

FISHERIES SUBSIDIES UNDER THE *TRANS-PACIFIC PARTNERSHIP*: TOWARDS POSITIVE OUTCOMES FOR GLOBAL FISHERIES SUSTAINABILITY AND REGIME INTERACTION UNDER INTERNATIONAL LAW

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The much-anticipated Environment Chapter of the recently concluded Trans-Pacific Partnership ('TPP') includes provisions prohibiting members from granting certain subsidies to their fisheries industries and calls for the implementation of effective fisheries management systems. These provisions represent a significant step for fisheries sustainability, and come at a time when the world's oceans are facing serious challenges from overfishing and the over-exploitation of marine resources. Whilst the link between overfishing and some types of subsidies is firmly established, competing economic, political and developmental interests have hindered efforts by members of the World Trade Organization to agree upon effective disciplines in this area, despite numerous draft proposals. Members of the TPP appear to have drawn upon some of these proposals in formulating their own fisheries subsidies disciplines, overcoming, in some respects, the further challenge of 'regime interaction' by incorporating the standards and concepts of fisheries management established by the United Nations Convention on the Law of the Sea and the Food and Agriculture Organization of the United Nations. In its analysis of the TPP's fisheries subsidies provisions, this article demonstrates that whilst there is certainly scope for improvement and firmer disciplines in this area, the current provisions provide a strong base from which to move forward towards the eventual elimination of all forms of fisheries subsidies that contribute to overfishing.

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I INTRODUCTION

Overfishing represents one of the most significant challenges facing the world’s oceans and marine ecosystems today. With almost 90 per cent of fish stocks estimated to be over-exploited or fully exploited,¹ the issue is one which is having dramatic consequences at many levels, including on ecology, global food security and economic prosperity, particularly in developing countries.

The link between overfishing and certain types of fisheries subsidies has long been recognised and has recently become the subject of increased international attention. Perverse economic incentives create a situation in which governments are providing huge subsidies to maintain fishing industries which would otherwise be unable to operate, distorting global trade and leading to overfishing and unsustainable fishing practices.² The most recent study on this issue estimates global fisheries subsidies in 2009 were USD35 billion, with Japan and China providing the highest amount among developed countries.³

Recognising the need for significant subsidies reform, it was against this background in 2001 that members of the World Trade Organization (‘WTO’) agreed to negotiate to ‘clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries’.⁴ Although there have been many meetings and proposals since then — including the most recent ministerial conference in Nairobi in December 2015 — and despite the strong consensus among member states as to the nature and extent of the problem and the urgency of a solution, no firm disciplines on fisheries have been agreed.

As the debate continues in the context of the WTO and members ‘seek to reinvigorate’ the negotiations in this area,⁵ another trading regime has emerged on the international stage. Following five years of negotiations, the text of the *Trans-Pacific Partnership* (‘TPP’) was concluded on 5 October 2015.⁶ Described as an ‘ambitious, comprehensive, high standard and balanced

¹ Food and Agriculture Organization of the United Nations, ‘The State of the World Fisheries and Aquaculture’ (Report, 2016) 38.

² Margaret A Young, ‘Fragmentation or Interaction: The WTO, Fisheries Subsidies and International Law’ (2009) 8 *World Trade Review* 477, 478. See also Anja von Moltke (ed), *Fisheries Subsidies, Sustainable Development and the WTO* (Earthscan, 2011) 10.

³ Directorate-General for Internal Policies, Policy Department B: Structural Cohesion Policies, *Global Fisheries Subsidies* (Note, European Parliament, 2013) 27.

⁴ *Doha Work Programme*, WTO Doc WT/MIN/(01)/DEC/1 (20 November 2001, adopted on 14 November 2001) (Ministerial Declaration) para 28 (‘*Doha Ministerial Declaration*’).

⁵ *Fisheries Subsidies Ministerial Statement on behalf of Argentina et al (Revision)*, WTO Doc WT/MIN/(15)/37/Rev.1 (7 January 2016) para 1 (‘*Nairobi Fisheries Declaration*’).

⁶ *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force) (‘TPP’).

agreement',⁷ the TPP consists of 30 chapters — including its much-anticipated Environment Chapter — and its 12 participants ('TPP Parties')⁸ represent nearly 40 per cent of the global economy.⁹ More importantly in the context of the discussion on fisheries subsidies, the TPP Parties account for eight of the world's top 20 fishing nations.¹⁰ As such, there was hope among experts that this agreement would be used as an opportunity to address the issue of fishing subsidies, which is exactly what has transpired: the Environment Chapter includes several provisions relating to fisheries management and fisheries subsidies, including a prohibition on the granting of certain types of subsidies.¹¹ Whilst there is a divergence of opinion amongst conservation groups regarding the potential effectiveness of the fisheries subsidies provisions and the Environment Chapter in general,¹² there is no doubt that these provisions have the potential to make a significant contribution to ongoing efforts to reform fisheries subsidies disciplines and reduce overfishing.

This article will examine and critically analyse the fisheries subsidies and related provisions contained in the TPP and assess whether they are likely to achieve positive environmental outcomes for fisheries sustainability. Such an assessment will be undertaken primarily by considering the way in which these provisions have been formulated, and also by briefly considering whether appropriate methodologies and mechanisms exist for assessing their impact and ensuring their enforcement. In doing so, this article will consider the international legal rules that currently exist for fisheries management and sustainability, including those incorporated in other legal regimes such as the *United Nations Convention on the Law of the Sea* ('UNCLOS')¹³ and the Food and Agriculture Organization of the United Nations ('FAO'). These two sources of fisheries law in particular have a crucial role to play in formulating global rules and practices for the promotion of sustainable fishing, including by mandating a role for proper scientific assessment and the decisions of regional fisheries management organisations ('RFMOs'), and by addressing the issue of illegal, unreported and unregulated ('IUU') fishing, one of the main causes of

⁷ Office of the United States Trade Representative, 'Trans-Pacific Partnership Ministers' Statement' (Press Release, October 2015) <<https://perma.cc/3F96-QSVQ>> ('TPP Minister's Statement').

⁸ The 12 countries party to the TPP are: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. See Australian Government, Department of Foreign Affairs and Trade, *TPP Text and Associated Documents* (6 October 2015) <<http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>>.

⁹ Office of the United States Trade Representative, 'TPP Minister's Statement', above n 7.

¹⁰ International Centre for Trade and Sustainable Development, *Trans-Pacific Partnership Trade Pact Text Published, Environment Chapter Scrutinised* (12 November 2015) <<https://perma.cc/K2WM-79HS>>.

¹¹ TPP ch 20.

¹² See, eg, Sierra Club, 'A Dirty Deal: How the Trans-Pacific Partnership Threatens Our Climate' (Report, December 2015) <<https://perma.cc/KU87-FZK6>>; Greenpeace, 'TPP Environmental Provisions a Major Disappointment' (Press Release, 6 November 2015) <<https://perma.cc/FLY3-8G28>>. Cf World Wildlife Fund, 'WWF Statement on the Close of the Trans-Pacific Partnership Negotiations' (Press Release, 5 October 2015) <<https://perma.cc/HH2J-9R4S>>.

¹³ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) ('UNCLOS').

overfishing.¹⁴ Given the importance of these ‘regimes’ in the context of fisheries law, it is ultimately their effective interaction with global and regional trading regimes such as the WTO and the TPP which will determine the success or otherwise of any trade-specific measures aimed at promoting sustainable fishing, such as those the subject of this article. This article will also examine and compare some of the proposals for subsidies reform put forward by the WTO and its members — parts of which appear to have formed the basis of the TPP provisions — and consider how challenges, including that of ‘regime interaction’ have been approached by the TPP Parties. Finally, this paper will consider, where appropriate, how the TPP subsidies provisions could be used as a base from which to create expanded fisheries disciplines within the TPP and, potentially, within the WTO, in an effort to reduce the negative impacts of fisheries subsidies and bring about lasting positive environmental outcomes for fisheries sustainability.

II FISHERIES SUBSIDIES

A Background

Fishing is both a major source of food and a provider of employment and economic benefits for billions of people around the world.¹⁵ The FAO estimates that in 2013, fish provided 3.1 billion people with almost 20 per cent of their average per capita animal protein intake,¹⁶ and in 2012, fisheries and aquaculture supported the livelihoods of 12 per cent of the world’s population.¹⁷ For developing countries in particular, the fisheries industry is vital, representing a major source of employment and food security.¹⁸ The contribution

¹⁴ The *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unregulated and Unreported Fishing* generally defines IUU fishing as fishing activities which: (a) are conducted in contravention of the laws of a relevant state or the conservation and management measures adopted by a relevant RFMO; (b) have not been reported or have been misreported pursuant to relevant national laws or the procedures of a relevant RFMO; or (c) are conducted in the area of application of a relevant RFMO in a manner that is not consistent with or contravenes the conservation and management measures of that RFMO, or in areas or for fish stocks in relation to which there are no applicable conservation or management measures in a manner inconsistent with the obligations for the conservation of living marine resources imposed under international law: Food and Agriculture Organization of the United Nations, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unregulated and Unreported Fishing* (2001) para 3 (*IPOA-IUU*). See further nn 90–3 and surrounding text.

¹⁵ Food and Agriculture Organization of the United Nations, Fisheries and Aquaculture Economics and Policy Division, *Fisheries Management: Managing Fishing Capacity* (FAO Technical Guidelines for Responsible Fisheries, No 4, Supp 3, 2014) (*FAO Technical Guidelines*). See also David K Schorr, ‘Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fisheries Subsidies in the World Trade Organization’ (Position Paper and Technical Resource, World Wildlife Fund, 2004) xiii (*Healthy Fisheries Report*).

¹⁶ Food and Agriculture Organization of the United Nations, ‘The State of the World Fisheries and Aquaculture’, above n 1, 71.

¹⁷ *Ibid* 126, citing Food and Agriculture Organization of the United Nations, ‘The State of the World Fisheries and Aquaculture’ (Report, 2012) 209.

¹⁸ World Wildlife Fund, ‘Reforming Fisheries Subsidies’ (Briefing, November 2011) 4.

of small-scale or artisanal fisheries to employment, food security and poverty alleviation in these countries is also becoming increasingly recognised.¹⁹

In economic terms, fish remains one of the most traded global food commodities.²⁰ In 2014, it represented about nine per cent of total agricultural exports, and in respect of some developing countries it accounts for more than half of the total value of their traded commodities.²¹ However, the growing global demand for fish — driven by the globalisation of the fisheries trade²² — is a major contributing factor in the promotion of increased fishing capacity and fishing effort,²³ and has inevitably resulted in overfishing. According to the World Bank, any benefit to be derived from a globalised fisheries trade has been eroded by ineffective fisheries governance which has allowed such overfishing and the depletion of fish stocks.²⁴ The economic impact of this on the fisheries industry — in terms of the difference between the potential and net economic benefits from this industry — has been estimated at around USD50 billion per year.²⁵

Further contributing to the problem of overfishing and overcapacity are the significant subsidies provided by national governments to their fishing industries. Although the level of these subsidies is difficult to accurately quantify given there is a lack of reliable and consistent information from states on their subsidies programs,²⁶ all studies conclude that the scale of fisheries subsidies is

¹⁹ Food and Agriculture Organization of the United Nations, ‘The State of the World Fisheries and Aquaculture’, above n 1, 32. See also Roman Grynberg and Natallie Rochester, ‘The Emerging Architecture of a World Trade Organization Fisheries Subsidies Agreement and the Interests of Developing Coastal States’ (2005) 39 *Journal of World Trade* 503, 522–3. The term ‘artisanal’ is often used to describe a range of small-scale fishing activities. The key characteristic of this type of fishing is that the fishers use small vessels, operate mostly close to shore, and catch relatively small quantities of fish on an individual basis: *FAO Technical Guidelines*, above n 15, 42.

²⁰ Food and Agriculture Organization of the United Nations, ‘The State of the World Fisheries and Aquaculture’, above n 1, ii.

²¹ *Ibid* ii, 51.

²² World Bank and Food and Agriculture Organization of the United Nations, *The Sunken Billions: The Economic Justification for Fisheries Reform* (2009) 5 (‘*The Sunken Billions*’). See also *FAO Technical Guidelines*, above n 15, 16.

²³ The terms ‘fishing capacity’ and ‘fishing effort’ are subject to much debate and have different meanings for fisheries scientists, fisheries managers and economists: *FAO Technical Guidelines*, above n 15, 9–13. See also J M Ward et al, ‘Measuring and Assessing Capacity in Fisheries: Basic Concepts and Management Options’ (Technical Paper No 433/1, Food and Agriculture Organization of the United Nations, 2004). The FAO has defined ‘fishing capacity’ to mean ‘for a given resource condition, the amount of fish (or fishing effort) that can be produced over a period of time (eg a year) by a vessel or a fleet if fully utilized’: *FAO Technical Guidelines*, above n 15, 10, citing Food and Agriculture Organization of the United Nations, *Report of the Technical Consultation on the Measurement of Fishing Capacity* (FAO Fisheries Report No 615, 2000). See also *Healthy Fisheries Report*, above n 15, 62; Gareth Porter, *Analysing the Resource Impact of Fisheries Subsidies: A Matrix Approach* (United Nations Environment Program, 2004) 16 (‘*UNEP Report*’). ‘Fishing effort’ has been defined as ‘the degree to which fishing capacity is actually employed’ (the product of fishing capacity and fishing activity): *Healthy Fisheries Report*, above n 15, 62.

²⁴ *The Sunken Billions*, above n 22, 5, citing International Centre for Trade and Sustainable Development, ‘Fisheries, International Trade and Sustainable Development’ (Policy Discussion Paper, 2006).

²⁵ *Ibid* 49.

²⁶ U Rashid Sumaila, ‘How to Make Progress in Disciplining Overfishing Subsidies’ (2013) 70 *ICES Journal of Marine Science* 251, 251. See also von Moltke, above n 2, 314–15.

considerable.²⁷ Moreover, it has been estimated that 60 per cent of global fisheries subsidies, or USD16 billion, support unsustainable fisheries practices that lead to overfishing.²⁸

B *Types of Subsidies*

There is an extensive range of possible definitions of a ‘subsidy’. Generally in the context of fisheries, however, any government support to the fishing industry, whether direct or indirect, will be considered a subsidy.²⁹ These subsidies come in a variety of forms, which similarly are the subject of a variety of classifications from a number of different organisations. One such organisation which has provided a useful reference point for fisheries subsidies classification is the United Nations Environment Program (‘UNEP’),³⁰ which recognises eight categories of subsidies as described briefly below:

- (a) *Subsidies to capital costs*: These are usually provided to expand or improve fishing fleets, providing an incentive to fishers to increase their fishing capacity.³¹
- (b) *Subsidies to variable costs*: Examples include subsidies to reduce the cost of fuel and fishing gear. These generally lower the cost of each fishing trip and therefore increase fishing effort.³² Fuel subsidies have been recognised as a particular problem, as they allow fishing fleets to travel longer distances and often encourage the use of more powerful, fuel-consuming engines on vessels.³³
- (c) *Subsidies for access to foreign countries’ waters*: Some governments purchase access to the waters of other countries on behalf of their fishing fleets, providing an incentive for these fleets to increase efforts in distant-water fishing.³⁴ They also provide an incentive to coastal state governments to allow more distant-water fishing than would otherwise be the case in the absence of such subsidies.³⁵
- (d) *Subsidies for fisheries infrastructure*: These consist of subsidies for the construction and maintenance of fishing ports and associated facilities.³⁶ Governments around the world regularly subsidise this part of their

²⁷ Sumaila, above n 26, 252.

²⁸ Based on an analysis of 2003 data: U Rashid Sumaila et al, ‘A Bottom-Up Re-Estimation of Global Fishing Subsidies’ (2010) 12 *Journal of Bioeconomics* 201, 215.

²⁹ Sumaila, above n 26, 251. The FAO similarly defines a subsidy as ‘government actions or inactions outside of normal practices that modify — by increasing or decreasing — the potential profits by the fisheries industry in the short-, medium- or long-term’: Food and Agriculture Organization of the United Nations, *Guide for Identifying, Assessing and Reporting on Subsidies in the Fisheries Sector* (FAO Series Technical Paper No 438, 2004). See also Chen-Ju Chen, *Fisheries Subsidies under International Law* (Springer, 2010) 7–9.

³⁰ *UNEP Report*, above n 23. See also Alice V Tipping, ‘Building on Progress in Fisheries Subsidies Disciplines’ (2015) 69 *Marine Policy* 202, 203; J Samuel Barkin and Elizabeth R DeSombre, *Saving Global Fisheries: Reducing Fishing Capacity to Promote Sustainability* (MIT Press, 2013), both of which similarly rely on the UNEP classification of subsidies in their analysis.

³¹ *UNEP Report*, above n 23, 32.

³² *Ibid* 36.

³³ *Ibid*.

³⁴ *Ibid* 22.

³⁵ *Ibid*.

³⁶ *Ibid* 19.

fisheries industries, which usually provides a closer base from which to reach fisheries resources and thus reduces costs.³⁷

- (e) *Subsidies for price support*: These include government interventions in the market to create a minimum price for fish products, or to compensate local fishers for significant reductions in the global price, creating incentives for them to increase production and protecting them from market fluctuations.³⁸
- (f) *Subsidies for income support*: These include government interventions to ensure that fishers receive a reliable wage, irrespective of fishing conditions and regulations, including in the form of unemployment insurance to employees.³⁹ These subsidies are generally thought to discourage capacity reductions when conditions would otherwise make such reductions desirable.⁴⁰
- (g) *Subsidies for decommissioning of vessels and license retirement*: The main purpose of these subsidies is to reduce overcapacity in a fishery whilst supporting fishers from the effects of doing so.⁴¹ Although they are generally considered to be effective in this regard, at least temporarily, they are also thought to create ‘perverse incentives’ that may entice vessel owners to stay in the industry longer in the hope of receiving further decommissioning subsidies.⁴² A related problem is that the additional capital provided to vessel owners in the form of these subsidies may be used to increase investment and thus capacity in the fishery.⁴³
- (h) *Management services and research*: There is some debate as to whether fisheries management services (for example, stock assessments, surveillance and enforcement of fishing regulations, conducting research) constitute fisheries subsidies.⁴⁴ Since many of these forms of subsidies result in increased sustainability of fisheries resources and thus a ‘public good’, they are often ignored when discussing subsidies reform, despite the fact that they also constitute a private benefit to the fishing industry.⁴⁵

The above subsidy classification scheme devised by UNEP (the ‘UNEP Scheme’) was based upon its analysis of a number of other such classification schemes, including those devised by the Organisation for Economic Co-operation and Development, the Asia-Pacific Economic

³⁷ Tipping, above n 30, 204 citing M Milazzo, *Subsidies in World Fisheries: A Re-Examination* (Technical Papers No 406, Fisheries Series, World Bank, 1998).

³⁸ *UNEP Report*, above n 23, 41. See also Tipping, above n 30, 204.

³⁹ *UNEP Report*, above n 23, 38. See also Barkin and DeSombre, above n 30, 117.

⁴⁰ Barkin and DeSombre, above n 30, 117.

⁴¹ *UNEP Report*, above n 23, 24–5.

⁴² Barkin and DeSombre, above n 30, 123.

⁴³ *UNEP Report*, above n, 23, 25; Barkin and DeSombre, above n 30, 124.

⁴⁴ *UNEP Report*, above n 23, 21. See also Tipping, above n 30, 3; Barkin and DeSombre, above n 30, 121–2.

⁴⁵ *UNEP Report*, above n 23, 21; Barkin and DeSombre, above n 30, 121. See generally Dale Squires, Raymond Clarke and Valerie Chan, ‘Subsidies, Public Goods, and External Benefits in Fisheries’ (2014) 45 *Marine Policy* 222, 227.

Cooperation forum, the United States and the FAO.⁴⁶ Many of these schemes have a number of overlapping categories — primarily because some of these categories are defined by the intended effect of the subsidy — whilst others are based on the form of the subsidy.⁴⁷ The UNEP Scheme uses a composite list of categories that includes the categories employed by these earlier schemes, but it groups subsidies based on their objective rather than their form.⁴⁸ Significantly, unlike these other schemes, the UNEP Scheme also considers the impacts of these subsidies in the context of a particular set of management system parameters; so rather than identifying a particular set of prohibited subsidies, it identifies the general management conditions under which a given subsidy type would be acceptable (that is, beneficial or neutral) and those under which it would be unacceptable (that is, harmful). This type of classification is said to be better suited to further developing the definition of ‘subsidy’ in the *Agreement on Subsidies and Countervailing Measures* (‘SCM Agreement’),⁴⁹ the agreement through which the WTO currently disciplines the use of subsidies by its members (discussed further in Part IV below). Given this assessment and the extensive analysis that UNEP has conducted on this issue, its ‘matrix’ approach to subsidy categorisation seems to provide the most relevant and appropriate base from which to consider the issue of fisheries subsidies reform for the purposes of this article.

UNEP’s analysis of the eight categories of subsidies described above (under a combination of different fisheries management conditions and levels of stock exploitation)⁵⁰ has concluded that five types of subsidies are generally ‘harmful’ to fisheries resources in most conditions: subsidies to infrastructure, subsidies for access to foreign waters, price support subsidies, subsidies to capital costs and subsidies to variable costs.⁵¹ Such harmful subsidies contribute to distortions in world fish prices and provide a competitive advantage to subsidised fleets and multinational fishing corporations.⁵² Furthermore, they encourage overfishing and overcapacity, leading to the depletion of fisheries resources — including to levels where they are threatened with extinction — and damage to marine ecosystems and habitats.⁵³ As is now well established — and emphasised in UNEP’s analysis — the impact of these subsidies on long-term fisheries’ sustainability depends on the implementation of effective fisheries management systems and their enforcement.⁵⁴ UNEP defines an ‘effective’ management regime as one which ‘combines a scientifically based catch and effort controls,

⁴⁶ Von Moltke, above n 2, 20. See also Alice V Tipping, ‘A “Clean Sheet” Approach to Fisheries Subsidies Disciplines’ (Think Piece, International Centre for Trade and Sustainable Development, E15 Task Force on Rethinking International Subsidies Disciplines, April 2015) 3.

⁴⁷ Von Moltke, above n 2, 20.

⁴⁸ Ibid 21.

⁴⁹ *Agreement on Subsidies and Countervailing Measures*, opened for signature 15 April 1994, 1867 UNTS 14 (entered into force 1 January 1995) (‘SCM Agreement’).

⁵⁰ *UNEP Report*, above n 23, 47. For further discussion and analysis regarding the impacts of each category of subsidy under the conditions identified by UNEP, see *UNEP Report*, above n 23, 45–8; von Moltke, above n 2, ch 2.

⁵¹ *UNEP Report*, above n 23, 47.

⁵² Von Moltke, above n 2, 194–5.

⁵³ *FAO Technical Guidelines*, above n 15, 7.

⁵⁴ See generally *UNEP Report*, above n 23, 45–7; *FAO Technical Guidelines*, above n 15, 5.

adequate monitoring and surveillance measures and socio-economic incentives for sustainable fishing'.⁵⁵ The international 'regimes' governing the implementation and enforcement of such fisheries management systems are considered further below.

III OVERVIEW OF INTERNATIONAL FISHERIES 'REGIMES'

The concept of 'regimes' under international law is not new. In the context of fisheries in particular, states have historically cooperated across a range of issues, creating a variety of laws and principles in this area.⁵⁶ Defined as 'regimes',⁵⁷ it is the potential conflict between these differing laws and principles, and determining how these should coexist and interact, which has given rise to a number of challenges to international efforts to introduce binding reforms in the area of fisheries subsidies.

A UNCLOS and the United Nations Fish Stocks Agreement⁵⁸

One of the main international regimes relevant to this area is *UNCLOS*. *UNCLOS* provides a framework for the governance of the world's oceans and constitutes the most comprehensive, legally binding multilateral instrument governing this issue. In the area of fisheries management, its greatest impact has been on the recognition of the exclusive economic zone ('EEZ') of states, an area extending 200 nautical miles from the baseline from which a state's territorial sea is measured.⁵⁹ It was only upon the adoption of *UNCLOS* in 1984 that this concept became formally codified, and is now binding upon the 168 states party to *UNCLOS*.⁶⁰ The majority of the world's commercially valuable marine resources are located within the EEZ — and thus within the national jurisdiction — of states.⁶¹

UNCLOS grants coastal states sovereign rights for the purposes of, among other things, exploring and exploiting the natural resources (whether living or non-living) of their EEZ.⁶² However, with these rights come obligations upon states to manage and conserve the living resources within their EEZ⁶³ and to

⁵⁵ *UNEP Report*, above n 23, 45.

⁵⁶ Young, 'Fragmentation or Interaction', above n 2, 480.

⁵⁷ Margaret A Young defines 'regimes' as 'a set of laws, processes and institutions that have evolved by addressing a particular problem or function': Margaret A Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge University Press, 2011) 19.

⁵⁸ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 2167 UNTS 88 (entered into force 11 December 2001) ('*UN Fish Stocks Agreement*').

⁵⁹ See generally *UNCLOS* pt V, especially at art 57. A state's territorial sea is the area up to a limit of 12 nautical miles from baselines determined in accordance with *UNCLOS*: at art 3. Normally, the baseline is the low-water line along a state's coast: at art 5.

⁶⁰ For a list of states party to *UNCLOS*, see United Nations, Division for Ocean Affairs and the Law of the Sea, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements* (23 September 2016) <<https://perma.cc/FQF4-8VQJ>>.

⁶¹ Von Moltke, above n 2, 6.

⁶² *UNCLOS* art 56.

⁶³ *Ibid* art 61.

‘promote the objective of optimum utilization’ of these resources.⁶⁴ In doing so, states must determine their capacity to harvest the total allowable catch of their EEZ and must grant access to any surplus to other states.⁶⁵

Beyond the national jurisdiction of states (usually being the waters beyond a state’s EEZ), the ocean continues to be classified as the ‘high seas’.⁶⁶ Customary international law has long recognised the principle of freedom of the high seas, which effectively allows states to fish openly on the high seas without regulation.⁶⁷ *UNCLOS* has modified this principle only slightly, recognising the right of states to continue to engage in fishing (among other activities) on the high seas⁶⁸ but imposing additional obligations upon these states with regard to the conservation of species common to this area. In particular, this area contains a number of ‘highly migratory species’ which move over vast distances of the ocean between the high seas and the EEZ,⁶⁹ as well as ‘straddling stocks’ which move between the EEZ boundaries of one or more states and the high seas.⁷⁰ *UNCLOS* requires states fishing in the high seas to cooperate with relevant coastal states ‘with a view to ensuring conservation and promoting the objective of optimum utilization’ of these species, and provides a framework for the establishment of RFMOs to promote such cooperation.⁷¹ These RFMOs have become critical in facilitating international cooperation for fisheries management and conservation, but the inability of a number of them to effectively tackle the issue of overfishing has left them open to criticism.⁷² In particular, RFMOs have

⁶⁴ Ibid art 62(1).

⁶⁵ Ibid art 62(2).

⁶⁶ Ibid arts 116–20.

⁶⁷ Historically, this principle is said to have derived from the principle of freedom of navigation adopted by states to advance trade and commerce between them: Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2nd ed, 2015) 383. Evidence suggests that states in Asia were engaged in free navigation and maritime trade in the Indian Ocean as far back as 3000 BC: R P Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (Martinus Nijhoff, 1982) 10. Similarly, archaeological evidence supports the early existence of maritime trade in the Mediterranean, particularly in and around the small Aegean island of Rhodes, which believed in the practice of freedom of the seas: at 10–11. In the third or second century BC, Rhodes codified the commercial practices at the time in what some believe laid the foundation for modern maritime jurisprudence and also influenced the Byzantine Empire and Roman law: at 11. Much later, the Dutch jurist Hugo Grotius — writing during a time when powerful maritime trading states such as Spain and Portugal had effectively monopolised the trading routes of the vast Indian Ocean — drew support for his assertion that the sea could not be appropriated from the long tradition of freedom of navigation and trade in Asia, and also relied heavily on Roman law, which had also accepted freedom of navigation and maritime trade and commerce as part of the universal law of conduct between states: at 80–3. These general principles of maritime law were not only followed by the Asians and Romans, but also by the Arabs, Greeks and Latins of the time: at 83. In writing that ‘the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all’, Grotius was not inventing a new doctrine of freedom of the seas, but was simply referring to the historical existence of an established practice among states that he recommended also be adopted by Europe: at 86, quoting Hugo Grotius, *The Freedom of the Seas, or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (Ralph Van Deman Magoffin trans, Oxford University Press, 1916) 28 [trans of: *Mare Liberum* (first published 1609)].

⁶⁸ *UNCLOS* art 87.

⁶⁹ A list of highly migratory species is set out in *UNCLOS* annex I. See also at art 64(1).

⁷⁰ See generally *ibid* art 63.

⁷¹ *Ibid* arts 64(1), 118. See also at art 117.

⁷² Young, *Trading Fish, Saving Fish*, above n 57, 40; von Moltke, above n 2, 10.

suffered from, among other things, a lack of cooperation between members (in particular between coastal states and distant water fishing nations), a lack of effective mechanisms of enforcement, and ineffective treaty provisions such as those allowing members to object to particular management measures and thereby ‘opt out’ of these provisions.⁷³ Although efforts to strengthen RFMOs have been underway for some time now, and there has been some success in this regard,⁷⁴ strengthening RFMOs still remains a significant challenge in international efforts to promote fisheries sustainability.

In an effort to strengthen fisheries management, in particular in relation to high seas fishing and the effectiveness of RFMOs, *UNCLOS* was supplemented by the *UN Fish Stocks Agreement* in 1995.⁷⁵ This agreement establishes minimum international standards for the conservation and management of highly migratory species and straddling stocks, requiring cooperation between coastal states and states fishing on the high seas in relation to such species either directly or through appropriate RFMOs.⁷⁶ In particular, it requires states fishing for these species to either become members of the relevant RFMO or to agree to apply the

⁷³ For example, the Northwest Atlantic Fisheries Organization (‘NAFO’) (consisting of Canada, Cuba, Denmark (in respect of Faroe Islands and Greenland), the European Union, France (in respect of Saint Pierre et Miquelon), Iceland, Japan, the Republic of Korea, Norway, the Russian Federation, Ukraine and the United States) originally allowed for its members to make objections to catch allocation levels: *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, opened for signature 24 October 1978, 1135 UNTS 369 (entered into force 1 January 1979) art XXI (‘NAFO Convention’). On this basis, after 1985 the European Union refused to be bound by NAFO’s catch allocations and Spain and Portugal then set their own limits: Julie R Mack, ‘International Fisheries Management: How the UN Conference on Straddling Stocks Changes the Law of Fishing on the High Seas’ (1995) *California Western International Law Journal* 313, 319. As a result of persistent overfishing in the NAFO ‘Convention Area’ brought about by, among other things, such unilateral disregard for catch allocation levels, as well as catch allocation levels that were generally too high to begin with, in 1992 the large northern cod stock (which had until such time been the most important fish stock in the NAFO Convention Area) collapsed: Organisation for Economic Co-operation and Development, *Strengthening Regional Fisheries Management Organisations* (OECD Publishing, 2009) 93. Despite this, NAFO has still not been able to address the issue of allocation levels, and has simply deferred further consideration of the issue for the time being: at 116. Similarly, the International Commission for the Conservation of Atlantic Tunas (‘ICCAT’) has also been hampered by the voluntary nature of some of its key conservation measures, and provisions which allow members to opt out of measures with which they disagree: at 57. ICCAT also lacks a dispute resolution mechanism and has a large and diverse membership which makes it difficult to achieve consensus on many topics: at 55, 60.

⁷⁴ Despite being unable to effectively tackle the allocation issue, both NAFO and ICCAT have nonetheless been able to undertake extensive reform in recent years: Organisation for Economic Co-operation and Development, above n 73, 116. For example, in 2005 NAFO commenced an extensive reform process, resulting in the amendment of the *NAFO Convention* in 2007 (‘Amended Convention’): at 95, 97. The *Amended Convention* includes, among other things, a commitment to an ecosystem approach to fisheries management, a move away from majority voting as a general rule to consensus voting, an amendment to the objection procedure (which now requires a party filing an objection to a particular measure to provide an explanation of the reasons for its objection and state what alternative measures it proposes to take) and the introduction of a new dispute settlement mechanism: at 97, 101. Notably, the *Amended Convention* has yet to become legally binding, requiring ratification by at least three-quarters of NAFO members to reach this status. Similarly, ICCAT began making policy changes from the mid-1990s which focussed on improving conservation and management measures and the introduction of new compliance and enforcement mechanisms: at 49.

⁷⁵ Young, *Trading Fish, Saving Fish*, above n 57, 41.

⁷⁶ *UN Fish Stocks Agreement* art 8(1).

conservation and management measures established by such an organisation.⁷⁷ Only those states which comply with these requirements will have access to the relevant fisheries resources.⁷⁸ Coastal states and those states fishing on the high seas are also required to adopt measures to ensure the long-term sustainability of these species,⁷⁹ and to ‘take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources’.⁸⁰ The *UN Fish Stocks Agreement* is said to have been a major contributor to the impetus for change within many RFMOs, prompting efforts to modernise their operations to conform to the new and evolving international norms promoted in this agreement.⁸¹ However, this has not necessarily been effective in respect of all RFMOs. For example, 27 of the 50 members of the International Commission for the Conservation of Atlantic Tunas (‘ICCAT’) have not yet ratified the *UN Fish Stocks Agreement*.⁸² This has created problems for efforts to change the text of ICCAT’s treaty, given that over half of the ICCAT membership does not necessarily ascribe to the principles and basic international rules in relation to the governance of high seas stocks established in the *UN Fish Stocks Agreement*.⁸³

B The FAO

The FAO is a United Nations specialised agency with a global remit to promote the conservation of natural resources, including the sustainable management and optimum use of fisheries.⁸⁴ Within its framework, its members have developed a range of instruments, including voluntary codes of conduct, plans of action and technical guidelines.

Recognising the threat posed by overfishing, in 1995 FAO members adopted the *Code of Conduct for Responsible Fisheries* (‘FAO Code of Conduct’).⁸⁵ This voluntary instrument provides a set of standards and principles for the conservation and management of fisheries, including in relation to the processing and trade of fish and fisheries products.⁸⁶ Many of its provisions replicate the underlying principles of conservation and management set out in the *UN Fish Stocks Agreement*, indicating an application of these principles beyond just the high seas and transboundary fish stocks. Four voluntary ‘International Plans of Action’ (‘IPOAs’) supplement the *FAO Code of Conduct* in relation to specific species and issues. In relation to the issue of fisheries subsidies, the IPOA for the

⁷⁷ Ibid art 8(3).

⁷⁸ Ibid art 8(4).

⁷⁹ Ibid art 5(a).

⁸⁰ Ibid art 5(h).

⁸¹ Organisation for Economic Co-operation and Development, above n 73, 52.

⁸² For a list of ICCAT members, see ICCAT, *Contracting Parties* (18 December 2014) <<https://perma.cc/Z5J3-8M6T>>. For a list of states party to the *UN Fish Stocks Agreement*, see United Nations, Division for Ocean Affairs and the Law of the Sea, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements* (23 September 2016) <<https://perma.cc/GG8J-YP4V>>.

⁸³ Organisation for Economic Co-operation and Development, above n 73, 52.

⁸⁴ *Constitution of the Food and Agriculture Organisation of the United Nations*, signed 16 October 1945, 12 UST 980 (entered into force 16 October 1945) arts I, XII.

⁸⁵ Food and Agriculture Organization of the United Nations, *Code of Conduct for Responsible Fisheries* (1995) (‘FAO Code of Conduct’).

⁸⁶ See generally *ibid* arts 2, 6.

management of fishing capacity⁸⁷ requires states to ‘reduce and progressively eliminate all factors, including subsidies and economic incentives ... which contribute, directly or indirectly, to the build-up of excessive fishing capacity,’⁸⁸ including by preparing and implementing national plans and strengthening RFMOs.⁸⁹ The IPOA to prevent, deter and eliminate illegal, unregulated and unreported fishing (*IPOA-IUU*)⁹⁰ also refers to fisheries subsidies, advising that states should ‘to the extent possible in their national law, avoid conferring economic support, including subsidies, to companies, vessels or persons that are involved in IUU fishing’.⁹¹ The *IPOA-IUU* also requires states to take necessary steps, ‘consistent with international law’, to prevent fish caught by vessels identified by the relevant RFMO as having engaged in IUU fishing being traded or imported into their territories.⁹² This trade-specific measure may only be used in ‘exceptional circumstances’ where other measures have proven unsuccessful.⁹³

The voluntary approach espoused in the *FAO Code of Conduct* and the two IPOAs discussed above has largely failed to have an impact on overfishing. That said, it is worth noting that there are many other ways in which the international community has sought and continues to seek to address the issue of overfishing — for example, states have sought to cooperate to improve maritime security, particularly in vulnerable developing coastal states, in an effort to assist these states to better monitor their fisheries and combat IUU fishing.⁹⁴ Unilateral market-related measures are also increasingly being used to address IUU fishing by extending the scope of surveillance from the infringing vessels to the traded products themselves.⁹⁵ A good example is the EU regulation on IUU fishing,⁹⁶

⁸⁷ Food and Agriculture Organization of the United Nations, *International Plan of Action for the Management of Fishing Capacity* (2001).

⁸⁸ *Ibid* para 26.

⁸⁹ *Ibid* paras 8(iii), 19–24.

⁹⁰ *IPOA-IUU*, above n 14.

⁹¹ *Ibid* para 23.

⁹² *Ibid* para 66.

⁹³ *Ibid*.

⁹⁴ For example, in 2014 the European Union adopted the *European Union Maritime Security Strategy* to provide a framework for addressing a number of ‘maritime security challenges’ at an international, European Union and national level: Council of the European Union, *European Union Maritime Security Strategy* (Decision No 11205/14, 24 June 2014) 3 (*EUSS*). A subsequent action plan was adopted in 2016 to implement the *EUSS*, and includes provisions for the implementation of capacity building initiatives with other states and RFMOs to enhance their capacity in areas such as maritime law enforcement, port and maritime transport security and combatting IUU fishing: Council of the European Union, ‘European Union Maritime Security Strategy (EUMSS) — Action Plan’ (Information Note, 17002/14, 16 December 2014) [1.4].

⁹⁵ Margaret A Young, ‘International Trade Law Compatibility of Market-Related Measures to Combat Illegal, Unreported and Unregulated (IUU) Fishing’ (2016) 69 *Marine Policy* 209, 209.

⁹⁶ *Council Regulation (EC) No 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and Repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999* [2008] OJ L 286/1, paras 18–23. This regulation employs a catch certification scheme to support its prohibition on the import of fishery products into the EU where such products have been obtained from IUU fishing. It requires the EU Commission to work with EU members, third states and other bodies to compile a list of those vessels suspected of engaging in IUU fishing.

which has already been used to impose trade restrictions on fish and fish product imports from Belize, Cambodia, Guinea and Sri Lanka.⁹⁷ Also of relevance are port state measures (which involve the blocking of port access and landings to vessels identified as having engaged in IUU fishing), in particular the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* ('*Port State Measures Agreement*'),⁹⁸ which came into effect on 5 June 2016 and is now legally binding upon the 29 states and one RFMO that have adopted that agreement since 2009.⁹⁹ The *Port State Measures Agreement* is the first internationally binding agreement specifically related to IUU fishing, and requires states to implement a number of measures at ports under their control in order to better detect IUU fishing and prevent the contents of such fishing activities being offloaded at these ports.¹⁰⁰ Its effectiveness, however, will depend in some part on ensuring its uniform application across different ocean areas and, as such, the role of RFMOs will continue to be critical. Efforts should therefore be made to procure adoption of the *Port State Measures Agreement* by more RFMOs, and consistency between this agreement and the port state measures currently applied by RFMOs should be encouraged.

For the purposes of the trade-related focus of this paper, the existing WTO trading regime is of particular relevance and it is this regime which became the focus of attention for states seeking a solution to the problem of overfishing and overcapacity from the late 1990s onwards. The way in which the WTO currently disciplines the use of fisheries subsidies and the proposals for fisheries subsidies reform within the WTO are discussed further in Part IV below.

IV DISCIPLINING FISHERIES SUBSIDIES AT THE WTO

A The SCM Agreement

The WTO currently disciplines the use of certain subsidies by its members through the *SCM Agreement*. Pursuant to the *SCM Agreement*, a subsidy will be 'deemed to exist' if a government or public body makes a 'financial contribution' that confers a benefit on a 'specific' domestic industry.¹⁰¹ This definition is said to be broad enough to capture most significant classes of fisheries subsidies.¹⁰² The agreement divides subsidies into three categories: 'prohibited' (being contingent upon export performance or the use of domestic over imported goods),¹⁰³ 'actionable' (being subject to challenge by a member

⁹⁷ Young, 'International Trade Law Compatibility of Market-Related Measures', above n 95, 209.

⁹⁸ *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Revised Edition, 2016)* opened for signature 22 November 2009, [2016] ATS 21 (entered into force 5 June 2016) ('*Port State Measures Agreement*').

⁹⁹ Food and Agriculture Organization of the United Nations, 'World's First Illegal Fishing Treaty Now in Force' (Media Release, 5 June 2016) <<https://perma.cc/PZ84-8S59>>.

¹⁰⁰ Measures include the power to authorise or deny entry into ports to vessels suspected of having engaged in IUU fishing, and to deny any such vessels which have already entered a port the use of such port for landing, packaging and processing of fish: *Port State Measures Agreement* arts 9, 11.

¹⁰¹ *SCM Agreement* arts 1–2.

¹⁰² *Healthy Fisheries Report*, above n 15, 37, citing David Schorr, *The Footprint of Distant Water Fleets on World Fisheries* (World Wildlife Fund, 1998) ch 3.

¹⁰³ *SCM Agreement* art 3.

state¹⁰⁴ where these have adverse effects on that member state's interests)¹⁰⁵ or 'non-actionable', although this latter category (which included subsidies to support compliance with environmental requirements) has expired in accordance with art 31 of the *SCM Agreement*.¹⁰⁶

The *SCM Agreement* has proven to be lacking in its ability to adequately address the issue of fisheries subsidies.¹⁰⁷ Among other things, a lack of WTO litigation to date in respect of this issue has been attributed to the uncertainty that surrounds the applicability of the prohibited and actionable categories of subsidies described above in relation to fisheries subsidies.¹⁰⁸ For example, the test set out in art 3.1(a) in respect of prohibited subsidies is said to be difficult to satisfy, as governments do not often make their fisheries subsidies contingent upon exports,¹⁰⁹ and therefore net importers of fish such as Japan (whose subsidies programs are generally designed to promote domestic fish supply rather than exports) would not fall within the scope of this prohibition.¹¹⁰ Similarly, such subsidies programs would not be captured under art 3.1(b), as this provision is primarily aimed at subsidies to producers who use parts in their production process, rather than subsidies to domestic suppliers.¹¹¹ The way in which this category of subsidies has been defined has also been criticised as constituting a prohibition based on the design of the subsidy, rather than its actual impacts, so that even the most harmful types of subsidies are not prohibited.¹¹² Whilst there are certainly some advantages to having a design-based system of subsidies classification — for example, it can be applied without extensive empirical research or analysis¹¹³ — the main disadvantage is that such a system fails to take into account the actual effects of the subsidies, and so can overlook the fact that similarly designed subsidies can have different impacts in practice.¹¹⁴ The 'adverse effects' test in respect of the actionable subsidies in arts 5 and 6 is also said to constitute a 'heavy evidentiary burden' upon the complaining state, requiring from that state extensive data to demonstrate the harm it has suffered and a causal link to the relevant subsidies.¹¹⁵ For example, in the context of fisheries subsidies in particular, any likely adverse effects such subsidies may cause will be in resource availability, rather than export prices, and will be spread over a number of different fisheries

¹⁰⁴ A challenge to an 'actionable' subsidy can be made through the dispute settlement procedure of the *SCM Agreement* or the application of countervailing measures: see generally *SCM Agreement* art 7. See especially at art 7.9.

¹⁰⁵ *Ibid* arts 5, 6. These adverse effects are deemed to exist where there has been injury to the domestic industry of another member state, the nullification or impairment of benefits to a member state or serious prejudice to the interests of another member state: at art 5.

¹⁰⁶ *Ibid* arts 8, 9; see especially at art 8.2(b)(c). The category of 'non-actionable' subsidies was included provisionally for a period of five years. This was not renewed upon expiry of this provision on 31 December 1999: at art 31.

¹⁰⁷ See generally Young, *Trading Fish, Saving Fish*, above n 57, 91–3.

¹⁰⁸ *Ibid* 92.

¹⁰⁹ *Healthy Fisheries Report*, above n 15, 39.

¹¹⁰ Young, *Trading Fish, Saving Fish*, above n 57, 92.

¹¹¹ *Healthy Fisheries Report*, above n 15, 40.

¹¹² *Ibid* 38.

¹¹³ *Ibid* 34.

¹¹⁴ *Ibid*. This again highlights the desirability of the UNEP Scheme, which applies a matrix approach to subsidies classification: see above nn 46–9 and surrounding text.

¹¹⁵ *Ibid* 42.

products which may be difficult to identify for the purposes of demonstrating such adverse effects.¹¹⁶ Perhaps the uncertainty described above in relation to the application of the *SCM Agreement* is not so surprising considering that the *SCM Agreement* was created to address the trade-distorting consequences of subsidies, and not their potential environmental impacts, and thus goes some way to explaining the lack of any WTO litigation on fisheries subsidies to date.¹¹⁷

B *The WTO and Fisheries Subsidies Reform*

Recognising these inadequacies, in 2001 the Doha Ministerial Conference made negotiations for fisheries subsidies reform within the WTO framework a priority.¹¹⁸ Within the context of its mandate, the newly formed Negotiating Group on Rules (the ‘Rules Group’) was tasked with amending the *SCM Agreement*, culminating in the draft text of proposed disciplines circulated by the Chair of the Rules Group in 2007 (the ‘*Chair’s Text 2007*’).¹¹⁹ The mandate provided by the *Doha Ministerial Declaration* represented a significant milestone for the WTO, being the first time that it had as its purported aim the conservation of a vital natural resource in pursuit of positive outcomes for the environment and sustainable development.¹²⁰ A further Ministerial Declaration in Hong Kong in 2005 affirmed members’ commitment to ‘enhancing the mutual supportiveness of trade and environment’ and explicitly referred to the prohibition of harmful subsidies.¹²¹

In response, the *Chair’s Text 2007* presented a comprehensive proposal for fulfilling the mandates set in Doha and Hong Kong. It sets out a specific list of prohibited subsidies, including those provided in respect of vessel construction and repair and those in respect of operating costs such as fuel.¹²² It also proposes a prohibition on subsidies to vessels engaged in IUU fishing, which appears to

¹¹⁶ Young, *Trading Fish, Saving Fish*, above n 57, 92.

¹¹⁷ Other commentators have noted that the lack of WTO litigation in respect of fisheries subsidies may derive from the reluctance of member states to open their own subsidies arrangements up to scrutiny by pursuing claims against another member, and that many indirectly benefit from the subsidies of other member states, for example, where these are applied to procure access rights for fleets to fish in distant-water EEZs: Marc Benitah, ‘Ongoing WTO Negotiations on Fisheries Subsidies’ (2004) 8(12) *ASIL Insights* (online); Young, *Trading Fish, Saving Fish*, above n 57, 91–2.

¹¹⁸ *Doha Ministerial Declaration*, WTO Doc WT/MIN/(01)/DEC/1 (20 November 2001, adopted 14 November 2001) paras 28, 31.

¹¹⁹ *Draft Consolidated Chair Texts of the AD and SCM Agreements*, WTO Doc TN/RL/W/213 (30 November 2007) (Draft Agreement Text) (‘*Chair’s Text 2007*’). Although a subsequent Chair of the Rules Group prepared a further report in 2011, this only summarises the status of discussions and proposals set out in the *Chair’s Text 2007*, which have progressed little since then: *Communication from the Chairman*, WTO Doc TN/RL/W/254 (21 April 2011) (‘*Chair’s Text 2011*’). For the purposes of this article, the *Chair’s Text 2007* will therefore be used as the primary reference point when discussing the current status of WTO proposals for fisheries subsidies reform.

¹²⁰ World Wildlife Fund, ‘Turning the Tide on Fishing Subsidies: Can the World Trade Organization Play a Positive Role?’ (2002) 1 <<https://perma.cc/QPC7-Z2FG>>.

¹²¹ *Doha Work Programme*, WTO Doc WT/MIN(05)/DEC (22 December 2005, adopted 18 December 2005) (Ministerial Declaration) annex D para 9.

¹²² *Chair’s Text 2007*, WTO Doc TN/RL/W/213, annex VIII art 1.

have had the general support of most member states.¹²³ Somewhat more controversial, however, was the inclusion of a further prohibition on any other subsidies (not already included in the prohibited list) which are provided in respect of any vessel or fishing activity affecting fish stocks already in an ‘unequivocally overfished condition’.¹²⁴ This provision was generally met with strong opposition from member states, who considered such a prohibition too broad in its scope and expressed concern as to how and by whom the overfished stocks the subject of such a prohibition would be identified.¹²⁵

Exemptions from the list of prohibited subsidies in art I of the *Chair’s Text 2007* are set out in art II and, in respect of developing countries, art III.¹²⁶ Pursuant to art II, these exceptions include most of those subsidies generally recognised as ‘good’ subsidies, including those provided for: improvements in fishing techniques to reduce environmental impacts; crew and vessel safety; re-education and retraining of fishers; and vessel decommissioning and buy-backs.¹²⁷ Those member states seeking any of these exemptions must operate a fisheries management system based on ‘internationally-recognised best practices for fisheries management and conservation’ which will be subject to peer review by the FAO¹²⁸ (although, in respect of a state which is not a member of the FAO, such peer review will be conducted by ‘another relevant international organisation’).¹²⁹ In respect of developing countries, the concept of ‘special and differential treatment’ for these countries is recognised and applied, effectively allowing them to continue to apply those subsidies set out in art I where certain conditions have been met.¹³⁰

V THE CHALLENGES OF REGIME INTERACTION FOR FISHERIES REFORM

One of the main issues facing the WTO negotiations to date has been the reluctance of some states to defer to the standards and processes of other international regimes governing fisheries, particularly in circumstances where there is not uniform, or ‘parallel’, membership between the WTO and these other regimes. For example, the proposal discussed above whereby those member states seeking exemptions to the proposed prohibited subsidies would subject their fisheries management systems to review by the FAO¹³¹ was rejected by Taiwan, which expressed concern about the involvement of an international

¹²³ Ibid annex VIII art 1.1(h); *Chair’s Text 2011*, WTO Doc TN/RL/W/254, annex (‘Negotiations on Subsidies and Countervailing Measures — Report by the Chairman’) para 43.

¹²⁴ *Chair’s Text 2007*, WTO Doc TN/RL/W/213, annex VIII art 1.2.

¹²⁵ *Chair’s Text 2011*, WTO Doc TN/RL/W/254, annex (‘Negotiations on Subsidies and Countervailing Measures — Report by the Chairman’) para 40.

¹²⁶ *Chair’s Text 2007*, WTO Doc TN/RL/W/213, annex VIII arts 1–3.

¹²⁷ Ibid annex VIII art 2.

¹²⁸ Ibid annex VIII art 5.1.

¹²⁹ Ibid annex VIII art 5.1 n 86.

¹³⁰ For example, the prohibition on vessel construction set out in art I.1(a) will not be prohibited in respect of a member state where its vessels are used exclusively for fishing activities in respect of particular identified target stocks within that state’s EEZ and such stocks have been subject to prior scientific assessment ‘in accordance with relevant international standards’: *Draft Consolidated Chair Texts of the AD and SCM Agreements*, WTO Doc TN/RL/W/213 (30 November 2007) annex VIII art 3.2(b)(3).

¹³¹ See above nn 128–9 and surrounding text.

organisation to which not all WTO member states are party.¹³² Other member states also expressed concern about giving another international organisation the authority to review the adequacy of their management systems.¹³³ It is this issue of parallel membership which has obstructed regime interaction and given states that are not parties to particular regimes ‘a power of veto over the evolution of international law’.¹³⁴ It has done so by effectively preventing the WTO from making any significant progress on establishing binding disciplines on fisheries subsidies — despite many years of negotiations and draft proposals — through effective interaction with the other relevant international regimes discussed in this article.

Despite this lack of progress, a number of institutional arrangements do nonetheless exist within the WTO framework which seek to enhance the effective interaction of the WTO with other fisheries regimes. The Committee on Trade and Environment (‘CTE’) is one example. In its efforts to promote sustainable development as part of its mandate, the CTE has been able to collect large amounts of information about the operation of other regimes, such as the FAO. For example, in 1995 the Secretariat introduced the *FAO Code of Conduct* to the CTE.¹³⁵ This has been followed with further updates in relation to the *FAO Code of Conduct* directly from the FAO.¹³⁶ Significantly, it was following initial discussions and information sharing in the context of the CTE that the Rules Group was subsequently formed to specifically consider the issue of fisheries subsidies reform within the WTO.¹³⁷ There are also instances within the context of the fisheries subsidies negotiations where WTO members have sought to rely on the expertise of relevant intergovernmental organisations. For example, early submissions from a group of WTO member states calling themselves the ‘Friends of Fish’ referred to the classification of fisheries subsidies proposed by UNEP and the FAO.¹³⁸ There is also some scope within some WTO committees for the attendance of external parties to act as observers.¹³⁹ Although the Rules Group is generally closed to such observers, it has previously allowed representatives from the FAO Secretariat to attend its

¹³² *Working Document from the Chairman*, WTO Doc TN/RL/W/232 (28 May 2008) annex C-60; Young, ‘Fragmentation or Interaction’, above n 2, 503.

¹³³ *Working Document from the Chairman*, WTO Doc TN/RL/W/232 (28 May 2008) annex C-61.

¹³⁴ Young, *Trading Fish, Saving Fish*, above n 57, 269.

¹³⁵ *Trade Measures for Environmental Purposes Taken Pursuant to Multilateral Environmental Agreements: Recent Developments*, WTO Doc WT/CTE/W/15 (1 December 1995) (Note by the Secretariat); Young, *Trading Fish, Saving Fish*, above n 57, 80.

¹³⁶ *Update of FAO Activities Related to Fisheries*, WT/CTE/W/135 (25 February 2000) (Communication from the United Nations Food and Agriculture Organization).

¹³⁷ Prior to the creation of the Rules Group, the CTE was responsible for the coordination of discussions regarding fisheries subsidies. Its mandate is, inter alia, to ‘identify the relationship between trade measures and environmental measures, in order to promote sustainable development’ and to ‘make appropriate recommendations’ on necessary rules to enhance this relationship: *WTO Decision on Trade and Environment*, WTO Doc MTN.TCN/45(MIN) (14 April 1994).

¹³⁸ *Submission from Argentina, Chile, Iceland, New Zealand, Norway and Peru to the Negotiating Group on Rules: Subsidies in the Fisheries Sector: Possible Categorizations*, WTO Doc TN/RL/W/58 (10 February 2003) 3–4.

¹³⁹ Young, *Trading Fish, Saving Fish*, above n 57, 109.

negotiations in an informal capacity.¹⁴⁰ The CTE has also granted observer status to a number of intergovernmental organisations with interests in fisheries, including UNEP.¹⁴¹ The promotion of ‘inter-regime learning’ and information sharing in the manner described above, involving a network of interested parties including state and non-state actors, is crucial to effective regime interaction and can play a significant role in efforts to bring together international fisheries regimes and promote sustainable fisheries management.

It is interesting to consider the relationship between the *UNCLOS* and FAO measures discussed in Part III above on the one hand, and the trade-specific measures proposed under both the WTO and now the TPP on the other hand, in the context of regime interaction. In particular, could the legal fragmentation discussed above actually play a role, at some level, in promoting the existence and maintenance of the subsidies which the TPP is now seeking to discipline? For example, in the absence of greater integration between these regimes, could regulating access to certain fisheries under the *UN Fish Stocks Agreement* encourage states to continue to subsidise those fleets which now find themselves unable to access particular fisheries as a result of a failure by these states to adopt the standards and requirements imposed by this agreement? As discussed throughout this article, the international community has within its disposal a range of tools with which it has sought, and continues to seek, to address issues of overfishing and overcapacity. Trade-related measures provide one such tool, and the regulation of subsidies is a crucial part of these measures. More specific market-related measures such as those established under the *UN Fish Stocks Agreement* and the *Port State Measures Agreement* provide another crucial tool; however, such measures cannot find application in isolation, and it seems that without greater recognition of the integral link between trade and other measures in efforts to eliminate subsidies and combat IUU fishing, and without more effective regime interaction, there is a risk that some of these measures may in fact end up undermining efforts to address overfishing and overcapacity issues.

The subsidies provisions of the TPP have brought these issues of regime interaction into sharp focus. Part VI of this article will analyse these provisions and consider their potential to promote fisheries sustainability, including through greater regime interaction.

VI THE TPP: A NEW APPROACH TO DISCIPLINING FISHERIES SUBSIDIES?

A *Prohibited Subsidies*

The main provision of the Environment Chapter dealing with the issue of fisheries subsidies is art 20.16(5), which opens with a recognition by the parties that

the implementation of a fisheries management system that is designed to prevent overfishing and overcapacity and to promote the recovery of overfished stocks

¹⁴⁰ Ibid 111, citing an interview conducted by the author with a staff member of the Food and Agriculture Organization of the United Nations on 2 July 2008.

¹⁴¹ Ibid 109; *International Intergovernmental Organizations: Observer Status in the Committee on Trade and Environment*, WTO Doc WT/CTE/INF/6/Rev.4 (2 February 2007).

must include the control, reduction and eventual elimination of all subsidies that contribute to overfishing and overcapacity.¹⁴²

It then proceeds to prohibit parties from granting the following subsidies:

- (i) subsidies for fishing that negatively affect fish stocks that are in an overfished condition;¹⁴³ and
- (ii) subsidies provided to any fishing vessel while listed by the flag State or a relevant [RFMO] or Arrangement for IUU fishing in accordance with the rules and procedures of that [RFMO] or arrangement ...¹⁴⁴

These prohibitions are considered further below.

1 Reference to the SCM Agreement

Article 20.16(5) defines ‘subsidies’ by reference to art 1.1 of the *SCM Agreement* and requires that such subsidies satisfy the specificity requirements set out in art 2 of that agreement.¹⁴⁵ In addition, it provides that any negative effect on the fish stocks referred to in paragraph (a) be determined in accordance with ‘the best scientific evidence available’.¹⁴⁶

The use of the *SCM Agreement* to define subsidies allows a very broad use of this term which is likely to capture most fisheries subsidies. In formulating its prohibitions, the TPP has very specifically identified two situations in which these types of subsidies will be prohibited, in effect based upon the nature of the subsidised fishing activity rather than on the type of subsidy. This approach seems to reflect the general consensus that has recently emerged amongst a number of WTO member states regarding those subsidies which should be prohibited, including as set out in a recent ministerial statement on fisheries subsidies following the Nairobi Ministerial Conference in December 2015.¹⁴⁷ Where this formulation may be lacking, however, is in its failure to prohibit those specific subsidies which by their nature are also recognised as being major contributors to overcapacity and overfishing: fuel subsidies¹⁴⁸ and those provided for vessel construction and maintenance.¹⁴⁹ Although the *Chair’s Text 2011* indicates a strong level of support for the prohibition of construction

¹⁴² TPP art 20.16(5).

¹⁴³ *Ibid* art 20.16(5)(a).

¹⁴⁴ *Ibid* art 20.16(5)(b).

¹⁴⁵ *Ibid* art 20.16(5); *SCM Agreement* art 2.

¹⁴⁶ TPP art 20.16(5)(a) n 15.

¹⁴⁷ *Nairobi Fisheries Declaration*, WTO Doc WT/MIN/(15)/37/Rev.1 (7 January 2016). See also the following recent submissions: *Draft Decision on Fisheries Subsidies*, WTO Doc TN/RL/W/264 (21 October 2015) (Communication from Peru); *Elements for Effective Disciplines on Fisheries Subsidies in the Post-Bali Work Programme*, WTO Doc TN/RL/W/258 (19 June 2015) (Communication from Argentina, Iceland, New Zealand, Norway, Peru and Uruguay) para 3.1; *Fisheries Subsidies*, WTO Doc TN/RL/W/267 (13 November 2015) (Communication from African, Caribbean and Pacific Group of States) (‘ACP Group Proposal’); *Draft Decision on the Developmental and Food Security Aspects on Fisheries Subsidies Disciplines*, WTO Doc WT/MIN(15)/W/40 (17 December 2015) (Communication from the African, Caribbean and Pacific Group of States and Peru).

¹⁴⁸ Of the estimated 60 per cent of global fisheries subsidies found to be capacity-enhancing, 23 per cent constitute fuel subsidies: Sumaila, above n 28, 215.

¹⁴⁹ See above nn 50–1 and surrounding text.

subsidies among WTO member states,¹⁵⁰ the issue of fuel subsidies proved more controversial given their widespread application and their link to members' domestic fuel taxation and fuel pricing policies.¹⁵¹

The TPP has gone some way towards addressing this deficiency, however, by including a general discipline requiring that TPP Parties use their 'best efforts' to refrain from introducing any new subsidies (or from enhancing or extending existing subsidies) not otherwise prohibited under art 20.16(5) that contribute to overfishing or overcapacity.¹⁵² This reference to overfishing and overcapacity would clearly capture fuel subsidies as well as a number of others recognised as harmful. Whilst there is no absolute obligation on the TPP Parties to refrain from introducing such subsidies, but rather an obligation requiring the use of their 'best efforts', this provision nonetheless acknowledges the existence of further subsidies which contribute to overfishing and overcapacity beyond those set out in art 20.16(5) and could perhaps be used as a base from which to eventually provide an outright prohibition on these types of subsidies.

2 Reference to Fish in an 'Overfished Condition'

It is interesting to note the TPP's use of the reference to fish being in an 'overfished condition' in art 20.16(5)(a) and the way in which parties have chosen to define this term. In a footnote to the provision, it is stated that a fish stock will be considered 'overfished'

if the stock is at such a low level that mortality from fishing needs to be restricted to allow the stock to rebuild to a level that produces maximum sustainable yield or alternative reference points based on the best scientific evidence available.¹⁵³

The footnote further explains that a fish stock will also be considered overfished if the state in which the relevant fishing activity is taking place or a relevant RFMO recognises it as such.¹⁵⁴

As discussed above in the context of the WTO fisheries subsidies negotiations, a number of states had expressed concern at what they considered to be a vague and potentially difficult to interpret reference to fish being in an 'unequivocally overfished condition' in art 1.2 of the *Chair's Text 2007*.¹⁵⁵ This language had been proposed by the European Union and supported by other states who shared a reluctance to make any reference to the standards and concepts set out in other international regimes.¹⁵⁶

The TPP seems to have struck a balance between these two views in its formulation of art 20.16(5)(a). It has applied the general language originally proposed by the European Union (with the omission of the word

¹⁵⁰ *Chair's Text 2011*, WTO Doc TN/RL/W/254, annex ('Negotiations on Subsidies and Countervailing Measures — Report by the Chairman') para 25.

¹⁵¹ *Ibid* paras 25–7. For more detailed discussion on the issue of fuel subsidies, see Sarah Parker et al, 'Fuelling the Fisheries Subsidy Debate: Agreements, Loopholes and Implications' (2012) 113 *Fisheries Research* 143; see also Sumaila, above n 26.

¹⁵² TPP art 20.16(7).

¹⁵³ *Ibid* art 20.16(5)(a) n 16.

¹⁵⁴ *Ibid*.

¹⁵⁵ *Chair's Text 2007*, WTO Doc TN/RL/W/213, annex VIII art 1.2. See also above nn 125–6 and surrounding text.

¹⁵⁶ Young, 'Fragmentation or Interaction', above n 2, 500.

‘unequivocally’) but has removed much of the ambiguity by including a precise definition of what it means for a fish stock to be ‘overfished’.¹⁵⁷ However, although it has avoided reference to other international regimes, instead prescribing ‘the best scientific evidence available’ as the appropriate reference point, the TPP’s reference to the use of scientific evidence itself implies conformity with both *UNCLOS* and the FAO, both of which mandate a role for proper scientific evidence and assessment in their approach to fisheries management. The earlier reference to the ‘maximum sustainable yield’ also implies the adoption of a principle which finds common application in these regimes.¹⁵⁸ The TPP has also recognised the significant role that RFMOs and states themselves can play in the process of determining the state of fish stocks within their particular jurisdiction. It is not clear from this formulation, however, what standards are to be adopted by an RFMO for the purposes of assessing whether a particular fish stock is ‘overfished’, and how inconsistencies between RFMOs in the application of such standards might be addressed. It should also be noted that although most RFMOs have detailed scientific assessment procedures in place,¹⁵⁹ disagreements between member states over scientific advice have unfortunately been another factor impairing their efforts to combat overfishing to date.¹⁶⁰

Despite seemingly having reached a workable compromise on this issue, some argue that art 20.16(5)(a) could have gone further in protecting fish stocks. As currently drafted, it protects only those fish stocks in an ‘overfished condition’. This provision would therefore not apply to those stocks that are considered ‘fully fished’, as well as the small portion of stocks considered to be underfished.¹⁶¹ According to one expert commentator, by formulating the prohibition in this way instead of simply prohibiting those subsidies that contribute to overexploitation and overcapacity, the TPP ‘has missed an extraordinary opportunity’ and its fisheries subsidies provisions ‘must be viewed

¹⁵⁷ TPP art 20.16(5)(a).

¹⁵⁸ See, eg, *UNCLOS* arts 61(3), 119(1)(a). This term is generally defined as the maximum catch that can be obtained on a sustained basis: see, eg, Theodore Panayotou, *Management Concepts for Small-Scale Fisheries: Economic and Social Aspects* (FAO Fisheries Technical Paper No 228, Food and Agriculture Organization of the United Nations, 1982) pt 2 (Brief Review of the Basic Concepts of Fishery Management) <<https://perma.cc/5NY7-DXWH>>.

¹⁵⁹ For example NAFO operates a ‘Scientific Council’ which is tasked with providing information in relation to stock management, and the advice from which forms the basis of NAFO’s conservation and management measures: Organisation for Economic Co-operation and Development, above n 73, 99. See also NAFO, *NAFO Science — Advice* <<http://www.nafo.int/science/science.html>>. Similarly, science is also said to ‘underpin the management decisions made by ICCAT’, although this is done via a ‘national scientists model’ of scientific assessment which requires scientists from member states to submit the results of their research to a scientific body established as a subsidiary body of ICCAT: see <<http://www.iccat.org/en/>>. See further Organisation for Economic Co-operation and Development, above n 73, 56.

¹⁶⁰ Organisation for Economic Co-operation and Development, above n 73, 56–7, 99–100.

¹⁶¹ It is estimated that in 2013, 31.4 per cent of fish stocks were overfished, 58.1 per cent were fully fished and 10.5 per cent were underfished: Food and Agriculture Organization of the United Nations, ‘The State of the World Fisheries and Aquaculture’, above n 1, 38.

as inadequate to meet the challenges of fisheries management'.¹⁶² Conversely, however, it could be argued that targeting the most vulnerable, overfished stocks was a good place for the TPP to start, and that it has not failed to recognise the importance of working towards eliminating all subsidies that lead to overfishing and overcapacity, as the analysis of art 20.16(7) above has shown.¹⁶³

3 Reference to 'IUU Fishing' and the Role of RFMOs

In contrast to the approach adopted in art 20.16(5)(a), art 20.16(5)(b) applies the standards of another international regime, the FAO, by directly incorporating the definition of 'IUU fishing' set out in the *IPOA-IUU*.¹⁶⁴ Given that the definition of 'IUU fishing' also makes reference to relevant RFMOs, the TPP Parties have clearly shown a willingness in this instance to adopt the standards and concepts for fisheries conservation and management applied by these organisations. These are significant developments, in particular considering how contentious this form of regime interaction proved to be for some states in the context of the WTO negotiations.

In addition to these developments in the context of art 20.16(5)(b), the concept of IUU fishing has found reference elsewhere in the TPP. In particular, in support of efforts to combat IUU fishing, art 20.16(14) requires parties to, among other things, support monitoring, surveillance and enforcement measures, to implement port state measures, and to act consistently with relevant conservation and management measures adopted by RFMOs of which it is not a member.¹⁶⁵ The recognition of these market-related measures as a means of combatting IUU fishing in the context of a regional trade agreement such as the TPP is also significant. Not only does this provide a 'strong signal of the trade law compatibility of market-related measures to combat IUU fishing',¹⁶⁶ but it brings together different fisheries law regimes and imposes enforceable obligations on the TPP Parties in respect of provisions which would otherwise — pursuant to the FAO fisheries regime discussed above — only be voluntary in nature. This fact takes on particular significance when one considers that, of the twelve TPP Parties, eight have yet to ratify the *Port State Measures Agreement* which has recently become legally binding.¹⁶⁷ As discussed earlier in this article, in the absence of such parallel membership with other international regimes governing fisheries, it is particularly important for trading regimes such as the TPP to continue to promote the incorporation of legally binding market-related mechanisms aimed at addressing the issue of overfishing such as those now established in art 20.16(14) of the TPP. In this context, it is interesting

¹⁶² Chris Wold, 'Empty Promises and Missed Opportunities: An Assessment of the Environment Chapter of the Trans-Pacific Partnership' (Report, 4 January 2016) 16 <<https://perma.cc/NFT5-4HYF>>.

¹⁶³ See above n 153 and surrounding text.

¹⁶⁴ See TPP art 20.16(2) n 11. See also *IPOA-IUU* art 3.

¹⁶⁵ TPP art 20.16(14).

¹⁶⁶ Young, 'International Trade Law Compatibility of Market-Related Measures', above n 95, 216.

¹⁶⁷ For a list of states party to the *Port State Measures Agreement*, see Food and Agriculture Organization of the United Nations, *Agreement on Port Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (30 August 2016) 1 <<https://perma.cc/E6VC-6UQW>>.

to consider that, in its background guide to the *Port State Measures Agreement*, the FAO noted that ‘market-related measures taken in accordance with international law are particularly effective’,¹⁶⁸ but that these were not included in the *Port State Measures Agreement* as ‘it was not intended as a trade instrument’.¹⁶⁹ Despite this statement, the background guide then provides a ‘checklist’ for domestic implementation by states of the provisions of the *Port State Measures Agreement*, in which it recommends that states incorporate those provisions which prohibit ‘trade in fish or fish products taken, possessed, etc in violation of any treaty or binding conservation measure adopted by an RFMO’.¹⁷⁰ Similarly, the TPP appears to have recognised the importance of adopting measures beyond the trade restrictions traditionally applied by trading bodies by explicitly recognising the importance of port state measures in states’ efforts to address IUU fishing. When combined with the explicit prohibition on subsidies set out in art 20.16(5), it is clear that the TPP Parties have made significant progress towards establishing binding disciplines to promote fisheries sustainability, and they have done so through the interaction and application of concepts from different international legal regimes.

4 Social and Developmental Priorities

The TPP does not include exemptions specifically for developing countries in respect of the prohibitions set out in art 20.16(5). Instead, it seems to address the potential social, developmental and food security concerns of its members¹⁷¹ in art 20.16(7) (discussed above in the context of disciplining subsidies that contribute to overfishing and overcapacity).¹⁷² It does so by allowing a TPP Party to ‘[take] into consideration [its] social and development priorities, including food security concerns’ when applying its ‘best efforts’ to refrain from implementing new subsidies as set out in that provision.¹⁷³ A general exemption for developing countries similar to that proposed in the *Chair’s Text 2007* would clearly not have been appropriate given the scope of the prohibitions in

¹⁶⁸ David J Doullman and Judith Swan, *A Guide to the Background and Implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Fisheries and Aquaculture Circular No 1074, Food and Agriculture Organization of the United Nations, 2012) 68.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.* 159.

¹⁷¹ The United Nations designates the following TPP Parties as ‘developing countries’: Brunei, Chile, Malaysia, Mexico, Peru and Vietnam: see United Nations, *World Economic Situation and Prospects* (Report, 2015) 140 <<https://perma.cc/6CFZ-2A4F>>. The TPP also includes scope for the accession of new members, which could result in further developing countries becoming members in the future: TPP art 30.4.

¹⁷² See TPP art 20.16(5)(a).

¹⁷³ *Ibid.* art 20.16(7).

art 20.16(5);¹⁷⁴ instead, the TPP Parties seem to have struck an appropriate balance between attempting to reduce overfishing and overcapacity on the one hand, and recognising the unique challenges faced by developing countries on the other hand. That said, it is important to recall that the long-term goal of the TPP Parties is the ‘eventual elimination of all subsidies that contribute to overfishing and overcapacity’.¹⁷⁵ Thus, whilst the TPP provides flexibility for developing countries to grant subsidies in pursuit of their developmental objectives, an approach which effectively allows some states to continue to apply subsidies recognised as harmful cannot be the long-term solution. Ultimately, such an approach would be detrimental to all, including developing countries themselves, since any beneficial development effects in allowing them to continue to apply these subsidies would be negated in the long-term if, in doing so, domestic fish stocks were depleted.¹⁷⁶

B Fisheries Management Systems

In the context of the WTO negotiations, the *Chair’s Text 2011* notes that considerable convergence has emerged between member states in respect of fisheries management systems and the role that relevant international legal instruments should play in guiding their implementation.¹⁷⁷ The TPP Parties also appear to have been willing to incorporate the standards and concepts set out in these instruments in relation to this issue. Article 20.16(3) requires each TPP Party to ‘seek to operate a fisheries management system’ that is designed to prevent overfishing and overcapacity, reduce bycatch, and promote the recovery of overfished stocks.¹⁷⁸ Such a management system

shall be based on the best scientific evidence available and on internationally recognised best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at ensuring the sustainable use and conservation of marine species.¹⁷⁹

A footnote to this provision sets out a number of such relevant international agreements, including *UNCLOS*, the *UN Fish Stocks Agreement*, the *FAO Code of Conduct* and the *IPOA-IUU*.¹⁸⁰ This list clearly comprises the most important international instruments relating to fisheries conservation and management and

¹⁷⁴ See *Chair’s Text 2007*, WTO Doc TN/RL/W/213, annex VIII art 3.2(b)(3). This is also the position of a number of WTO member states: see, eg, *Nairobi Fisheries Declaration*, WTO Doc WT/MIN/(15)/37/Rev.1, para 4. Interestingly, the recent submission of the African, Caribbean and Pacific group of states considers that until such time as a position on special and differential treatment for developing countries has been agreed, member states ‘should refrain from providing capacity enhancing subsidies to their fishing fleets that affect the sustainability of fish stocks and undermine the development, livelihood and food security prospects of developing countries’: *ACP Group Proposal*, WTO Doc TN/RL/W/267, para 4. Although this is qualified as being ‘subject to their individual development needs’, the proposal makes this a firm obligation on parties in contrast to the ‘best efforts’ obligation set out in art 20.16(7) of the TPP.

¹⁷⁵ TPP art 20.16(5).

¹⁷⁶ Von Moltke, above n 2, 201.

¹⁷⁷ *Chair’s Text 2011*, WTO Doc TN/RL/W/254, annex (‘Negotiations on Subsidies and Countervailing Measures — Report by the Chairman’) para 94.

¹⁷⁸ TPP art 20.16(3).

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid* art 20.16(3) n 12.

represents a clear intention by the TPP Parties to incorporate the standards and benchmarks established in these instruments in their efforts to promote sustainable fisheries management.

What is somewhat disappointing, however, is that the TPP Parties have chosen to phrase the obligation of the parties in relation to fisheries management systems as one in which they must ‘seek to operate’ such systems. Like the ‘best efforts’ obligation discussed above in the context of art 20.16(7), this is an obligation of conduct rather than result (a ‘due diligence’ obligation), and thus imposes a lesser standard upon the parties.¹⁸¹

C Notifications

The issue of transparency in the granting of subsidies by states is one of the key issues common to a number of the recent proposals submitted by WTO member states in the lead-up to the 2015 Nairobi Ministerial Conference.¹⁸² It is an issue which is recognised as fundamental to international efforts to discipline fisheries subsidies,¹⁸³ and one which presented a serious challenge to the operation of the *SCM Agreement* in this area.¹⁸⁴

The TPP addresses this issue, requiring each party to notify the other TPP Parties of any subsidy granted or maintained by that party to persons engaged in fishing or fishing-related activities.¹⁸⁵ Such notification is required within one year of the date on which the TPP has entered into force for a TPP Party and every two years thereafter¹⁸⁶ and must include the information required under art 25.3 of the *SCM Agreement*.¹⁸⁷ To the extent possible, it must also include the information set out in art 20.16(10) of the TPP.¹⁸⁸ This list includes information

¹⁸¹ For analysis of the concept of a ‘due diligence’ obligation, see *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14, 79–80 [197]. See also *Responsibilities and Obligations of States with Respect to Activities in the Area (Advisory Opinion)* (International Tribunal for Law of the Sea, Case No 17, 1 February 2011) [117] <<https://perma.cc/S9US-8SAE>>.

¹⁸² See, eg, *Fisheries Subsidies: Ministerial Decision of December 2015*, WTO Doc TN/RL/W/266 (3 November 2015) (Proposal by Australia); *EU Technical Paper in Follow-Up of its Transparency Submission (TN/RL/W/260)*, WTO Doc TN/RL/W/263 (20 October 2015) (‘EU Technical Paper’); *ACP Group Proposal*, WTO Doc TN/RL/W/267.

¹⁸³ See Tracy M Price, ‘Negotiating WTO Fisheries Subsidy Disciplines: Can Subsidy Transparency and Classification Provide the Means Towards an End to the Race for Fish?’ (2005) 13 *Tulane Journal of International and Comparative Law* 141, 165–6; Rashid Sumaila, ‘The Race to Fish: How Fishing Subsidies Are Emptying Our Oceans’, *The Conversation* (online), 19 October 2015 <<https://perma.cc/W7L3-6LKU>>.

¹⁸⁴ There is generally a poor record of compliance amongst member states with the notification provisions of the *SCM Agreement*: Young, *Trading Fish, Saving Fish*, above n 57, 92–3. See also *SCM Agreement* art 25, which requires member states to notify the WTO of any subsidies granted or maintained. According to World Wildlife Fund estimates, it is likely that as many as 90 per cent of fisheries subsidies are not properly notified to the WTO: *Healthy Fisheries Report*, above n 15, 48. In addition, to the extent that notifications are made, the information required within such notifications is usually not sufficient to determine whether the subsidies conform to the *SCM Agreement*: Gustavo E Luengo Hernández de Madrid, *Regulation of Subsidies and States Aids in WTO and EC Law: Conflicts in International Trade Law* (Kluwer Law International, 2007) 200.

¹⁸⁵ TPP art 20.16(9).

¹⁸⁶ *Ibid*.

¹⁸⁷ *Ibid* art 20.16(10).

¹⁸⁸ *Ibid*.

such as the status of fish stocks in the fishery for which the subsidy is provided,¹⁸⁹ the fleet capacity for this fishery¹⁹⁰ and the conservation and management measures in place for the relevant fish stock.¹⁹¹ The list clearly goes beyond the trade-specific information required under art 25.3 of the *SCM Agreement*.¹⁹² Given the importance of this type of information to the sustainable management of fisheries, however, it would have been preferable to see a mandatory requirement on the parties to provide this information, without the qualification that this be ‘to the extent possible’, as art 20.16(10) is currently drafted. Whilst this language may have been an attempt to avoid imposing an additional burden on under-resourced developing countries, an alternative may be to instead consider creating a framework whereby technical assistance can be provided to these countries to assist them in meeting these notification obligations.¹⁹³

Article 20.16(11) imposes a further obligation to provide information, ‘to the extent possible’, in relation to other fisheries subsidies that are not covered by the prohibition in art 20.16(5), in particular fuel subsidies.¹⁹⁴ Again, an unconditional obligation to provide this information would have been preferable, particularly considering the magnitude of fuel subsidies and the consensus that exists amongst states regarding their impact and the need for further disciplines in this area.¹⁹⁵

The importance of receiving accurate and reliable data will also be crucial for the purposes of parties bringing claims pursuant to the dispute resolution mechanism discussed below.

D Enforcement

The TPP provides two potential mechanisms by which the provisions of the Environment Chapter may be enforced: a dispute resolution process¹⁹⁶ and a public submission process.¹⁹⁷ It also establishes an Environment Committee, comprising representatives from each of the TPP Parties, whose purpose is to

¹⁸⁹ Ibid art 20.16(10)(d).

¹⁹⁰ Ibid art 20.16(10)(e).

¹⁹¹ Ibid art 20.16(10)(f).

¹⁹² *SCM Agreement* art 25.3 requires that members provide the following information in respect of any subsidies they grant or maintain: (a) form of the subsidy (that is, grant, loan, tax concession etc); (b) subsidy per unit or, where this is not possible, the total amount or the annual amount budgeted for that subsidy; (c) policy objective and/or purpose of the subsidy; (d) duration of the subsidy and/or any other time-limits attached to it; and (e) statistical data permitting an assessment of the trade effects of the subsidy.

¹⁹³ This approach has been suggested by the European Union in the context of the WTO negotiations: *EU Technical Paper*, WTO Doc TN/RL/W/263, 3. The European Union and the African, Caribbean and Pacific Group of States also suggested that additional notification requirements could be made applicable only to major fishing nations, for example those accounting for a certain proportion of global wild fisheries catch: *EU Technical Paper*, WTO Doc TN/RL/W/263, 3; *ACP Group Proposal*, WTO Doc TN/RL/W/267, annex I art 2.2.

¹⁹⁴ TPP art 20.16(11).

¹⁹⁵ See above nn 149–52 and surrounding text regarding fuel subsidies.

¹⁹⁶ TPP art 20.23.

¹⁹⁷ Ibid art 20.9.

facilitate communication between the TPP Parties in the implementation of the Environment Chapter.¹⁹⁸

1 *Dispute Resolution*

The dispute resolution mechanism provides for a three-stage consultation process before a TPP Party may bring a claim before a dispute panel regarding any matter arising under the Environment Chapter.¹⁹⁹ Given this potentially lengthy process before a matter can even reach dispute settlement, a number of environmental groups and commentators have expressed some scepticism as to whether these provisions will actually have any effect.²⁰⁰ The Centre for International and Environmental Law ('CIEL') has also highlighted that, with similar enforcement provisions, no formal case has ever been instituted pursuant to the environmental provisions of any United States free trade agreement ('US FTA'), despite documented violations of these provisions.²⁰¹ It remains to be seen whether the dispute settlement provisions under the TPP will prove any more effective.

2 *Public Submissions*

The public submission process allows the citizens of a TPP Party (including acting through a non-governmental organisation) to present written submissions asserting that a TPP Party is failing to effectively enforce its environmental laws.²⁰² The procedure under the TPP first requires parties to present their submission not to an independent third party, but to the actual TPP Party whose implementation of the Environment Chapter is being challenged.²⁰³ It then allows for a request to be made to the Environment Committee to review the submission and the written response of the TPP Party the subject of the submission 'with a view to further understanding the matter raised ... and to consider whether the matter could benefit from cooperative activities'.²⁰⁴ Beyond this, the only other task of the Environment Committee in the public submission process is to prepare a written report for the TPP Commission²⁰⁵ regarding the implementation of art 20.9.²⁰⁶ There are no enforceable consequences arising from this report or from any other aspect of the process.

¹⁹⁸ Ibid art 20.19(2).

¹⁹⁹ Ibid arts 20.20–3. See also TPP ch 28.

²⁰⁰ See, eg, Wold, above n 162, 20.

²⁰¹ Centre for International Environmental Law, 'The Trans-Pacific Partnership and the Environment: An Assessment of Commitments and the Trade Agreement Enforcement' (November 2015) 1 <<https://perma.cc/4H3G-CENF>> ('CIEL Assessment'). See also Wold, above n 162, 20.

²⁰² TPP art 20.9.

²⁰³ Ibid art 20.9(1).

²⁰⁴ Ibid art 20.9(4).

²⁰⁵ Ibid art 27.1 The TPP Commission's functions include, inter alia, to: consider any matter regarding the implementation or operation of the TPP: at art 27.2(1)(a); consider proposals to amend or modify the TPP: at art 27.2(1)(c); and consider ways to further enhance trade and investment between the parties: at art 27.2(1)(e). It may also seek to resolve disputes arising under the TPP regarding its interpretation or application: at art 27.2(2)(e).

²⁰⁶ Such a report must be provided three years after the TPP has entered into force and thereafter as decided by the parties: ibid art 20.9(6).

In addition to the obvious concerns regarding a lack of independent oversight and binding enforcement, of further concern is the requirement that, in establishing the process outlined above, parties must ‘explain how, and to what extent, the issue raised affects trade or investment between the Parties’.²⁰⁷ Establishing such an effect is not always going to be possible or, indeed, relevant to the alleged violation; in the case of fisheries subsidies, for example, any likely adverse effects that a subsidy or a failure to maintain an effective fisheries management system may cause will be in resource availability, rather than export prices or any area generally affecting trade and investment. It was a similar focus on trade, and not environmental harm, that has meant that the *SCM Agreement* is inadequate to deal with the issue of fisheries subsidies.²⁰⁸

3 *Independence and Autonomy*

Given the history of non-use of the dispute mechanism procedures in other US FTAs and the weak, non-binding nature of the public submission process described above, it is not surprising that a number of environmental groups have been disappointed with the enforcement provisions in the TPP.²⁰⁹ This is particularly the case given that some environmental groups in the United States had recommended that their Congress consider ignoring previous US FTAs and instead adopt a new approach to dispute resolution under the TPP’s Environment Chapter.²¹⁰ One such recommendation involved the creation of an ‘independent body to continuously monitor countries’ compliance with environmental chapter obligations, report on best-practices and compliance, and bring cases directly to a dispute settlement body if and when it finds non-compliance with environmental obligations’.²¹¹ This request is seen largely as a response to the apparent decrease in independent oversight and autonomy that has undermined environmental enforcement in past US FTAs, now also evident in the TPP in the form of the elimination of the secretariat position.²¹² According to CIEL, an autonomous body such as the secretariat would be able to more effectively enforce the environmental provisions and evaluate the environmental effects of the TPP, including by reviewing citizen submissions and overseeing the dispute settlement process.²¹³

E *Investor–State Dispute Settlement*

The TPP’s investment chapter seeks to protect investors from political and other risks when they invest in any TPP country.²¹⁴ It does so by allowing an investor to challenge alleged violations of investment contracts, international law and even the domestic laws of a TPP country and seek compensation for

²⁰⁷ Ibid art 20.9(2)(d).

²⁰⁸ See above Part IV(A) in relation to the *SCM Agreement*.

²⁰⁹ See, eg, *CIEL Assessment*, above n 201.

²¹⁰ Ibid 7.

²¹¹ Ibid 8–9, citing a letter from 13 US environmental groups to the US Congress dated 29 October 2013.

²¹² Ibid 8.

²¹³ Ibid.

²¹⁴ TPP ch 9.

interference with its commercial interests.²¹⁵ The increasing application of these investor–state dispute settlement (‘ISDS’) provisions in other international trade and investment agreements is causing concern — and has given rise to much criticism of the TPP’s investment chapter — given the influence that potential disputes can have on a state’s internal public policy and decision-making.²¹⁶ There is particular concern in relation to the application of these provisions to environmental and other public interest policies. The recent claim brought by Philip Morris Asia Ltd against Australia pursuant to the ISDS provisions of a bilateral investment treaty between Australia and Hong Kong (the ‘*Australian Tobacco Case*’)²¹⁷ is an example of the use of ISDS provisions to challenge a state’s health and safety laws, in this case, those relating to new cigarette ‘plain packaging’ laws. A number of claims have also been made in other jurisdictions challenging a state’s environmental laws.²¹⁸

The TPP has taken steps to address the potential threat posed by the use of ISDS provisions to effectively challenge a party’s environmental obligations, including in response to the *Australian Tobacco Case*.²¹⁹ Significantly in the context of the TPP’s fisheries subsidies provisions, the Investment Chapter (ch 9) includes a specific carve-out in the application of the national treatment and most-favoured nation provisions for ‘subsidies or grants’ provided by a TPP Party,²²⁰ as well as a clarification that a party’s decision not to issue, renew or maintain, or modify or reduce, a subsidy or grant will not constitute an expropriation.²²¹ In addition, ch 9 includes a general provision recognising the importance of a party’s environmental and health policies, stipulating that no party will be prevented from adopting measures otherwise consistent with that chapter which ‘it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives’.²²² Taken together, these provisions should provide

²¹⁵ The main provisions of ch 9 require that a party accords to the investors and investments of another party treatment no less favourable than it accords, in like circumstances, to its own investors and their investments (TPP art 9.4), and treatment no less favourable than it accords to the investors and investments of any other party (TPP art 9.5).

²¹⁶ See, eg, Nathalie Bernasconi-Osterwalder, ‘How the Investment Chapter of the Trans-Pacific Partnership Falls Short’ on *International Institute for Sustainable Development Blog* (6 November 2015) <<https://perma.cc/ZC4Q-ZTGW>>; Elizabeth Warren, ‘The Trans-Pacific Partnership Clause Everyone Should Oppose’, *The Washington Post* (online), 25 February 2015 <<https://perma.cc/8A26-ZAPY>>; Paola Casale, *The Dangers of Investor State Dispute Settlements (ISDS)* (9 May 2016) *Economy in Crisis* <<https://perma.cc/6G3G-2BCH>>.

²¹⁷ *Philip Morris Asia Ltd (Hong Kong) v Australia (Award on Jurisdiction and Admissibility)* (Permanent Court of Arbitration, Case No 2012-12, 17 December 2015). The dispute was brought before an arbitral tribunal pursuant to the terms of the *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*, signed 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993).

²¹⁸ For discussion of other cases invoking ISDS provisions see *CIEL Assessment*, above n 201, 10–12.

²¹⁹ See TPP art 29.5, which specifically allows a TPP Party to deny investors the right to invoke the ISDS provisions to bring a claim challenging any ‘tobacco control measure’ of a TPP Party. A ‘tobacco control measure’ is defined as ‘a measure of a Party related to the production or consumption of manufactured tobacco products’.

²²⁰ TPP art 9.12(6)(b).

²²¹ *Ibid* art 9.7(6).

²²² *Ibid* art 9.16.

sufficient protection to TPP Parties against any potential investor's challenge to the policies and laws they will need to implement in order to comply with the fisheries subsidies obligations imposed on them under the Environment Chapter.

F *Evaluating the Success of the TPP's Fisheries Subsidies Provisions*

Part VI of this article has considered the fisheries subsidies and related provisions of the TPP to determine the potential for this new regional trading regime to bring about positive outcomes for fisheries sustainability. Whilst general conclusions can be drawn as to whether such outcomes can be achieved based on the analysis of the relevant provisions discussed in this article, the actual methods used to assess these outcomes should also be considered. A detailed analysis of such methods is beyond the scope of this article. However one important factor to note is whether a scientific committee (made up of appropriately qualified members of each of the TPP Parties, and similar to those which have been established pursuant to a number of RFMOs) should be considered for the purposes of evaluating compliance with the TPP's fisheries subsidies and related provisions. Although an Environment Committee is established pursuant to art 20.19(2) (as discussed above in the context of the public submissions process),²²³ it is unclear whether there is scope for this committee to conduct appropriate scientific analysis. There is, however scope for the TPP Parties to establish new 'consultative mechanisms'²²⁴ and for the Environment Committee to 'coordinate with other committees established under [the TPP] as appropriate'.²²⁵ A scientific committee could therefore be established and tasked with responsibility for collecting relevant data (for example, pursuant to the notification provisions set out in arts 20.16(9)–(12) of the TPP) and, perhaps most significantly, could undertake an analysis, based on the application of appropriate scientific standards and methods, as to whether any particular stock is 'negatively affected' or in 'overfished condition' as the language of art 20.16(5) provides. This committee could also act as a liaison with relevant RFMOs, the FAO and other relevant bodies for the purposes of ensuring proper coordination and cooperation between these different regimes. As this article has demonstrated, coordinated and effective regime interaction is crucial to efforts to address overfishing and will no doubt go a long way towards ensuring the effectiveness of the TPP's fisheries subsidies and related provisions.

VII CONCLUSION

This article has considered recent international efforts to use the laws and institutions of international trade to discipline the harmful subsidies that contribute to overfishing and overcapacity. The TPP has taken a significant first step towards implementing binding subsidies disciplines, including in relation to overfished stocks and those subsidies which play a role in the support of IUU fishing. Whereas WTO members have previously been unable to agree on the appropriate role of, and interaction with, other international regimes applicable to this issue, the TPP Parties have shown willingness, where appropriate, to draw

²²³ See further Part VI(D) above.

²²⁴ TPP art 20.8(2).

²²⁵ Ibid art 20.19(3)(f).

upon the expertise of other relevant international bodies and regimes, such as the FAO and *UNCLOS*, promoting information sharing and learning and a role for a wider group of interested parties. They have also indicated a willingness to work with RFMOs in promoting effective fisheries management — an element recognised as crucial to any efforts to promote lasting fisheries sustainability — and have introduced expanded notification provisions beyond those of the *SCM Agreement* in an effort to improve the transparency of states' subsidies programs. Significantly, the TPP has also been able to integrate market-related concepts and standards which have, until now, found no application in the context of multilateral or regional trading regimes. The reference to the application of port state measures in efforts to combat IUU fishing is of particular significance. This move towards greater regime interaction, and recognition of the compatibility of trade and market-related measures, is a positive development for international efforts to address overfishing.

In other areas, however, there is still significant room for improvement: the TPP has failed to discipline those subsidies generally recognised as harmful, in particular fuel subsidies, and in other areas has used weak, qualified language which has the potential to render some of its provisions completely ineffective; its public submission and state-to-state resolution processes are somewhat convoluted and, more disturbingly, provide for no independent oversight or enforcement mechanisms; and whilst its ISDS provisions have specifically sought to carve out subsidies from their application and include a general provision recognising the importance of the parties' environmental and health policies, it remains to be seen how these provisions will be interpreted and applied in practise, and whether there is any scope for other related provisions to nonetheless be caught within the ambit of these provisions. Consideration should also be given to including a framework for the implementation of carefully designed subsidies programs to support fisheries management, research and, in respect of developing countries, poverty alleviation and developmental objectives. An appropriately qualified scientific committee should also be considered as a means of ensuring the effective application of relevant scientific methods and principles as required.

It is hoped that the TPP can provide the impetus for the continuation of WTO negotiations in this area, and that these two international trading regimes can create robust and consistent disciplines for fisheries subsidies through integration with, and application of the principles of, the other international regimes relevant to fisheries governance discussed in this article. Given the crisis facing the world's oceans, striking the right balance between the competing developmental, trade and environmental issues outlined in this article must be at the forefront of all negotiations; in this way, it is hoped that the eventual elimination of all subsidies which contribute to overfishing and overcapacity can be realised, and that positive and lasting outcomes for fisheries sustainability will be achieved.