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Trade, Law *and* Development

EDITORIAL

Amogh Pareek & Sahil Verma, *Brick by Brick: COVID-19 and the WTO*

ARTICLES

Shishir Priyadarshi, *Promoting Increased Participation of LDCs in Global Trade – A Critical Account of the Measures Taken at the WTO*

Rafael Leal-Arcas et al., *International Trade, Energy Transition and Climate Change Obligations: The perspective of small Pacific islands and the Caribbean Community*

Christian Häberli, *Food Crises (cont'd): What's Wrong with Trade and Investment Rules?*

Mukesh Bhatnagar, *Emerging Disciplines on Fisheries Subsidies Negotiations in the WTO and the Relationship with Other International Instruments on Fisheries — A Tight Rope Walk*

Jason Beckett, *Harry Potter and the Gluttonous Machine: Reflections on International Law, Poverty, and the Secret Success of Failure*

Apoorva Singh Vishnoi & Rishabha Meena, *Has Uncertainty been Ascertained? – Delineating the Scope of Security Exceptions Provisions in the WTO Agreements and the Free Trade Agreements*

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Mukesh Bhatnagar, *Emerging Disciplines on Fisheries Subsidies Negotiations in the WTO and the Relationship with Other International Instruments on Fisheries — A Tight Rope Walk*
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EMERGING DISCIPLINES ON FISHERIES SUBSIDIES NEGOTIATIONS IN THE WTO AND THE RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS ON FISHERIES — A TIGHT ROPE WALK

MUKESH BHATNAGAR*

*Fisheries subsidies negotiations in the World Trade Organization (WTO) were launched in 2001 under the Doha Round. The negotiations are primarily aimed at preserving environmental sustainability, by seeking to prohibit harmful fisheries subsidies that may contribute to over-exploitation of marine resources or may support Illegal, unreported and unregulated (IUU) fishing. The negotiations have traversed a long journey with several missed deadlines. The United Nations Sustainable Development Group (UNSDG) Target 14.6 adopted in 2015 gave impetus to conclude these negotiations by 2020. Additionally, appropriate and effective special and differential treatment (S&DT) for developing countries and Least Developed Countries (LDCs) has also been an integral part of these negotiations. As the negotiations approach the finish line towards the forthcoming WTO Ministerial meeting to be held from November 30, 202 to December 3, 2021, negotiations are at a frantic pace to conclude.** Several contentious issues remain to be resolved viz. treatment of non-specific fuel subsidies; what*

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** MC 12 has been postponed due to epidemiological situation in Geneva, Switzerland.

should be the approach to prohibit subsidies which contribute to overcapacity and overfishing; what should be the S&DT for developing countries; dispute settlement, etc. The new fisheries subsidies instrument will have an interface with the existing framework of international agreements, conventions, and instruments which govern the marine resources or deal with maritime jurisdiction or rights of coastal states under the United Nations Convention on the Law of the Sea (UNCLOS). This article attempts to examine the challenges the negotiators have faced in crafting the new disciplines with an attempt to find a balance between the rights and obligations of Members under existing international instruments on fisheries and the new obligations that will emerge from the disciplines. It is a tight rope walk for Members to conclude the final phase of these negotiations.

TABLE OF CONTENTS

I. INTRODUCTION
II. LAUNCH OF NEGOTIATIONS IN THE WTO
III. ESTIMATES OF GLOBAL FISHERIES SUBSIDIES
IV. THE EXTENT OF IUU FISHING
V. STATE OF PLAY OF NEGOTIATIONS IN THE WTO
VI. SEEKING S&DT IN FISHERIES SUBSIDIES NEGOTIATIONS
VII. PROHIBITION OF SUBSIDIES FOR IUU FISHING – DUE PROCESS REQUIREMENT IN IUU DETERMINATION
VIII. RELATIONSHIP OF THE NEW FISHERIES SUBSIDIES INSTRUMENT WITH OTHER INTERNATIONAL LEGAL INSTRUMENTS
IX. CONCLUSION

I. INTRODUCTION

The history of negotiations over fisheries subsidies, has traversed a long, arduous path be it in the General Agreement on Tariffs and Trade (GATT) or later in the World Trade Organization (WTO). A major underpinning of these negotiations has been to establish strict disciplines on fisheries subsidies *that* threaten environmental sustainability. A closer look at the nature of deliberations undertaken by the members sheds light on fundamental aspects such as — why was there a need to treat the fisheries sector differently and how the rules were to be shaped, in times to come. It is noteworthy that multilateral efforts to deal with fisheries subsidies have been influenced greatly by rules catering to farm products. For instance, under Article XI of the 1947 GATT, fishery products were exempted from the same disciplines on import restrictions that applied to agricultural

products.[1] A major difference between the two sectors, however, has been that, unlike in agriculture, most of the tariffs on fishery products, applied by developed countries were bound under GATT before the Uruguay Round negotiations got underway. This "tariff binding" thus served as a blockade for these countries left with no possibility of increasing the tariff /non-tariff protection already negotiated. As per one estimate, prior to the conclusion of the Uruguay Round Agreements, approximately 80% of tariffs levied on fish and fish products were GATT bound.[2] By the 1980s, the fisheries sector was in the midst of a two-decade era of extraordinary transformation, with most coastal states having already extended national jurisdiction over fisheries resources from a few miles to 200 nautical miles (370 kilometers). Resource-rich coastal States had an incentive in extending financial assistance to their domestic fleet in order to swiftly seize fishing opportunities abandoned by foreign fleets, and then the dilemma that remained was the difficulty in not overshooting the mark. Countries increasingly reliant on distant/foreign water fishing felt encouraged to assist their now overly large fleets in adjusting to the new international order, supporting vessel decommissioning plans in certain circumstances, but also rerouting them to other exclusive economic zones (EEZ) and international high-seas waters. All of these activities can be said to have cumulatively resulted in global overcapacity.

Renewed efforts to put in place, binding constraints on fisheries subsidies did not see the light of day until the GATT Uruguay Round of international trade negotiations.[3] Early in the Round, the United States attempted, with the backing of the Cairns Group, to include the subject of fisheries in the Agricultural Negotiating Group's (ANG) deliberations.

During the Uruguay Round negotiations, the United States proposed that the negotiations should focus on all agricultural commodities, food, beverages, forest products, and fish and fish products.[4] In a submission in October 1989 on

[1] Ronald P. Steenblik, *Previous Multilateral Efforts to Discipline Subsidies to Natural Resource Based Industries*, Report of Proceedings on the Impact of Government Financial Transfers on Fisheries Management, Resource Sustainability, and International Trade, 20 (Aug. 17,1998).
[2] *Problems of Trade in Fish and Fisheries Products - Background Study by the Secretariat*, 84(7) SPEC 24–25(Mar. 9, 1984), *quoted in* World Trade Organization, *The WTO Trade Cost Index and its Determinants*, Staff Working Paper ERSD-2021-6 (Feb. 12, 2021).
[3] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 1867 U.N.T.S. 14.
[4] Multilateral Trade Negotiations, The Uruguay Round, United States Proposal for Negotiations on Agriculture, 3 MTN.GNG/NG5/W/14 (July 7, 1987).

"comprehensive long-term agricultural reform", the United States included fishery products in the scope of future disciplines and liberalisation plans.[5]

However, because other members in the ANG either did not support or actively resist this attempt, efforts were then redirected to the Market Access Group. There, the US proposed a "zero-for-zero" arrangement — if you abolish tariffs and non-tariff obstacles affecting fisheries, we would do the same — but it was met with little enthusiasm.[6] Furthermore, the European Union stated unequivocally that it would be willing to participate in negotiations on the fisheries sector only if all specific factors impacting the sector and affecting trade in fishery products were acknowledged. This stance was summed up in the term "market access in return for resource access".[7] During the Round, several other approaches, including ones by New Zealand and Canada, each proposing harmonisation of tariffs (and, in the case of New Zealand's, non-tariff trade barriers as well), were tested. But since they also suffered the same fate, fishery products came to be expressly excluded [from the list of products covered by the Agreement on Agriculture] from the final Act, and were instead presumed to be covered, along with industrial products, by the General Agreement on Subsidies and Countervailing Measures (ASCM).[8]

The succeeding parts of the Article trace the negotiations in the WTO — how have these progressed and the challenges posed. As the negotiations in the WTO are about fisheries subsidies, it is important to know the extent of subsidies. An attempt has thus been made to analyse the available data on fisheries subsidies. The negotiations are aimed to prohibit subsidies that support Illegal, unreported and unregulated (IUU) fishing and for this it is relevant to know the extent of IUU fishing and the efforts made by the United Nations Food and Agriculture Organization (FAO) in this respect. While capturing the state of play of negotiations in the WTO, it is essential to understand the key elements of the negotiations, in particular how Members are tackling the issue of prohibition of subsidies that contribute to overcapacity and overfishing; special and differential treatment (S&DT) for developing countries; challenges in incorporating 'Due process' requirement in IUU determination, etc. Finally, the relationship of the new fisheries subsidies instrument with other international legal instruments has

[5] Multilateral Trade Negotiations, The Uruguay Round, Submission of the United States on Comprehensive Long-term Agricultural Reform, 17 MTN.GNG/NG5/W/118 (Oct. 25, 1989).
[6] Steenblik, *supra* note 1.
[7] *See id.*
[8] World Trade Organization, Agreement on Subsidies and Countervailing Measures, 1867 U.N.T.S. 14, https://www.wto.org/english/docs_e/legal_e/24-scm.pdf [hereinafter ASCM].

been examined, in particular, the provisions in UNCLOS which provide rights to coastal states for exploring, exploiting, conserving and managing the marine resources within its EEZ.

II. LAUNCH OF NEGOTIATIONS IN THE WTO

Negotiations over fisheries subsidies were launched under the WTO's Doha round in 2001 (Doha Declaration)[9] due to persistent efforts of the international civil society, Non-Government Organisations (NGOs), United Nations Environment Programme (UNEP), as well as World Bank reports highlighting that subsidies granted by governments to their fishing fleet had led to over-exploitation of fishery resources which had, as a result, contributed to the depletion of global marine fish stocks.

Early rough estimations, such as those by the FAO in 1993, suggested that on the basis of the difference between revenue and estimated costs of fishing, global fishery subsidies were estimated to be in the order of $54 billion annually (to make the industry break-even). The FAO report estimated total costs in world fisheries at $124 billion per year at that time producing a gross revenue of around $70 billion per year, with subsidies presumed to cover the deficit.[10] Another estimation by Milazzo (1998) of the World Bank was more conservative, suggesting subsidies in the range of $14–$20 billion annually, or 17–25% of the industry's revenue.[11]

Further, a study by the WTO on Trade and Environment in 1999 concluded that even after several decades of continued efforts towards expansion of global fishing activity, far from achieving the desired results, the amount of 'fish landing' (bringing harvested catch to land) was on the verge of a steady decline. [12] The study attributed this to the issue of 'overfishing' i.e. depleting the stock of fish from the water body at a rate far more than that at which it is able to replenish itself. In light of this, the study also evaluated a finding consistently resonating with its case

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[9] World Trade Organization Secretariat, *Fourth WTO Ministerial Conference (MC4): DOHA*, 9–14 November 2001, *in* WTO MINISTERIAL CONFERENCES: KEY OUTCOMES 40–69 (2019); *see* World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 28, 31, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) [hereinafter Doha Declaration].

[10] Anthony Cox & U. Rashid Sumaila, *A Review of Fisheries subsidies: quantification, impacts and reforms*, *in* HANDBOOK OF MARINE FISHERIES CONSERVATION AND MANAGEMENT 99–112 (Oxford Uni. Press 2010).

[11] Food and Agricultural Organization of the United Nations, Report of the FAO's Technical Working Group on the management of fishing capacity (Apr. 1998).

[12] Håkan Nordström & Scott Vaughan, *Trade and Environment*, Special Studies 4, WORLD TRADE ORGANIZATION, 21 (1999), https://www.wto.org/english/res_e/booksp_e/special_study_4_e.pdf.

analyses, that overfishing was "closely related to two policy failures — the first being failure to set up and enforce proper resource management schemes (unrestricted or open-access fishing) and, second, government subsidies encouraging overcapitalisation of the industry and hence, overfishing."[13]

Taking stock of these reports, paragraph 28 of the Doha Declaration, while pertaining to the "decision to launch negotiations for *clarification* and *improvement* of disciplines under the Anti-Dumping Agreement as well as Subsidies and Countervailing Measures Agreement",[14] also gave directions for commencement of negotiations on fisheries subsidies. To this end, it stated inter-alia, "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. We note that fisheries subsidies are also referred to in paragraph 31."[15] Paragraph 31 of the Doha Declaration, pertaining to 'Trade and Environment' states in the chapeau that "With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome ... " Thus the launch of negotiations in the WTO, to discipline fisheries subsidies, signalled a resolve of Members to negotiate a multilateral agreement aimed at sustainability of marine resources, while giving due recognition to the importance of fisheries as an important source of livelihood to fishermen in developing countries.

It was the WTO's Hong Kong Ministerial Declaration in 2005,[16] that gave more precise directions to Members to 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 and called on Participants promptly to undertake further detailed work to, inter alia, establish the nature and extent of those disciplines, including transparency and enforceability. It further stated that: "*Appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns.*"[17]

The protracted negotiations held from 2001 to 2011 encompassed a whole range of issues such as types of fisheries subsidies to be prohibited; general exceptions;

[13] *Id.*
[14] Doha Declaration, *supra* note 9.
[15] *Id.*
[16] World Trade Organization, Ministerial Declaration of 22 December 2005, ¶ 9, Annexure D, WTO Doc. WT/MIN(05)/DEC (2005), https://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm#annexd.
[17] *Id.*

special & differential treatment (S&D) to LDCs and developing countries; fisheries management aimed at conservation measures; enhanced notification obligations, etc. While these negotiations were comprehensive, a consensus was elusive due to differing views of the Members on the range of issues including the core issue of what type of subsidies can be prohibited upfront. Traditionally, the USA, Australia, Iceland, New Zealand, Norway have been demanders of a strong discipline on fisheries subsidies. On the other hand, countries like Japan, Korea, and Chinese Taipei had defensive interests in these negotiations as they have been big subsidisers. As far as countries like India, Indonesia, Brazil, China, and Mexico are concerned, what they primarily focused on was securing effective S&D treatment in the negotiations.

After a long hiatus, negotiations on fisheries subsidies resumed in 2015 in the months leading to the WTO's Nairobi Ministerial.[18] In the intervening period, there had been several noteworthy developments which spurred the negotiations. In September 2015, for instance, the UNSDG Members, under 'Target 14.6',[19] committed to prohibit by 2020, certain forms of subsidies that contributed to overcapacity and overfishing as well as eliminate subsidies that contributed to IUU fishing, "recognizing that appropriate and effective S&D treatment for developing countries and LDCs should be an integral part of the fisheries subsidies negotiations."

Further, the Trans-Pacific Partnership Agreement (TPP) was concluded in October 2015 which included the USA, Japan, Australia, New Zealand, Mexico amongst others. However, the USA withdrew from the TPP. Later the remaining parties to the TPP went ahead to implement the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[20] Under the chapter titled 'Environment' of the CPTPP, with respect to provisions concerning 'Marine Capture Fisheries', it was agreed that subsidies for fish stocks which were in overfished condition or subsidies which contributed to overcapacity and overfishing or where these supported IUU fishing, were to be prohibited.[21]

As the negotiations in the WTO pertain to fisheries subsidies, it is important to examine the extent of these subsidies based on previous estimates, research studies

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[18] World Trade Organization, Ministerial Declaration of 19 December 2015, WTO Doc. WT/MIN(15)/DEC (2015).

[19] G. A. Res. A/RES/70/1, Transforming our world: the 2030 Agenda for Sustainable Development, Target 14.6 (Oct. 21, 2015) [hereinafter UNSDG Target 14.6].

[20] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Dec. 30, 2018, M.F.A.T. B2018-08, https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents (signed by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam) (supersedes the TPP).

[21] *Id.*

and WTO Members' notification to the WTO. The next part attempts to examine the fisheries subsidies based on different data sources and with particular emphasis on fuel subsidies.

III. ESTIMATES OF GLOBAL FISHERIES SUBSIDIES

The most recent estimates from 2019 (by Rashid Sumaila et al.),[22] suggest that global fisheries subsidies were provided to the extent of USD 35.4 billion in 2018. A closer look at the distribution reveals that 'capacity-enhancing' subsidies constituted the largest share at over USD 22.2 billion. Fuel subsidies (including fuel-specific tax exemptions) formed the largest subsidy type at 22% of the total global subsidies, followed by subsidies for fisheries management (19% of the total) and non-fuel tax exemptions (15% of the total).

However, the extent and amount of fisheries subsidies notified to the WTO by Members, owing to the notification obligations under the ASCM,[23] are far less. In a review by the Centre for WTO Studies of the notifications of fisheries subsidies to the WTO up to September 2019, the total amount of notified fisheries subsidies was only US $4.45 Billion. What explains this vast difference in fisheries subsidies figures? First, the report by Sumaila et al. used an estimation methodology where the subsidies are not notified by countries. This is based on modelling techniques. Second, the Members notify WTO of only specific subsidies, i.e. subsidies which are 'specific to the fisheries sector'. Hence, a significant portion of fuel subsidies, which account for the largest component of fisheries subsidies, remains unreported to the WTO, these not being 'specific to the fisheries sector' of many countries, particularly in developed countries.

A. The Conundrum of Fuel Subsidies

An important aspect of the negotiations is the treatment of fuel subsidies. The general approach is to prohibit subsidies that are 'specific to the fisheries sector', as per provisions of the ASCM. This may prove to be a point of divergence since in the case of many developed countries, the fuel subsidies may not be 'specific to the fisheries sector' in view of the design of tax-rebate schemes in their systems, while in the case of other countries, including India, the fuel subsidy schemes are 'specific to the fisheries sector'. As per statistics of an Organisation for Economic Co-operation and Development (OECD) report of 2012, fuel subsidies of

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[22] Sumaila et al., *Updated estimates and analysis of global fisheries subsidies*, 109 MAR. POLICY, 4 (2019).
[23] ASCM, *supra* note 8, art. 25.

developed countries were to the extent of $2 Billion.[24] Further, as discussed above, the report by Sumaila et al. mentions that fuel subsidies account for the highest component, roughly 22%, of the fisheries subsidies. In light of this, India has proposed that even non-specific fuel subsidies, which benefit the fisheries sector, should be subject to disciplines because these are as harmful as specific fuel subsidies. Based on India's proposal the NGR Chair has included a text in Scope Article 1 which remains an unresolved issue. This has been explained in detail towards the end of this part.

Owing to the lack of complete information on fuels subsidies, WTO Members requested the Secretariat to compile information on fuel subsidies. On the basis of Members' request, the Secretariat identified a range of sources for such information — relevant databases compiled by the WTO, OECD, other relevant institutions and organisations, and academic and technical papers. These contained information on fuel subsidies/supports in general, on fisheries subsidies/supports in general, and on fuel subsidies/supports to fisheries. Drawing upon these sources, the Secretariat prepared an overview of this information,[25] aimed at providing a factual framework on the global scenario of fuel subsidies. Data sources used were Members' notifications to the WTO, OECD estimates, APEC, and other research studies.

B. *What are fuel subsidies to the fisheries sector?*

Fuel constitutes a substantial component of the cost of fishing. Although the actual proportion varies with different fisheries, it can be estimated to amount to 60% of total costs.[26] Fuel subsidies/supports for fisheries are often in the form of tax incentives to compensate for the (sometimes large) differences in fuel taxes among different territories.

In considering information on fuel subsidies, it is important to recall the range of different definitions used by different sources, which in turn are not identical to the ASCM definition. For example:

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[24] Roger Martini, *Fuel Tax Concessions in the Fisheries Sector* (OECD Food, Agriculture and Fisheries Papers, No. 56, 2012), https://www.oecd-ilibrary.org/docserver/5k9bdccqft30-en.pdf?expires=1631424334&id=id&accname=guest&checksum=3220A48745BA0FDCC20112F9767D7B37 [hereinafter Martini].
[25] World Trade Organization, Fisheries subsidies — Fuel subsidies to the fisheries sector, Negotiating Group on Rules, Unofficial room document, WTO Doc. RD/TN/RL/78 (Feb. 22, 2019) [hereinafter Unofficial Room Document].
[26] Sumaila et.al, *The World Trade Organization and global fisheries sustainability*, 88 FISHERIES RESEARCH, 1–4 (2007).

- *The FAO* defines fisheries subsidies in broad terms as: "*government actions or inactions outside of normal practices that modify - by increasing or decreasing - the potential profits by the industry in the short-, medium- or long-term*".[27] With respect to fuel, this definition includes direct payments by a government to the fisheries industry related to fuel and full or partial exemptions from taxes on fuel;
- *The OECD paper* on fuel tax concessions in the fisheries sector defines a fuel subsidy to fishers, by broadly mapping various budgetary transfers and non-budgetary transfers such as fuel tax reductions/exemptions. According to the paper, "a fuel subsidy (to fishers) is defined as a rebate, refund, expenditure or reduction (to fishers) from Value Added Taxes (VAT) and other such direct fuel taxes that are normally levied by the government on fuel users in the economy; price controls that suppress fuel prices below normal market prices; and, programmes that provide direct transfers or payments";[28]
- *The APEC 2000* study also adopted a broad definition of fisheries subsidies and has included a number of support programmes that, in the words of the study, "would not ordinarily be considered as providing subsidies",[29] such as management and conservation measures; and
- *Sumaila et al. (2006)* defined fuel subsidies as the price differential between what fishers pay for fuel as compared to other users in a given economy. However, as mentioned in the WTO compilation of fuel subsidies (footnote 26), it is not clear whether the "other users" referred to are private consumers or other commercial enterprises.

In addition to information on fuel subsidies, the WTO Secretariat also gathered information on dual pricing schemes, road tax exemptions, export duties, and other export restrictions on fuel benefiting fishers. These terms were understood to mean:

- Dual pricing schemes: where the same fuel product is sold at different prices to different types of purchasers;
- Road tax exemptions: where fishers are exempt from fuel tax destined for road funds; and

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[27] Food and Agriculture Organization of the United Nations, Report of the Expert Consultation on Identifying, Assessing and Reporting on Subsidies in the Fishing Industry, FIPP/R698 (Dec. 3–6, 2002).

[28] Martini, *supra* note 24.

[29] APEC Committee on Trade and Investment, Study Into the Nature and Extent of Subsidies in the Fisheries Sector of APEC Members Economies, ¶ 3.2, APEC/00-FS-01.1 (Oct. 2000), https://www.apec.org/Publications/2000/10/Study-into-the-Nature-and-Extent-of-Subsidies-in-the-Fisheries-Sector-of-APEC-Member-Economies-2000.

- Export duties and other export restrictions on fuel: where general or specific taxes on goods or services are payable when fuel is exported, or where there are limitations applied that could restrict fuel exports.

C. *Total global and regional fisheries subsidies*

The factual paper of the WTO highlights the varied estimates of global fisheries subsidies.[30] It mentions that the FAO estimated total global fisheries subsidies at USD 54 billion in 1992. The World Bank estimated such global subsidies at USD 14 to USD 20 billion in 1998. Regional estimates by the APEC Secretariat for the members of APEC in 2000 found that the total value of supports to fisheries among these economies was USD 12.6 billion. More recent studies led by Sumaila et al. as part of the 'Sea Around Us' project have estimated global fisheries subsidies in 2009 at about USD 35 billion, of which fuel subsidies to the fisheries sector were estimated at USD 7.7 billion.

In OECD Working Paper No. 56, fisheries fuel subsidies for OECD Members and participating non-OECD economies were estimated to be about USD 2 billion in 2008.[31] Drawing on this Working Paper, and using a different methodology, Borrello et al. (2013) estimated fuel subsidies for the EU fishing fleet at around EUR 1 billion per year over the period 2002–2011.

It is essential to understand the extent of global fisheries subsidies, while negotiating the disciplines on fisheries subsidies. As can be seen by the varied estimates of fisheries subsidies and within the spectrum of overall fisheries subsidies, it is further difficult to know what the extent of fuel subsidies is — whether specific or non-specific.

D. *WTO Members' Notification Obligations under ASCM*

There has been a history of lax compliance by WTO Members as far as notification obligations under Article 25 of the ASCM are concerned. In the Secretariat's compilation, only eight Members notified the total of 24 programmes identified as fuel subsidies to the fisheries sector, these being Brazil, Canada, Switzerland, India, China, Mexico, the Philippines, and the USA.

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[30] Unofficial Room Document, *supra* note 25.
[31] *See* Martini, *supra* note 24.

The Centre for WTO Studies' Indian Institute of Foreign Trade (IIFT) reviewed the subsidy notifications of Members during 2019. On a review of subsidy notifications of 17 Members that contained information about fisheries subsidies, it was found that the fuel subsidies notified to the WTO by those Members were only to the extent of $121.78 Million.[32]

Thus, when it comes to fuel subsidies, it becomes astounding to note that what the WTO negotiations are attempting to discipline is only around $122 Million subsidies. The reasons for this stark difference in data available on fuel subsidies can be manifold, the foremost being, as discussed above, that non-specific fuel subsidies are not required to be notified to the WTO. Other reasons could be a generally poor track record of many Members in notifying their subsidies; method of estimation of use of fuel in fisheries by studies of OECD, Sumaila et al., etc. Several energy-related programmes are being maintained in various Member countries which can be broader road tax exemptions or other horizontal subsidy programmes which also benefit the fisheries sector. Distant water fishing vessels also get fuel on the high seas, either without any taxes or under certain bunkering arrangements.

As noted above, fisheries subsidies negotiations in the WTO were driven by growing concerns of over-exploitation of marine resources causing harm to oceans and our environment. This over-exploitation of marine resources was aided by large fishing capacity created by the developed world, having the capacity to provide subsidies to their industrial fishing fleet, and in turn, providing fuel at concessional rates/or with fuel de-taxation programmes. Often it has been reported that distant water fishing is not profitable without the support of fuel subsidies.[33] Considering that fuel subsidies can constitute as much as 22% of total fisheries subsidies (as noted above), the objective of disciplining harmful fisheries subsidies will only be achieved by disciplining fuel subsidies, whether specific or non-specific.

Driven by these considerations, India's stance in the WTO negotiations has consistently been that 'non-specific fuel subsidies' should also be brought under the scope of fisheries subsidies disciplines. Based on India's proposal, the June 2021 revised 'draft consolidated chair text' of the Negotiating Group on Rules

[32] WTO Members whose subsidy notifications were studied by the Centre for WTO Studies were: Australia, Brazil, Canada, Chile, China PR, European Union (10 Member States' notifications were studied), Hong Kong China, India, Indonesia, Japan, Republic of Korea, Morocco, Norway, Peru, Russia, Thailand and USA.

[33] Research Summary, *Tracking Harmful Fisheries Subsidies* (June 2021), https://oceana.org/sites/default/files/994812/Oceana_Summary6-22.pdf.

(NGR) contains, in Article 1 on Scope, the following text — "1.2 [Notwithstanding paragraph 1 of this Article, this [Instrument] *also applies* to fuel subsidies to fishing and fishing related activities at sea that are not specific within the meaning of Article 2 of the SCM Agreement.]"[34] This text is still in brackets in the Chair's text, implying that it has not achieved a consensus among Members. It remains to be seen what position will finally emerge on this issue.

IV. THE EXTENT OF IUU FISHING

The FAO's International Plan of Action to prevent, deter and eliminate IUU fishing (IPOA-IUU) was agreed upon in 2001.[35] It spells out what constitutes "Illegal", "Unreported" and "Unregulated" fishing. Broadly, the IUU lays down a framework of obligations for national authorities, to put in place rules and regulations so that marine fishing activities are regulated from the point of registering of a vessel for fishing to point of a vessel's return from fishing with reporting of catch. There are several regional fisheries management organisations and arrangements (RFMO/A) for the management of marine fishing resources on the high seas. The IPOA-IUU recognises the role of these RFMO/As, as well as the role of national authorities of coastal States for the purpose of implementing "conservation and management measures" for marine resources.[36]

In 2009 a paper by Agnew et al. it was estimated that IUU-caught fish in 2003 was 11–19% of reported catches, representing 11–26 million tonnes of fish valued at US $10–23 billion.[37] It is very difficult to have an accurate estimation of the extent of IUU fishing, while it is globally recognised that IUU fishing occurs to a large extent. The challenges in such estimation are manifold due to the interpretation of terminology of what constitutes 'IUU fishing'. The IUU fishing can happen within the jurisdiction of a Coastal State where the fishing may be conducted by the vessels of the Coastal State without the permission of the authority or in contravention of its laws and regulations. It is very difficult to estimate such IUU fishing if the Coastal State lacks the resources to implement its national laws. A more accurate account can be made of the IUU fishing taking place within the area of competence of an RFMO as the RFMO will generally have a more robust

[34] World Trade Organization, Fisheries Subsidies Revised Draft Consolidated Chair Text, Negotiating Group on Rules, ¶ 1.2, WTO Doc. TN/RL/W/276/Rev.1 (June 30, 2021), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/RL/W276R1.pdf&Open=True [hereinafter Revised Draft Text].
[35] Food and Agriculture Organization of the United Nations, International Plan of Action for the Prevention, Deterrence and Elimination of Illegal, Unreported and Unregulated Fishing (2001), http://www.fao.org/fishery/ipoa-iuu/about/en [hereinafter IPOA-IUU].
[36] *Id.*
[37] Agnew et al., *Estimating the Worldwide Extent of Illegal Fishing*, PLOS ONE 1(2009).

implementation of its conservation and management measures. In February 2015, the FAO convened a workshop in Rome to consider methodologies for estimating IUU fishing at the global level.[38] In June 2016 a study titled "Review of Studies estimating IUU Fishing and the Methodologies Utilized"[39] (presented by Poseidon Aquatic Resource Management Ltd. upon request by the FAO) found that: (i) although many different methodologies are being used to estimate IUU catch, many estimates are not robust and methodologies not consistent; (ii) estimates of global "missing catch" made in some studies include catch that is not necessarily IUU in terms of the definitions in the IPOA-IUU; (iii) developing an updated global estimate of IUU catch may have limited benefit due to wide confidence intervals and a lack of clarity over IUU behaviours included; (iv) indicators of IUU fishing to monitor progress in combatting IUU fishing need not necessarily include global estimates of volumes of IUU fish, and could focus on other aspects such as numbers of vessels on IUU fishing vessel lists, etc.;

One of the conclusions of this study suggested that "the global estimate of IUU catch suggested by the FAO–supported workshop in Rome in 2015 is not necessary or advisable from a technical point of view."[40] Additionally however, it also stated that "there may still be a political impetus for such an estimate and that in this case, FAO may be considered the most appropriate organisation to support the development of such an estimate given its global mandate for fisheries."[41] While further attempts will be made to estimate the extent of IUU fishing, it is important to understand that much of IUU fishing being complained about is in unregulated high seas where there may be no presence of an RFMO/A or fishing by vessels of a Flag state intruding into the waters of another Coastal state without authorisation.

V. STATE OF PLAY OF NEGOTIATIONS IN THE WTO

The protracted fisheries subsidies negotiations launched under the Doha Declaration back in 2001 now seem to be headed towards a decisive phase. The main focus of WTO's "Ministerial Decision on Fisheries Subsidies" at its eleventh Ministerial Conference in December 2017 was on constructive engagement in the fisheries subsidies negotiations and to conclude the negotiations by the next

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[38] Food and Agriculture Organization of the United Nations, Report of the FAO Workshop on Impacts of Marine Protected Areas on Fisheries Yield, Fishing Communities and Ecosystems, FIPI/R1136 (June 16–18, 2015).
[39] Macfadyen G. et al., *Review of studies estimating levels of IUU fishing and the methodologies utilized*, Final Rep.1188-REG/R/01/B, POSEIDON REV. STUDIES ESTIMATING LEVELS IUU FISHING (June 3, 2016).
[40] *Id.* ¶ 3.1.
[41] *Id.*

Ministerial which was scheduled to be held in June 2020 (given the renewed sense of urgency in decisively determining subsidy disciplines that followed).[42] The conclusion of the negotiations, however, has missed several deadlines as the Ministerial Conference scheduled to be held in Nur Sultan couldn't be held due to the COVID 19 pandemic. Understandably, WTO Members are aiming to conclude the fisheries subsidies Agreement by the twelfth Ministerial Conference, now scheduled to be held in Geneva from November 30–December 3, 2021.[43] In view of the epidemiologic situation in Geneva, Switzerland, the Ministerial meeting had to be postponed.

The Negotiating Group on Rules (NGR) in its June 2021 revised 'draft consolidated chair text'[44] on fisheries subsidies has classified the prohibition of subsidies under three pillars, viz. IUU, Overfished Stocks and Overcapacity and overfishing. In addition to this, the text also addresses issues relating to its scope, important definitions used, dispute settlement mechanism, notification and transparency requirements, institutional arrangements, etc. which have been dealt with in later parts.

Under the *IUU pillar*, there is broad convergence on the aspect of entities that can make a determination of IUU fishing viz. a coastal State, a Flag state, as well as an RFMO.[45] However, there is a divergence of views on the issue of 'due process' in making IUU determination as to how much the WTO Agreement will prescribe for the same.

Under the *Overfished Stocks pillar*, there is broad convergence on the approach to be undertaken to prohibit subsidies when the stocks are found in an overfished condition, whether by a Coastal Member or by a RFMO. Again, India had sought a S&DT carve out for fishing in the territorial sea and a two-year transition period for fishing in the EEZ after recognition of stock as overfished due to multi-species fishery in tropical waters. However, the Chair's text provides for a "two-year transition period as S&DT for low income, resource-poor, and livelihood fishing

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[42] World Trade Organization Secretariat, *Eleventh WTO Ministerial Conference (MC11): Buenos Aires*, 10–13 December 2017, *in* WTO MINISTERIAL CONFERENCES: KEY OUTCOMES 229–238 (2019); World Trade Organization, Ministerial Decision of 13 December 2017, ¶ 1, WTO Doc. WT/MIN(17)/64, WT/L/1031 (2017) [hereinafter Ministerial Decision 2017].
[43] World Trade Organization, Factsheet: Negotiations on fisheries subsidies, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm#:~:text=%20Factsheet%3A%20Negotiations%20on%20fisheries%20subsidies%20%201,progress%20in%20the%20negotiations.%20Ambassadors%20in...%20More%20.
[44] Revised Draft Text, *supra* note 34.
[45] RFMOs are Regional Fisheries Management Organisations which are inter-government bodies created by Members under UNCLOS to oversee conservation and management of straddling and highly migratory fish stocks on the high seas.

up to 12 nautical miles" only. Another hurdle India is faced with is that most Members are opposed to any S&DT under the Overfished stocks pillar and that other developing countries have not demanded any S&DT in this pillar.

The Overcapacity and Overfishing (OCOF) pillar is the core of these disciplines. However, the most challenging predicament under this pillar so far, has been that Members are yet to find an agreeable approach for the prohibition of subsidies that contribute to OCOF. There is now a compromised 'hybrid' approach, viz a list approach and 'sustainability' approach. Under the former, there is a list of subsidies that are presumed to contribute to OCOF such as vessel construction, modernisation, etc.; machines and equipment for vessels and operating costs including fuel, etc. The 'sustainability approach' allows members to grant otherwise prohibited subsidies "if the subsidizing member demonstrates that fisheries management measures are implemented to maintain the stocks at a 'biologically sustainable level'".[46]

> A biologically sustainable level is the level determined by a coastal Member having jurisdiction over the area where the fishing is taking place, using reference points such as maximum sustainable yield (MSY), or other reference points such as level of depletion, or level of or trend in time series data on catch per unit effort, commensurate with the data available for the fishery; or by a relevant RFMO/A in areas and for species under its competence.[47]

The sustainability approach has been pushed by members like the EU, Japan, Korea, Chinese Taipei — the traditional big subsidisers who are capable of demonstrating the sustainability of fish stocks while continuing to grant subsidies. Countries like the US, Australia, New Zealand, Canada, Norway, 6 LAT group,[48] have also supported this approach as a compromise. Yet some Members still prefer an approach whereby a subsidy is categorised as contributing to OCOF "when a stock is being fished at a rate of fishing or with a measurement of fishing capacity that is greater than would allow the stock to be maintained at a biologically sustainable level."[49] Further, the ACP group,[50] was strongly opposed to the sustainability approach. India has also been voicing concerns that those who provided subsidies in the past and built huge capacities, must take up more obligations, following the 'polluter pays' principle.

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[46] Revised Draft Text, *supra* note 34, art. 5.1.1. "A subsidy is not inconsistent with Article 5.1 if the subsidizing Member demonstrates that measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level."
[47] *Id.* at 10.
[48] 6 LAT comprises of Argentina, Costa Rica, Colombia, Panama, Peru and Uruguay.
[49] Australia had moved such proposal.
[50] ACP is a sixty-member group of African, Caribbean and Pacific countries.

VI. SEEKING S&DT IN FISHERIES SUBSIDIES NEGOTIATIONS

As highlighted previously, a very important component of fisheries subsidies negotiations has been appropriate and effective S&DT for developing countries and LDCs. Although this provision finds mention in significant resolutions such as the mandate of WTO's eleventh Ministerial Conference,[51] and UNSDG Target 14.6,[52] it has become a highly contentious issue with strong a divergence of views among Members.

Members like India, the ACP group, LDCs group, Indonesia, Sri Lanka, and Vietnam have been seeking effective S&DT in these negotiations. India made a proposal seeking S&DT, as an exception to the subsidy disciplines, for LDCs and developing countries, reflecting their legitimate needs, keeping in view the developmental priorities and concerns over food and nutritional security.[53] By this, it sought to secure the livelihoods of fishermen, who are resource-poor and marginalised, and address capacity constraints in implementing the disciplines being negotiated. The carve-outs proposed in respect of fishing within 'territorial seas', from the disciplines for developing countries and LDCs, is critical as subsistence, artisanal, and small-scale fishermen predominantly fish in territorial waters, hence requiring their needs to be dealt with differently.

In the IUU pillar, India has sought S&DT carve out for Unreported and Unregulated fishing (U&U) for LDCs and developing countries for fishing activities up to territorial sea (12 nautical miles) by vessels other than large scale industrial fishing vessels. For fishing in EEZ and RFMO areas, India has sought S&DT for U&U as a transition period of 7 years. The Chair's text provides a two years transition period for low income, resource poor and livelihood fishing activities within 12 nautical miles. This is considered highly inadequate by India. In the pillar of prohibition of subsidies that contribute to OCOF, India has sought S&DT carve out for LDCs. For developing countries, India has sought to carve out up to the territorial sea (12 nautical miles). For fishing in the EEZ and areas falling under competence of RFMOs, India has sought S&DT for developing countries based on four criteria viz. i) if the GNI per capita is less than $5000 (based on constant 2010 $); ii) if share in global marine capture catch is less than 2%; iii) if a member does not engage in distant water fishing; and iv) the share in GDP from Agriculture, forestry, and fishing is more than 10%, such that if any

[51] Ministerial Decision 2017, *supra* note 42.
[52] UNSDG Target 14.6, *supra* note 19.
[53] World Trade Organization, Article [X]: Special and Differential Treatment, Communication from India, Negotiating Group on Rules, WTO Doc. TN/RL/GEN/200/Rev.1 (Mar. 6, 2020).

one of these four criteria is satisfied, the developing country should be allowed to continue to avail the S&DT.[54] These S&DT criteria are in the nature of a transition period taking into account the duration by which developing countries will graduate out of these four eligibility criteria. However, developed countries see these four criteria as providing a permanent carve-out and are thus strongly opposed to it. Developing countries, on the other hand, continue to strive hard to secure an appropriate and effective S&DT.

Developed countries such as the USA, Australia, New Zealand, Japan, EU, Canada, and Russia strongly oppose a horizontal broad S&DT exception for developing countries and LDCs. They are also supported by a group of Latin American countries viz. Argentina, Peru, Colombia, Costa Rica, Panama, and Uruguay (6 LAT). In their view, some of the developing countries are also the major marine capture producers such as China, Indonesia, India, who will benefit from the S&D exception.

VII. PROHIBITION OF SUBSIDIES FOR IUU FISHING – DUE PROCESS REQUIREMENT IN IUU DETERMINATION

In accordance with UNSDG Target 14.6, Members were mandated to engage in negotiations to prohibit certain forms of fisheries subsidies that contributed to OCOF and eliminate subsidies that contributed to IUU.[55] Further, the Ministerial Decision of WTO's eleventh Ministerial Conference in Buenos Aires also gave the mandate to *conclude* the negotiations on fisheries subsidies by the next Ministerial meeting.[56]

The consolidated draft Chair's text issued on 30 June 2021 by NGR Chair contains 11 Articles with Article 1 on Scope, Article 2 on Definitions, Article 3 to 5 are the three pillars of negotiations of core disciplines, viz. Article 3 on IUU; Article 4 on Overfished Stocks and Article 5 on Overcapacity and Overfishing. Article 8 is on Notification and Transparency, Article 9 on Institutional Arrangements, Article 10 on Dispute Settlement, and Article 11 contains Final provisions.[57]

Under Article 3 of the 'draft consolidated chair text', that pertains to "prohibition of subsidies to Illegal, Unreported and Unregulated fishing (IUU)", there is broad convergence on the provision that "[no] Member shall grant or maintain any

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[54] *See id.* X.3(c).
[55] UNSDG Target 14.6, *supra* note 19.
[56] Ministerial Decision 2017, *supra* note 42.
[57] Revised Draft Text, *supra* note 34.

subsidy to a vessel or operator engaged in IUU fishing."[58] The term 'IUU' is defined herein as referring to "activities set out in paragraph 3 of the *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* adopted by the FAO in 2001 (IPOA-IUU)."[59]

The IPOA-IUU, adopted in 2001, is a voluntary code of the FAO.[60] The three elements of IUU are set out in paragraph 3 of the IPOA-IUU which can be explained as under:

- Illegal fishing refers to activities conducted either by a coastal state's own vessels or by foreign vessels in the waters under the jurisdiction of a coastal state, i.e. within the EEZ of a coastal state. Such illegal fishing can be fishing without permission to fish or in contravention of the laws and regulations of the coastal state. Illegal fishing will also include fishing in the area of competence of an RFMO which is in contravention of the conservation and management measures of the RFMO.
- Unreported fishing implies fishing activities that are not reported or are misreported to the relevant national authority or the relevant RFMO. The objective is that fish catch must be accurately reported to the appropriate authority under whose jurisdiction fishing activity is taking place.
- Unregulated fishing refers to fishing activities conducted by vessels that cannot be identified by their nationality or by such vessels that do not belong to a party to an RFMO, and fishing is conducted in a manner that is inconsistent with the conservation and management measures of the relevant RFMO. Fishing in areas in which there are no applicable conservation and management measures, such as unregulated High seas, can also be treated as Unregulated if it is conducted in a manner which is contrary to a State's responsibility under international law, such as UNCLOS. Notwithstanding, the provisions relating to Unregulated fishing, the IPOA-IUU recognises that certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the IPOA-IUU.

Under Article 3.2 of the 'draft consolidated chair text', there are three types of entities that can make an IUU determination, viz.,[61] first, a coastal State, for activities occurring within the waters under its jurisdiction; second, a Flag State Member, for activities pertaining to vessels distinguished by its flag; and third, a

[58] *Id.* art. 3.1.
[59] IPOA-IUU, *supra* note 35, ¶ 3.
[60] *Id.*
[61] Revised Draft Text, *supra* note 34, art. 3.2.

RFMO/A in accordance with the rules and procedures of the RFMO and relevant international law,[62] in areas and for species under its competence.

In furtherance of this and more significantly, Article 3.3 of the 'draft consolidated chair text' prescribes that the prohibition will apply "only when the coastal Member's IUU determination is *based on positive evidence* and *follows due process*."[63] This text in Article 3.3 (b) is still in brackets signifying that it has not been agreed to by all Members. The reservation of Members on this 'due process' requirement is based on several different counts. Some members hold the view that a coastal Member's IUU determination is made based on the due process enshrined under their national laws. They do not want a WTO panel, in the situation of a dispute, to adjudicate on the issue of 'due process' followed as per the national law of a Member, since doing so would amount to opening their domestic laws to the organisation's scrutiny. Other Members want more specific provisions on the elements of 'due process' to be included in the text. A previous version of the Chair's text had elements of 'due process' where the IUU determining entity was to follow 'fair, transparent, and non-discriminatory procedures'. However, this also did not garner convergence among Members, and the Chair in its wisdom, introduced the phrase "based on positive evidence and follows due process" as encompassing procedural fairness.

Introducing a language on 'due process' in the fisheries subsidies discipline has been posing challenges for the negotiators. In public international law, there is no express definition of "due process" but it is rather said to differ from jurisdiction to jurisdiction, depending on diversity in social, economic, and cultural factors. For instance, the concept *per se* does not exist in India and appears in a narrowed form under its Constitution as "procedure established by law". Therefore, the concept of due process being understood and interpreted differently in different jurisdictions, it is reasonably clear that incorporating the "due process" requirement without an objective qualifier in a *multilateral* treaty may pose some challenges, since otherwise, the probability of discord between different WTO Members regarding its interpretation and fulfilment, are at a higher incidence of occurring. For the purpose of IUU determination, every Member has its domestic laws and regulations to tackle the subject of IUU determinations.

Related to this issue of IUU determination is how much deference is to be given to the domestic law for IUU determination by a coastal Member. In the previous

[62] For instance, the UNCLOS, UN Fish Stock Agreement, etc.
[63] Revised Draft Text, *supra* note 34, art. 3.3(b).

version of the Chair's text, there was a provision alongside the activities that entailed IUU and it read as:[64]

> 'Illegal, unreported and unregulated (IUU) fishing' refers to activities set out in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing adopted by the UN Food and Agriculture Organization (FAO) in 2001[, *where applicable, as implemented under national fisheries laws and regulations*, or under relevant Regional Fisheries Management Organization or Arrangement (RFMO/A) management and conservation rules and procedures].

Some Members hold the view that, the inclusion of the phrase "where applicable, as implemented under national fisheries laws and regulations," in the text, served as a sense of comfort to them, in as much as that the IUU determination by a coastal state/Member would have been 'as implemented under national fisheries laws and regulations'. Further, this was considered necessary in view of the national laws of Members having firstly, provisions to deal with IUU as per their own national plan of action to deal with IUU fishing; secondly giving due regard to their domestic situations and thirdly, the possibility of dealing differently with aspects such as small artisanal fishing activities, foreign fishing vessels and conservation, and management measures, etc. Thus, some members held the view that the laws to effectively tackle IUU fishing could not be as straight-jacketed as envisaged by the FAO's IPOA-IUU, but rather be guided by national priorities. However, in the revised June 2021 'draft consolidated chair text', the phrase "where applicable, as implemented under national fisheries laws and regulations," did not find a mention because several WTO Members were of the view that the use of this language might give rise to significant diversity in implementation of IUU provisions of paragraph 3 of IPOA-IUU by different Members. In addition, these Members held the view that introducing such a language may throw open to WTO scrutiny, the Members' domestic laws enacted to tackle IUU fishing. Divergence of views on this issue has remained as the negotiations have progressed.

VIII. RELATIONSHIP OF THE NEW FISHERIES SUBSIDIES INSTRUMENT WITH OTHER INTERNATIONAL LEGAL INSTRUMENTS

There are several international instruments, both legal and voluntary in nature, which govern maritime zones, global fisheries resources, and conservation and management measures. Some such instruments include:

[64] World Trade Organization, Fisheries Subsidies Draft Consolidated Chair Text, WTO Doc. TN/RL/W/276 (May 11, 2021).

(a) *The United Nations Convention on the Laws of the Seas (UNCLOS)* – The Convention being signed in 1982, was effectuated in 1994 with the signing of its 60th member, and since then, States have continued to ratify it, with 167 member countries including the EU becoming a party to it by June 2016.[65] This multilateral agreement holds significance owing to the comprehensive legal framework that it has established, in order to regulate pertinent aspects of maritime governance, such as — "limits of the territorial sea, navigational rights, the exclusive economic zones, legal status of resources on the seabed beyond the limits of national jurisdiction, conservation, and management of living marine resources, protection of the marine environment, marine scientific research and settlement of disputes between States", etc.[66] Most importantly, the UNCLOS addresses the issue of balancing the powers of coastal States and flag States in maritime zones closer to the coastal States (being more prone to conflict).

(b) The 1993 FAO *"Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas"*[67] – The FAO adopted this Agreement within its framework to encourage fishing vessels on the high seas to comply with international conservation and management measures. It is aimed at preventing the practise of "reflagging of vessels", because it is a commonly used method to circumvent compliance with domestic or international fisheries conservation and management regulations. It requires State parties to take every necessary precautionary measure so as to ensure that fishing vessels authorised to fly their flag do not partake in any conduct that would compromise or undermine the efficacy of international conservation and management measures.

(c) The 1995 UN Agreement for the *"Implementation of the Provisions of the 1982 UN Convention on the Law of the Sea, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks"*,[68] provides for a management framework premised on precautionary principles and the best scientific information available, with the main aim of addressing overexploitation of straddling and migratory fish stocks in regions adjacent to

[65] Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter The UNCLOS].
[66] Abdullah Al Arif, *An Introduction to International Fisheries Law Research,* GLOBALEX (Feb. 2018) [hereinafter Al Arif].
[67] Food and Agricultural Organization of the United Nations, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Apr. 24, 2003, 2221 U.N.T.S. 91.
[68] Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Dec. 11, 2001, 2167 U.N.T.S. 88.

EEZs, these being waters of tension between coastal States [that try to apply 'conservation and management measures'] as compared to flag States [wanting to concentrate much of their fishing fleet in these regions].[69]

(d) The 1995 FAO *Code of Conduct for Responsible Fisheries*,[70] was unanimously adopted by over 170 member Governments of the FAO Conference in 1995. The Code is comprised of a set of principles, aims, and components relating to the preservation, management, and enhancement of live marine resources while giving due regard to the ecosystem and biodiversity. A drawback of this Code remains that despite it representing a global consensus/understanding on a wide variety of concerns that continue to grapple the fisheries sector, its implementation is voluntary rather than compulsory. Yet, its significance cannot be denied owing to the fact that some of its stipulations have already been made legally binding by the UNCLOS.

(e) The *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2009,* which as the name suggests, seeks to address IUU fishing by way of implementation of port State measures. The agreement entered into force on June 5, 2016 and as of now, 69 countries are parties to it.[71]

(f) The *FAO's IPOA-IUU*–[72] As already discussed in preceding parts, the FAO introduced four International Plans of Action (IPOAs) to address issues raised by its Code of Conduct. Just like the Code of Conduct for Responsible Fisheries, these are non-legally binding instruments, aimed to "prevent, deter and eliminate Illegal, Unreported and Unregulated Fishing". This plan, adopted in 2001, forms the basis for developing WTO disciplines on the prohibition of subsidies for IUU fishing.

(g) *RFMOs* – One type of response to international concerns over the conservation of high seas marine fishery resources has been carrying out regional action, often through States' cooperation in establishing regional organisations. These organisations are generally referred to as Regional

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[69] Warner et al., *An Ecosystem Approach to Management of Seamounts in the Southern Indian Ocean*, 3 LEGAL & INSTITUTIONAL GAP ANALYSIS (2012).

[70] Food and Agriculture Organization of the United Nations, Code of Conduct for Responsible Fisheries (Oct. 31, 1995), http://www.fao.org/3/v9878e/v9878e00.htm#:~:text=The%20Code%2C%20which%20was%20unanimously,the%20environment%20(Annex%202).

[71] Food and Agriculture Organization of United Nations, Agreement on Port State Measures (PSMA) (June 5, 2016), http://www.fao.org/3/i5469t/I5469T.pdf [hereinafter PSMA].

[72] *See* IPOA-IUU, *supra* note 35.

Fisheries Management Organizations (RFMOs). The Agreement on Port State Measures, 2009 defines an RFMO as: "*an intergovernmental fisheries organization or arrangement, as appropriate, that has the competence to establish conservation and management measures.*"[73] These RFMOs also function as technical and policy forums, making decisions on fisheries resources' conservation, management, development, and responsible usage. The mandates of RFMOs differ. Some RFMOs have an advisory mandate and give non-binding advice, decisions, or cooperating mechanism solutions to their members; while others have a management mandate and the management decisions they make are obligatory upon the members.[74]

As the negotiations in the WTO progress towards a conclusion, and members decide on the mechanisms for implementation, it is important to ensure that the delicate balance between what lies within the competence and domain of the WTO on one hand and what lies within the competence and domain of the various international conventions, legal frameworks, national, regional and international authorities that have evolved on the other, is maintained, to be able to address issues relating to conservation, management and sustainable use of fisheries resources in an efficacious manner.

The issues involved in maintaining this delicate balance between the existing international instruments on fisheries and the new WTO agreement or instrument on Fisheries subsidies have been examined in greater detail under three core aspects:

(a) Inter-se relations between the provisions under international instruments on fisheries and the new Fisheries subsidies Agreement;
(b) IUU determination by coastal states and RFMOs; and
(c) Dispute settlement under the new Agreement.

A. Inter-se relations between the provisions under international instruments on fisheries and the new Fisheries subsidies Agreement

The UNCLOS introduced a number of provisions, covering, most significantly, issues such as setting limits, navigation, archipelagic status and transit regimes, EEZs, continental shelf jurisdiction, the exploitation regime, protection of the marine environment, scientific research, and settlement of disputes. It replaced the older 'freedom of the seas' concept, dating back to the 17th century. According

[73] PSMA, *supra* note 71, art. 1(j).
[74] Al Arif, *supra* note 66.

to this concept, national rights were limited to a specified belt of water extending from a nation's coastlines, usually 3 nautical miles (5.6 km; 3.5 mi). All waters beyond national boundaries were considered international waters: free to all nations, but belonging to none of them. Under the UNCLOS, the EEZ of a coastal state now extends up to 200 nautical miles from the baseline.[75]

Article 56 of the UNCLOS contains the rights, jurisdiction, and duties of the coastal State in its EEZ stating that in the EEZ, the coastal State has sovereign rights for the purpose of exploring, exploiting, conserving, and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil.[76] The new fisheries subsidies discipline seeks prohibition of subsidies when the stocks in a fishery under the jurisdiction of a coastal State are recognised as overfished. For instance, Article 4 of the 'draft consolidated chair text' proposes disciplines on the prohibition of subsidies when stocks in the relevant fishery are recognised as overfished.[77] As per the text, a fish stock can be considered overfished if it is recognised as overfished by the coastal Member under whose jurisdiction the fishing is taking place or by a relevant RFMO/A in areas and for species under its competence based on the best scientific evidence available to it.

In as much as UNCLOS provides a sovereign right to a coastal State for exploring, exploiting, conserving, and managing the marine resources within its EEZ, the determination of the status of fish stocks being overfished or not has to be left to the coastal State. In light of this, the emerging disciplines can give rise to situations where the stock status determination by a coastal state may be made the subject of a challenge by another WTO Member, by either bringing the issue before a Committee of the WTO or be raised as a dispute before the WTO (request for consultations).

The negotiations are aimed towards prohibiting subsidies that contribute to overcapacity and overfishing. What contributes to overcapacity and overfishing is an issue that the WTO negotiations have been grappling with right since the negotiations were launched in WTO Doha Ministerial of 2001. Several pertinent questions deserve attention on this aspect. Whether overcapacity always contributes to overfishing or whether having more fishing capacity than a member requires to fish sustainably will always be termed to be overcapacity? Who determines overcapacity so that a discipline on prohibition can be triggered — a Member itself, for fishing in its jurisdiction i.e. up to 200 nautical miles or an RFMO, in areas of its competence? What if the subsidising member has

[75] The UNCLOS, *supra* note 65, art. 57.
[76] *Id*. art. 56.
[77] Revised Draft Text, *supra* note 34, art. 4.

conservation and management measures through which it can demonstrate that the fishery is at a biologically sustainable level? This has led to the development of a hybrid approach that has evolved over these years of long-standing negotiations as explained in the earlier parts.[78] Article 5.1 of the 'draft consolidated chair text' contains a list of subsidies such as "subsidies for vessel construction, modernisation, etc. subsidies for the purchase of machines and equipment for vessels operating cost subsidies such as for fuel, ice, or bait etc. Further, under Article 5.1.1, a subsidy is not inconsistent with Article 5.1 (those enumerated in the above list) "if the subsidising Member demonstrates that measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level."[79] This 'hybrid' approach is dubbed as a compromise to find a way out from intractable positions of Members — those pushing for strong disciplines to prohibit all subsidies in the list for all with S&DT for developing countries on one hand and those advocating for the approach of 'sustainability' i.e. based on conservation and management measures, on the other. This is an imperfect solution to the menace of overfishing occurring at the global level, which is compounded due to the subsidies being provided by the nations.

Again, certain serious questions beg attention. To what extent could a WTO member's stock status determination, its fishing fleet's capacity — whether sustainable or not, or the conservation and management measures undertaken by it, be reviewed by the WTO Committee?; What technical competence can be attributed to a WTO Committee reviewing these measures without the support of experts from the FAO or other international organisations dealing with the fisheries industry? These challenges are bound to occur when the new Fisheries subsidies agreement will reach its implementation stage.

B. IUU determination by a Coastal Member and RFMOs — Analysing Possible Conflicts

The disciplines proposed under Article 3 of the 'draft consolidated chair' text' provide a coastal Member with the right to make an affirmative determination on whether a vessel or operator had engaged in IUU fishing in waters under its jurisdiction.[80] Now if IUU fishing is to be interpreted in accordance with paragraph 3 of the IPOA-IUU,[81] the issue of interpretation and implementation of national laws to deal with IUU fishing will arise. In the case of IUU determination

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[78] *Id.* art. 5.1, 5.1.1.
[79] *Id.*
[80] *Id.* art. 3.
[81] IPOA-IUU, *supra* note 35, ¶ 3.

in respect of its own vessels, the authority to do so is left upon a coastal Member, by applying its relevant national laws. Here, the issue of 'whether a coastal State not taking cognizance of any perceived IUU fishing activity by its own vessels and within its own jurisdictional waters can be a ground for a challenge by other WTO Members may be raised with the WTO Committee. When it comes to IUU determination by a coastal Member in respect of other flag States' vessels, the issue of 'due process' may arise in case there is a disagreement in the coastal Member's IUU determination with that of the other flag State/Member (most likely a subsidising Member). In tackling this issue, several other aspects such as — on the basis of what positive evidence was the IUU determination made?; whether the vessels/operators of the flag State were afforded the opportunity to defend their position/?; whether such determination by a coastal Member can become the subject of a WTO dispute brought by an aggrieved flag state Member? In the event of a dispute, to what extent can the national law of a coastal Member be subjected to a review by a WTO Panel? — will require careful deliberation when the new discipline will be implemented.

As per the 'draft consolidated chair text', an RFMO also possesses the right to make an IUU determination under Article 3.2. A significant hurdle, thus, is the possibility of conflicting views or determinations in respect of the *fishing conducted in the EEZ* of a coastal State which is also covered within the area of competence of an RFMO. India is a Member of the Indian Ocean Tuna Commission (IOTC), an RFMO in the Indian Ocean for Tuna and Tuna like species.[82] The area of competence of IOTC overlaps with India's EEZ. Article 56 of the UNCLOS, as noted in preceding parts, provides that in the exclusive economic zone, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving, and managing the natural resources, whether living or non-living.[83] Similarly, Article XVI of the IOTC agreement protects the sovereign rights of coastal States by stating that:

> This Agreement shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction.[84]

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[82] Food and Agriculture Organization of the United Nations, Agreement for the Establishment of the Indian Ocean Tuna Commission, http://www.fao.org/fishery/rfb/iotc/en [hereinafter IOTC Agreement].
[83] The UNCLOS, *supra* note 65, art. 56.
[84] IOTC Agreement, *supra* note 82, art. XVI.

The objectives and functions of the IOTC include, inter-alia that "*The Commission shall promote cooperation among its Members with a view to ensuring, through appropriate management, the conservation and optimum utilization of stocks covered by this Agreement and encouraging sustainable development of fisheries based on such stocks*."[85]

The objectives of IOTC for conservation and management of Tuna and Tuna like species are pursued through the Scientific Committee. The Scientific Committee was established as an advisory body to the Commission. Resolutions are brought before the Scientific Committee for adoption by the IOTC members. A member of the IOTC has the right to object to a particular 'conservation and management measure' of the Commission within 120 days from the date of its adoption by the Commission,[86] and in such an event the resolution will not be considered binding on the objecting Member. However, the overarching Article XVI of the IOTC protects the sovereign rights of coastal States for the purposes of exploring and exploiting, conserving, and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction.

Therefore, the role of an RFMO in the determination of IUU fishing by vessels of a Coastal state within its EEZ, which coincides with the area of competence of the RFMO, has to be circumscribed by the protection provided under the UNCLOS and the IOTC Agreement. The determination by an RFMO for fishing activities in the EEZ of a coastal Member cannot be absolute. However, the emerging disciplines under Article 3 of the 'draft consolidated chair text' on IUU determination have the potential to override the rights of a coastal State provided under the UNCLOS and IOTC Agreement. This is a cause of concern and this issue has been highlighted by India during the negotiations by suggesting certain safeguards. India proposed the following text to be incorporated in Article 1 on Scope:[87]

> 1.3 The provisions of this [Instrument] shall apply subject to the international law of the sea and relevant instruments, and the sovereign rights of coastal states provided for therein, for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under the coastal Member's jurisdiction.

[85] *Id.* art. V (1).
[86] *Id.* art. IX.
[87] World Trade Organization, Fisheries Subsidies — India's Proposals on Scope (article 1) and Notification and Transparency, Negotiating Group on Rules, Unofficial room document, WTO Doc. RD/TN/RL/140 (June 14, 2021).

It is but a matter to be deliberated upon in the negotiations, to gauge the extent to which WTO Members can be persuaded to agree to the addition of this proposed text in the scope of the new instrument.

C. Dispute settlement under the new Fisheries Subsidies Agreement

The negotiations over the new fisheries subsidies agreement were launched due to the persistent pressure by environmentalists, NGOs, reports of World Bank and Trade & Environment Division of the WTO, etc. pointing towards the need for regulating subsidies contributing to over-exploitation of global marine resources. The negotiations are rooted in the concern over marine environment sustainability, as is evident from the UNSDG Target 14.6. While the negotiations are making progress, certain important issues pertaining to settlement of disputes, which will have a bearing on the final outcome of the negotiations, have been debated upon by the Members.

1) Whether the Dispute Settlement provision of Article 4 under the ASCM and WTO's Dispute Settlement Understanding (DSU) are applicable to the new instrument?

Under Article 10 of the 'draft consolidated chair text', the Chair has proposed the following text:

> The provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Dispute Settlement Understanding, and Article 4 of the Agreement on Subsidies and Countervailing Measures shall apply to consultations, the settlement of disputes, and remedies under this [Instrument], except as otherwise specifically provided herein.[88]

While several discussion papers had been floated by Members on the possible approach to deal with WTO disputes on fisheries subsidies, no definitive view had emerged so as to be able to serve as possible exceptions to the existing framework of 'Remedies' under Article 4 of the ASCM. Remedies under Article 4 of the ASCM fall under the rubric of 'Prohibited Subsidies' under Article 3 of the ASCM.[89] The negotiators perceived these remedies in the context of trade distortions caused by prohibited subsidies covered by Article 3, viz export subsidies and local content subsidies.

Since the new disciplines being crafted to prohibit subsidies, that support IUU fishing or which contribute to overcapacity and overfishing, are different from

[88] Revised Draft Text, *supra* note 34, art. 10.

[89] ASCM, *supra* note 8, arts. 3 & 4.

'trade-related' prohibited subsidies, several Members are of the view that the remedies to tackle prohibited subsidies under the new disciplines must be different. Yet, the starting point of the debate on applicability of DSU provisions remains the 'Standard of review' by WTO Panels.

2) Whether the 'standard of review' of fisheries subsidies related dispute cases should follow Article 7 and 11 of DSU?

Several Members have been of the view that the WTO disciplines on fisheries subsidies will require a different 'standard of review'. In dealing with a dispute, a potential significant question concerning whether a panel should only assess the *process* that a Member undertook when granting a subsidy or whether the panel's purview should include deciding on *substantial* issues of fisheries management, stock being overfished, the existence of OCOF, the credibility of national decisions on these aspects, etc. may present itself. To this end, some Members were of the view that there could be a need for a panel and/or the Appellate Body to make some technical evaluations if the disciplines contain fisheries-related reference points (i.e. stock assessments).
In this respect, Article 11 of the DSU contains the standard of review generally applicable to dispute settlement panels. Article 11 requires panels to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[90]

In EC — Hormones, the Appellate Body stated that "so far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor total deference, but rather the 'objective assessment of the facts".[91]

Members discussed various options regarding whether full or partial deference must be accorded to national determinations. For instance, Article 17.6(i) of the Anti-Dumping Agreement provides for a standard of review that gives certain deference to the determinations of domestic authorities, by stating that:

> [i]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether

[90] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.
[91] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones),* ¶ 117, WTO Doc. WT/DS26/AB/R (adopted Jan. 16, 1998).

> their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.[92]

In the context of existing WTO agreements, the Appellate Body has warned against applying for *de novo* review under Article 11 of the DSU. In its view, "a panel may not conduct a de novo review of the evidence or substitute its judgement for that of the competent authorities."[93] Accordingly, should negotiators agree that WTO panels would be permitted to review IUU and stock status determinations *de novo*; it would be advisable to state this explicitly in the fisheries subsidies disciplines. In other words, the question still remains as to whether the implementation of national laws and regulations made by competent authorities of a Member can be subjected to substantive or procedural review under WTO dispute settlement?

3) Scope of Dispute Settlement of Fisheries Subsidies Agreement

Another important issue brought up was the scope of WTO dispute settlement on fisheries subsidies. This is germane to issues such as (a) sovereign rights of members within their EEZ, (b) aversion to have a national stock assessment or IUU determination challenged in the WTO, and (c) certain exceptions provided in the UNCLOS from Dispute settlement provisions to coastal states for fishing within their own EEZ.

Members have debated upon what elements of the agreement should be subject to dispute settlement and whether there are issues that the WTO panels can or cannot review. More specifically, many potential disciplines involve fisheries management issues such as the status of a stock and whether a vessel committed IUU fishing. If at all Members wish to limit dispute settlement to subsidy issues, or to only certain aspects of the disciplines (e.g. whether necessary procedural steps were followed), it is advisable that they be *clearly* decisive about the scope of what the WTO panels can review. This may also prove to be helpful in ensuring that decisions made under the DSU do not contradict or undermine decisions made by fisheries management organisations.

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[92] World Trade Organization, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 17.6(1), https://www.wto.org/english/docs_e/legal_e/19-adp_02_e.htm#art17.

[93] Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 299, WTO Doc. WT/DS252/AB/R (adopted Dec. 10, 2003).

As has been discussed above, the UNCLOS provides sovereign rights to coastal States within their EEZ, for the purpose of exploring and exploiting, conserving, and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil. The coastal State will make stock assessment determinations and will apply 'conservation and management measures' to their fishery resources as per their national capabilities. But, to what extent can these determinations or measures be challenged in a WTO dispute and reviewed by a Panel?

During the negotiations held from 2018to 2019, conceptual suggestions through discussion papers were submitted by the Members. In one such paper by China,[94] the provisions of the UNCLOS, dealing with disputes and sovereign rights of coastal States, were highlighted.

For example, under Article 297.3 of the UNCLOS, coastal States are not obliged to agree to the submission of any dispute concerning their sovereign rights with respect to the living resources, or their exercise in their EEZ to the binding dispute settlement procedures of the UNCLOS.[95]
In accordance with Article 298 of the UNCLOS,[96] many Members also made submissions on exceptions to the compulsory binding procedures concerning law

[94] World Trade Organization, Fisheries subsidies — Adjusting the WTO dispute settlement mechanism when applied to the fisheries subsidies, Negotiating Group on Rules, Unofficial room document, WTO Doc. RD/TN/RL/107/Rev.1 (Nov. 11, 2019).
[95] The UNCLOS, *supra* note 65, art. 279.3 (a). 'Limitations on applicability of section 2', Para 3.(a): Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.
[96] *Id.* art. 298. 'Optional exceptions to applicability of section 2', Para 1. [...]a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: (a)(i)disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles [...]; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission [...]; (b) [...] disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.

enforcement activities, with regard to the exercise of sovereign rights or jurisdiction under Article 297.3.

As such, Members' rights under the UNCLOS and fisheries-related international agreements may be disregarded on grounds of the differences between the dispute settlement mechanism of WTO with that of the UNCLOS.

India's proposal on 'Scope' under Article 1.3, as mentioned above, was also inspired by the concern of protection of sovereign rights under the UNCLOS. Many Members want to adopt the WTO's provisions of 'Remedies' under Article 4 of the ASCM and the DSU whereas some Members, including India, want due recognition to be given to the provisions of other international instruments such as the UNCLOS in matters relating to dispute settlement since these preserve the rights of coastal States as far as fishing activities within their jurisdiction are concerned.

India also made a proposal,[97] as regards Article 10 of the 'draft consolidated chair text' on Dispute settlement to seek preservation of the rights of coastal States with regard to stock assessment within their own EEZ. While India's proposal is structured around the Article 10 of the Chair's text on Dispute settlement, it proposes that non-violation and situation complaints covered under GATT Article XXIII 1 (b) and (c) should not apply to Dispute settlement under fisheries subsidies disciplines. This is due to the reason that fisheries disciplines are aimed towards sustainability of resources and such provisions may not be required. India has also proposed that till Members get clarity on the types of countermeasures that can be taken in a dispute relating to fisheries subsidies, the 'Remedies' provisions applicable as per Article 4 of ASCM, should be decided later (discussed in detail in following paragraph). Further, the expedited time frame relating to prohibited subsidies under Article 4 of ASCM should not apply to disputes in fisheries subsidies where the responding party is a developing country. As discussed previously, India has also proposed that a WTO Panel shall not review the determination made by a coastal state with regard to the status of fish stocks within the jurisdiction of the coastal state. Finally, India has also proposed that matters under the purview of an RFMO should be dealt there and disputes related to RFMO matters shall not be brought before the WTO. This is with a view to preserve the coastal states rights under other international instruments.

4) Countermeasures under Article 4 of the ASCM

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[97] World Trade Organization, Fisheries subsidies — India's proposed text for article 10: Dispute settlement - Communication from India – Revision, Negotiating Group on Rules, Unofficial room document, WTO Doc. RD/TN/RL/133/Rev.1 (June 24, 2021).

A very contentious issue is the countermeasures that can be authorised in the event of a responding party's non-compliance with the ruling of a WTO panel with respect to a fishery subsidy being prohibited. Articles 4.10 and 4.11 of the ASCM contain provisions regarding countermeasures in the event the recommendation of the DSU is not followed within the time period specified by the Panel. The 'draft consolidated chair text' provides under Article 10 that remedies available under GATT, the DSU, and the ASCM Agreement shall also apply to the fisheries subsidies instrument. Most of the Members agree that withdrawal of the subsidy found to be prohibited should be the remedy in a dispute concerning fisheries subsidies.

Members recognise that the fisheries subsidies instrument is not a trade-related agreement, and the nullification or impairment will not be similar to existing WTO agreements and further, countermeasures or retaliation in the form of suspension of concession should not be applied in fisheries subsidies disputes. Moreover, so far, none of the Members have been able to propose what form of countermeasures or suspension of concessions could be applied to the fisheries subsidies instrument. The question that still remains is how enforceability of the instrument will be ensured in the absence of application of any form of countermeasures or retaliation. This issue of countermeasures is highly complex and, an agreeable approach is still elusive. The need of the hour is Members finding a right and balanced approach, compatible with the objective of sustainability of marine resources. India proposed that until Members have clarity on what form of countermeasures or retaliation is to be included in the fisheries subsidies instrument, the part titled 'Remedies' be placed under brackets.

5) What should be the legal status of the new instrument — an annexure to the ASCM or a standalone new agreement?

Members' views have been divided on the issue of placement of the new legal instrument on fisheries subsidies in the array of WTO legal texts. Earlier most Members were of the view that it should be an annexure to the ASCM, the foremost reason for this being that it deals with prohibited subsidies, which are covered under Article 3 of the ASCM. The new agreement will also rely on the definition of a subsidy under Article 1 and the concept of 'specificity' under Article 2 of the ASCM — albeit the issue of non-specific fuel subsidies. However, many Members later veered away from this position as the new disciplines, being rooted in environment sustainability, are quite different from the rest of the provisions of the ASCM, being based on trade-related distortions caused by subsidies. It is also hard to comprehend whether the new disciplines will give rise to the possibility of countervailing measures, as under the existing provisions in Part V of the ASCM. If the new instrument is going to be a stand-alone agreement, it will have to go

through the process of ratification by 2/3rd of the WTO Membership, before it becomes part of 'Annex 1 of the Marrakesh Agreement establishing the WTO'. Understandably, this process was also followed for the Trade Facilitation Agreement (TFA). Even in the event of the instrument being agreed upon as an annexure of the ASCM, it will be an amendment to the existing agreement and will require a ratification process.

IX. CONCLUSION

The fisheries subsidies disciplines, under negotiations since 2001, may finally be heading towards a conclusion with the approaching twelfth Ministerial Conference to be held from 30 November to 3 December, 2021 (now postponed due to epidemiological situation in Geneva, Switzerland). Several provisions of existing international instruments which are voluntary in nature will become binding obligations under the new WTO Agreement which can be enforced through a binding dispute settlement mechanism. Whether the new agreement will be highly ambitious or not will depend upon the will of the Members to move out of their comfort zone to make compromises. For India, the livelihood and food security concerns of its artisanal and small-scale fishermen are of paramount importance in securing an appropriate and effective special and differential treatment. Further, it would be only reasonable for those who are responsible for environmental degradation through overexploitation of marine resources, to contribute more by taking commensurate obligations.

A binding dispute settlement provision under the DSU has been a cornerstone of the predictability of various WTO Agreements. The new agreement, which is emanating from the sustainability of environment concerns, will be a new experience for WTO Members to frame a discipline in WTO's array of trade agreements to foster sustainable trade.