vitally important to any emerging consensus on how to achieve sustainability in global fisheries.

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NEW DEVELOPMENTS REGARDING MARINE GENETIC RESOURCES

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Despite the ongoing U.S. failure to accede to the UN Convention on the Law of the Sea (UNCLOS), important developments relating to marine genetic resources continue to accelerate at the international level. The deep ocean is a major reservoir of global biodiversity, and unique genetic resources abound in "hotspots" around seamounts, deepwater corals, methane seeps and hydrothermal vents. These ecosystems offer significant opportunities for scientific and commercial research. Although marine research is expensive, bioprospecting for marine genetic material has increased in recent years as deepwater exploration technology becomes more accessible. The pharmaceutical, biotechnology and cosmetics sectors are all active in the field.

At the same time, the international community has become increasingly concerned that these ecosystems are vulnerable, primarily from unsustainable fishing practices such as unreported and illegal catches and, most notably, unregulated bottom trawling on the high seas. Because many of these ecosystems lie in areas beyond national jurisdiction, however, there is no clear

international framework governing activities aimed at these resources. The conservation and sustainable use of these resources has therefore attracted growing international attention. In addition, developing countries have taken note of the potential value of these resources and in turn have asserted that such resources are “the common heritage of mankind” and that benefits derived from them must be shared accordingly.

The past year has seen the publication of three major international reports on this subject, focused in large part on the legal framework applicable to these resources, and in particular the regime applicable to bioprospecting for genetic material in these areas. That framework currently consists of a collection of instruments, none of which directly addresses the treatment of marine biodiversity or bioprospecting for marine genetic resources. These instruments include UNCLOS, the Convention on Biological Diversity (CBD), various intellectual property rights agreements and regional fisheries agreements. Each of these agreements is relevant to some degree. Some consider, however, that there should be a comprehensive mechanism that governs activities directed at marine biodiversity or genetic resources beyond the limits of national jurisdiction, while others (such as the United States) consider the current legal regime to be adequate.

The UN General Assembly adopted a resolution in 2004 to establish a working group to examine these issues. The working group met for the first time in February 2006. Although it did not adopt any formal decisions or make significant progress in resolving open issues, the meeting set the stage for further, more focused work, including the possibility of a new binding agreement (as proposed by the European Union).

As the framework agreement governing all issues relating to oceans, UNCLOS is widely recognized as the starting point for evaluating any rules applicable to activities relating to these resources. UNCLOS sets out the rights and obligations of parties on the basis of maritime zones, delineated according to distance from the coastline. States have sovereignty over their territorial seas and sovereign rights over the resources

in their Exclusive Economic Zones and continental shelf. The area beyond these limits is known as the high seas and, with respect to the seabed and ocean floor beyond the continental shelf, as “the Area.” Living resources in the high seas and in the Area are generally not subject to individual national protection measures.

UNCLOS does not, however, prescribe a specific regulatory regime to govern activities aimed at genetic resources located beyond national jurisdiction. Some developing countries have suggested that these resources fall under the Convention’s deep seabed mining regime (which among other things declares that mineral resources in the Area are the “common heritage of mankind”). It is clear from the Convention’s definitions, however, that the seabed mining regime only applies to *mineral* resources, although the mining regime would be relevant to the protection of genetic resources to the extent they are threatened by deep seabed mining activities. The only clear regime under UNCLOS that currently governs bioprospecting beyond national jurisdiction is flag state jurisdiction, *i.e.*, the regulatory and enforcement authority that is allocated to a state when a vessel is registered in that state. In theory, a flag state has existing authority under UNCLOS to prohibit or control activities directed at marine genetic resources on the high seas, such as bioprospecting, although it is not clear that any state has sought to exercise that authority to date.

Given the imminent threats to at least some of these resources, the absence of clear rules addressing bioprospecting on the high seas has therefore raised concerns among some states about whether UNCLOS should be changed to address marine biodiversity beyond national jurisdiction. For some, the main issue is conservation and sustainable use, while for others it is sharing of benefits derived from marine biodiversity and the extension to these resources of the “common heritage” framework.

A number of other instruments exist that may be relevant to bioprospecting activities, including mechanisms under which countries agree to exercise their jurisdiction to control activities in the high seas to

protect the marine environment or set sustainable harvest limits for fish. These include measures to establish so-called “marine protected areas.” There are also various codes of conduct under development that would apply to marine scientific research in the deep seabed. Reliance on such voluntary codes is likely to increase in the absence of any clear binding regulatory or management framework. One such approach is being developed by a scientific initiative known as “InterRidge,” which would apply to organizations and individuals performing marine science research on hydrothermal vents (both within and beyond areas of national jurisdiction). In addition, codes of conduct for access and benefit-sharing for land-based bioprospecting, including the “international regime” currently being negotiated under the CBD, may also be relevant.

At the February meeting of the UN working group, it was widely agreed that illegal, unregulated and unreported (so-called “IUU”) fishing, together with the destruction wrought on fragile ecosystems on the ocean floor by bottom trawling, poses the greatest immediate threat to these unique marine ecosystems and their associated biodiversity. Many countries, supported vocally by the NGO community, called for near-term action to address the most immediate threat to these ecosystems through a UN General Assembly resolution calling for a moratorium on unregulated high-seas bottom trawling.

On other issues, positions vary among developing and developed countries. As noted above, developing countries concentrated on the need to consider a new regime to implement benefit-sharing or to bring marine resources within the current regime applicable to mineral resources in the Area. Developed countries in turn pushed back on the idea that these resources are subject to the mining regime, although they differed on the question whether a new regime was necessary to ensure the conservation and sustainable use of these resources.

Some countries have suggested that the legal debate should be sidestepped for the time being in favor of pragmatic approaches to provide more immediate protection of these resources. It seems likely that

near-term action with respect to high-seas bioprospecting will be focused on concrete steps such as establishing guidelines or a code of conduct to govern such activities.

Although the potential scope of the EU’s proposed new agreement is vague, it appears that one of the main purposes of the initiative is to impose further controls on IUU fishing activity. The NGO community has been vocal in its demand for a UN resolution calling for an immediate cessation of bottom-trawling fishing, to be followed by a comprehensive new strategy to develop an effective new marine protected area regime. It seems likely that the February UN meeting will galvanize further action toward this end. As of this writing, the General Assembly was still debating the annual resolution on IUU fishing—a debate that was energized by President Bush’s Oct. 3 announcement calling for a moratorium on destructive fishing activity in areas of the high seas where there are no applicable conservation or management measures.

New developments in non-binding guidelines relating to marine scientific research and bioprospecting and efforts by developing countries to extend access and benefit-sharing issues to the treatment of high seas genetic resources will primarily affect commercial interests such as the pharmaceutical, cosmetics and biotechnology sectors. The food products industry also has an obvious interest in related controls on international fishing. In addition, if the EU’s call for a new implementation agreement takes hold, then it is likely to prove difficult to confine the scope to marine protected areas. While a piecemeal approach to establishing an international regulatory regime for such important ocean resources is not ideal, it appears to be the course of action underway as interested countries seek to take immediate action on threats that are seen as having devastating environmental and economic consequences.

In terms of the process going forward, the current General Assembly session will define the next steps with respect to the Working Group. Although the group’s mandate was limited to a single session, the General Assembly has before it the co-chairs’ report from the February session, and it seems likely that its

mandate will be extended as part of the annual resolution on oceans and law of the sea. Those with an interest in the various intersecting issues raised in the working group—including marine scientific research, genetic research, access and benefit-sharing and intellectual property, and protection of marine resources and fisheries issues—will no doubt have an interest in following this emerging issue as the work in this area deepens.

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IMPLEMENTING THE INTERNATIONAL AGREEMENT TO PROTECT RMS *TITANIC*

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Historical, Cultural and Iconic Interests

RMS *Titanic* is perhaps the most famous shipwreck of modern popular culture. She was a British flagged steamship and the largest and most luxurious passenger ship of her time. Owned by the White Star Line, she was reported to be unsinkable.

On April 10, 1912, RMS *Titanic* set sail on her maiden voyage from Southampton, England, to New York City with 2,227 passengers and crew aboard. Determined to break the record for a trans-Atlantic journey, the captain of RMS *Titanic* ordered her to steam as fast as possible despite repeated warnings about icebergs. RMS *Titanic* was traveling at near top speed of about 20.5 knots when at 11:40 p.m. on April 14, 1912, she struck an iceberg. Less than three hours later, RMS *Titanic* sunk, taking more than 1,500 men, women and children with her.

Since her sinking on April 15, 1912, RMS *Titanic* has captivated the interest of people around the world. The tragic accident resulted in governmental investigations in the United States and the United Kingdom. The sinking also influenced the development of international maritime law. It was the catalyst for the negotiation of the first International Convention for the Safety of Life at Sea (1914), as well as for the establishment of what was to become the International Maritime Organization. The maritime tragedy also has been the inspiration for expeditions, research, books, movies and television shows. RMS *Titanic* and the story of her fated voyage are known world-wide. In many ways, she has become a cultural icon.

Discovery of the Wreck and Concern about Disturbing the Site

The wreck of RMS *Titanic* was discovered on Sept. 1, 1985, by a joint French-American expedition



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led by Jean-Luis Michel of the French Ocean Institute (IFREMIR) and Dr. Robert Ballard of the Woods Hole Oceanographic Institution. The wreck was found approximately 340 nautical miles (nm) off the Canadian coast of Newfoundland in international waters two miles below the ocean surface (depth of 12,500 ft or 3,800 m). Shortly after the discovery, Dr. Ballard testified before the U.S. Congress to encourage the enactment of legislation to designate the wreck as a maritime memorial. In July 1986, a plaque was placed on RMS *Titanic* recording its discovery the previous year and calling for the wreck to be left undisturbed in memory of those who perished aboard her. In 1987, a U.S. company working with IFREMIR returned to the wreck and began to salvage artifacts from the debris field.

U.S. Acts to Address the Threats of Misguided Salvage of RMS *Titanic*

In 1986, Congress passed and the president signed into law the RMS *Titanic* Maritime Memorial Act (1986 Act) to protect the wreck from potential harm caused by misguided salvage. *See* 16 U.S.C. §§ 450rr – 450rr-6. Congress recognized that while it had a significant interest in protecting RMS *Titanic*, the United States needed the cooperation of other interested nations. Thus, the 1986 Act directed the Department of State to enter into negotiations with interested nations to establish an international agreement to designate the wreck as a maritime memorial and to protect it from looting and unscientific salvage. Negotiations with Canada, France and the United Kingdom began in 1997 and the text of the *International Agreement to Protect the Shipwrecked Vessel RMS Titanic* (International Agreement) was finalized in 2000. The United Kingdom signed the International Agreement in November 2003 and, at the same time, enacted implementing legislation. The United States signed the International Agreement on June 18, 2004, subject to acceptance. Once necessary domestic implementing legislation is enacted, the United States intends to deposit its acceptance and the International Agreement will enter into force and become effective for the United States.

The 1986 Act also directed the National Oceanic and Atmospheric Administration (NOAA) to consult with interested nations in the development of guidelines for the exploration, research and, if determined appropriate, salvage of artifacts from the wreck site. NOAA did so, and proposed these guidelines for public comment on June 2, 2000. *See* 65 Fed. Reg. 35,326. Final guidelines were published on April 1, 2001 (NOAA Guidelines). *See* 66 Fed. Reg. 18,905.

The NOAA Guidelines, International Agreement and Annexed Rules

The NOAA Guidelines and the rules annexed to the International Agreement (Titanic Rules) are essentially the same as the Annexed Rules to the UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001) (UNESCO UCH Convention). The Annexed Rules of the UNESCO UCH Convention are considered by the United States to embody the international standard for professional maritime archaeological research and recovery. The Annexed Rules of the UNESCO UCH Convention, the NOAA Guidelines and the Titanic Rules all incorporate a preferred resource management policy of *in situ* preservation that disfavors salvage. The International Agreement requires that each Party take all reasonable measures to ensure that any artifacts recovered from RMS *Titanic* by those subject to their jurisdiction are conserved and curated consistent with the Titanic Rules and are kept together and intact as project collections. Each Party must also take the necessary measures, in respect of its nationals and vessels flying its flag, to regulate entry into the hull sections of RMS *Titanic* so that they, other artifacts and any human remains, are not disturbed, and to regulate activities aimed at artifacts from RMS *Titanic* found outside the hull in the debris field so that all such activities are, to the maximum extent practicable, conducted in accordance with the Titanic Rules.

Proposed Legislation to Implement the International Agreement

The 1986 Act directed the Department of State to submit the International Agreement to Congress along with proposed implementing legislation. On June 9, 2006, the Department of State did so. Consistent with

the 1986 Act and the International Agreement, the Administration's proposed implementing legislation designates RMS *Titanic* as an international maritime memorial and gravesite to those aboard her who perished in 1912. It also implements the International Agreement by prohibiting potentially harmful activities directed at RMS *Titanic* and by establishing a NOAA-administered permit system to manage any research, exploration or recovery and salvage activities directed at RMS *Titanic* by U.S. nationals and others subject to U.S. jurisdiction. In general, the proposed implementing legislation does not cover activities directed at RMS *Titanic* by foreign nationals outside of U.S. territory, territorial sea or contiguous zone.

Unless authorized by a permit, the proposed implementing legislation prohibits engaging in an activity that disturbs, removes or injures, or attempts to disturb, remove or injure, the wreck or artifacts at the site; entering the hull sections; engaging in an activity at the site that poses a significant threat to public safety; and selling, purchasing, importing or exporting artifacts. These prohibitions recognize the historical and cultural significance of RMS *Titanic*, and reflect the preferred resource management policy of *in situ* preservation. They are consistent with international law, including the UN Convention on the Law of the Sea. They are also consistent with the judicial orders in the matter of *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, Civil Action No. 2:93-cv902 (E.D. Va., filed 1993) (orders prohibiting the U.S. company with salvage rights to RMS *Titanic* from entering the hull portions of the wreck and selling individual artifacts, and orders requiring the company to keep together recovered artifacts as an intact collection for public access).

The proposed implementing legislation requires vessels subject to U.S. jurisdiction to provide advance notice to NOAA if they intend to stop within a specified maritime zone above the wreck site. One purpose of this notice provision is to ensure that NOAA has prior knowledge of the timing and purpose of the presence of a vessel in this zone so that the agency can determine whether a permit is required. Another purpose is to facilitate fulfillment of certain coordination requirements with other parties to the International

Agreement. The notice provision will help the United States to protect the wreck site and manage activities directed at RMS *Titanic*.

The proposed implementing legislation authorizes a full range of enforcement options to deter noncompliance and allow for the imposition of sanctions commensurate with any damage a violation may cause to the wreck. These options include civil administrative penalties of up to \$250,000 per day, civil judicial penalties of up to \$500,000 per day, criminal fines and imprisonment. Also authorized are liability damage actions, seizure and forfeiture.

Conclusion

The International Agreement was negotiated to protect the most well known shipwreck of our time. Because the wreck lies in international waters, the International Agreement was carefully crafted to be consistent with international law, in particular the UN Convention on the Law of the Sea. The administration's proposed implementing legislation satisfies the letter and spirit of the International Agreement and, once enacted, will allow the agreement to enter into force. RMS *Titanic* will then benefit from greater protection from misguided salvage, and enjoy the long-warranted designation as an international maritime memorial.

*Mr. Oppenheimer is senior counselor in NOAA's Office of General Counsel for International Law. Mr. Varmer is an attorney-advisor in the same office. As part of a federal interagency working group, they both helped to develop the administration's proposed legislation to implement the "International Agreement Concerning the Shipwrecked Vessel R.M.S. Titanic." This article is partially based on one authored by Mr. Varmer and published by the International Council of Monuments and Sites (ICOMOS). See www.international.icomos.org/risk/2006/ for a special edition of the ICOMOS series on Underwater Cultural Heritage at Risk, including articles on the RMS *Titanic*, the USS *Monitor* and the World War II Japanese midget submarine recently discovered outside Pearl Harbor.*