

CAN FISH SAVE THE WTO: CURRENT PROBLEMS AND POTENTIAL OUTCOMES OF THE WTO FISHERIES SUBSIDIES NEGOTIATIONS

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INTRODUCTION

Countries around the world pour public money into propping up the fishing industry, yet the global fishing community catches more than the sustainable levels of fish.¹ As of 2015, over ninety percent of marine fish stocks were either overfished (33.1 percent)

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¹ See Ricardo Meléndez-Ortiz, *We Have a Window of Opportunity to Save Our Oceans, But It's Closing Fast*, WORLD ECON. FORUM (June 6, 2017), <https://www.weforum.org/agenda/2017/06/fisheries-subsidies-need-urgent-reform-heres-why/>.

or fished to the maximum sustainable yield (59.9 percent).² The percentages are worse for some of the most valuable species of fish. For instance, around forty-one percent of the key species of tuna are fished beyond their capacity.³ Fish is an important source of protein, particularly in developing countries, where it represents more than half of all consumed animal protein.⁴ Not only is our current system not satisfactorily protecting this critical resource, but public policies, such as subsidies for the fishing industry, exacerbate the problem. In developing its sustainable development goals, the United Nations addressed this concern by tasking the World Trade Organization (WTO) with developing rules that would prohibit certain harmful fisheries subsidies by 2020.⁵

Management of marine resources is split up into different regions with different levels of protection. The 1982 United Nations Convention for the Law of the Sea (UNCLOS) established that coastal countries can set territorial seas up to twelve miles offshore and create an Exclusive Economic Zone (EEZ) up to 200 miles off their shorelines.⁶ Beyond the EEZ is the high seas, a rare case of a global commons where fishing is open to all.⁷

Fish, of course, do not honor the boundaries created by humans, and marine life travels throughout these different zones.⁸ Thus, lack of management and conservation in one part of the ocean can have a broad impact. Stress from overfishing, illegal fishing, climate

² See FOOD & AGRIC. ORG. OF THE UNITED NATIONS, *THE STATE OF WORLD FISHERIES AND AQUACULTURE: MEETING THE SUSTAINABLE DEVELOPMENT GOALS 2* (2018).

³ See Meléndez-Ortiz, *supra* note 1.

⁴ See Smriti Bahety & Julian Mukiibi, *WTO Fisheries Subsidies Negotiations: Main Issues and Interests of Least Developed Countries*, CUTS INT'L GENEVA 6 (2017); *Governing the Oceans: The Tragedy of the High Seas*, THE ECONOMIST: LEADERS (Feb. 22, 2014), <https://www.economist.com/leaders/2014/02/22/the-tragedy-of-the-high-seas>; FOOD & AGRIC. ORG. OF THE UNITED NATIONS, *supra* note 2 at 2.

⁵ See *Introduction to Fisheries Subsidies in the WTO*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm (last visited Nov. 4, 2019).

⁶ See *Oceans and the Law of the Sea*, UNITED NATIONS, <http://www.un.org/en/sections/issues-depth/oceans-and-law-sea/> (last visited Nov. 4, 2019); ECONOMIST: LEADERS, *supra* note 4.

⁷ See ECONOMIST: LEADERS, *supra* note 4.

⁸ See Obiageli Ezekwesili, *High Seas at Risk: Why the World Must Act*, TREND (July 5, 2016), <https://trend.pewtrusts.org/en/archive/trend-summer-2016/high-seas-at-risk-why-the-world-must-act>.

change, pollution, and other factors have left these regions in a troubling state.⁹

Despite the problems facing our oceans and the negative impact of overfishing, governments across the world provide billions of dollars to subsidize the fishing industry.¹⁰ An estimated \$35 billion a year is spent on fishing subsidies.¹¹ Of that \$35 billion, \$22 billion is in a form that tends to increase fishing capacity.¹² Evidence suggests that these subsidies lead to over-capitalization of the fishing industry and incentivize fishing at an unsustainable level.¹³ Examples of fisheries subsidies include subsidies for fuel, vessel construction, ports and harbors, tax exemptions, fleet modernization, and research and development.¹⁴ Eight billion dollars go to fuel subsidies alone.¹⁵ While likely not intentional, sometimes these subsidies, particularly subsidies for fuel and vessel infrastructure, end up supporting vessels engaged in illegal, unreported, and unregulated (IUU) fishing.¹⁶ Subsidies can also contribute to overfishing, including supporting fishing overfished stocks, and a problem called overcapacity, when fishing operations have the ability to catch greater than the desired amount of fish due to an excessive supply of resources, such as bait, vessel size, and fuel.¹⁷

⁹ See *id.*

¹⁰ See *Regulating Fisheries Subsidies*, UNITED NATIONS CONFERENCE ON TRADE & DEV., <https://unctad.org/en/Pages/DITC/Trade-and-Environment/Regulating-Fisheries-Subsidies.aspx> (last visited Dec. 22, 2019).

¹¹ See Alice Tipping, *Overview: Building Comprehensive and Effective WTO Rules on Fisheries Subsidies*, in *FISHERIES SUBSIDIES RULES AT THE WTO: A COMPILATION OF EVIDENCE AND ANALYSIS* 11, 13 (Int'l Ctr. for Trade & Sustainable Dev. ed., 2018); *ECONOMIST: LEADERS*, *supra* note 4.

¹² See U. Rashid Sumaila et al., *Updated Estimates and Analysis of Global Fisheries Subsidies*, 109 *MARINE POL'Y* (forthcoming 2019) (manuscript at 1–5), https://www.sciencedirect.com/science/article/pii/S0308597X19303677#catch_JMPO103695.

¹³ See Tipping, *supra* note 11, at 1.

¹⁴ See Meléndez-Ortiz, *supra* note 1, at 3. See generally Tipping, *supra* note 11.

¹⁵ See Meléndez-Ortiz, *supra* note 1, at 3.

¹⁶ See Carl-Christian Schmidt, *Issues and Options for Disciplines on Subsidies to Illegal, Unreported and Unregulated Fishing*, in *FISHERIES SUBSIDIES RULES AT THE WTO: A COMPILATION OF EVIDENCE AND ANALYSIS* 53, 55 (Int'l Ctr. for Trade & Sustainable Dev. ed., 2018).

¹⁷ See Tipping, *supra* note 11, at 15–16; see also Irina Chicu et al., *Defining and Defending the Interest of Countries in WTO and Plurilateral Negotiations on Fisheries Subsidies*, TRADELAB (Feb. 18, 2017), <https://tradelab.legal.io/guide/>

The WTO has been trying to come up with new rules for regulating fisheries subsidies for decades.¹⁸ Negotiations were revitalized in the past few years by the United Nations Sustainable Development Goals (UN SDGs) and the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP), yet negotiators have repeatedly failed to meet deadlines for reaching an agreement on new disciplines for fisheries subsidies.¹⁹ The 2019 discussions yet again failed to reach an agreement and negotiators are now hoping to reach an agreement by the June 2020 Ministerial Conference.²⁰ As the Trump administration undermines the WTO's ability to arbitrate disputes, and critics question if the WTO is capable of reaching a multilateral agreement, one ambassador stated that, "[i]t's not the WTO that will save the fish. It's the fish that are going to save the WTO."²¹ In Part I of this Note, I will discuss the history of the WTO's negotiations on fisheries subsidies, the key issues the WTO is looking to address, and what has been accomplished so far. In Part II, I will examine what is preventing the WTO from reaching an agreement in their negotiations on fisheries subsidies and the current status of negotiations. In Part III, I will analyze potential outcomes of the fisheries subsidies

58a84aada1b01a0278000003/Defining+and+Defending+the+Interest+of+Countries+in+WTO+and+Plurilateral+Negotiations+on+Fisheries+Subsidies.

¹⁸ See Catherine Benson Wahlén, *WTO Puts off Agreement on Fisheries Subsidies*, INT'L INST. FOR SUSTAINABLE DEV.: SDG KNOWLEDGE HUB (Dec. 18, 2017), <http://sdg.iisd.org/news/wto-puts-off-agreement-on-fisheries-subsidies/>; see also *WTO Fisheries Subsidies Negotiations—Down but Not Out*, UNITED NATIONS CONFERENCE ON TRADE & DEV. (July 17, 2018), <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1816>.

¹⁹ See *WTO Rules on Fisheries Subsidies: Progress and Prospects*, BRIDGES WEEKLY (Int'l Ctr. for Trade & Sustainable Dev., Geneva, Switz., Nov. 30, 2017), <https://www.ictsd.org/bridges-news/bridges/news/wto-rules-on-fisheries-subsidies-progress-and-prospects/>; see also Catherine Benson Wahlén, *WTO Puts off Agreement on Fisheries Subsidies*, INT'L INST. FOR SUSTAINABLE DEV.: SDG KNOWLEDGE HUB (Dec. 18, 2017), <http://sdg.iisd.org/news/wto-puts-off-agreement-on-fisheries-subsidies/>; UNITED NATIONS CONFERENCE ON TRADE & DEV., *supra* note 18.

²⁰ See Emma Farge, *Ditch Long-held Positions, WTO Chair Urges in Key Fisheries Talks*, REUTERS (Dec. 16, 2019), <https://www.reuters.com/article/trade-wto-fish/ditch-long-held-positions-wto-chair-urges-in-key-fisheries-talks-idUSL8N28Q1EX>.

²¹ Philip Blenkinsop, *U.S. Trade Offensive Takes out WTO as Global Arbitrator*, REUTERS (Dec. 10, 2019), <https://www.reuters.com/article/us-trade-wto/us-trade-offensive-takes-out-wto-as-global-arbitrator-idUSKBN1YE0YE>.

negotiations and discuss what countries could do if the negotiations fail yet again.

I. HISTORY OF WTO NEGOTIATIONS ON FISHERIES SUBSIDIES

A. *What Are Fisheries Subsidies and How Are They Regulated?*

In broad terms, the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) defines subsidy as “a financial contribution by a government or public body, which confers a benefit.”²² Subsidies are generally used by national governments to further important and legitimate policy objectives.²³ Subsidies, however, can harm trading partners by undermining industries due to unfair competition from the lower cost of subsidized products.²⁴ Given the potential negative impact of subsidies, they are subject to a variety of WTO rules, contained within the WTO SCM Agreement and in Articles VI and XVI of the General Agreement on Tariffs and Trade (GATT) 1994.²⁵ Some types of subsidies are prohibited outright, while others are “actionable,” meaning they can be challenged if they have adverse effects on other WTO members.²⁶ WTO members are also allowed to impose countervailing duties on a subsidized product if it causes material harm to one of the member’s domestic industries.²⁷

Many benefits to the fishing industry count as subsidies under the SCM Agreement.²⁸ Examples of fisheries subsidies include grants, fuel discounts, maintenance of ports and harbors, support for fishers’ wages, assistance with purchasing new gear, and loan assistance for vessel repair and construction.²⁹ These count as a

²² PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 773 (4th ed. 2017).

²³ *See id.* at 770.

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See id.*

²⁷ *See id.*

²⁸ FOOD & AGRIC. ORG. OF THE UNITED NATIONS, *TECHNICAL CONSULTATION ON THE USE OF SUBSIDIES IN THE FISHERIES SECTOR: A SUMMARY OF RECENT WORK ON SUBSIDIES IN THE FISHING SECTOR* 22 (2004).

²⁹ *See* Christopher D. Stone, *Too Many Fishing Boats, Too Few Fish: Can Trade Laws Trim Subsidies and Restore the Balance in Global Fisheries?*, 24 *ECOLOGICAL L.Q.* 505, 515 (1997); *see also* Derek J. Dostal, *Global Fisheries Subsidies: Will the WTO Reel in Effective Regulations?*, 26 *U. PA. J. INT’L ECON. L.* 815, 826 (2005).

“financial contribution by a government or any public body” which confers a benefit.³⁰

While fisheries subsidies are covered by the WTO through the SCM Agreement, there are also legal measures beyond the WTO that govern fisheries and interact with the WTO rules.³¹ UNCLOS is the main regime governing the ocean.³² UNCLOS established the formation of the EEZ and gave coastal states “sovereign rights to exploit resources within their [EEZ],” but also required that coastal states “ensure those resources are not over-exploited.”³³ Not all WTO members have signed UNCLOS, but UNCLOS is generally recognized as “codifying customary international law.”³⁴ The United Nations Fish Stocks Agreement (UNFSA) expanded upon the cooperation requirements in UNCLOS for shared fish stocks and designated Regional Fisheries Management Organizations (RFMOs) as the appropriate system through which countries could cooperate to implement conservation goals in EEZs and on the high seas.³⁵

The regulation of subsidies through the SCM Agreement has proven to be inadequate for a number of reasons.³⁶ As explained by the World Wildlife Fund in a 2004 paper discussing how to create new rules for fisheries subsidies, while the SCM Agreement, under Articles 3 and 4, provides for a potential affirmative prohibition on certain subsidies, “contingent on export performance or on the use of domestic over imported goods,” fisheries subsidies rarely fall within this category.³⁷ Fisheries subsidies have generally not been

³⁰ FOOD & AGRIC. ORG. OF THE UNITED NATIONS, *supra* note 28.

³¹ See MARGARET A. YOUNG, INT’L CTR. FOR TRADE & SUSTAINABLE DEV., THE ‘LAW OF THE SEA’ OBLIGATIONS UNDERPINNING FISHERIES SUBSIDIES DISCIPLINES 1 (2017), https://www.ictsd.org/sites/default/files/research/the_law_of_the_sea_obligations_underlying_fisheries_subsidies_disciplines2.pdf.

³² See *id.* at vi.

³³ *Id.*

³⁴ *Id.*

³⁵ See *Id.* See also Michael W. Lodge et al, *Recommended Best Practices for Regional Fisheries Management Organizations*, Chatham House (The Royal Institute of International Affairs) 4 (2007), <https://www.oecd.org/sd-roundtable/papersandpublications/39374297.pdf>.

³⁶ See generally Chau et al., *Remedies Applicable to a New WTO Fisheries Subsidies Framework*, INST. OF INT’L ECON. LAW—TRADELAB (June 2019), <https://georgetown.app.box.com/s/7xe5hl5peh9h1q6k30ttq8pocmicuykd>.

³⁷ DAVID K. SCHORR, HEALTH FISHERIES, SUSTAINABLE TRADE: CRAFTING NEW RULES ON FISHING SUBSIDIES IN THE WORLD TRADE ORGANIZATION, WWF

contingent on export performance, possibly due to strength of the GATT export subsidies ban and the fact that most fisheries subsidies are from countries which import more fish than they export.³⁸ Fisheries subsidies which promote the domestic supply of fish have also not fallen within Article 3 of the SCM Agreement:

Some fishing subsidies are meant to promote the supply of fish to domestic markets from domestic enterprises. This may often result in the effective displacement or prevention of imports (especially where the subsidized fleet is operating in foreign waters or on straddling or migratory stocks). Indeed, such subsidies may even be in pursuit of a more or less explicit policy to promote domestic supply over potential imports. Still, such subsidies are rarely (if ever) made legally contingent on domestic supply. Moreover, Article 3.1(b) is really aimed at subsidies to producers who use parts or primary inputs in their production process, rather than at subsidies to their domestic suppliers. It is not fishers who are engaged in “import-substituting” behavior, even though the subsidies they receive may effectively distort import levels.³⁹

Thus, it has generally not been possible to prohibit fisheries subsidies outright.⁴⁰ It has also been difficult to challenge a fisheries subsidy for having an “adverse effect” under Article 5 of the SCM Agreement.⁴¹ Article 5 of the SCM Agreement requires that:

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:
injury to the domestic industry of another Member;
nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994;
serious prejudice to the interests of another Member.⁴²

POSITION PAPER AND TECHNICAL RESOURCE 38–40 (2004), https://www.wto.org/english/forums_e/ngo_e/posp43_wwf_e.pdf.

³⁸ *See id.* at 39–40.

³⁹ *Id.* at 40.

⁴⁰ *See id.* at 38–40.

⁴¹ *Id.* at 40–44.

⁴² *Agreement on Subsidies and Countervailing Measures* art. 5, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm (last visited Jan. 4, 2020).

To prove an adverse effect, WTO members must make factual arguments to demonstrate both harm and a causal link.⁴³ The “adverse effects” test has proven to be a frustrating method for disciplining subsidies generally due to a heavy evidentiary burden, and it has been particularly difficult to apply to fisheries subsidies.⁴⁴ A key issue for addressing fisheries subsidies is the narrow definition of “adverse effects”:

[T]he notion of a “trade distortion” reflected in the terms and traditions of the SCM—and particularly in the definitions given to the term “adverse effects” in Article 5—is basically restricted to distortions suffered by exporters at the time of export. In the case of fishing subsidies, however, the primary economic distortion takes place at the level of production. In the context of competition for the exploitation of fisheries resources, subsidies more directly distort the access to production rather than the access to export markets.⁴⁵

It is also difficult to meet the evidentiary burden of an “adverse effect” because of data constraints and the rampant lack of transparency in the fishing industry.⁴⁶ For example, because the fishing sector is so diffuse, it is more difficult to calculate “the price and market share impacts of subsidies” than in many other industries.⁴⁷ Systems for tracking the “origins and ultimate destinations of fish products” are also imperfect, making it a particularly difficult sector to regulate.⁴⁸

Additionally, fisheries subsidies are “effort- and capacity-enhancing,” meaning they can, either directly or indirectly, encourage and enhance harvesting of fish stock and lead to unsustainable fishing practices.⁴⁹ This has led to concern by institutions such as the World Wildlife Fund and the International Centre for Trade and Sustainable Development that some fisheries subsidies have helped create a massive global fishing fleet which threatens “economic development, livelihood, environment, and

⁴³ See SCHORR, *supra* note 37, at 42.

⁴⁴ See *id.* at 41–43.

⁴⁵ *Id.* at 43.

⁴⁶ See *od.* at 44.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Matteo Milazzo, *Subsidies in World Fisheries* 12 (World Bank, Technical Paper No. 406, 1998), <http://documents.worldbank.org/curated/en/133031468776403491/pdf/multi-page.pdf>.

food security.”⁵⁰ Unlike many other subsidies, fisheries subsidies undermine the sustainability of a shared resource, which, if mismanaged, can be depleted.⁵¹

Even in purely commercial terms, fishing subsidies have a particularly pernicious effect. In areas such as agriculture or manufacturing, one country’s subsidizing production does not reduce another country’s production resources, even though it gives the subsidizing country’s producers a competitive advantage. In the fishing sector, on the other hand, such practices rob the other countries of production resources by depleting the fisheries that are everyone’s resource base.⁵²

Fisheries subsidies are complicated by the fact that they impact activities on the high seas, an area beyond a country’s EEZs, and impact migratory species that move between borders.⁵³

The WTO recognizes the inadequacy of its current rules governing fisheries subsidies and has been working since the early 2000s to address the problem.⁵⁴ The Pacific Islands Forum’s permanent representative to the United Nations and the WTO in Geneva, Mere Falemaka, explained that although negotiations around fisheries subsidies are “not a straight-forward WTO agreement about trade rules that affect trade competition,” the negotiations are about “the effect of trade rules on fish stocks. It’s not about dealing with trade distortions.”⁵⁵ Negotiations have focused on the issue of sustainability and have been “centered explicitly at the nexus of trade policy, natural resource economics, and environmental conservation.”⁵⁶

B. *The History of WTO Negotiations on Fisheries Subsidies*

In the 1990s, there was growing concern about the state of global fish stocks.⁵⁷ In 1992, the Food and Agriculture Organization

⁵⁰ PETER ALLGEIER, THE TRADE TOOLBOX AND ENVIRONMENTAL SUSTAINABILITY: THE CASE FOR FISHERIES 3 (2012), <https://www.ictsd.org/sites/default/files/research/2012/02/peter-allgeier-the-trade-toolbox-and-environmental-sustainability-the-case-for-fisheries.pdf>.

⁵¹ *See id.* at 3.

⁵² *Id.*

⁵³ *See id.* at 2.

⁵⁴ *See* WORLD TRADE ORG., *supra* note 5.

⁵⁵ UNITED NATIONS CONFERENCE ON TRADE & DEV., *supra* note 18.

⁵⁶ SCHORR, *supra* note 37; *see also* ALLGEIER, *supra* note 50, at 2.

⁵⁷ *See generally* Schrank, *Introducing Fisheries Subsidies* 437 (FAO Fisheries, Technical Paper No. 437, 2003), <http://www.fao.org/3/a-y4647e.pdf>.

(FAO) published *Fisheries and the Law of the Sea: A Decade of Change*, which highlighted the impact of fisheries subsidies.⁵⁸ Another report in the early 1990s indicated that almost half of the United States' fish stocks were overfished.⁵⁹ By the end of the decade, Congress was requiring annual reports on the status of fish stocks.⁶⁰ In 2001, the WTO first took an official position on fisheries subsidies at the fourth WTO Ministerial Conference in Doha, by including fisheries subsidies in a ministerial declaration.⁶¹ Section 28 of the WTO's Doha Ministerial Declaration states:

In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.⁶²

This declaration described the WTO's mandate and launched negotiations on disciplines for fisheries subsidies.⁶³ The Trade and Environment Committee of the WTO had been studying the issue of fisheries subsidies for several years and had come to the conclusion that environmental damage could result from subsidies which incentivize too many fishers pursuing too few fish.⁶⁴ This initial declaration by the WTO indicated a recognition that problems

⁵⁸ See *id.* at iii.

⁵⁹ See Katrina Wyman, *The Recovery in U.S. Fisheries* 8–9 (NYU Center for Law, Econ. & Org., Working Paper No. 16-20, 2016).

⁶⁰ See *id.* at 9.

⁶¹ See Bahety & Mukiibi, *supra* note 4, at 8.

⁶² See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746, 750 (2002).

⁶³ Bahety and Mukiibi, *supra* note 4, at 9.

⁶⁴ *The Doha Declaration Explained*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#fisheries_subsidies (last visited Jan. 4, 2020).

existed with the current rules on fisheries subsidies and that a global discussion could help to improve the situation.

In 2005, at the Hong Kong Ministerial Conference, the WTO elaborated on its mandate from the Doha Ministerial Conference.⁶⁵ The Hong Kong Ministerial Declaration noted that there was a broad agreement that the Negotiating Group on Rules “should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing.”⁶⁶ The Declaration called on participants to work on establishing disciplines, with a focus on “transparency and enforceability.”⁶⁷ As in Doha, the Negotiating Group raised the importance of looking at impacts to developing member nations.⁶⁸ The 2005 Declaration directed the Negotiating Group “to intensify and accelerate the negotiating process in all areas of its mandate.”⁶⁹

The negotiations were active between 2005 and 2011, but no solution was agreed upon.⁷⁰ The failure to reach a compromise was not so much about disagreements over the need for a new fisheries subsidies regime, but rather about “the nature and scope of the rules and the disciplines for the developing countries.”⁷¹ Disagreements over issues such as how to treat high seas fishing and fuel subsidies led to an impasse between WTO members.⁷² Negotiations stalled until the UN SDGs of the 2030 Agenda for Sustainable Development were officially put into effect in January 2016.⁷³ The

⁶⁵ See *Negotiations on Fisheries Subsidies*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm (last visited Jan. 4, 2020).

⁶⁶ World Trade Organization, Ministerial Declaration of 18 December 2005, WT/MIN(05)/DEC Appendix D: Rules, ¶ 9, https://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm#annexd1-9.

⁶⁷ *Id.*

⁶⁸ *See id.*

⁶⁹ *Id.* ¶ 10.

⁷⁰ *See* WORLD TRADE ORG., *supra* note 5.

⁷¹ Bahety & Mukiibi, *supra* note 4, at 11.

⁷² *See* Manleen Dugan & Hugh Walton, *WTO Fisheries Subsidies Negotiations and Pacific Island States*, TRADE NEGOTS. INSIGHTS (Int’l Ctr. for Trade & Sustainable Dev., Geneva, Switz.), Nov. 2011, at 15–16, http://www.ictsd.org/sites/default/files/review/tni/tni_en_10-8.pdf.

⁷³ *See* *WTO Members Engage on New Fisheries Subsidies Proposals*, WORLD TRADE ORG. (Dec. 9, 2016), https://www.wto.org/english/news_e/news16_e/fish_09dec16_e.htm; *see also* *Sustainable Development Goal—The Sustainable*

WTO negotiating process is specifically mentioned in UN SDG 14.6, in which United Nations member states entered into a commitment to “prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing, and refrain from introducing new subsidies” by 2020.⁷⁴ Reiterating their reliance on the UN SDGs, WTO members affirmed a strong interest in creating new international fisheries subsidies.⁷⁵ By the end of 2016, detailed discussions were happening around numerous proposals with the goal of coming to an agreement by the 2017 Buenos Aires Ministerial Conference (MC11).⁷⁶ Proposals came from countries around the globe including a proposal from the European Union, another proposal from the African, Caribbean and Pacific (ACP) group of members, and one from six Latin American members (Argentina, Colombia, Costa Rica, Panama, Peru, and Uruguay).⁷⁷ The three proposals all had the same objectives: (1) “achieving the goals set out in [UN] SDG 14.6;” (2) “ensuring effective disciplines while also providing special and differential treatment for developing and least developed country (LDC) members;” and (3) “securing an outcome at the Eleventh Ministerial Conference (MC11) in Buenos Aires.”⁷⁸ Despite recommendations coming from a diverse group of members and there being significant consensus to begin with, the negotiating process in Buenos Aires failed to reach a substantive outcome.⁷⁹ At MC11, the WTO members were only able to adopt a ministerial decision on fisheries subsidies stating that they would continue negotiations:

Development Agenda, UNITED NATIONS, <https://www.un.org/sustainabledevelopment/development-agenda-retired/> (last visited Jan. 4, 2020).

⁷⁴ See United Nations, *supra* note 73; see also *WTO Members Prepare to Shift Gears in Fisheries Negotiations*, BRIDGES WEEKLY (Int’l Ctr. for Trade & Sustainable Dev., Geneva, Switz.), Nov. 15, 2018, at 4–5, <https://www.ictsd.org/bridges-news/bridges/news/wto-members-prepare-to-shift-gears-in-fisheries-negotiations>; Margaret A. Young, *supra* note 31, at V (Forward by Ricardo Meléndez-Ortiz).

⁷⁵ See *WTO Members Affirm Interest in New International Fisheries Subsidies Rules, But Differ on Way Forward*, WORLD TRADE ORG. (June 29, 2016), https://www.wto.org/english/news_e/news16_e/rule_06jul16_e.htm.

⁷⁶ See WORLD TRADE ORG., *supra* note 73.

⁷⁷ See *id.*

⁷⁸ *Id.*

⁷⁹ See *id.* See also UNITED NATIONS CONFERENCE ON TRADE AND DEV., *supra* note 18.

[W]ith a view to adopting an agreement by the next Ministerial Conference in 2019 on comprehensive and effective disciplines that prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and eliminate subsidies that contribute to illegal, unreported and unregulated (IUU) fishing.⁸⁰

WTO members recognized that realizing an agreement in 2019 would be in line with the 2030 UN SDGs.⁸¹

WTO members were also inspired by the Trans-Pacific Partnership (TPP) Agreement which included binding rules for fisheries subsidies.⁸² While the TPP effectively died after President Trump withdrew the United States from the trade agreement in 2018, the eleven remaining signatories finalized the CPTPP agreement which still included the provisions on fisheries subsidies.⁸³ Despite eleven countries coming to an agreement on fisheries subsidies and the pressure from the UN SDGs, the 2019 deadline was again missed and negotiations were yet again pushed to another ministerial conference.⁸⁴ WTO members agreed to a new work program from January to May 2020 with the hope of now coming to an agreement in June 2020 at the Twelfth Ministerial Conference (MC12).⁸⁵

II. WHAT IS PREVENTING AN AGREEMENT ON FISHERIES SUBSIDIES

A. *Key Issues in the Negotiations and the Sticking Points*

The negotiations on fisheries subsidies cover a variety of concerns including IUU fishing, overfished stocks, overcapacity and overfishing, special and differential treatment for developing

⁸⁰ Press Release, World Trade Org., Ministerial ends with decisions on fish subsidies, e-commerce duties; ongoing work continues (Dec. 13, 2017), https://www.wto.org/english/news_e/news17_e/mc11_13dec17_e.htm.

⁸¹ See *WTO Members Prepare to Shift Gears in Fisheries Negotiations*, *supra* note 74.

⁸² See *WTO Rules on Fisheries Subsidies: Progress and Prospects*, *supra* note 19.

⁸³ See Colin Dwyer, *The TPP Is Dead. Long Live the Trans-Pacific Trade Deal*, NPR (Mar. 8, 2018), <https://www.npr.org/sections/thetwo-way/2018/03/08/591549744/the-tpp-is-dead-long-live-the-trans-pacific-trade-deal>; see also Markus Gehring, *From Fisheries Subsidies to Energy Reform under International Trade Law* 4 (Ctr. for Int'l Governance Innovation, Paper No. 188, 2018), <https://www.cigionline.org/sites/default/files/documents/Paper%20no.188web.pdf>.

⁸⁴ See Press Release, World Trade Org., WTO members prepare to intensify fisheries subsidies negotiations in 2020, Dec. 6, 2019, https://www.wto.org/english/news_e/news19_e/fish_06dec19_e.htm.

⁸⁵ See *id.*

and least-developed countries (LDCs), and notification and transparency.⁸⁶ Many of these issues have been raised repeatedly over the years, stretching back to the Doha Ministerial Conference in 2001 and as recently as in the UN SDGs for 2030.⁸⁷

The UN SDG 14.6 sets a deadline for eliminating subsidies for IUU fishing.⁸⁸ IUU fishing occurs both on the high seas and within EEZs.⁸⁹ It hinders the global, regional, and national efforts to

⁸⁶ See generally Tipping, *supra* note 11; see also WORLD TRADE ORG., *supra* note 5.

⁸⁷ See WORLD TRADE ORG., *supra* note 64; *WTO Members Prepare to Shift Gears in Fisheries Negotiations*, *supra* note 74.

⁸⁸ See WORLD TRADE ORG., *supra* note 5.

⁸⁹ IUU fishing captures a broad range of activities. The UN FAO describes activities that count as IUU fishing in the *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)* as follows:

Illegal fishing:

conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

Unreported fishing:

which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or are undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

Unregulated fishing:

in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

manage fish stocks sustainably and disadvantages those fishers who follow the rules.⁹⁰

Despite the fact that there is a general consensus that the WTO needs to deal with subsidies that benefit IUU fishing, there are still many sticking points preventing an agreement.⁹¹ One key question is how to identify IUU fishing and thus how to trigger the subsidy discipline.⁹² As summarized by Alice Tipping in her overview on “*Building Comprehensive and Effective WTO Rules on Fisheries Subsidies*,” the definition of IUU fishing determines the scope of the rule.⁹³ One option is to limit the prohibition on subsidies “to those vessels or operators identified by a member or Regional Fisheries Management Organization (RFMO) under one of the provisions of the agreement.”⁹⁴ This approach could lead to an initially limited list, but it could also give members more discretion in determining a subsidy prohibition.⁹⁵ The subsidy prohibition could also “apply to all subsidies to IUU fishing *per se*, on the basis of a fixed, universally-applicable standard or definition of IUU fishing, such as that set out in Article 3 of the FAO International Plan of Action on IUU Fishing (IPOA-IUU).”⁹⁶ Scholars such as Carl-Christian Schmidt have pointed out that while the definitions set out in the IPOA-IUU are useful, they can be overly broad and might require further reference to be able to identify IUU fishing in practice.⁹⁷

Another fraught area of negotiation is whether to prohibit subsidies that impact overfished stocks.⁹⁸ Over thirty percent of the assessed fish stocks are classified as overfished.⁹⁹ A fish stock tends to be considered overfished¹⁰⁰ when “fishing has reduced the stock

Illegal, Unreported and Unregulated (IUU) fishing: What is IUU fishing?, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, <http://www.fao.org/iuu-fishing/background/what-is-iuu-fishing/en/> (last visited Nov. 16, 2019).

⁹⁰ *See id.*

⁹¹ *See* Tipping, *supra* note 11, at 11.

⁹² *See id.* at 12.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See id.*

⁹⁶ *Id.*

⁹⁷ *See* Schmidt, *supra* note 16, at 5.

⁹⁸ *See* WORLD TRADE ORG., *supra* note 5.

⁹⁹ *See* Tipping, *supra* note 11, at 13.

¹⁰⁰ Being “overfished” is a different concept than “overfishing.”

[O]verfishing is a measure of the fishing effort being exerted, while a decision that a stock is overfished relates to the stock’s biomass. The two

to a size below the level that can produce [maximum sustainable yield]”.¹⁰¹ A key area of debate in negotiations over subsidies for overfished stocks is who makes the determination about whether a fish stock is overfished and what to do about fish stocks that have not been formally assessed or for which there are insufficient data.¹⁰² Formally assessed fish stocks only constitute approximately one-fourth of the marine catch that comes to ports.¹⁰³ Formal assessment is a data intensive undertaking and is not easily accomplished by every country.¹⁰⁴ To address subsidy prohibitions on stocks that have not been formally assessed, countries could either take a precautionary approach and assume a fish stock is overfished, allow subsidies until a member country had the ability to assess the fish stock, or use informal assessments and estimates to determine the status of a fish stock.¹⁰⁵

Subsidies that support or enhance overcapacity is another area the WTO rules negotiations are looking to regulate.¹⁰⁶ Overcapacity can contribute to and incentivize overfishing.¹⁰⁷ The WTO is

situations may or may not coincide: for example, if fishing efforts have been reduced to allow a stock to rebuild, a stock may be overfished, but overfishing may not be taking place.

Tipping, *supra* note 11 (citing M. CASTRO DE SOUZA ET AL., INT’L CTR. FOR TRADE & SUSTAINABLE DEV., OVERFISHING, OVERFISHED STOCKS, AND THE CURRENT WTO NEGOTIATIONS ON FISHERIES SUBSIDIES (2018)).

¹⁰¹ An informational note from the International Centre for Trade and Sustainable Development explains maximum sustainable yield as:

The surplus production of a stock varies according to diverse factors, including the biological characteristics of the species, the environmental conditions in the stock distribution area and the size of the stock relative to the ecosystem carrying capacity. The maximum sustainable yield (MSY) is defined as the highest catch that can be continuously taken from a stock under existing environmental conditions.

M. CASTRO DE SOUZA ET AL., INT’L CTR. FOR TRADE & SUSTAINABLE DEV., OVERFISHING, OVERFISHED STOCKS, AND THE CURRENT WTO NEGOTIATIONS ON FISHERIES SUBSIDIES (2018), https://www.ictsd.org/sites/default/files/research/information_note-overfished_stocks-fao-final.pdf.

¹⁰² See generally Tipping, *supra* note 11.

¹⁰³ See CASTRO DE SOUZA ET AL., *supra* note 101, at 7.

¹⁰⁴ See *id.*

¹⁰⁵ See Tipping, *supra* note 11, at 15–16.

¹⁰⁶ See *id.* at 16.

¹⁰⁷ See Communication from the Chair, *Fisheries Subsidies Working Document—Revision*, WTO Doc. TN/RL/W/274/Rev.6 (Nov. 14, 2018), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=249979,249645,247116,246037,245243,245067,240686,240657,240288,237980&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglish

negotiating prohibiting “capacity enhancing subsidies” such as subsidies which increase or maintain a fishing fleet’s marine fishing capacity, support the purchasing of fishing equipment, aid in construction or upgrading of fishing vessels, and provide for operational costs such as income support and license fees.¹⁰⁸

The WTO is also negotiating whether subsidies offered by developing countries should be exempted from prohibitions on subsidies promoting overfishing and overcapacity.¹⁰⁹ Countries could be exempted either for the type of fishing they are subsidizing, such as small-scale fishing, though how to define “small-scale” is another area under debate.¹¹⁰ Another option is exempting developing countries based on where the fishing takes place, such as in their EEZ or as part of their RFMO quota.¹¹¹ Prohibiting fishing outside of a member state’s national jurisdiction is another proposal for addressing overfishing and overcapacity, meaning that member states would be allowed to fish throughout their whole EEZ, but not in the EEZs of other WTO members or on the high seas.¹¹²

Proposals which allow for special and differential treatment of developing and LDCs are critical to ensuring that developing and LDCs will want to sign on to an agreement. Argentina, Colombia, Costa Rica, Panama, Peru, and Uruguay’s joint proposal on fisheries subsidies was inspired by the WTO Trade Facilitation Agreement, which allows “developing and [LDCs] to determine when they will implement individual provisions of the Agreement and to identify provisions that they will only be able to implement upon the receipt of technical assistance and support for capacity building.”¹¹³ The

Record=True&HasFrenchRecord=True&HasSpanishRecord=True; *see also* Matteo Milazzo, *Subsidies in World Fisheries* 12 (World Bank, Technical Paper No. 406, 1998), <http://documents.worldbank.org/curated/en/133031468776403491/pdf/multi-page.pdf>.

¹⁰⁸ *See* WTO: Communication from the Chair, Fisheries Subsidies Working Document—Revision, *supra* note 107 at art. 3, ¶ 7.

¹⁰⁹ *See id.*

¹¹⁰ *See id.* arts. 5–6.

¹¹¹ *See id.* art. 6.

¹¹² *See id.* art. 7.

¹¹³ *The Trade Facilitation Agreement: An Overview*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/tradfa_e/tradfatheagreement_e.htm (last visited Nov. 16, 2019); Press Release, World Trade Org., WTO members engage in new fisheries subsidies proposals (Dec. 9, 2016), https://www.wto.org/english/news_e/news16_e/fish_09dec16_e.htm.

joint proposal explained how to adapt the Trade Facilitation Agreement approach to the Fisheries Subsidies' negotiations:

Through the SDG 14.6, our Heads of State and Government gave to WTO Members a specific mandate to negotiate this issue on its own merits, without linking its process to any other WTO negotiation. Therefore this should be a standalone Agreement, as the TFA, in which all Members should agree on definitions, disciplines and timelines. As a complement, rules should be established aiming at:

Ensuring the appropriate enforcement of disciplines;

Exploring cooperation between competent authorities;

Identifying cases in which flexibilities ([special & differential treatment]) should be given to fulfil the commitments included in the Agreement.¹¹⁴

An option for special and differential treatment of developing countries is to exempt subsidies by developing countries and LDCs that support harvesting overfished stocks within their territorial waters or EEZ. Another option is to allow developing countries to provide subsidies to small-scale and artisanal fishing that contribute to overfishing and overcapacity.¹¹⁵

The WTO Negotiating Group on Rules is also looking at ways to improve notifications and transparency of subsidies.¹¹⁶ Fisheries subsidies, like other subsidies for industrial goods, must comply with the notification requirements of GATT Article XIV:1 and the *SCM Agreement* Article 25.¹¹⁷ However, compliance with these rules has been inconsistent, and many WTO member countries appear to support making changes to improve transparency.¹¹⁸ Some proposals suggest requiring notification of information about a catch and “the status of the fish stocks in the fishery for which the subsidy

¹¹⁴ Communication circulated at the request of the delegations of Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay, WTO Fisheries Subsidies: A Framework to Guide the Multilateral Negotiations to Eliminate Harmful Fisheries Subsidies (Nov. 28, 2016), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=233017,232723,232683,232681,232022,232027,231240,231090,230174,230127&CurrentCatalogueIdIndex=0&FullTextHash=.

¹¹⁵ See WTO: Communication from the Chair, *supra* note 107, at art. 5.

¹¹⁶ See Press Release, World Trade Org., Members welcome progress in notification of fisheries subsidies (Nov. 19, 2019), http://wto.org/english/news_e/news19_e/scm_19nov19_e.htm.

¹¹⁷ See Tipping, *supra* note 11, at 19.

¹¹⁸ See *id.*

is provided.”¹¹⁹ A concern with such a notification requirement, however, is that it could be unfeasible for fishing on a smaller scale and for developing countries.¹²⁰ Another potential notification requirement suggested is requiring that the *SCM* Committee be notified when a vessel engages in IUU fishing.¹²¹

B. *What Went Wrong at MC11?*

Despite there being a number of sticking points, there was hope that WTO members would be able to come to an agreement on disciplines for fisheries subsidies at the MC11 in Buenos Aires.¹²² Addressing fisheries subsidies has been on the WTO agenda since the Doha Ministerial Declaration in 2001 and there is general agreement that the WTO needs to take action, a view that has been reinforced by the UN SDGs.¹²³ Yet the WTO negotiating group failed to reach a solution in Buenos Aires. All that was accomplished was another delayed deadline and a decision to continue negotiations with the goal of adopting an agreement by the end of 2019.¹²⁴

While initial fisheries subsidies discussions in Buenos Aires covered a range of issues, including overfishing, IUU subsidies, and overcapacity, the focus eventually narrowed to IUU subsidies alone.¹²⁵ But even on this issue—the one for which there was the most consensus—the negotiations proved fruitless.¹²⁶ WTO Director-General Roberto Azevêdo commented at the end of the conference that progress “would [have] require[d] a leap in

¹¹⁹ *Id.*

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *See* Erin Hannah et al., *The WTO in Buenos Aires: The Outcome and its Significance for the Future of the Multilateral Trading System*, 41 *WORLD ECON.* 2578, 2589 (2018); *see also* Asit Ranjan Mishra, *Why India Opposed Deal to End Fisheries Subsidies at WTO*, *LIVEMINT* (Dec. 27, 2017), <https://www.livemint.com/Politics/RSxoNQz04CjrTcVutX8uI/Why-India-opposed-deal-to-end-fisheries-subsidies-at-WTO.html>.

¹²³ *See* WORLD TRADE ORG., *supra* note 65; *see also* UNITED NATIONS CONFERENCE ON TRADE & DEV., *supra* note 18.

¹²⁴ Press Release, World Trade Org., Ministerial ends with decisions on fish subsidies, e-commerce duties; ongoing work continues (Dec. 13, 2017), https://www.wto.org/english/news_e/news17_e/mc11_13dec17_e.htm.

¹²⁵ *See* Hannah et al., *supra* note 122, at 2589.

¹²⁶ *See* WORLD TRADE ORG., *supra* note 5; *see also* Hannah et al., *supra* note 122, at 2589.

members' positions" that did not occur.¹²⁷ One setback was that India refused to agree to any interim decision on IUU fishing beyond delaying the agreement due to a lack of clarity around defining elements related to the concerns of developing countries.¹²⁸ Indian officials were worried that any interim decision would lead to support for its country's fish workers being ripped away.¹²⁹ Many of the low-income fishers along India's coastal states depend on the assistance for their livelihood.¹³⁰ India's initial proposal was for "special and differential treatment for its artisanal fishermen" allowing the country "to continue to supply fuel subsidy within the territorial waters, which is within twelve nautical miles from the coast."¹³¹ However, India subsequently changed its position to be special and differential treatment throughout the EEZ, a distance of 200 nautical miles from its coast.¹³² Another setback has been that the United States increased its criticism of the WTO and retreated from its usual leadership role within WTO negotiations, which some countries argue made it more difficult for agreements to be formed.¹³³

While some view the failure to reach a consensus on fisheries subsidies at Buenos Aires as exemplifying the deficiencies of the WTO system as a whole, Robert Zapata Barradas, the WTO ambassador from Mexico and the chairman of the WTO Negotiating Group on Rules up until August 2019, said that the "reports of the death of the fisheries discussion in the WTO have been greatly exaggerated."¹³⁴

¹²⁷ Catherine Benson Wahlén, *WTO Puts Off Agreement on Fisheries Subsidies*, INT'L INST. SUSTAINABLE DEV. (Dec. 18, 2017), <http://sdg.iisd.org/news/wto-puts-off-agreement-on-fisheries-subsidies/>.

¹²⁸ See Mishra, *supra* note 122.

¹²⁹ See Kirtika Suneja, *India to Resist Interim Ban on Fisheries Sops*, ECON. TIMES (Dec. 12, 2017), <https://economictimes.indiatimes.com/news/economy/agriculture/india-to-resist-interim-ban-on-fisheries-sops/articleshow/62043540.cms>.

¹³⁰ See Mishra, *supra* note 122.

¹³¹ *Id.*

¹³² See *id.*; see also Suneja, *supra* note 129.

¹³³ See Sam Sachdeva, *WTO Failure Raises Concerns About Decline*, NEWSROOM (Dec. 21, 2017), <https://www.newsroom.co.nz/2017/12/20/70417/wto-failure-raises-concerns-about-decline#>.

¹³⁴ UNITED NATIONS CONFERENCE ON TRADE & DEV., *supra* note 18 (July 17, 2018), <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1816>; see also, Emma Farge, *As Ocean Fears Gather Pace, WTO Fishing Talks Stall*, REUTERS (Oct. 1, 2019), <https://www.reuters.com/article/us-trade-wto-fish/as-ocean-fears-gather-pace-wto-fishing-talks-stall-idUSKBN1WG42V>; Rémi Parmentier, *WTO*

C. Current Status of Negotiations

One outcome of the MC11 was that the Negotiating Group on Rules produced a working document on fisheries subsidies.¹³⁵ The working document highlights the declarations from the Doha Ministerial Conference in 2001 and the Hong Kong Ministerial Conference in 2005, the WTO's commitment to meeting the UN SDG 14.6 under the 2030 Development Agenda, and the importance of "special and differential treatment for developing and least-developed Members."¹³⁶

The Negotiating Group developed a work program that established clusters of meetings, each focused on a specific theme, which have led to revisions of the working document on fisheries subsidies.¹³⁷ The issue of "[s]pecial and differential treatment for developing members and least developed country (LDC) members" was to be integrated throughout all of the meetings of the clusters.¹³⁸ The first set of meetings was in May, June, and July of 2018.¹³⁹ The May cluster of meetings focused on "subsidies that enhance and/or maintain fishing capacity and subsidies that contribute to overcapacity and overfishing."¹⁴⁰ The June 2018 cluster of meetings focused on "subsidies to fishing on overfished stocks."¹⁴¹ The July 2018 cluster of meetings focused on IUU fishing.¹⁴² At the meetings in July, WTO member delegations also agreed to an intensified work

Fisheries Negotiations: Failure Is Not An Option, IISD (June 25, 2019), <https://sdg.iisd.org/commentary/guest-articles/wto-fisheries-negotiations-failure-is-not-an-option/>.

¹³⁵ See WTO: Communication from the Chair, *supra* note 107.

¹³⁶ See *generally id.*

¹³⁷ See Press Release, World Trade Org., Members Agree on May-July Work Programme for Fisheries Subsidies Negotiations, WTO (Apr. 11, 2018), https://www.wto.org/english/news_e/news18_e/fish_11apr18_e.htm.

¹³⁸ *Id.*

¹³⁹ See *id.*

¹⁴⁰ *Id.*; see also Press Release, World Trade Org., WTO Members Complete First Cluster of Meetings for Fisheries Subsidies Negotiations Since MC11 (May 17, 2018), https://www.wto.org/english/news_e/news18_e/fish_18may18_e.htm.

¹⁴¹ See Press Release, World Trade Org., *supra* at note 137; see also Press Release, World Trade Org., WTO Members Focus on Subsidies for Fishing in Overexploited Stocks at June Meetings (June 11, 2018), https://www.wto.org/english/news_e/news18_e/fish_11jun18_e.htm.

¹⁴² See Press Release, World Trade Org., *supra* note 137; see also, Press Release, World Trade Org., WTO Members Take up Disciplines on Subsidies to IUU Fishing at July Meetings (July 26, 2018), https://www.wto.org/english/news_e/news18_e/fish_26jul18_e.htm.

program from September to December 2018.¹⁴³ The September meetings involved the Negotiating Group on Rules holding “text-based discussions on capacity- and effort-related subsidies” as well as an exchange on “enhancing the transparency of fishery subsidy and establishing institutional arrangements for monitoring the implementation of new discipline.”¹⁴⁴ At one of the September meetings, “[h]eads of WTO member delegations...voiced their strong commitment to creative, constructive engagement in the fisheries subsidies negotiations...”¹⁴⁵ In November 2018, WTO members discussed “subsidies that affect stocks in an overfished condition” and produced the most recent revision of the working document.¹⁴⁶

The working document lays out potential definitions for IUU fishing and overfished stocks.¹⁴⁷ The proposal would define “IUU

¹⁴³ Press Release, World Trade Org., *supra* note 142.

¹⁴⁴ Press Release, World Trade Org., Members Complete First Cluster of Meetings in Sept-Dec Fisheries Subsidies Work Programme (Sept. 28, 2018), https://www.wto.org/english/news_e/news18_e/fish_24sep18_e.htm.

¹⁴⁵ Press Release, World Trade Org., Members Start September-December Fisheries Subsidies Talks Under Intensified Work Programme (Sept. 17, 2018), https://www.wto.org/english/news_e/news18_e/fish_17sep18_e.htm.

¹⁴⁶ See Press Release, World Trade Org., Members Hold Second Cluster of Meetings in Sept-Dec Fisheries Subsidies Work Programme (Nov. 9, 2018), https://www.wto.org/english/news_e/news18_e/fish_05nov18_e.htm. See generally WTO, Communication from the Chair, *supra* note 107.

¹⁴⁷ Revision 6 of the Fisheries Subsidies working document defines IUU fishing and overfished stocks as follows:

“Illegal, unreported and unregulated fishing (IUU)” [has the same meaning as] [shall be interpreted in accordance with the definition set out in] paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of the UN Food and Agricultural Organization (FAO) [2001] [, as well as any modifications to, or replacements of, this instrument,] [shall be defined in accordance with Annex I of this instrument [and as implemented under national laws and regulations]. National and RFMO IUU lists, established in accordance with due process mechanisms, may be taken into account];

“overfished stock” [is where [the biomass of] a fish stock is at such a low level that mortality from fishing needs to be [restricted] [adjusted] to allow the stock to rebuild to a level that produces maximum sustainable yield or alternative reference points based on the [best] scientific evidence available] [to the Member within its jurisdiction or to the relevant RFMO [within its convention area] [by the RFMO in consultation with the Member]]. In the cases of straddling and highly migratory fish stocks, shared among Members, the evaluation related to

fishing” based on the FAO definition, with the possibility for adjustments.¹⁴⁸ The negotiators seem to be debating how stringent the definition of “overfished stock” should be, giving options for fishing either being “restricted” or “adjusted” to allow for rebuilding of the fish stock.¹⁴⁹ There also still appears to be debate over whether to use the “best scientific evidence available” or just any “scientific evidence available.”¹⁵⁰

The working document goes through potential disciplines for prohibited subsidies for IUU fishing, overfished stocks, overcapacity/capacity enhancing subsidies and overfishing, as well as special and differential treatment for developing countries and LDCs.¹⁵¹ A major component of the working document seems to be working in flexibility for member countries to ensure a consensus. For instance, in defining prohibited subsidies for IUU fishing, the working document includes a footnote which states that some member countries maintain “the right to determine what constitutes such [identification,] determination, or listing of IUU fishing.”¹⁵² The working document also includes considerations to exempt LDCs from certain notification and transparency requirements or to ensure that any such requirements “not be burdensome on developing countries with capacity constraints, especially LDCs.”¹⁵³ There are also proposed provisions that would give developing and LDCs extra time to come into compliance with certain aspects of new disciplines on fisheries subsidies,¹⁵⁴ and, in line with the proposals inspired by the Trade Facilitation

the fish stocks in the fishery for which the subsidy is provided shall be made pursuant cooperation [and agreement] of the Members involved];

WTO, Communication from the Chair, *supra* note 107, art. 1.

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *See generally id.*

¹⁵² *See id.* art. 3 & n.4.

¹⁵³ *See id.* arts. 5.19–5.20.

¹⁵⁴ *See id.* art. 5.11 (“In order to bring any subsidy programs into conformity with the obligations provided in this provision, developing and least-developed country Members, that at [the time of entry into force/adoption] of this instrument, have not completed; or, need to update the information related to the status of the fish stocks in the fishery for which the subsidy is provided, shall be granted with a period of time of [X] and [Y] years, respectively, after entry into force, subject to comply with the transparency section provided below in Article 6.X.”).

Agreement, provide “[t]echnical [a]ssistance and [c]apacity [b]uilding” to a developing country or LDC.¹⁵⁵

While the most recent version of the working document on fisheries subsidies is from November 2018, negotiations and proposals have been ongoing. China, which had previously kept its negotiating position relatively private, revealed a new proposal to cap subsidies to fisheries.¹⁵⁶ China starting to get more involved in the negotiations is significant. China alone accounted for twenty-one percent of the fishing on the high seas in 2014.¹⁵⁷ Other countries such as the Philippines, the United States, and Australia have also proposed a capping approach.¹⁵⁸ India released a new proposal which continued to highlight its focus on the importance of special and differential treatment for developing and LDCs.¹⁵⁹ Despite new proposals, negotiations stalled. Roberto Zapata Barradas stepped down as chair in August, and it took the Negotiating Group on Rules three months to agree on his

¹⁵⁵ See *id.* art. 5.15. (“[Upon request of a developing country or LDC Member] [and with reference to guidance provided by the UN Fish Stocks Agreement,] [Developed countries], [and developing countries in a position to do so] shall provide, [and relevant agencies are invited to provide,] targeted technical assistance and capacity building [assistance] [on mutually agreed terms and conditions] to developing countries, in particular LDCs and small, vulnerable economies (SVEs) to: (a) address institutional and financial difficulties faced by LDCs and developing countries [with constraints to implement this instrument] [countries in the implementation of this instrument]; (b) establish reporting mechanisms and regulations to prevent unreported and unregulated fishing; (c) to allow them to participate fully in any RFMO adjacent to their exclusive economic zone or archipelagic waters; (d) to develop the capacity to initiate, implement, and enforce compliance with a fishery management plan in keeping with the FAO Code of Conduct on Responsible Fisheries and adequate to provide the showing required by Articles 5.8 (d) and 5.8 (f) and (g) of this instrument; (e) conduct stock assessments; (f) conduct monitoring, control and surveillance of fish stocks; and (g) research and development]”).

¹⁵⁶ See Todd Woody, *High Stakes for China as WTO Fishing Subsidies Cap Looms*, MAR. EXECUTIVE (July 5, 2019), <https://www.maritime-executive.com/editorials/high-stakes-for-china-as-wto-fishing-subsidies-cap-looms>.

¹⁵⁷ See *id.*

¹⁵⁸ See Press Release, World Trade Org., Fisheries Subsidies Negotiations Pick Up Pace with More Proposals Tabled (June 15, 2019), https://www.wto.org/english/news_e/news19_e/fish_15jun19_e.htm.

¹⁵⁹ See Amiti Sen, *India Makes Strong Case at WTO for Continuing Fisheries Subsidies*, HINDU BUS. LINE (July 19, 2019), <https://www.thehindubusinessline.com/economy/india-makes-strong-case-at-wto-for-continuing-fisheries-subsidies/article28596286.ece>.

replacement.¹⁶⁰ Colombian Ambassador Santiago Wills was eventually elected as chair of the Negotiation Group on Rules in November 2019.¹⁶¹ That same month, members noted the challenge of finishing negotiations by the end of 2019, citing “the complexities of the discussions, the remaining divergences in positions, and the absence of a chair since the summer.”¹⁶² By the end of 2019, two years after the failure at MC11, all WTO members were able to agree to intensifying negotiations in 2020 with the goal of reaching an agreement by MC12 in June 2020.¹⁶³

III. POSSIBLE OUTCOMES OF FISHERIES SUBSIDIES NEGOTIATIONS

A. *Successful Negotiations Could Achieve a Multilateral Agreement*

Given the progress and increased effort that has been made in negotiating rules for fisheries subsidies, one potential outcome of the new rounds of negotiations is that the WTO member countries reach a multilateral agreement and develop new binding rules on prohibited fisheries subsidies at MC12. As Sir David Attenborough said in a video discussing the WTO fisheries subsidies negotiation at the October 2019 World Economic Forum:

The World Trade Organization has previously negotiated global rules for government subsidies to industry and farming, now it's time to put an end to subsidies that harm our oceans too...

¹⁶⁰ See Emma Farge, *As Ocean Fears Gather Pace, WTO Fishing Talks Stall*, REUTERS (Oct. 1, 2019), <https://www.reuters.com/article/us-trade-wto-fish/as-ocean-fears-gather-pace-wto-fishing-talks-stall-idUSKBN1WG42V>; see also, Press Release, World Trade Org., New chair highlights importance of concluding fisheries subsidies negotiations (Nov. 8, 2019), https://www.wto.org/english/news_e/news19_e/fish_12nov19_e.htm.

¹⁶¹ See Press Release, World Trade Org., New chair highlights importance of concluding fisheries subsidies negotiations, 2019 news—Negotiations on Fisheries Subsidies (Nov. 8, 2019), https://www.wto.org/english/news_e/news19_e/fish_12nov19_e.htm.

¹⁶² *Id.*

¹⁶³ See Press Release, World Trade Org., WTO members prepare to intensify fisheries subsidies negotiations in 2020, WTO: 2019 News Items—Negotiations on Fisheries Subsidies (Dec. 6, 2019), https://www.wto.org/english/news_e/news19_e/fish_06dec19_e.htm.

Reaching the right deal may not be easy, but a sustainable future for the oceans and ourselves is within reach.¹⁶⁴

Technical assistance to developing countries and LDCs could be particularly helpful to reaching an agreement given that “non-compliance with international law is often based on lack of state capacity rather than lack of state intent.”¹⁶⁵ The pressure to fulfill UN SDG 14.6 while it is still 2020, plus the flexibility that members are trying to build into the working document, should help move an agreement forward. India, a country viewed as complicating reaching an agreement at Buenos Aires, is in favor of flexibility “in the form of special and differential treatment in the implementation of commitments as [India’s] subsidies to small fishers in the form of support for motorisation of fishing boats, fuel rebates and infrastructure support, all fall under the targeted subsidies list at the WTO.”¹⁶⁶ An Indian official explained:

India is not in a position to discontinue fisheries subsidies that are targeted at protecting the livelihood of its fishing community. It would need to be given flexibilities in case a pact is reached at the WTO so that such subsidies could continue.¹⁶⁷

If the WTO Negotiating Group on Rules is able to reach an agreement that includes flexibility for developing countries, then a binding decision could be within reach.

There is an added wrinkle in the negotiations on fisheries subsidies, however, as the Trump administration has been critical of the WTO’s recognition and special treatment of developing countries. In July 2019, the president issued a memorandum that calls on the U.S. Trade Representative to “use all available means to secure changes at the WTO that would prevent self-declared developing countries from availing themselves of flexibilities in WTO rules and negotiations that are not justified by appropriate economic and other indicators.”¹⁶⁸ If, within ninety days, no

¹⁶⁴ World Economic Forum, *David Attenborough Explains What We Need to Do to Stop Over-Fishing*, YOUTUBE (Oct. 8, 2019), <https://www.youtube.com/watch?v=og8N-EslUPQ&t=129s>.

¹⁶⁵ Young, *supra* note 31.

¹⁶⁶ Amity Sen, *WTO: India, China Call for Flexibility in Proposed Pact on Fisheries Subsidies*, HINDU BUS. LINE (Sept. 19, 2018), <https://www.thehindubusinessline.com/economy/agri-business/wto-india-china-call-for-flexibility-in-proposed-pact-on-fisheries-subsidies/article24988463.ece>.

¹⁶⁷ *Id.*

¹⁶⁸ Memorandum on Reforming Developing-Country Status in the World Trade Organization, 2019 Daily Comp. Press Doc. 201900511 (July 26, 2019),

progress was made to secure the desired changes, the U.S. Trade Representative would then be given the power to “no longer treat as a developing country for the purposes of the WTO any WTO Member that in the [U.S. Trade Representative]’s judgment is improperly declaring itself a developing country and inappropriately seeking the benefit of flexibilities in WTO rules and negotiations.”¹⁶⁹ India issued a statement on behalf of more than fifty other countries rejecting the Trump administration’s memorandum and supporting the need for special and differential treatment.¹⁷⁰ Without specific mention of the United States, India’s ambassador and trade envoy, J.S. Deepak, stated that “any unilateral attack on [special and differential treatment] is an onslaught on the very tenets of multilateralism that the WTO seeks to protect” which could “cause lasting and systemic damage to the multilateral trading system.”¹⁷¹ Other countries voluntarily gave up their status as developing nations. For instance, South Korea, one of the top five fisheries subsidizers, voluntarily gave up its developing nation status in October 2019.¹⁷²

The United States’ confrontation with the WTO took a turn in December 2019 when, after blocking appointments to the WTO’s Appellate Body for two years, the United States officially paralyzed the WTO’s ability to act as arbiter for international trade.¹⁷³ The WTO’s Appellate Body is supposed to consist of seven members.¹⁷⁴

<https://www.whitehouse.gov/presidential-actions/memorandum-reforming-developing-country-status-world-trade-organization/>.

¹⁶⁹ *Id.*

¹⁷⁰ See D. Ravi Kanth, *India Rallies 51 Nations to Reject US Memo on Special Treatment*, LIVEMINT (Oct. 17, 2019), <https://www.livemint.com/companies/news/india-rallies-51-nations-to-reject-us-memo-on-special-treatment-11571335050665.html>.

¹⁷¹ *Id.*

¹⁷² See Jane Chung and Joori Roh, *South Korea to Give up Developing Country Status in WTO Talks*, REUTERS (Oct. 24, 2019), <https://www.reuters.com/article/us-southkorea-trade-wto/south-korea-to-give-up-developing-country-status-in-wto-talks-idUSKBN1X401W>; see also Emma Farge, *As Deadline Looms, WTO Fish Subsidy Talks Get New Colombian Chief*, REUTERS (Nov. 8, 2019), <https://www.reuters.com/article/us-wto-trade-fish/as-deadline-looms-wto-fish-subsidy-talks-get-new-colombian-chief-idUSKBN1XI2C6>.

¹⁷³ Philip Blenkinsop, *U.S. Trade Offensive Takes out WTO as Global Arbiter*, REUTERS (Dec. 10, 2019), <https://www.reuters.com/article/us-trade-wto/us-trade-offensive-takes-out-wto-as-global-arbiter-idUSKBN1YE0YE>. See generally Jean Galbraith, *Contemporary Practice of the United States Relating to International Law*, 113 AM. J. INT’L L. 812, 822–31 (2019).

¹⁷⁴ See generally Galbraith, *supra* note 173, at 822–31.

As of November 2019, there were only three.¹⁷⁵ In December 2019, the terms of two of the members expired, leaving only one member.¹⁷⁶ Under the WTO dispute settlement process, there must be three members to hear an appeal, so the Appellate Body is no longer able to hear appeals.¹⁷⁷ Then in February 2020, the U.S. Trade Representative followed through on the Trump administration's memorandum and issued a notice reexamining the designations of countries considered developing or least-developed and eliminated special preferences for more than twenty countries, including India and China.¹⁷⁸

Despite complicated disagreements between members, multilateral agreements are the goal of the WTO for a reason. Multilateral agreements help make a global, international trading system successful.¹⁷⁹ Special and differential treatment is a critical part of a multilateral agreement because it recognizes the existing differences between countries as WTO members try to come up with an agreement that works for everyone.¹⁸⁰

Fisheries subsidies negotiators still hold out hope that a multilateral agreement is possible. At the meeting of the Negotiating Group on Rules in December 2018, the then-group chair, Ambassador Roberto Zapata Barradas, stated, “[w]e all know the mandate is to reach an agreement by end-2019 and we all know getting there is not easy...If we are serious about getting this done, we have to move into the uncomfortable zone of compromise and accommodation.”¹⁸¹ Many members supported the call to enter into a “genuine compromise-seeking mode.”¹⁸² Other members

¹⁷⁵ *See id.*

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ *See* Designations of Developing and Least-Developed Countries Under the Countervailing Duty Law, 85 Fed. Reg. 7613 (Feb. 10, 2020); *see also* Bryce Baschuk, *U.S. Revokes WTO Subsidy Preferences for Some Developing Nations*, BLOOMBERG (Feb. 10, 2020).

¹⁷⁹ *See* JAMES BACCHUS, CATO INST., WAS BUENOS AIRES THE BEGINNING OF THE END OR THE END OF THE BEGINNING: THE FUTURE OF THE WORLD TRADE ORGANIZATION 1, 3 (2018), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa-841-updated.pdf>.

¹⁸⁰ *See* Kanth, *supra* note 170, at 1.

¹⁸¹ *See* Press Release, World Trade Org., WTO Members Voice Commitment to Intensify Fisheries Subsidies Negotiations in 2019 (Dec. 20, 2018), https://www.wto.org/english/news_e/news18_e/fish_20dec18_e.htm.

¹⁸² *See id.*

highlighted that coming to an agreement was important because failing to reach a consensus on fisheries subsidies could harm the credibility of the WTO.¹⁸³ The WTO director-general Roberto Azevêdo said in a June 2019 op-ed that the WTO negotiations on fisheries subsidies “represent a critically important litmus test as to whether the WTO can continue to deliver multilateral agreements.”¹⁸⁴

If the WTO fails to come up with a consensus on fisheries subsidies, an issue that all the member countries seem to be on board with fixing, it could further undermine the credibility of the WTO as an organization.¹⁸⁵ The lack of a multilateral agreement on fisheries subsidies, or on any other matter, at the MC11 in Buenos Aires, left many wondering if the WTO is still a relevant organization.¹⁸⁶ While some at the WTO, like the Ambassador and Permanent Representative of Canada to the WTO, Stephen de Boer, insist that coming to an agreement on fisheries subsidies is “not about maintaining the credibility of the WTO but about fish and tackling development challenges,” an agreement on an issue which many view as “low-hanging fruit” would be a step in the right direction of proving that the WTO is capable of coming to a multilateral consensus.¹⁸⁷

B. *Potential for Plurilateral or Unilateral Efforts*

If a multilateral agreement on fisheries subsidies cannot be reached, the WTO framework does allow for plurilateral

¹⁸³ *Id.*

¹⁸⁴ Roberto Azevêdo, *Africa: Cut Fishing Subsidies and Save Marine Life, Says Trade Talks Chief*, ALLAFRICA (June 6, 2019), <https://allafrica.com/stories/201906060851.html>.

¹⁸⁵ EU Trade Commissioner Cecilia Malmström, criticizing the insubstantial outcome of the Buenos Aires conference, complained that members of the WTO could not “even agree to stop subsidizing illegal fishing.” Erin Hannah et al., *The WTO in Buenos Aires: The Outcome and Its Significance for the Future of the Multilateral Trading System*, 41 *WORLD ECON.* 2578, 2579 (2018), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/twec.12657>; see also BACCHUS, *supra* note 179.

¹⁸⁶ See BACCHUS, *supra* note 179.

¹⁸⁷ Busani Bafana, *What Fish Can Do for the WTO*, IPS NEWS (Nov. 26, 2018), <http://www.ipsnews.net/2018/11/fish-can-wto>; see also Asit Ranjan Mishra, *Why India Opposed Deal to End Fisheries Subsidies at WTO*, LIVEMINT (Dec. 27, 2017), <https://www.livemint.com/Politics/RSxoNQz04CjrTcVutX8uI/Why-India-opposed-deal-to-end-fisheries-subsidies-at-WTO.html>.

agreement.¹⁸⁸ Unlike agreements under Annexes 1 to 3, which create binding obligations for all WTO members, “plurilateral agreements” under Annex 4 would only be binding on WTO members which are parties to the agreement.¹⁸⁹ If conservation-minded countries banded together, they could adopt an agreement more ambitious than one that needs to accommodate everyone.¹⁹⁰ Such an agreement could relate to “unilateral subsidy reductions, which by definition would benefit all other WTO members without discrimination” thus “it might not be difficult to generate consensus to incorporate a plurilateral agreement on subsidies into Annex 4 of the WTO Agreements.”¹⁹¹ Since the agreement would not be binding on WTO members not party to the agreement, the parties not signed on would not be able to be sanctioned for not following the agreement.¹⁹² Even if a plurilateral agreement were not binding on other countries, it could still impact and influence them.¹⁹³ And there would always be the potential that the plurilateral agreement could eventually grow and become a full, multilateral agreement.¹⁹⁴

Back in 2016, before the Buenos Aires conference, more than a dozen WTO members released a statement saying they were entering into a plurilateral effort to address subsidies that contribute to IUU fishing and overcapacity and overfishing.¹⁹⁵ Argentina, Australia, Canada, Chile, Colombia, New Zealand, Norway, Papua

¹⁸⁸ A plurilateral agreement may be adopted under Article X:9, which states that “[t]he Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4.” LORAND BARTELS & TIBISAY MORGANDI, INT’L CTR. FOR TRADE & SUSTAINABLE DEV., OPTIONS FOR THE LEGAL FORM OF A WTO AGREEMENT ON FISHERIES SUBSIDIES 12 (Nov. 15, 2017), https://www.ictsd.org/sites/default/files/research/options_for_the_legal_form_of_a_wto_agreement_on_fisheries_subsidies.pdf.

¹⁸⁹ VAN DEN BOSSCHE & ZDOUC, *supra* note 22, at 53.

¹⁹⁰ BARTELS & MORGANDI, *supra* note 188, at 12.

¹⁹¹ *Id.*

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ *See* BACCHUS, *supra* note 179, at 1.

¹⁹⁵ INT’L CTR. FOR TRADE & SUSTAINABLE DEV., ADVANCING MULTILATERAL TRADE NEGOTIATIONS ON FISHERIES SUBSIDIES (2018), https://www.ictsd.org/sites/default/files/research/fisheries_subsidies_negotiations-ictsd_policy_brief_2018.pdf. *See also* Press Release, U.S. Trade Rep., Joint Statement Regarding Fisheries Subsidies (Sept. 14, 2016), https://ustr.gov/sites/default/files/09142016_STATEMENT_joint_statement_fisheries_partners_FINAL.pdf; *see also* Bahety and Mukiibi, *supra* note 4.

New Guinea, Peru, Singapore, Switzerland, Uruguay, and the United States participated in the group.¹⁹⁶ The hope was that the plurilateral effort would continue alongside the multilateral discussions.¹⁹⁷ While no agreement was reached before or during the Buenos Aires conference, it does show a willingness and interest by WTO members in exploring a plurilateral path as frustration builds with the decades of unsuccessful multilateral negotiations.

The CPTPP is an example of a plurilateral Free Trade Agreement.¹⁹⁸ While not specifically about fisheries subsidies, it does include binding fisheries subsidies rules.¹⁹⁹ Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam are all signed onto the agreement.²⁰⁰ Of those countries, Japan is one of the top five fisheries subsidizers (the others are China, the European Union, the United States, and South Korea).²⁰¹ While not a full solution to the fisheries subsidies problem, the CPTPP has already helped inspire progress on a multilateral agreement²⁰² and should also help effect changes in the countries signed onto the agreement.

Plurilateral agreements can help the legitimacy of the WTO because they might modernize trade rules and can demonstrate that at least some WTO members are able to reach a consensus.²⁰³ There

¹⁹⁶ INT'L CTR. FOR TRADE & SUSTAINABLE DEV., *supra* note 195; *see also* Press Release, U.S. Trade Rep., *supra* note 195; Bahety & Mukiibi, *supra* note 4.

¹⁹⁷ *See* Bahety & Mukiibi, *supra* note 4.

¹⁹⁸ *See* DEPT. INT'L TRADE, AN INFORMATION PACK FOR THE CONSULTATION RELATING TO THE UK POTENTIALLY SEEKING ACCESSION TO THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP (CPTPP) (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/745951/FTA_brochure_CPTPP_FINAL.pdf.

¹⁹⁹ *See* WTO Rules on Fisheries Subsidies: Progress and Prospects, *supra* note 19.

²⁰⁰ *See* What is the CPTPP?, GOV'T OF CAN., <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpp/index.aspx?lang=eng> (last visited Jan. 4, 2020).

²⁰¹ *See* Farge, *supra* note 172.

²⁰² *See* WTO Rules on Fisheries Subsidies: Progress and Prospects, *supra* note 19.

²⁰³ *See* Robert Basedow, *The WTO and plurilateralism: What Lessons Can We Draw from the EU's Experience With 'Differentiated Integration'?*, LONDON SCH. OF ECON. & POLITICAL SCI. (Dec. 8, 2017), <https://blogs.lse.ac.uk/europpblog/2017/12/08/the-wto-and-plurilateralism-what-lessons-can-we-draw-from-the-eus-experience-with-differentiated-integration/>.

is a risk, however, of creating a two-tiered system where developing countries are sidestepped.²⁰⁴

If a plurilateral agreement is not feasible or is undesirable, there are also occasions where the WTO permits countries to act unilaterally to protect a resource. The WTO allows members “under specific conditions, to give *priority* to the protection or promotion of certain societal values and interests *over* trade liberalization, market access and/or non-discrimination.”²⁰⁵ One of these avenues is through Article XX(g) on the “General Exceptions” to the GATT 1994 which states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any [Member] of measures... relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.²⁰⁶

This exception allows measures that “depart from core GATT rules for environmental protection purposes.”²⁰⁷

A key example of the use of the Article XX(g) exception for environmental protection is found in the WTO Appellate Body *US-Shrimp* case.²⁰⁸ In *US-Shrimp*, the United States unilaterally issued regulations to try and promote the conservation of sea turtles and imposed an “import ban on shrimp harvested with commercial fishing technology which may adversely affect sea turtles.”²⁰⁹ The WTO appellate body originally struck down this action and explained the importance of multilateral solutions:

The multilateral trade system is based on multilateral cooperation. If every WTO Member were free to pursue its own trade policy solutions to what it perceives to be environmental

²⁰⁴ *See id.*

²⁰⁵ VAN DEN BOSSCHE & ZDOUC, *supra* note 22, at 545–46.

²⁰⁶ *Id.* at 546.

²⁰⁷ *Id.* at 573.

²⁰⁸ *See generally* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted Oct. 12, 1998), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=58544&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

²⁰⁹ *Id.* ¶¶ 2–3, 172.

concerns, the multilateral trade system would cease to exist. By preventing the abuse of Article XX, the chapeau protects against threats to the multilateral trading system. The prevention of abuse and the prevention of threats to the multilateral trading system are therefore inextricably linked to the object, purpose and goals of Article XX of the GATT 1994.²¹⁰

In its ruling, however, the WTO appellate body made clear that it was not disallowing bilateral or plurilateral action altogether:

We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.²¹¹

The issue with the United States' import ban was that it was adopted "in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO contrary to the requirements of the chapeau of Article XX."²¹² The United States had "negotiated an agreement to protect and conserve sea turtles with some WTO Members, but did not propose the negotiation of such an agreement with the...Appellees until after having concluded its negotiations with the other Members."²¹³

The United States eventually managed to have its import ban upheld by demonstrating "ongoing serious good faith efforts" to come to a multilateral agreement on turtle conservation.²¹⁴ The appellate body explained that the United States could fail to reach a multilateral agreement despite "serious, good faith efforts" and still avoid "arbitrary and unjustifiable discrimination":

Under the chapeau of Article XX, an importing Member may not treat its trading partners in a manner that would constitute "arbitrary or unjustifiable discrimination". With respect to this measure, the United States could conceivably respect this obligation, and the conclusion of an international agreement

²¹⁰ *Id.* ¶ 35.

²¹¹ *Id.* ¶ 185.

²¹² *Id.* ¶ 186.

²¹³ *Id.* ¶ 42.

²¹⁴ See Daniel Pruzin, *WTO Appellate Body Upholds Ruling Favoring U.S. in Shrimp-Turtle Dispute*, INT'L TRADE DAILY (Oct. 23, 2001), <https://www.iatp.org/news/wto-appellate-body-upholds-ruling-favoring-us-in-shrimp-turtle-dispute>.

might nevertheless not be possible despite the serious, good faith efforts of the United States. Requiring that a multilateral agreement be *concluded* by the United States in order to avoid “arbitrary or unjustifiable discrimination” in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement would not be reasonable. For a variety of reasons, it may be possible to conclude an agreement with one group of countries but not another. The conclusion of a multilateral agreement requires the cooperation and commitment of many countries. In our view, the United States cannot be held to have engaged in “arbitrary or unjustifiable discrimination” under Article XX solely because one international negotiation resulted in an agreement while another did not.²¹⁵

The Appellate Body explained that, even if good faith efforts to reach a multilateral deal failed, WTO member countries could reach an agreement with “one group of countries,” and require that other exporting WTO member countries comply with their adopted conservation policies, if said policy fit under the GATT XX(g) exception, as a condition of access to their domestic market.²¹⁶

In the context of fisheries subsidies, efforts to discipline subsidies which contribute to overfishing, IUU fishing, fishing overfished stocks, and other problems associated with fisheries subsidies would likely fit under the GATT XX(g) exception as they “relat[e] to the conservation of exhaustible natural resources.”²¹⁷ Since WTO member countries have been trying to negotiate this issue for almost two decades, countries who wanted to act unilaterally or plurilaterally would have a stronger argument under WTO law that they have made a “good faith effort” at reaching a

²¹⁵ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 123, WTO Doc. WT/DS58/AB/R, (adopted Oct. 22, 2001), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=22613&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

²¹⁶ *Id.*; see also *id.* ¶ 138 (“As we said before, it appears to us “that conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.”).

²¹⁷ VAN DEN BOSSCHE & ZDOUC, *supra* note 22, at 545–46.

multilateral agreement.²¹⁸ Thus, in the vein of *US-Shrimp*, as long as the policies “are made effective in conjunction with restrictions on domestic production or consumption,”²¹⁹ WTO member countries could potentially come to an agreement with a smaller group of countries and restrict access to their domestic markets to those who do not subsidize overfishing, IUU fishing, and overfished stocks. This could influence countries such as India, who are among the top ten exporters of “fish and fishery products,”²²⁰ to reduce or end their subsidization of harmful fishing to maintain access to the domestic markets of those countries who have implemented such an import ban. Countries might also be able to act unilaterally to protect fisheries. Scholars have proposed the potential for some countries to, for instance, unilaterally impose an import ban on fish caught on the high seas.²²¹ While not specifically about the fisheries subsidies negotiations, the breakdown of multilateral and even plurilateral agreements might strengthen a country’s case for acting unilaterally to protect fishery resources. Of course, any challenge to such a plurilateral or unilateral agreement would require a functioning WTO Appellate Body to resolve, which, as of December 2019, does not exist.

Overall, the WTO currently still prefers multilateral agreements and, given that fisheries subsidies are a global problem, a global consensus is ideal.²²² A multilateral agreement on fisheries subsidies would likely have the biggest impact on preserving fish stocks and on proving the WTO’s ability to negotiate agreements. However, a plurilateral agreement or an import ban would be a good first step if a multilateral agreement is not achieved in 2020, especially if it could set a benchmark for future negotiations or incentivize other countries to get on board and thus help to

²¹⁸ See Appellate Body Report, *supra* note 215; *Negotiations on Fisheries Subsidies*, *supra* note 65.

²¹⁹ VAN DEN BOSSCHE & ZDOUC, *supra* note 22, at 545–46.

²²⁰ See FOOD & AGRIC. ORG. OF THE UNITED NATIONS, THE STATE OF WORLD FISHERIES AND AQUACULTURE 2016: CONTRIBUTING TO FOOD SECURITY AND NUTRITION FOR ALL 53 (2016), <http://www.fao.org/3/a-i5555e.pdf>.

²²¹ See generally Katrina M. Wyman, *Unilateral Steps to End High Seas Fishing*, 6 TEX. A&M L. REV. 259 (2018), <https://scholarship.law.tamu.edu/lawreview/vol6/iss1/11>.

²²² See *WTO Rules and Environmental Policies: GATT Exceptions*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (last visited Nov. 13, 2019).

eventually produce a multilateral agreement.²²³ At the very least, a plurilateral agreement would be an example of the WTO's ability to reach some kind of a consensus.

The difficulty of reaching multilateral agreements on complex issues has already caused some members of the WTO to no longer view the multilateral consensus-based model as the best approach.²²⁴ An Indian government official, with knowledge of India's trading position, explained the country's concern that the recent G20 declaration could suggest developed countries might attempt to move away from "the consensus-based model of the WTO" and instead "may propose a majority-driven model like the Trade Facilitation Agreement (TFA) or voting on the basis of assigned weights as done at the International Monetary Fund."²²⁵ India, who hindered an agreement on fisheries subsidies at MC11, would likely also oppose any move towards a plurilateral system.²²⁶

CONCLUSION

The world desperately needs new rules governing fisheries subsidies and the WTO needs to prove it can successfully negotiate multilateral agreements.²²⁷ For almost two decades, the WTO Negotiating Group on Rules has failed to come to a consensus on how to address this global problem.²²⁸ After failing to come to an agreement at the MC11 in Buenos Aires and missing its deadline of reaching an agreement by the end of 2019, the WTO delayed its negotiations yet again and made a new commitment to reach an agreement by MC12 in June 2020.²²⁹ Negotiations on fisheries subsidies will either demonstrate the WTO's capacity to marshal

²²³ See BARTELS & MORGANDI, *supra* note 188, at 13; see also JAMES BACCHUS, *supra* note 179 at 11.

²²⁴ See Asit Ranhan Mishra, *Why Reforms at WTO Could Go Against the Interest of India?*, LIVEMINT (Dec. 10, 2018), <https://www.livemint.com/Politics/ECJKtJgzKdZuyKE5MVjZL/Why-reforms-at-WTO-could-go-against-the-interest-of-India.html>.

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ See, e.g., WORLD TRADE ORG., *supra* note 5 ("[F]ish stocks that are within biologically sustainable levels have fallen from 90.0 percent in 1974 to 66.9 percent in 2015.").

²²⁸ See *Negotiations on Fisheries Subsidies*, *supra* note 65.

²²⁹ See *WTO Members Prepare to Shift Gears in Fisheries Negotiations*, *supra* note 74; see also Press Release, World Trade Org., *supra* note 84.

multilateral consensus, or they will signal a potential need for institutional reforms. The organization is already in peril as actions by the United States are currently preventing the WTO Appellate Body from arbitrating over any disputes.²³⁰ Even if the WTO fails to reach a multilateral agreement in 2020, the current WTO rules would still allow a subset of countries to implement policies which would help protect fishery resources. If the Negotiating Group on Rules fails to come up with a multilateral agreement on fisheries subsidies in 2020, conservation-minded countries should make efforts either plurilaterally or unilaterally to protect our planet's critical fishery resources. The world's marine fisheries cannot wait another two decades for the WTO to figure out how to address this critical problem. The fish need the WTO, and the WTO needs the fish.

²³⁰ See Philip Blenkinsop, *U.S. trade offensive takes out WTO as global arbiter*, REUTERS (Dec. 10, 2019), <https://www.reuters.com/article/us-trade-wto/us-trade-offensive-takes-out-wto-as-global-arbiter-idUSKBN1YE0YE>.