CURRENT DEVELOPMENT OF FISHERIES SUBSIDIES REGULATIONS AFTER THE FAILURE OF WTO DOHA ROUND NEGOTIATIONS WITH A FOCUS ON THE ASIA-PACIFIC REGION

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ABSTRACT

Given the negative impacts of fisheries subsidies on trade, the environment and sustainable development, there have been concerns for eliminating fisheries subsidies via international instruments following the development of international fisheries law, and international trade law, in particular, the World Trade Organization (hereinafter "WTO") law. As there is no single international instrument at the global level to effectively control fisheries subsidies, via a group of WTO Members' advocates this issue was finally drawn to the WTO's Doha Round Negotiations initiated in 2001 and contained in the mandates of the Doha Ministerial Declaration. In 2007, the WTO's Negotiating Group on Rules (NGR) proposed the Draft Consolidated Chair Texts of the AD and SCM Agreement (hereinafter "2007 Proposed Draft") which represents a substantial step of these negotiations. However, with the failure of the Doha Round Negotiations, the 2007 Proposed Draft has been put in mothballs. Fortunately, international concerns were later stimulated at both the regional and global levels, namely the 2015 Trans-Pacific Partnership Agreement (hereinafter "TPP") which was then replaced by the 2018 Comprehensive and Progressive

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Agreement for Trans-Pacific Partnership (hereinafter "CPTPP") as well as the 2015 United Nations Sustainable Development Goals (hereinafter "SDGs"). Both concepts developed within the TPP/CPTPP and SDGs to a great extent reflect those of the WTO's 2007 Proposed Draft.

Finally, as the response to the SDGs and as the decision of the 2017 WTO Buenos Aires Ministerial Conference, the negotiations resumed in 2020 aiming to conclude the negotiations in the next Ministerial Conference. Although the negotiations have been impacted by the COVID-19 Pandemic, based on efforts that have been made, the Chair of fisheries subsidies negotiations released a revised draft (hereinafter "2021 Revised Draft") in November 2021.

Given that the fisheries resources in the Asia-Pacific region are depleting, as well as that the majority of States involving in marine capture fisheries and fisheries subsidies are located in this region, this paper with a focus on this region examines the potential instruments via a normative and comparative analysis of the WTO's 2007 Proposed Draft and 2021 Revised Draft, as well as the CPTPP Environment Chapter. Found are that the 2021 Revised Draft seems to have made some compromises and thus there may be fewer obstacles in the negotiations. Yet, the wrestling between the United States and China may still impact the outcome of negotiations. In that case, further attention can be paid to the CPTPP which provides robust fisheries subsidies and fisheries management regulations. Both to accelerate the WTO fisheries subsidies negotiations at the global level as well as to enhance the CPTPP expansion and to improve its enforcement at the regional level would be needed for the robust fisheries management and conservation in the Asia-Pacific region.

KEYWORDS: *fisheries subsidies, SCM Agreement, WTO, CPTPP, IUU fishing, overcapacity, overfishing, overfished, fisheries management system, Doha Round Negotiations, Asia-Pacific region*

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I. INTRODUCTION

The United Nations Food and Agriculture Organization (hereinafter "FAO") estimated that global marine capture fisheries were approximately 84.4 million tons in 2018.[1] A high percentage of the global fisheries trade resulted from fisheries subsidies, in their various forms.[2] Also estimated were that global fisheries subsidies were USD 35.4 billion in 2018.[3] Significantly, 65% of global fisheries subsidies were provided by Asia-Pacific Economic Cooperation (APEC) countries.[4] Most of these subsidies were capacity-enhancing.[5] Thus, the international society has long considered the impacts of fisheries subsidies and the need to regulate them.

The "Guide for Identifying, Assessing and Reporting on Subsidies in the Fisheries Sector" adopted by the FAO in 2002 was the first step to understanding the effects of the fisheries subsidies.[6] It defined fisheries subsidies as government actions or inactions beyond normal practices that, by increasing or decreasing them, modify the potential profits of the fisheries industry in the short, medium or long term.[7] The definition at the regulatory level is provided by the Agreement on Subsidies and Countervailing Measures (hereinafter "SCM Agreement") under Annex I of the World Trade Organization (hereinafter "WTO") Agreements. Article 1 of the SCM Agreement provides that a subsidy exists when there is a "financial contribution" by a "government or any public body within the territory of a Member" that confers a "benefit."[8] Fisheries subsidies exist in various forms as observed by the FAO, including (1) direct government payments to the fishing industry; (2) service and indirect financial transfers; (3) implicit payments to or charges against the industry; (4) general programmes that affect fisheries; (5) regulations; (6) lack of government intervention.[9] Estimates conducted by the United Nations Environment Programme (UNEP) have considered that fisheries subsidies lead to market distortions and

[1] FOOD & AGRIC. ORG. OF THE U.N. [hereinafter FAO], THE STATE OF WORLD FISHERIES AND AQUACULTURE 2020: SUSTAINABILITY IN ACTION 5 (2020).
[2] Ussif Rashid Sumaila et al., *A Global Dataset on Subsidies on the Fisheries Sector*, 27 DATA IN BRIEF 1, 3 (2019).
[3] Ussif Rashid Sumaila et al., *Updated Estimates and Analysis of Global Fisheries Subsidies*, 109 MARINE POL'Y 1, 1 (2019).
[4] HUANI ZHU & CARLOS KURIYAMA, TRADE OF FISHERY PRODUCTS AND FISHERIES SUBSIDIES IN APEC 3 (2017).
[5] *See* Sumaila et al., *supra* note 3.
[6] LENA WESTLUND, GUIDE FOR IDENTIFYING, ASSESSING AND REPORTING ON SUBSIDIES IN THE FISHERIES SECTOR 19 (2004), https://www.fao.org/3/y5424e/y5424e00.htm.
[7] *Id*. at 7-8.
[8] Agreement on Subsidies and Countervailing Measures art. 1.1(a)(1), (b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].
[9] *See* WESTLUND, *supra* note 6, at 15-17.

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fisheries depletion.[10] These negative impacts on trade, the environment and development exist in particular without the existence of the sound fisheries management system.[11]

Thus, regulating fisheries subsidies has drawn attention of international society and two aspects can be examined. First, amongst the numerous international fisheries instruments, the International Plan of Action for the Management of Fishing Capacity (hereinafter "IPOA-Capacity")[12] and International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter "IPOA-IUU")[13] developed by the FAO take into account the role of subsidies in building excess reduction and incentivizing Illegal, Unreported and Unregulated fishing (hereinafter "IUU fishing"). However, the results have long shown the ineffectiveness of existing fisheries instruments, given their voluntary legal nature and reliance on unilateral action by fishing States.[14] Second, the SCM Agreement provides a series of multilateral and domestic remedial mechanisms to establish the legality of a subsidy that has an adverse effect on trade or the markets of its Members and uses countervailing duties as a means of protection against the subsidized imports. Yet, these general subsidies regulations envisage merely in industrialized products and manufacturing industries and are insufficient to cover all the negative impacts resulting from various types of fisheries subsidies. Due to the unique nature of the fishing industry and the great variety of fisheries subsidies, the current provisions of the SCM Agreement do not adequately cover fisheries subsidies. During the Doha Round Negotiations which was initiated in 2001, to amend the SCM Agreement has been the mainstream in fisheries subsidies negotiations.[15] As the WTO with its pivotal role on international trade and its power to adopt binding regulations on its Members has the necessary expertise, legal framework and mechanism to enact measures to control fisheries subsidies on a global scale, the fisheries subsidies negotiations at

[10] U.N. ENV'T PROGRAMME, ANALYZING THE RESOURCE IMPACT OF FISHERIES SUBSIDIES: A MATRIX APPROACH 4-18 (2004).
[11] CHEN-JU CHEN, FISHERIES SUBSIDIES UNDER INTERNATIONAL LAW 11-18 (2010).
[12] FAO, INTERNATIONAL PLAN OF ACTION FOR REDUCING INCIDENTAL CATCH OF SEABIRDS IN LONGLINE FISHERIES. INTERNATIONAL PLAN OF ACTION FOR THE CONSERVATION AND MANAGEMENT OF SHARKS. INTERNATIONAL PLAN OF ACTION FOR THE MANAGEMENT OF FISHING CAPACITY (1999), https://www.fao.org/3/x3170e/x3170e00.htm.
[13] FAO, INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING (2001).
[14] David K. Schorr, *Fisheries Subsidies and the WTO, in* TRADE, ENVIRONMENT AND THE MILLENNIUM 143, 182-83 (Gary P. Sampson & W. Bradnee Chambers eds., 2002).
[15] Debashis Chakraborty et al., *Doha Round Negotiations on Subsidy and Countervailing Measures: Potential Implications on Trade Flows in Fishery Sector*, 6(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 201, 210-15 (2011).

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the global level take place in the WTO framework.[16] Yet, the Doha Round Negotiations have come to the deadlock and no consensus on fisheries subsides has been reached.

Observed is that at the end of the era of multilateralism comes the era of regionalism.[17] In the Asia-Pacific region, emerged significantly is the development of the 2015 Trans-Pacific Partnership Agreement (hereinafter "TPP") to enhance regional economic integration. The TPP was then replaced by the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter "CPTPP").[18] The TPP Environment Chapter, largely unchanged in the CPTPP,[19] acknowledges the overfishing conditions resulting from the fisheries subsidies that contribute to overfishing and overcapacity and requires parties to take measures based on "internationally recognized best practices for fisheries management and conservation."[20] Expected is its implementation of binding fisheries subsidies regulations, although some improvements of the CPTPP contents are still needed.[21]

Also, the United Nations Sustainable Development Goals (hereinafter "SDGs") adopted in September 2015 affirms the WTO's role in developing fisheries subsidies regulations as well as gives the negotiators the tasks to prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing and to eliminate subsidies that contribute to IUU fishing by 2020. Thus, the 2017 11th WTO Ministerial Conference in Buenos Aires raised the urgent need to conclude the fisheries subsidies negotiations within the WTO and adopted the mandate to resume the negotiations. In 2020, the negotiations resumed. Based on the collective efforts of WTO Members, the Chair of fisheries subsidies negotiations released a revised draft on 24

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[16] At the early stage, there were doubts over the WTO's role in fisheries subsidies management. *See generally* Seung Wha Chang, *WTO Disciplines on Fisheries Subsidies: A Historic Step Towards Sustainability*, 6(4) J. INT'L ECON. L. 879 (2003).

[17] Daniel Drache & Marc D. Froese, *Deadlock in the Doha Round: The Long Slow Decline of Trade Multilateralism*, SSRN (Oct. 23, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024030.

[18] *The Comprehensive and Progressive Agreement for Trans-Pacific Partnership Text and Resources*, N.Z. FOREIGN AFFS. & TRADE, https://www.mfat.govt.nz/tw/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/ (last visited Mar. 8, 2022).

[19] *Consolidated TPP Text – Chapter 20 – Environment*, GOV'T CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/20.aspx?lang=eng (last visited Mar. 13, 2022) [hereinafter CPTPP Environment Chapter]. Regarding the CPTPP Environment Chapter, see generally Christopher O'Toole, *TPP Trade and Environment Chapter*, *in* THE COMPREHENSIVE AND PROGRESSIVE TRANS-PACIFIC PARTNERSHIP: ANALYSIS AND COMMENTARY 633 (Jorge A. Huerta-Goldman & David A. Gantz eds., 2021).

[20] CPTPP Environment Chapter, *supra* note 19, art. 20.16(3).

[21] Amanda Rologas Tsangalis, *Fisheries Subsidies Under the Trans-Pacific Partnership: Towards Positive Outcomes for Global Fisheries Sustainability and Regime Interaction Under International Law*, 17(2) MELB. J. INT'L L. 445, 475-76 (2016).

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November 2021 (hereinafter "2021 Revised Draft"),[22] ahead of the twelfth WTO Ministerial Conference,[23] which was set to take place in December 2021 but postponed again to 2022.[24]

It has taken a great deal of effort in conducting international negotiations and making legislation: from the Doha Round Negotiations to amend the SCM Agreement,[25] the adoption and entering into force of the CPTPP Environment Chapter, the affirmation of the SDG 14.6 as well as the progress made in the WTO since the Ministerial Conference in 2017.

The Asia-Pacific region is where fifteen of the twenty-five global marine capture producing countries are located.[26] Seven of these fifteen countries are the CPTPP Contracting Parties, namely Peru as the second, Vietnam as the seventh, Japan as the eighth, Chile as the tenth, Mexico as the thirteenth, Malaysia as the fourteenth, and Canada as the twenty-fourth largest marine capture producing country.[27] Amongst these CPTPP Contracting Parties, Japan is the second-largest importer of fish and fish products. Vietnam is the third-largest exporter, Chile is the fourth and Canada is the ninth. The United States and China are also amongst the top marine capture producing countries, importers and exporters.[28] These statistics show the significance of fisheries sector in the Asia-Pacific region. In addition, the thirteen highest subsidizing States or entities in 2018 include China, European Union (hereinafter "EU"), United States, Korea, Japan, Russia, Thailand, Indonesia, Canada, Norway, Spain, Taiwan and Vietnam.[29] Those who mostly subsidizing the distant water fleets are China, the EU, Japan, Korea and Taiwan.[30] Most of them are still located in the Asia-Pacific region. Few are even the EU and its Members States, although observed is that they may via the EU Common Fisheries Policy, regulations and directives as well as external trade agreements pursue fisheries conservation and sustainability.[31]

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[22] World Trade Org. [hereinafter WTO], *Agreement on Fisheries Subsidies, Draft Text*, WTO Doc. WT.MIN(21)/W/5 (Nov. 24, 2021) [hereinafter 2021 Revised Draft].

[23] *Draft Agreement on Fisheries Subsidies Submitted for Ministers' Attention Ahead of MC 12*, WTO (Nov. 25, 2021), https://www.wto.org/english/news_e/news21_e/fish_25nov21_e.htm.

[24] *DG Calls on Members to Agree on Pandemic Response, Fisheries Subsidies by End-February*, WTO (Dec. 2, 2021), https://www.wto.org/english/news_e/news21_e/hod_02dec21_e.htm.

[25] See more about the applicability of the current instruments, including the General Agreement on Tariffs and Trade (GATT) and SCM Agreement, to fisheries subsidies, in Chakraborty et al., *supra* note 15.

[26] China, Peru, Indonesia, Russia, United States, Viet Nam, Japan, Chile, Philippines, Thailand, Mexico, Malaysia, Korea, Taiwan and Canada. *See* FAO, *supra* note 1, at 13.

[27] *Id.*

[28] *Id.* at 76.

[29] *See* Sumaila et al., *supra* note 3, at 7.

[30] Isabel Jarrett & Reyna Gilbert, *New Research Shows the 5 Governments Funding Most Distant-Water Fishing—and the Harm It Causes*, PEW (Nov. 18, 2021), https://www.pewtrusts.org/zh/research-and-analysis/articles/2021/11/18/new-research-shows-the-5-governments-funding-most-distant-water-fishing-and-the-harm-it-causes.

[31] Mihail Vatsov, *Towards Achieving Sustainable Fishing Through EU Trade Agreements?*, 3(1) EUR. & WORLD: L. REV. 1, 18 (2019).

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As the Asia-Pacific fisheries are also facing the challenges of overfishing just like the other parts of the world,[32] the attention of this paper is paid to the Asia-Pacific region.

Accordingly, in order to learn how the current development of fisheries subsidies regulations implicates the Asia-Pacific region, this paper examines the differences between the released or adopted drafts from a normative and comparative analysis. Included are the drafts released by the WTO as well as the CPTPP Environment Chapter. In order to pursue the fisheries conservation and sustainability, investigated is this development of fisheries subsidies regulations to see on what kind of structure this set of regulations is developed, by what kind of criteria and requirements it regulates the different categories of fisheries subsidies, to what extent it incorporates international fisheries management instruments into the WTO framework, to what extent the Asia-Pacific region is implicated, etc. Further examined is the balance that this development tries to reach between trade and the environment. Looked ahead would be the consensus to be reached in the twelfth WTO Ministerial Conference.

II. EARLY DEVELOPMENT AND THE DEADLOCK WITHIN THE WTO FRAMEWORK

A. Negotiations with the WTO Framework Before the Doha Ministerial Conference

After the establishment of the WTO, the discussions on fisheries subsidies were firstly taken place in the Committee on Trade and Environment (hereinafter "CTE") regarding the role that subsidies played in the fisheries sector. Australia, Iceland, New Zealand and the United States brought their concerns about the negative impacts of fisheries subsidies to the WTO and called for the elimination of subsidies contributing to overcapacity and overfishing within the WTO Framework.[33] Yet, Japan

[32] *See* FAO, *supra* note 1, at 49, Fig. 20.

[33] Numerous submissions include: WTO, *Submission by the United States to the Committee on Trade and Environment: Environmental and Trade Benefits of Removing Subsidies in the Fisheries Sector*, WTO Doc. WT/CTE/W/51 (May 19, 1997); WTO, *Submission by Australia to the Committee on Trade and Environment: Trade Liberalization and the Environment: A Positive Agenda for Trade Reform*, WTO Doc. WT/CTE/W/105 (Feb. 2, 1999); WTO, *Submission by Iceland to the Committee on Trade and Environment: On the Environmental Impact of Fisheries Subsidies*, WTO Doc. WT/CTE/W/111 (Mar. 11, 1999); WTO, *Submission by Iceland to the Committee on Trade and Environment: The Icelandic Fisheries Management System: A Market-Driven Sustainable Fisheries Regime*, WTO Doc. WT/CTE/W/103 (Jan. 25, 1999); WTO, *Submission by New Zealand to the Committee on Trade and Environment: Benefits of Eliminating Trade Distorting and Environmentally Damaging Subsidies in the Fisheries Sector*, WTO Doc. WT/CTE/W/121 (June 28, 1999).

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considered that other factors on fisheries management were needed, and the FAO should be the appropriate forum to deal with fisheries subsidies.[34]

The negotiations launched at the 2001 Doha Ministerial Conference have significantly advanced the fisheries subsidies issue in the WTO agenda. The Doha Ministerial Declaration required the negotiations to take place on improving and clarifying the existing SCM Agreement, to consider the needs of developing and Least-Developed Country (hereinafter "LDC") Members and the importance of the fisheries sector to these countries, as well as to enhance the mutual supportiveness of trade and the environment.[35] These have then been considered as a "win-win" outcome for trade liberalization, fisheries conservation and sustainable development.

Since then, numerous submissions have been proposed by several WTO Members to the Negotiating Group on Rules (hereinafter "NGR") regarding whether fisheries subsidies regulations should be developed under the current SCM Agreement, whether a top-down or a bottom-up approach should be adopted, how the fisheries subsidies should be sub-categorized, and how the other technical provisions should be provided.[36] In November 2007, based on the efforts of the WTO and its Members during the negotiations over the past few years, the NGR Chair, Ambassador Guillermo Valles Games, released the Chair's draft of proposed WTO regulations on fisheries subsidies and anti-dumping and countervailing measures (hereinafter "2007 Proposed Draft"). The negotiations culminated with this release.[37]

B. Proposed Fisheries Subsidies Regulations by the WTO Negotiating Group on Rules Chairman

Within the 2007 Proposed Draft, several major elements of the proposed fisheries subsidies regulations can be analyzed below.

1. Structure and Scope of the 2007 Proposed Draft — Swinging between the top-down and bottom-up approaches in the negotiations, the 2007 Proposed Draft adopts the bottom-up approach and provides more sophisticated provisions for sub-categories of subsidies. The provisions include the ones for prohibited fisheries subsidies and the exceptions to these prohibitions reflecting the major concerns of Members about various types

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[34] WTO, *Communication from Japan to the General Council: Preparations for the 1999 Ministerial Conference: Negotiations on Forestry and Fishery Products*, WTO Doc. WT/GC/W/221 (June 28, 1999).

[35] WTO, Ministerial Declaration of 14 November 2001, ¶ 31, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

[36] *See* CHEN, *supra* note 11, at 58-108.

[37] Negotiation Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, Annex VIII Fisheries Subsidies, WTO Doc. TN/RL/W/213 (Nov. 30, 2007) [hereinafter 2007 Proposed Draft].

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of fisheries subsidies expressed during the negotiations.

2. Sub-categorization of Fisheries Subsidies: Prohibited Fisheries Subsidies and Their Exceptions — Article I of the 2007 Proposed Draft comes straight to the point by prohibiting the listed fisheries subsidies, including subsidies to reduce capital costs and operating costs of fishing or service vessels, subsidies benefits of which are conferred on the transfer of fishing or service vessels to third countries, subsidies for port infrastructure, income support, price support, subsidies for access to foreign countries' waters, and subsidies benefiting IUU fishing.[38] Also, subsidies affecting fish stocks in an unequivocally overfished condition are prohibited.[39] Most fisheries subsidies with negative impacts on trade and the environment are accordingly prohibited.

Taking into consideration public policies and subsidies programs that may reduce fisheries capacity, a list of general exceptions are provided under Article II to these prohibited fisheries subsidies.[40] When the subsidies have the objectives to comply with safety standards,[41] to meet the fisheries management requirement,[42] to permanently reduce personnel, fishing vessels and fishing capacity in the fishing industry,[43] to make user-specific allocations,[44] and to provide natural disaster relieves are considered as exceptions to the prohibited fisheries subsidies.[45]

3. Considerations for Developing County Members — As the fisheries sector is strategically important to developing country Members, the 2007 Proposed Draft also adopts Special and Differential Treatment (hereinafter "S&DT") provisions to provide the developing country Members policy space and flexibility along with sustainability criteria. Within the WTO, the developing country Members are provided via the S&DT provisions in several WTO Agreements with the opportunity to meet their development needs and to safeguard their policy space and options for adopting and implementing trade, economic and development policies.[46] As development has played an important role in the WTO, the S&DT can be viewed as one of the core principles of the WTO law.[47] The 2007 Proposed Draft, thus, first considers the government-to-government access fees and the investment in

[38] *Id.* Annex VIII, art. I.1.
[39] *Id.* Annex VIII, art. I.2.
[40] *Id.* Annex VIII, arts. I.1, II, n.140.
[41] *Id.* Annex VIII, art. II(a).
[42] *Id.* Annex VIII, art. II(b).
[43] *Id.* Annex VIII, art. II(c)-(d).
[44] *Id.* Annex VIII, art. II(e).
[45] *Id.* Annex VIII, art. I, n.77.
[46] Committee on Trade and Development, *Implementation of Special and Differential Treatment Provisions in WTO Agreement and Decisions*, ¶ 3, WTO Doc. WT/COMTD/W/77/Rev.1 (Sept. 21, 2001).
[47] ANDREW D. MITCHELL, LEGAL PRINCIPLES IN WTO DISPUTES 238-65 (2008).

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general infrastructure not prohibited.[48] Contained is also a positive and exhaustive list of subsidies that developing country Members would be authorized to apply,[49] if certain criteria are met.[50] In particular, it also offers the S&DT to small-scale fisheries in developing country Members by not prohibiting subsidies related exclusively to marine wild capture fishing performed on an inshore basis with non-mechanized net-retrieval.[51] In addition, it also provides to establish mechanism for technical assistance as well as to allow longer transitional periods of notification and conformity to developing country Members.[52]

4. Criteria Required for Providing Fisheries Subsidies — The 2007 Proposed Draft sets the stock-related, capacity-related and management-related criteria and requires effective fisheries management systems as the preconditions for exceptions to prohibited fisheries subsidies and the S&DT to developing country Members. Drawing on international norms and standards emanating from international fisheries instruments, these minimum criteria for the fisheries management systems are required to avoid the negative impacts of fisheries subsidies on fisheries conservation while policy space and flexibility are provided to subsidize.[53]

Article IV adopts the general principle of the use of subsidies. It requires that no subsidizing Member shall cause depletion of or harm to, or creation of overcapacity in respect of, (a) straddling or highly migratory fish stocks of which range extends into the Exclusive Economic Zone (hereinafter "EEZ") of another Member; or (b) stocks in which another Member has identifiable fishing interests.[54] It also provides the method for determining this requirement by "taking into account available pertinent information, including from other relevant international organizations."[55] The international organizations here are taken to be the FAO and Regional Fisheries Management Organizations (hereinafter "RFMOs"), since they collect, compile and access the relevant information at the global and regional levels. The information includes the status of the fisheries management system of the subsidizing Member.[56] Moreover, the 2007 Proposed Draft emphasizes that any subsidy referred to in these regulations "shall be attributed to the Member conferring it, regardless of the flag(s) of the vessel(s) involved or the application of rules of origin to the fish

[48] 2007 Proposed Draft, *supra* note 37, Annex VIII, art. I.1(d), (g), n.143.
[49] *Id.* Annex VIII, art. III.
[50] *Id.* Annex VIII, arts. IV, V.
[51] *Id.* Annex VIII, art. III.2(a).
[52] *Id.* Annex VIII, arts. III.4, VII.1, VII.2
[53] *See* CHEN, *supra* note 11, at 148; 2007 Proposed Draft, *supra* note 37, Annex VIII, art. V.
[54] 2007 Proposed Draft, *supra* note 37, Annex VIII, art. IV.1.
[55] *Id.*
[56] *Id.*

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involved."[57] It avoids the conflicts of jurisdictional zones established by the United Nations Convention on the Law of the Sea (hereinafter "LOS Convention"),[58] and reflects the trend of application across these zones that has been led by the 1995 FAO Code of Conduct for Responsible Fisheries (hereinafter "Code of Conduct").[59]

Article V further sets up the requirements for appropriate fisheries management systems. It requires that "any Member granting or maintaining any subsidy as referred to in Article II or Article III.2(b) shall operate a fisheries management system regulating marine wild capture fishing within its jurisdiction, designed to prevent overfishing."[60] This management system shall be based on "internationally-recognized best practices for fisheries management and conservation" and shall include regular science-based stock assessment and capacity and management measures. Prior to authorizing granting the subsidy, the fisheries management system of the subsidizing Member is subject to peer review by the FAO.[61] The so-called "best practices" are reflected in a non-exhaustive list of five international fisheries instruments: (1) the 1995 UN Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter "Fish Stocks Agreement");[62] (2) the 1995 FAO Code of Conduct for Responsible Fisheries; (3) the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (hereinafter "Compliance Agreement");[63] (4) FAO's technical guidelines; and (5) FAO's international plans of action (IPOAs).[64] Thus, these instruments are

[57] *Id.* art. IV.2.

[58] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention].

[59] The 1995 FAO Code of Conduct for Responsible Fisheries has an extensive scope and is applicable across the jurisdictional zones established by the LOS Convention. *See* FAO, FAO CODE OF CONDUCT FOR RESPONSIBLE FISHERIES (1995), https://www.fao.org/publications/card/en/c/e6cf549d-589a-5281-ac13-766603db9c03/.

[60] 2007 Proposed Draft, *supra* note 37, Annex VIII, art. V.1.

[61] *Id.*

[62] United Nations 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, Dec. 4, 1995, 2167 U.N.T.S. 3, 34 I.L.M. 1542 [hereinafter Fish Stocks Agreement].

[63] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 24, 1993, 2221 U.N.T.S. 91 [Compliance Agreement].

[64] 2007 Proposed Draft, *supra* note 37, Annex VIII, arts. V.1, IV.1. Both the FAO's technical guidelines and IPOAs, supplementary to the Code of Conduct for Responsible Fisheries, provide guidance to coastal States and flag States as well as Regional Fisheries Management Organization or Arrangements [hereinafter RFMO/As] to implement the Code of Conduct. *See* Tore Henriksen, *FAO and Ocean Governance*, *in* THE IMLI TREATIES ON GLOBAL OCEAN GOVERNANCE: VOLUME II: UN SPECIALIZED AGENCIES AND GLOBAL OCEAN GOVERNANCE 16-18 (David Joseph Attard et al. eds., 2018).

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considered as the international standards with which the subsidizing Members must comply.[65] Also provided is that the fisheries management system shall "include regular science-based stock assessment, as well as capacity and effort management measures." Certain effort management measures are also included.[66]

Using the effective fisheries management system as a precondition for the exceptions to prohibited fisheries subsidies and S&DT is an example of interaction between two regimes. Thus, incorporating the fisheries management instruments from the FAO and other inter-governmental organizations into the WTO framework demonstrates a willingness of the WTO to interact with other regimes. Although some of the fisheries instruments incorporated are merely soft-law ones or legally binding ones but not participated by certain WTO Members, they can still be decisive during the WTO dispute settlement and may be de facto binding on all WTO Members. Similar provisions or arrangements of rule-referencing and involving international standards and their setting bodies also exist in other WTO Agreements, in particular the technical regulations and "relevant international standards" under the Agreement in Technical Barriers to Trade (TBT Agreement)[67] as well as the sanitary or phytosanitary measures and "international standards, guidelines or recommendations" under the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter "SPS Agreement").[68] The incorporation of the fisheries management instruments from organizations with fisheries expertise into the 2007 Proposed Draft does not go beyond the scope which already exists in similar WTO Agreements. Thus, this arrangement should not be viewed as an obstacle to adopt the final Draft in the end.

5. Establishing Institutional Mechanisms for Reviewing and Settling Disputes — To enforce the minimum criteria provisions, needed are also fisheries experts. As a trade organization, the WTO thus needs to make use of external institutional or individual experts to criteria enforcement and dispute settlement. The concepts of institutional mechanisms are adopted in the 2007 Proposed Draft. Established is an institutional mechanism between the WTO and FAO which requires stock-related, capacity-related and

[65] For the Code of Conduct for Responsible Fisheries, although being voluntary, it consists of a mixture of high principles and common sense as well as uses clear language in the text. Thus, it is viewed as a self-help guide for governments to pursue fisheries sustainability. *See generally* EVALUATIONS OF COMPLIANCE WITH THE FAO (UN) CODE OF CONDUCT FOR RESPONSIBLE FISHERIES (Tony J. Pitcher et al. eds., 2006).

[66] 2007 Proposed Draft, *supra* note 37, Annex VIII, art. V.1.

[67] Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [TBT Agreement].

[68] Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [SPS Agreement]; Oliver Landwehr, *Article 3 SPS*, *in* WTO: TECHNICAL BARRIERS AND SPS MEASURES 412, 421-22 (Rüdiger Wolfrum et al. eds., 2007).

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management-related criteria subject to peer review in the FAO.

First of all, this "peer review" mechanism is adopted in two instances. Under the S&DT provisions, subsidies for capital costs are not prohibited to fishing vessels which are greater than ten meters in length, provided that they are used in EEZs of developing country Members and that targeted stocks have been subject to prior scientific status assessment conducted in accordance with relevant international standards and peer review in the FAO.[69] Another provision states that the assessment of the affected fish stocks and fishing capacity as well as the fisheries management systems of the subsidizing Members are subject to peer review prior to the granting of the subsidy.[70] Taking into account the dissimilar Membership between the WTO and FAO, attentions should be paid to the case of a major fishing player, Taiwan. The arrangement would be to take place the peer review in another recognized and competent international organization.[71]

Second, the institutional mechanism for settling disputes is also established. For disputes about prohibited fisheries subsidies, the procedure under Article 4 of the SCM Agreement shall apply, while for disputes other than those about prohibited fisheries subsidies, the procedure under Article 30 of the SCM Agreement shall apply.[72] Provided that a dispute raises scientific or technical questions to fisheries, the Draft offers the panel the opportunity to establish an advisory technical fisheries expert group or consult recognized and competent international organizations at the request of either party to the dispute or on its own initiative.[73] A similar provision can be found under the SPS Agreement, namely Article 11.2 of the SPS Agreement. Yet, during the negotiations, some have proposed to expand the role of fisheries experts, such as to organize a permanent group of fisheries experts and to provide their decisions more deceive force.[74] Based on the 2007 Proposed Draft to be provided are the discretionary competence to establish an expert group or to consult other relevant organizations as well as the advisory force of the decision made by the experts or expert group.

6. Provisions on Notifications and Surveillance — Transparency has been an important policy tool within the WTO. To pursue transparency, the WTO establishes the monitoring and surveillance system and requires access to precisely defined and structured factual information submitted by the WTO Members to enhance particular policy objectives. Government actions can thus be consistent with implicit norms and explicit obligations of the

[69] 2007 Proposed Draft, *supra* note 37, Annex VIII, art. III.2(b)(3).
[70] *Id.* Annex VIII, art. V.1.
[71] *Id.* n.146.
[72] *Id.* Annex VIII, art. VIII.1.
[73] *Id.* Annex VIII, art. VIII.4.
[74] *See* CHEN, *supra* note 11, at 163.

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trading system.[75] Provided are the reporting mechanisms and technical assistance for developing country Members in implementation to effectively enforce international agreements.

Within the WTO, notification requirements and a trade policy review mechanism (TPRM) have been established to regularly evaluate the Members' trade policies. Given the poor transparency in the fisheries sector, the issues of transparency and enforcement seem more fundamental to the ultimate effectiveness of fisheries subsidies regulations. The 2007 Proposed Draft thus requires Members to notify the SCM Committee in advance of its implementation of any measure for which the Member invokes the provisions of general exceptions to prohibited fisheries subsidies or S&DT provisions.[76] A subsidy that has not been notified is presumed to be prohibited. It is for the subsidizing Members to demonstrate that the subsidy in question is not prohibited.[77]

The 2007 Proposed Draft, as the basis to further negotiate at the global level, can enhance the consensus needed to approve the legal text. It represents a substantial step in the WTO negotiations on fisheries subsidies and a landmark in the efforts of the world community to maintain fisheries sustainability. Overall, this Draft reflects the mandates of the Ministerial Declarations, further reconciles the positions of Members and incorporates suggestions and proposals from different Members and other relevant international organizations. These negotiators have, through research and informal meetings with the WTO Members, promoted a deeper involvement of the WTO in fisheries conservation. Since then, comments and positions of the WTO Members have been made on the basis of the 2007 Proposed Draft.[78]

Yet, in the middle of the Doha Round Negotiation could be observed was that to adopt fisheries subsidies regulations was still contingent on the overall results as the negotiations were a "single undertaking" and focused on other drafts regarding agriculture and industrial products.[79] As the overall negotiations have been stagnant around the WTO seventh Ministerial Conference in 2009,[80] the fisheries subsidies negotiations seemed coming to

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[75] *See generally* Robert Wolfe, *Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life* (WTO Econ. Rsch. & Stat. Div., Staff Working Paper ERSD-2013-03, 2013).
[76] 2007 Proposed Draft, *supra* note 37, Annex VIII, art. VI.1.
[77] *Id.* Annex VIII, art. VIII.2.
[78] Such as Negotiating Group on Rules, *New Draft Consolidated Chair Texts of the AD and SCM Agreements*, Annex C (Fisheries Subsidies), WTO Doc. TN/RL/W/232 (May 28, 2008); Negotiating Group on Rules, *Framework of the Disciplines on Fisheries Subsidies: Communication from the Republic of Korea*, WTO Doc. TN/RL/W/245 (Nov. 24, 2009).
[79] *See* CHEN, *supra* note 11, at 109.
[80] Regarding reasons for this situation, see generally Stuart Harbinson, *The Doha Round: "Death-Defying Agenda" or "Don't Do It Again"?* (Eur. Ctr. for Int'l Pol. Econ., ECIPE Working Paper No. 10/2009, 2009), https://ecipe.org/wp-content/uploads/2014/12/the-doha-round-a-death-defying-act.

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a deadlock. Only when the Members agreed to negotiate specific issues separately, would the negotiations be resumed and new sets of rules be finally adopted, such as the Trade Facilitation Agreement in 2013.[81] The same as the fisheries subsidies negotiations since 2017.

III. THE CPTPP AS AN EFFECTIVE INSTRUMENT TO REGULATE FISHERIES SUBSIDIES IN THE ASIA-PACIFIC REGION

Given the deadlock of the Doha Round Negotiations, to a certain degree the trade negotiations have been moved to the regional level.[82] Observed is also that the weakening multilateralism partially leads to the development of the multiple mega-regionalisms.[83] In the Asia-Pacific region, illustrated can be the TPP negotiations initiated in 2010. As the United States President Donald Trump in 2017 withdrew the United States from the deal, the remaining eleven countries continued the trade talks by ensuring the original agreement in principle and as a result adopted the CPTPP which finally came into force on 30 December 2018. The first six countries to have ratified the agreement included Canada, Australia, Japan, Mexico, New Zealand and Singapore.[84] The former five countries together with the United States have been active negotiators in the WTO fisheries subsidies negotiations, although their positions may be different. Some of them, namely Australia, New Zealand and the United States, belong to the "Friends of Fish" coalition and propose robust fisheries subsidies regulations, while Japan is in a more decisive position over these regulations and Mexico is arguing for the S&DT.[85]

Despite their different positions, sometimes contradictory to each other, in the WTO negotiations, with the efforts of original negotiating parties, the CPTPP Environment Chapter was concluded. It has established advanced trading rules which are not necessarily included in other Free Trade

pdf; WTO, ANNUAL REPORT 2011 § 2 (2011), https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep11_chap2_e.pdf.

[81] *Doha Development Agenda*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm (last visited Mar. 10, 2022).

[82] *See generally* Marion Jansen et al., *Regional Integration: The Next Wave*, *in* THE HANDBOOK OF GLOBAL TRADE POLICY ch. 11 (Andreas Klasen ed., 2020).

[83] LEÏLA CHOUKROUNE & JAMES J. NEDUMPARA, INTERNATIONAL ECONOMIC LAW: TEXT, CASES AND MATERIALS 2 (2021).

[84] *About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, GOV'T CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/backgrounder-document_information.aspx?lang=eng.

[85] *See* CHEN, *supra* note 11, at 60-112; Mukesh Bhatnagar, *Emerging Disciplines on Fisheries Subsidies Negotiations in the WTO and the Relationship with Other International Instruments on Fisheries—A Tight Rope Walk*, 13(2) TRADE L. & DEV. 369, 375 (2021).

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Agreements (hereinafter FTAs) or the WTO Agreements.[86] Observed is that with the influence of the United States, this Environment Chapter enhances the mutual supportiveness of trade and environment, which are referred to as the two pillars of sustainable development.[87]

A. The Environment Chapter of the CPTPP

The CPTPP significantly incorporates the environmental elements into its text. For some of the original CPTPP Contracting Parties, such as Japan, Malaysia, Vietnam and Brunei, it seems to be the first time to conclude a FTA with an environment chapter. Yet, for the others, in particular one of the original negotiating parties, the United States, it is common to sign bilateral FTAs with an environment chapter or to conclude a supplemental agreement on the environment incorporated into the original FTA.[88] Illustrated is the Agreement between the United States of America, the United Mexican States and Canada (United States–Mexico–Canada Agreement, hereinafter USMCA) substituting the North America Free Trade Agreement (NAFTA) and entering into force on July 1, 2020.[89] The USMCA within its Environment Chapter covers broadly and also provides fisheries subsidies provisions,[90] whose contents are quite similar to those of the CPTPP.[91]

The characteristic of incorporating the environmental elements reflects the fact that the fisheries subsidies provisions within the CPTPP are structured and regulated on a different base from those within the WTO framework. The CPTPP text contains more environmental elements, as in the Asia-Pacific region faced are a series of environmental challenges, namely the illegal take of and illegal trade in wild fauna and flora, illegal fishing and marine pollution, which threaten the human health, natural habitats and biodiversity. Its Environment Chapter consists of twenty-three

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[86] *See generally* Shinya Matano, *USTR's Stance Reflected in CPTPP Environment Chapter*, MITSUI & CO., https://www.mitsui.com/mgssi/en/report/detail/__icsFiles/afieldfile/2018/10/10/1809c_matano_e.pdf (last visited Mar. 10, 2022).

[87] STEFANIE SCHACHERER, SUSTAINABLE DEVELOPMENT IN EU FOREIGN INVESTMENT LAW 360 (2021).

[88] Matano, *supra* note 86, at 2-3.

[89] *Agreement Between the United States of America, the United Mexican States and Canada 7/1/20 Text* [hereinafter USMCA], U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (last visited Mar. 10, 2022).

[90] Kateřina Hradilová & Ondřej Svoboda, *Trade Policy as a Tool for the Sustainable Use of Oceans*, 4(1) DEV. ENV'T & FORESIGHT 55, 64 (2018).

[91] CPTPP Environment Chapter, *supra* note 19, art. 20.16(5)-(12); *Chapter 24: Environment*, U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/files/agreements/usmca/24_Environment.pdf (last visited Mar. 10, 2022) (art. 24.20). One difference is that under the USMCA Article 24.20(1)(a), no Party shall grant or maintain any subsidies provided to an operator while listed for Illegal, Unreported and Unregulated fishing [IUU fishing].

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articles with the objectives "to promote mutually supportive trade and environmental policies; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation." [92] An Environment Committee is also established to implement this chapter.[93]

B. Comparison with the WTO's Environmental Goal

The WTO via the Preamble of the Marrakesh Agreement establishing the WTO holds that the relations in the field of trade and economic endeavor should be conducted:

> [W]ith a view to also allowing for the optimal use of the world's resources in accordance with the objective of sustainable development and seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

Yet, the WTO Agreements do not include a specific agreement dealing with environmental issues. The WTO CTE was established to serves as a forum for dialogue on the impact of trade policies on the environment, and of environmental policies on trade. With the development of the WTO Dispute Settlement Mechanism (DSM), cases are analyzed to demonstrate the WTO's attitudes toward environmental issues. For instance, in the *United States — Gasoline*, the Appellate Body specifically acknowledged the importance of coordinating policies on trade and the environment.[94] In *United States — Shrimp*, the Appellate Body referred to the objective of "sustainable development" in the Preamble when interpreting the terms "exhaustible natural resources" in GATT Article XX(g).[95] Following this, sustainable development has formed the core objective in the Doha Round negotiations, although the trade law regime has been viewed as a "self-contained" system in the context of general international law.[96]

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[92] CPTPP Environment Chapter, *supra* note 19, art. 20.2(1).
[93] *Id.* art. 20.19.
[94] Appellate Body Report, *United States — Standards for Reformed and Conventional Gasoline*, at 30, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).
[95] General Agreement on Tariffs and Trade art. XX(g), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [GATT 1994]; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 129-31, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).
[96] *See generally* Bruno Simma & Dirk Pulkowski, *Of Plants and the Universe: Self-Contained Regimes in International Law*, 17(3) EUR. J. INT'L L. 483 (2006); Pieter Jan Kuyper, *The Law of the*

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C. Legislative Model of the Environment Chapter

Via the CPTPP Environment Chapter, the Contracting Parties are generally committed to recognizing the importance of mutually supportive trade and environmental policies and practices, the sovereignty of each Party to develop and enforce its environmental laws and policies,[97] as well as the importance of the multilateral environmental agreements (hereinafter MEAs) and their implementation to achieve the environmental objectives.[98] Thus, the Contracting Parties affirm their commitments to implement these MEAs to which they are parties,[99] and emphasize the dialogue on trade and environmental issues in the negotiation and implementation of relevant MEAs and trade agreements.[100]

Accordingly, in its following text, a typical regulating model is adopted as first to recognize the importance of specific environmental issues, then to recognize the importance of public participation and consultation, and to finally cooperate in consistence with Article 20.12 Cooperation Frameworks. Examples can be given as to protect the Ozone Layer, the Contacting Parties recognize the significant impact of certain substance emissions and the need to take measures to control the production and consumption of, and trade in, such substances.[101] Further recognized are the importance of public participation and consultation in the development and implementation of measures concerning the protection of the ozone layer.[102] Thus, to make publicly available appropriate information about its programs and activities related to ozone layer protection is required.[103] Also, the Contracting Parties are required to cooperate to address matters of mutual interest related to ozone-depleting substances.[104] The CPTPP Environment Chapter also based on similar provisions deals with the issues regarding the protection of the marine environment from ship pollution,[105] trade and biodiversity,[106] as well as IUU fishing.[107]

GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-contained System of International Law?, 25 NETH. Y.B. INT'L L. 227 (1994).

[97] CPTPP Environment Chapter, *supra* note 19, art. 20.3(1)-(2).

[98] *Id.* art. 20.4(1).

[99] *Id.*

[100] *Id.* art. 20.4(2).

[101] *Id.* art. 20.5(1).

[102] *Id.* art. 20.5(2).

[103] *Id.*

[104] *Id.* art. 20.5(3).

[105] *Id.* art. 20.6.

[106] *Id.* art. 20.13.

[107] *Id.* art. 20.16(13)-(14).

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D. Regulations on the Marine Capture Fisheries

With the focus on the marine capture fisheries, Article 20.16 adopts a different model by firstly acknowledging the role of Contracting Parties as consumers, producers and traders of fisheries products.[108] This reflects its concerns on the fisheries market structure in the region.

1. Requirements of Establishing Fisheries Management Systems and Adopting Certain Measures — The CPTPP further acknowledges the need for adequate fisheries management, as without sound fisheries management, fisheries subsidies may lead to negative impacts on trade, development and the environment.[109]

Thus, the CPTPP requires Contracting Parties to operate a fisheries management system that regulates marine wild capture fishing.[110] This system shall also be designed to: (a) prevent overfishing and overcapacity; (b) reduce bycatch of non-target species and juveniles, and (c) promote the recovery of overfished stocks for all marine fisheries in which that Party's persons conduct fishing activities.[111] It further provides that this fisheries management system shall be established based on the best scientific evidence available and on internationally recognized best practices for fisheries management and conservation.[112] The so-called best practices for fisheries management and conservation are reflected in the relevant provisions of international fisheries instruments, including the LOS Convention, Compliance Agreement, Fish Stocks Agreement, FAO Code of Conduct for Responsible Fisheries, and IPOA-IUU.[113] Relevant technical guidelines and plans of action for the implementation of these instruments or other related or successor instruments referred to by Article V of the 2007 Proposed Draft are not covered in this CPTPP provision.

Unlike the 2007 Proposed Draft that requires the fisheries management system to be established as the criteria for adopting fisheries subsidies, the CPTPP directly requires the Contracting Parties to establish the fisheries management system. It even further adopts specific measures for certain endangered species, in order to promote their long-term conservation, including sharks, marine turtles, seabirds and marine mammals. Respectively, the CPTPP requires the Contracting Parties for the conservation of sharks to take measures, including the collection of species-specific data, fisheries bycatch mitigation measures, catch limits, and finning prohibitions. Similarly, for the conservation of marine turtles, seabirds, and

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[108] *Id.* art. 20.16(1).
[109] *Id.* art. 20.16(2).
[110] *Id.* art. 20.16(3).
[111] *Id.*
[112] *Id.*
[113] *Id.* art. 20.16(3), n.12.

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marine mammals, required are to take fisheries bycatch mitigation measures, conservation and relevant management measures, prohibitions, and other measures in accordance with relevant international agreements to which the CPTPP Contracting Party is party.[114] For the conservation of these specific endangered species, the CPTPP does not identify relevant international instruments as it does for establishing the fisheries management system and combating the IUU fishing. Yet, certain international instruments have also been developed respectively for these endangered species.[115] To what extent the measures adopted by the CPTPP reflect these instruments deserves further examination. Amongst these instruments, the LOS Conventions provides international rules dividing maritime zones and ascribing rights and responsibilities to different States for the activities being undertaken. Yet, roughly speaking, these instruments still may not conserve marine mammals effectively, as some of them are non-legally binding and some rely on States to implement the international standards at the national level.[116] It may be too early to evaluate the CPTPP's impact on marine mammal conservations at present.

Although the CPTPP does not identify these relevant international instruments in its text, it still moderately requires the Contracting Parties to take "measures in accordance with relevant international agreements to which the Party is party."[117] As roughly illustrated above, some instruments

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[114] *Id.* art. 20.16(4)(b).

[115] In the case of sharks, international instruments include the LOS Convention, Fish Stocks Agreement, FAO International Plan of Action for Sharks (IPOA-Sharks), Convention of the International Trade in Endangered Species of Wild Fauna and Flora [hereinafter CITES], Convention on the Conservation of Migratory Species of Wild Animals [hereinafter CMS] and its Memorandum of Understanding on the Conservation of Migratory Sharks. *See* ERIKA J. TECHERA & NATALIA KLEIN, INTERNATIONAL LAW OF SHARKS: OBSTACLES, OPTIONS AND OPPORTUNITIES 27-47 (2017). In the case of sea turtles, international instruments are developed at both the regional and global levels. The former include the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (and Specially Protected Areas and Wildlife (SPAW) Protocol to the Cartagena Convention), Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, and Inter-American Convention for the Protection and Conservation of Sea Turtles. The latter include "Light Pollution Guidelines for Wildlife Including Marine Turtles, Seabirds and Migratory Shorebirds" and even some broader instruments, namely the LOS Convention, CITES, CMS, Convention on Biological Diversity [hereinafter CBD], Convention on Wetlands of International Importance, Convention Concerning the Protection of the World Cultural and Natural Heritage as well as International Convention for the Prevention of Pollution from Shipping. *See generally* Chris Wold, *The Status of Sea Turtles Under International Environmental Law and International Environmental Agreements*, 5(1-2) J. INT'L WILD L. & POL'Y 11 (2002). In the case of seabirds, included are also the LOS Convention, Fish Stocks Agreement, CBD, 2001 Agreement on the Conservation of Albatrosses and Petrels (ACAP), FAO International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA-Seabirds) as well as the regulations provided by the RFMOs. *See generally* Arie Trouwborst, *Seabird Bycatch—Deathbed Conservation or a Precautionary and Holistic Approach?*, 11(4) J. INT'L WILDLIFE L. & POL'Y 293 (2009). In the case of marine mammals, instruments can still be divided into those of whales, seals and polar bears. More details, see generally NIKOLAS SELLHEIM, INTERNATIONAL MARINE MAMMAL LAW (2020).

[116] *See generally id.*

[117] CPTPP Environment Chapter, *supra* note 19, art. 20.16(4)(b).

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are soft-law ones, and seem to fall out of the CPTPP concerns. This can also reflect the Contracting Parties' commitments on the MEAs.[118] In particular, to read Article 20.16 with other paragraphs of the Environment Chapter, the connection can be found in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter "CITES"). Due to the importance of combating the illegal take of, and illegal trade in, wild fauna and flora in the conservation and sustainable management of these natural resources, the CPTPP requires Contracting Parties to adopt, maintain and implement laws, regulations and any other measures to fulfill its obligations under the CITES,[119] whose role in fisheries sustainability has been reemphasized.[120]

2. Prohibition of Certain Types of Fisheries Subsidies — As also recognizing the negative impacts of fisheries subsidies on trade, development and the environment, the CPTPP Article 20.16(5) sets up the regulations on fisheries subsidies.[121] Its major concerns are related to fisheries subsidies that contribute to overfishing and overcapacity, as well as IUU fishing. The CPTPP also, via its footnote, refers to the definition of IUU fishing to the one provided by paragraph 3 of the 2001 FAO IPOA-IUU.

Its view on the relation of the fisheries management system and fisheries subsidies can be found from that the Contracting Parties recognize that "the implementation of a fisheries management system that is designed to prevent overfishing and overcapacity and to promote the recovery of overfished stocks must include the control, reduction and eventual elimination of all subsidies that contribute to overfishing and overcapacity."[122] Within the CPTPP text, fisheries subsidies are those fall into the meaning of Article 1.1 of the SCM Agreement that are specific within the meaning of Article 2 of the SCM Agreement.[123]

According to the CPTPP Article 20.16(5), the types of fisheries subsidies to be prohibited include subsidies for fishing that negatively affect fish stocks that are in an overfished condition; and those provided to any fishing vessel while listed by the flag State or a relevant Regional Fisheries Management Organization or Arrangement (hereinafter "RFMO/A") for IUU fishing in accordance with the rules and procedures of that organization or arrangement and in conformity with international law. To determine whether the subsidies

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[118] *See generally* Jeffrey J. Schott, *TPP and the Environment*, *in* ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES 33 (Jeffery J. Schott & Cathleen Cimino-Isaacs eds., 2016).

[119] CPTPP Environment Chapter, *supra* note 19, art. 20.17(1)-(2).

[120] *See generally* Amanda C.J. Vincent et al., *The Role of CITES in the Conservation of Marine Fishes Subject to International Trade*, 15(4) FISH & FISHERIES 563 (2014). *See* SOLÈNE GUGGISBERG, THE USE OF CITES FOR COMMERCIALLY-EXPLOITED FISH SPECIES: A SOLUTION TO OVEREXPLOITATION AND ILLEGAL, UNREPORTED AND UNREGULATED FISHING? 216 (2016).

[121] CPTPP Environment Chapter, *supra* note 19, art. 20.16(5).

[122] *Id.*

[123] *Id.* art. 20.16(5), (7), (9).

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have negative impacts shall be based on the best scientific evidence available.[124] For subsidies not prohibited above, taking into consideration a Party's social and developmental priorities, including food security concerns, each Party shall make best efforts to refrain from introducing new, or extending or enhancing existing subsidies that contribute to overfishing or overcapacity.[125]

The CPTPP also provides definitions on the terms of "fishing" and "fishing vessels" in the footnotes. Although not defined in the 2007 Proposed Draft, the term "fishing" within the CPTPP text means "searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish."[126] This definition is later adopted in the 2021 Revised Draft Article 2(b).[127] "The term 'fishing vessels' refers to any vessel, ship or other type of boat used for, equipped to be used for, or intended to be used for fishing or fishing related activities."[128] With slight difference, Article 2(d) of the 2021 Revised Draft refers to "vessel" as "any vessel, ship of another type or boat used for, equipped to be used for, or intended to be used for fishing or fishing related activities."[129] In addition, the service vessels fall into the scope of the 2007 Proposed Draft, but not in the latter two instruments.

In general, subsidy programs established by a CPTPP Contracting Party before the date of entry into force of the CPTPP and inconsistent with Article 20.16(5)(a) shall be brought into conformity as soon as possible and no later than three years of the date of entry into force of the CPTPP.[130] Following this, the S&DT concerns in the CPTPP is to provide an extension to its developing fishing Contracting Party, Vietnam. Its special concerns have noted in Footnote 18, as it requested an extension of two additional years to bring any subsidy programs into conformity by providing a written request to the Environment Committee no later than six months before the expiry of the three-year period provided for in Article 20.16(6).[131]

Requirements of reviewing,[132] and notification are also provided by the CPTPP. Any subsidies granted and maintained to persons engaging in fishing or fishing related activities are to be notified within one year of the date of entry into force of the CPTPP and every two years thereafter.[133] Contents of

[124] *Id.* art. 20.16(5)(a), n.15.
[125] *Id.* art. 20.16(7).
[126] *Id.* n.14.
[127] 2021 Revised Draft, *supra* note 22, art. 2(b).
[128] CPTPP Environment Chapter, *supra* note 19, n.17.
[129] 2021 Revised Draft, *supra* note 22, art. 2(d).
[130] CPTPP Environment Chapter, *supra* note 19, art. 20.16(6).
[131] *Id.* n.18.
[132] *Id.* art. 20.16(8).
[133] *Id.* art. 20.16(9)-(10).

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this notification cover those required by Article 25.3 of the SCM Agreement as well as those related to fisheries required by Article 20.16(10) of the CPTPP Environment Chapter.

3. Addressing the Challenges of IUU Fishing — Essential international fisheries instruments are also incorporated into the CPTPP text. The CPTPP focuses on the establishment of the fisheries management systems via Article 20.16(3) and (4) and specifically on combating IUU fishing via Article 20.16(13) and (14). The typical regulating model of the CPTPP Environment Chapter can also be found to combat IUU fishing. In detail, recognized firstly is the importance of concerted international action to address IUU fishing as reflected in regional and international instruments.[134] Specifically identified in the footnote are the instruments developed to compact the IUU fishing, including the 2001 FAO IPOA-IUU, the 2005 Rome Declaration on IUU Fishing, the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing (hereinafter "PSMA"), as well as instruments establishing and adopted by RFMOs.[135] Further required is the endeavor to improve cooperation internationally in this regard, including with and through competent international organizations.[136] The IUU fishing-related instruments range from soft-law instruments to legally binding ones, as well as from global ones to regional ones. Taking into account the mutual supportiveness of efforts to combat IUU fishing and to deter trade in products resulting from these practices, the Contracting Parties are required to take measures as follows. As capacity-building is considered, the Contracting Parties are to cooperate to identify needs and to build capacity to support the implementation of Article 20. The Contracting Parties as flag States, coastal States, or port States are via their different roles and responsibilities to support the monitoring, control, and surveillance systems, which are namely the compliance and enforcement systems, by adopting, reviewing, or revising appropriate measures. For the flag State, required is to deter vessels that are flying its flag and its nationals from engaging in IUU fishing activities. For the coastal State, required is to address the transshipment at sea of fish or fish products caught through IUU fishing activities. For the port State, implementing port State measures is required as it has been the core in the development of the international fisheries law. For the CPTPP Contracting Parties who are not a member of certain RFMO/As, required are to act consistently with relevant conservation and management measures adopted by these RFMO/As, and not to undermine these measures as well as the catch or trade documentation schemes operated by RFMO/As or other

[134] *Id.* art. 20.16(13).
[135] *Id.* n.20.
[136] *Id.* art. 20.16(13).

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intergovernmental organizations whose scopes include the management of shared fisheries resources.[137]

Article 20 of the CPTPP Environment Chapter contains two major issues, including fisheries management and conservation as well as fisheries subsidies. Compared to the 2007 Proposed Draft, the CPTPP's characteristic is its recognizing the mutual supportiveness of trade and environment. It, thus, considers a sound fisheries management system to include the control, reduction and eventual elimination of all subsidies that contribute to overfishing and overcapacity and the need to take specific measures for certain endangered species as well as to implement relevant instruments to combat IUU fishing. Moreover, the CPTPP Chapter 28 also provides its dispute settlement mechanism to a violation of these fisheries-related provisions that does not necessarily affect the trade or investment between its Contracting Parties.[138] Although some doubts exist regarding this dispute settlement mechanism,[139] the CPTPP is still expectably to serve as the effectively binding instrument for fisheries subsidies in this region.

IV. TRIGGERING BY THE 2015 UN SUSTAINABLE DEVELOPMENT GOALS

In September 2015, the UN Sustainable Development Goals (hereinafter "SDGs") was adopted by all UN Member States with 17 Goals and 169 Targets.[140] SDG 14.6 states that:

> By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to illegal, unreported and unregulated [IUU] fishing and refrain from introducing such new subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation.[141]

As trade plays an important role in promoting sustainable development, the WTO is central to achieving the 2030 Agenda for Sustainable

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[137] *Id.* art. 20.16(14).
[138] See more in Haneul Jung & Nu Ri Jung, *Enforcing 'Purely' Environmental Obligations Through International Trade Law: A Case of the CPTPP's Fisheries Subsidie*s, 53(6) J. WORLD TRADE 1001, 1004 (2019).
[139] *Id.*
[140] G.A. Res. A/70/1 (Oct. 21, 2015).
[141] *SDG Indictors, Metadata Repository*, SUSTAINABLE DEV. GOALS, https://unstats.un.org/sdgs/metadata/?Text=&Goal=14&Target=14.6 (last visited Mar. 10, 2022).

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Development and its SDGs.[142] Targeted is to accomplish the fisheries subsidies negotiations within the WTO. It obviously relies on the achievement of the WTO negotiations on fisheries subsidies to prohibit certain types of fisheries subsidies. Thus, triggered by the SDG, the eleventh WTO Ministerial Conference in Buenos Aires in December 2017 decided to conclude the negotiations by adopting an agreement on fisheries subsidies at the twelfth Ministerial Conference.

Yet, doubted is how to determine SDG 14.6 has been reached and whether the WTO is the only fora to accomplish this goal. In July 2017, the UN Statistical Commission adopted the Global Indicator Framework and provided 231 unique indicators.[143] Amongst these indicators, the SDG indicator 14.6.1 refers to the "degree of implementation of international instruments aiming to combat illegal, unreported and unregulated fishing."[144] Accordingly, the indicator to determine the achievement of the SDG 14.6 relies on the progress made by countries in their implementation of the different international instruments that combat IUU fishing, rather than on the adoption of the fisheries subsidies agreement within the WTO and its compliance. The international instruments covered by the indicator are the LOS Convention, Compliance Agreement, Fish Stocks Agreement, IPOA-IUU, FAO Voluntary Guidelines for Flag State Performance (VG-FSP), and PSMA. The instruments range from hard-law instruments to soft-law ones. Covered are also the instruments dealing with the roles of coastal States, flag States and port States in combating IUU fishing.[145] Yet, these instruments contain no specific rules on subsidies. Their function here is to reflect the practice of the strong fisheries management system to combat IUU fishing.

Although the SDG Indicator Metadata also refers to Chapter 17 of the Agenda 21 and the FAO Code of Conduct for Responsible Fisheries, the Metadata does not consider them as the international instruments combating IUU fishing as they cover a wider range of issues.[146] Yet, the Code of Conduct and its relevant documents consist of provisions regarding fisheries subsidies. The Code of Conduct provides that States and RFMO/As should adopt appropriate measures,[147] and included are also the measures providing the economic conditions under which fishing industries operate to promote

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[142] *The WTO and the Sustainable Development Goals*, WTO, https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm (last visited Mar. 10, 2022).

[143] *SDG Indicators, Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development*, SUSTAINABLE DEV. GOALS, https://unstats.un.org/sdgs/indicators/indicators-list/ (last visited Mar. 10, 2022).

[144] G.A. Res. A/RES/71/313, at 19 (July 10, 2016) (SDG indicator 14.6.1), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/207/63/PDF/N1720763.pdf?OpenElement.

[145] *SDG Indicator Metadata*, U.N. STAT. 2-3, https://unstats.un.org/sdgs/metadata/files/Metadata-14-06-01.pdf (last visited Mar. 13, 2022).

[146] *Id*. at 2.

[147] FAO, *supra* note 59, art. 7.2.1.

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responsible fisheries.[148] The IPOA-Capacity was thus developed by the FAO. It requires States to prepare and implement national plans, as well as to assess the possible impact of all factors, including subsidies, which might contribute to excess fishing capacity and should distinguish between these and those which produce a positive effect or are neutral.[149] States should also reduce and progressively eliminate all factors, including subsidies, which directly or indirectly contribute to excessive fishing capacity and undermine the sustainability of marine living resources.[150]

V. RESPONSES OF THE WTO SINCE THE ELEVENTH MINISTERIAL CONFERENCE

As the Doha Round Negotiations were resumed at the eleventh Ministerial Conference in 2017, the WTO negotiations have been accelerated since then. The negotiations still move on even when facing the challenges of the COVID-19 pandemic since late 2019. In June 2020, a consolidated text was introduced by the NGR Chair.[151] It was revised in November 2020, June 2021, early and late November 2021, showing the stronger intention of the Members to conclude the negotiations by the twelfth Ministerial Conference.[152] To further clarify the revised draft, the Chair also released an explanatory note in November 2021.[153] Numerous efforts have been made to accelerate the negotiations. However, the recent negotiations are not as transparent as the past, as most of the recent position papers submitted by specific Members to the WTO are restricted at this stage, not open to the public, on the WTO official database. To learn more about specific Members' positions relies on limited secondary sources.

Yet, the twelfth Ministerial Conference originally set to take place in June 2020, was postponed to November 2021. On 26 November 2021, the WTO General Council decided to postpone the twelfth Ministerial Conference to February 2022, again due to the outbreak of a particularly transmissible strain of the COVID-19 virus. Although the COVID-19 pandemic may form the obstacle to holding the physical meeting and to conclude the negotiations, the WTO Members still via revising the draft of the new set of rules make progress to adopt the fisheries subsidies regulations

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[148] *Id.* art. 7.2.2(b).
[149] FAO, *supra* note 12, ¶ 25.
[150] *Id.* ¶ 26.
[151] *Fisheries Subsidies Negotiations Chair Introduces Draft Consolidated Text to WTO Members*, WTO (June 25, 2020), https://www.wto.org/english/news_e/news20_e/fish_25jun20_e.htm.
[152] *Revised Fisheries Subsidies Text Kicks Off Intensified Negotiations Ahead of MC12*, WTO (Nov. 8, 2021), https://www.wto.org/english/news_e/news21_e/fish_08nov21_e.htm.
[153] Negotiation Group on Rules, *Fisheries Subsidies: Revised Draft Text: Chair's Explanatory Note Accompanying TN/RL/W276/Rev.2, Addendum*, WTO Doc. TN/RL/W/276/Rev.2/Add.1 (Nov. 8, 2021) [hereinafter Chair's Explanatory Note].

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within the WTO. Observed is the successful development of the negotiations as it is the only ongoing multilateral trade negotiation at the global level as well as the symbol for the WTO's credibility and relevance as a negotiating body.[154] The analysis below focuses on the 2021 Revised Draft.[155]

VI. THE REVISED PROPOSED DRAFT IN 2021

Unlike the 2007 Proposed Draft titled ANNEX VIII Fisheries Subsidies which is supposed to be annexed to the original SCM Agreement, the 2021 Revised Draft is titled "Agreement on Fisheries Subsidies" and contains eleven articles.[156]

A. The Scope of the 2021 Revised Draft

The scope of the 2021 Revised Draft covers subsidies within the meaning of Article 1.1 of the SCM Agreement that are specific within the meaning of Article 2 of the Agreement to marine wild capture fishing and fishing-related activities at sea.[157] Implicated is that this set of rules is still developing within the scope of the SCM Agreement. In addition, it also remains some flexibilities for further discussion in the negotiations by putting provisions within the "[]" (square brackets). The flexibility regarding the scope is whether the Agreement also applies to fuel subsidies to fishing and fishing-related activities at sea that are not specific within the meaning of Article 2 of the SCM Agreement.[158] If these fuel subsidies do not fall into this scope, in particular, if they are not specific to an enterprise or industry or group of enterprises or industries as provided in Article 2 of the SCM Agreement, they are not subject to the classification of subsidies under the SCM Agreement or the Agreement on Fisheries Subsidies. Yet, the subsidizing Member still needs to provide their information as part of its regular notification under Article 25 of the SCM Agreement.[159]

Still prohibited are fuel subsidies specific within the meaning of Article 2 of the SCM Agreement as Article 5.1(c) of the 2021 Revised Draft provides

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[154] Liana Wong, *World Trade Organization Fisheries Subsidies Negotiations*, CONG. RSCH. SERV. (Sept. 16, 2021), https://crsreports.congress.gov/product/pdf/IF/IF11929.

[155] Negotiating Group on Rules, *Negotiating Group on Rules-Fisheries Subsidies: Revised Draft Text*, WTO Doc. TN/RL/W/276/Rev.2 (Nov. 8, 2021); 2021 Revised Draft, *supra* note 22.

[156] 2021 Revised Draft, *supra* note 22. These include Article 1 Scope; Article 2 Definition; Article 3 Subsidies contributing to IUU fish; Article 4 Subsidies Regarding Overfished Stocks; Article 5 Subsidies Contributing to Overcapacity and Overfishing; Article 6 Specific Provision for LDC Members; Article 7 Technical assistance and capacity building; Article 8 notification and transparency; Article 9 Institutional arrangements; Article 10 dispute settlement; as well as Article 11 final provisions.

[157] *Id.* art. 1.1.

[158] *Id.* art. 1.2.

[159] *Id.* art. 8.1*bis*.

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that subsidies contributing to overcapacity and overfishing including those to the purchase/costs of fuel are to be prohibited. One should also be aware that fuel subsidies are prohibited under the 2007 Proposed Draft.[160] The same as the arrangement of the 2007 Proposed Draft,[161] government-to-government payments under fisheries access agreements shall not be deemed to be subsidies within the meaning of this Agreement.[162]

B. The Definitions Provided by the 2021 Revised Draft

Different from the 2007 Proposed Draft providing definitions via footnotes, the 2021 Revised Draft provides a specific article with definitions of certain terms for the purpose of the Agreement, including the terms "fish," "fishing," "fishing-related activities," "vessel," and "operator."[163] As the 2007 Proposed Draft separately defines the terms "fishing vessels" and "service vessels,"[164] the 2021 Revised Draft defines the term "vessels" as "vessels, ships of another type or boats used for, equipped to be used for, or intended to be used for, fishing or fishing related activities" which seem to cover both the fishing vessels and service ones.

More significantly, the 2021 Draft takes into account subsidies linked to an individual, not merely to vessels, and defines the term "operator" as "the owner of a vessel, or any person, who is in charge of or directs or controls the vessel."[165] Subsidies granted to an operator engaged in IUU fishing are to be prohibited. This arrangement also seems more echoed to the meaning of IUU fishing as defined in paragraph 3 of the IPOA-IUU. In particular, based on the IPOA-IUU, "illegal fishing" refers to activities conducted by national or foreign vessels in waters under the jurisdiction of a State without the permission of that State, or in contravention of its laws and regulations.[166] That implies both the States' personal jurisdiction and territorial jurisdiction over the IUU fishing activities. Another provision that also contains similar implications is to prohibit income support of vessels or operators or the workers they employ under the 2021 Revised Draft,[167] while the 2007

[160] 2007 Proposed Draft, *supra* note 37, Annex VIII, art. I.1(c).
[161] *Id.* n.80.
[162] 2021 Revised Draft, *supra* note 22, n.2.
[163] *Id.* art. 2.
[164] 2007 Proposed Draft, *supra* note 37, Annex VIII, nn.78-79. Footnote 78 refers to the term "fishing vessels" as vessels used for marine wild capture fishing and/or on-board processing of the products thereof. Footnote 79 refers to the term "service vessels" as vessels used to transship the products of marine capture fishing from fishing vessels to on-shore facilities; and vessels used for at-sea refueling, provisioning and other servicing of fishing vessels.
[165] 2021 Revised Draft, *supra* note 22, art. 2(e).
[166] FAO, *supra* note 12, ¶ 3.1.1.
[167] 2021 Revised Draft, *supra* note 22, art. 5.1(e).

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Proposed Draft only covers income support for natural or legal persons engaged in marine wild capture fishing.[168]

C. Prohibited Fisheries Subsidies Provided by the 2021 Revised Draft

Within the 2021 Revised Draft, three major types of fisheries subsidies are to be prohibited, namely, the subsidies contributing to IUU fishing,[169] those regarding overfished stocks,[170] and those contributing to overcapacity and overfishing.[171] Unlike the 2007 Proposed Draft to provide a list of general exceptions and an exemption of subsidizing relief from natural disasters, the 2021 Revised Draft only exempts the subsidies with the objective of relief from natural disaster via Article 11 Final Provisions.[172]

The first to be prohibited is any subsidy to a vessel or operator engaged in IUU fishing or fishing related activities in support of IUU fishing.[173] To decide whether a vessel or operator is engaged in IUU fishing, needed is an affirmative determination made by a coastal Member for activities in areas under its jurisdiction, by a flag State Member for activities by vessels flying its flag, or by a relevant RFMO in accordance with its rules and procedures and relevant international law.[174] Still emphasized is that nothing in this Article shall be interpreted to obligate Members to initiate IUU fishing investigations or make IUU fishing determinations,[175] as this obligation is subject to the international fisheries instruments signed and ratified by the Members. Yet, the Members are obliged to have laws, regulations and/or administrative procedures in place to ensure that subsidies contributing to IUU fishing are not granted or maintained.[176]

The second to be prohibited is any subsidy for fishing or fishing related activities regarding an overfished stock.[177] To decide whether a fish stock is overfished, needed is the recognition as overfished by the coastal Member under whose jurisdiction the fishing is taking place or by a relevant RFMO/A in areas and for species under its competence, based on best scientific evidence available to it.[178] If such subsidies or other measures are implemented to rebuild the stock to "a biologically sustainable level," flexibilities seem to be preserved.[179] A biologically sustainable level is

[168] 2007 Proposed Draft, *supra* note 37, Annex VIII, art. I.1(e).
[169] 2021 Revised Draft, *supra* note 22, art. 3.
[170] *Id.* art. 4.
[171] *Id.* art. 5.
[172] *Id.* art. 11.2.
[173] *Id.* art. 3.1.
[174] *Id.* art. 3.2.
[175] *Id.* n.5.
[176] *Id.* art. 3.7.
[177] *Id.* art. 4.1.
[178] *Id.* art. 4.2.
[179] *Id.* art. 4.3.

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further defined as the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using reference points such as maximum sustainable yield (hereinafter "MSY") or other reference points, commensurate with the data available for the fishery; or by a relevant RFMO/A in areas and for species under its competence.[180] The MSY, at the center of the fisheries conservation and management, is calculated by the coastal State based on relevant scientific information, according to Article 61 of the LOS Convention. The coastal States are obliged to conserve living resources within their EEZ via proper conservation and management measures.[181] These measures are designed to maintain or restore populations of harvested species at levels that can produce the MSY.[182] According to the LOS Convention, to determine the MSY, shall be taken into consideration are also relevant environmental and economic factors, including the economic needs of coastal fishing communities, the special requirements of developing States, the fishing patterns, the interdependence of stocks as well as any generally recommended international minimum standards, whether subregional, regional or global.[183] These factors are up to the coastal State to decide and subject to its discretion. Considered also the contemporary international environmental law, the MSY should be seen as the upper limit beyond which harvesting levels are no longer sustainable, thus the coastal State is not allowed to set the qualified MSY above the biological MSY level.[184] As the 2021 Revised Draft requires to rebuild the stock to a biological sustainable level, the meaning of the MSY within the WTO should also be viewed as the upper limit of the harvested species populations. In addition, to determine the MSY, generally recommended international minimum standards shall be taken into account. This refers to a series of international fisheries instruments adopted by the FAO Fisheries Committee, standards adopted by other regional or subregional bodies and even decisions adopted by the Conference of the Parties of the Convention on Biological Diversity.[185] Via the footnote to define "a biologically sustainable level" by illustrating the MSY as one of the reference points, the 2021 Revised Draft establishes its connection with the broader concepts of international fisheries instruments.

The third to be prohibited is any subsidy contributing to overcapacity or overfishing.[186] Several specific types of subsidies to fishing or fishing related activities are illustratively listed in Article 5.1 of the 2021 Revised

[180] *Id.* n.10.
[181] LOS Convention, *supra* note 58, art. 61.2.
[182] *Id.* art. 61.3.
[183] *Id.*
[184] James Harrison & Elisa Morgera, *Article 61*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, 480, 484-86 (Alexander Proelss et al. eds., 2017).
[185] *Id.* at 487.
[186] 2021 Revised Draft, *supra* note 22, art. 5.

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Draft, namely: (a) subsidies to construction, acquisition, modernization, renovation or upgrading of vessels; (b) subsidies to the purchase of machines and equipment for vessels (including fishing gear and engine, fish-processing machinery, fish-finding technology, refrigerators, or machinery for sorting or cleaning fish); (c) subsidies to the purchase/costs of fuel, ice, or bait; (d) subsidies to costs of personnel, social charges, or insurance; (e) income support of vessels or operators or the workers they employ; (f) price support of fish caught; (g) subsidies to at-sea support; (h) subsidies covering operating losses of vessels or fishing or fishing related activities; and (i) subsidies contingent upon, or tied to, actual or anticipated fishing or fishing related activities in areas beyond the subsidizing Member's jurisdiction (whether solely or as one of several other conditions).[187]

In addition, some provisions regarding subsidies contributing to overcapacity and overfishing are still subject to further negotiations as to whether the following subsidies shall be prohibited, namely subsidies for a vessel not flying the flag of the subsidizing Member and those under Article 5.1 for a vessel over which the subsidizing Member cannot exercise jurisdiction or control or cannot otherwise ensure that the vessel to which the subsidy is granted is not engaging in activities contributing to overfishing or overcapacity.[188]

Similar to Article 4.3 of the 2021 Revised Draft, if the subsidizing Member demonstrates that measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level, the subsidy may not be deemed as subsidies contributing to overcapacity and overfishing.[189] The Chair's Explanatory Note also strengthens that requiring Members to demonstrate that measures are implemented to maintain the biological sustainability of the fisheries for granting subsidies under Article 5.1 is not to establish a standard or a procedural step, but to show that what would have been taken into account are the data available, the fisheries in question and specific management measures.[190]

Regarding the different jurisdictions in maritime zones set under the LOS Convention, to grant or maintain a subsidy to vessels or operators engaged in fishing or fishing related activities in areas beyond the subsidizing Member's jurisdiction shall not be the reason alone to be considered the existence of prohibited fisheries subsidies.[191] Yet, the 2007 Proposed Draft only refers to the system within the jurisdiction of the subsidizing Member.[192] The 2021 Revised Draft seems more considerate to

[187] *Id.* art. 5.1, n.11.
[188] *Id.* art. 5.3.
[189] *Id.* art. 5.1.1.
[190] Chair's Explanatory Note, *supra* note 153, ¶ 77.
[191] 2021 Revised Draft, *supra* note 22, n.11.
[192] *See* CHEN, *supra* note 11, at 151.

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the challenges of creeping jurisdiction under the law of the sea,[193] as well as the current concerns and developments of the UN Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ).[194]

Furthermore, the 2021 Revised Draft seems to provide fewer types of prohibited fisheries subsidies. Certain types of fisheries subsidies that have been prohibited in the 2007 Proposed Draft are not included in the prohibited ones of the 2021 Revised Draft, namely subsidies the benefits of which are conferred on transfer of fishing or service vessels to third countries, subsidies for port infrastructure, and subsidies for access to foreign countries' waters.

D. S&DT Provided by the 2021 Revised Draft

The 2021 Revised Draft also takes into account the need of developing country Members. It first provides the S&DT to the LDC Member by opening the door for their subsidies contributing to overcapacity and overfishing.[195] Most of the other S&DT provisions provided to developing country Members, including LDC Members, for their small-scale fisheries are listed respectively in different articles within the "[]" (square brackets), subject to further negotiations. "Small-scale fisheries" referred to in the Draft are "low income, resource-poor and livelihood fishing or fishing-related activities, up to [12] nautical miles measured from the baselines."[196] These articles include those to allow longer transitional periods of their compliance and to exempt them from dispute settlement with certain provisions on prohibited fisheries subsidies.[197] More significantly, allowed is also the developing country Member to provide "*de minimis*" subsidies if its annual share of the global volume of marine capture production does not exceed [0.7 %] as per the most recent published FAO data; and if they are provided for small-scale fisheries.[198] Less frequency of notifying "*de minimis*" subsidies is also provided for further negotiations as the S&DT to LDC and developing country Members.[199] Also, in order to provide targeted technical assistance and capacity building assistance to these Members, a voluntary WTO

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[193] The creeping jurisdiction is referred to as the gradual process of unilateral extension of coastal State jurisdiction offshore. *See generally* Barbara Kwiatkowska, *Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice*, 22 OCEAN DEV. & INT'L L. 153, 159 (1991).

[194] *Intergovernmental Conference on an International Legally Binding Instrument Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (General Assembly Resolution 72/249)*, U.N., https://www.un.org/bbnj/ (last visited Mar. 19, 2022).

[195] 2021 Revised Draft, *supra* note 22, art. 6.1.

[196] *Id.* arts. 3.8, 4.4, 5.4.

[197] *Id.*

[198] *Id.* art. 5.4.

[199] *Id.* n.15.

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funding mechanism shall be established in cooperation with relevant international organizations such as the FAO and International Fund for Agricultural Development.[200]

For the current negotiations, the S&DT issues remain as the major conflicts among the negotiators, while the negotiators have not reached a consensus on certain S&DT issues. Also, the developing country Members, such as China, India, and others, have long resisted the developed countries' proposals to reform the S&DT. China owns the world's largest fishing vessels and massively subsidizes them. Yet, it insists its development needs as a developing country in the negotiations, blocks environmentally-oriented reforms, and challenges the United States' proposal to manage fisheries subsidies by linking to United States' concessions on other trade rules that the United States may not accept.[201] This leads to the recent doubts over whether it is still optimistic to conclude the fisheries subsidies negotiations at the twelfth Ministerial Conference.[202]

E. Notification and Surveillance Provided by the 2021 Revised Draft

In order to strengthen and enhance notifications of fisheries subsidies, and to enable more effective surveillance of their implementation, each Member shall provide certain information, including the type of fishing activities, species-catch data, the status of fish stocks, conservation and management measures, name and identification number of vessels, as well as fleet capacity, as part of their regular notification of fisheries subsidies under Article 25 of the SCM Agreement.[203] In particular, other information are also required to notify the Committee established based on Article 9 of the Draft, including vessels and operators engaged in IUU fishing, as well as fisheries access agreements.[204]

In addition, as the United States proposed on basis of its "worker-centric" trade policy agenda,[205] to report the information regarding the vessels and operators reasonably indicated the use of forced labor is also included in the 2021 Revised Draft with square brackets and subject to further

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[200] *Id.* art. 7.

[201] KRISTEN HOPEWELL, CLASH OF POWERS: US-CHINA RIVALRY IN GLOBAL TRADE GOVERNANCE 94-132 (2021).

[202] Jeffrey J. Schott, *Has India's Trade Negotiating Strategy Hit a Dead End?*, *in* A WARY PARTNERSHIP: FUTURE OF US-INDIA ECONOMIC RELATIONS 70, 73 (Euijin Jung et al. eds., 2020).

[203] 2021 Revised Draft, *supra* note 22, art. 8.1.

[204] *Id.* art. 8.2.

[205] *See* Chair's Explanatory Note, *supra* note 153; *United States Urges WTO Members to Address Forced Labor on Fishing Vessels in Ongoing Fisheries Subsidies Negotiations*, U.S. TRADE REPRESENTATIVE (May 26, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-urges-wto-members-address-forced-labor-fishing-vessels-ongoing-fisheries-subsidies.

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negotiations.[206] Originally, the United States proposed to include effective disciplines on harmful subsidies to fishing activities that may be associated with the use of forced labor, explicit recognition of the problem and the need to eliminate it, as well as transparency with respect to vessels or operators engaged in the use of forced labor.[207] These have been blocked by other Members, in particular those who are accused of forced labor, such as China.[208] Probably as a compromise made by the NGR Chair, remained in the 2021 Revised Draft is only the one regarding the requirements of transparency by reporting relevant information.

F. Institutional Arrangements and Dispute Settlements Under the 2021 Revised Draft

Regarding the institutional arrangements in enforcing fisheries subsidies regulations, a committee is to be established to carry out responsibilities assigned by the Agreement, to examine all information provided, and to review annually the implementation and operation of the Agreement.[209] The 2007 Proposed Draft, without establishing a specific fisheries subsidies committee, establishes a more formal institutional mechanism to enhance the cooperation between the WTO and FAO, by establishing a "peer review" mechanism for certain subsidies,[210] and by providing the panel the opportunity to establish an advisory technical fisheries expert group or to consult recognized and competent international organizations for the dispute settlement.[211] Regarding the institutional cooperation, the 2021 Revised Draft requires the Committee to only maintain close contact with the FAO and with other relevant international organizations in the field of the fisheries management, including relevant RFMO/As.[212] To settle the disputes on three types of prohibited fisheries subsidies, Article 4 of the SCM Agreement regarding remedies can apply.[213] Doubted would be that the role of the fisheries expertise in the dispute settlement seems to be ignored in the new draft, as Article 4 of the SCM Agreement provides the panel the opportunity

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[206] 2021 Revised Draft, *supra* note 22, art. 8.2(b).
[207] *See United States Urges WTO Members to Address Forced Labor on Fishing Vessels in Ongoing Fisheries Subsidies Negotiations*, *supra* note 205; Negotiating Group on Rules, *The Use of Forced Labor on Fishing Vessels: Submission of the United States*, WTO Doc. TN/RL/GEN/205 (May 27, 2021).
[208] Simon Lester, *Latest WTO Fisheries Subsidies Negotiating Text Addresses Forced Labour*, CHINA TRADE MONITOR (Nov. 9, 2021), https://www.chinatrademonitor.com/latest-wto-fisheries-subsidies-negotiating-text-addresses-forced-labor/.
[209] 2021 Revised Draft, *supra* note 22, art. 9.1-.3.
[210] 2007 Proposed Draft, *supra* note 37, Annex VIII, arts. III.2(b)(3), V.1.
[211] *Id.* art. VIII.4.
[212] 2021 Revised Draft, *supra* note 22, art. 9.5.
[213] *Id.* art. 10.2.

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to request the assistance of the Permanent Group of Experts,[214] which is established by the SCM Committee composed of five independent and highly qualified persons in the fields of subsidies and trade relations.[215] Persons in the field of fisheries are not covered.

G. Other Important Provisions of the 2021 Revised Draft

To reconcile the relation of this Agreement and the possible territorial and maritime disputes, the 2021 Revised Draft emphasizes, although via provisions within the square brackets and still subject to further negotiations, that nothing in this agreement would have legal implications regarding territorial claims or delimitation of maritime boundaries and the panel established is not to address any issues of territorial claims or delimitation of maritime boundaries.[216] Targeted are the disputes between China and other Claimant States in the South China Sea region, in particular given the experience of China in the South China Sea Arbitration with the Philippines.[217] This proposal made by China symbolizes that China as a growing World power has played a more significant role in the WTO and brought its political concerns, not merely economic ones, into the WTO negotiations.[218]

For the relations of this Agreement and other agreements under the law of the sea, the 2021 Revised Draft provides that in this Agreement nothing shall be construed or applied in a manner which will prejudice the jurisdiction, rights and obligations of Members under the law of the sea and shall imply a Member to be bound by measures or decisions of, or recognizes, any RFMO/As of which it is not a party or a cooperating non-party.[219]

Overall, the 2007 Proposed Draft significantly provides the provisions on general exceptions opening the door for fisheries subsidies, while such provisions do not exist in the 2021 Revised Draft. The 2021 Revised Draft,

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[214] SCM Agreement, supra note 8, art. 4.5.

[215] *Id*. art. 24.3.

[216] 2021 Revised Draft, *supra* note 22, art. 11.3(a)-(b); Negotiating Group on Rules, *Fisheries Subsidies: Revised Draft Consolidated Chair Text: Chair's Explanatory Note Accompanying TN/RL/W/276/Rev.1, add.*, ¶¶ 114-17, WTO Doc. TN/RL/W/276/Rev.1/Add.1 (June 30, 2021).

[217] Negotiating Group on Rules, *Philippine Statement on the Subsidies Prohibition on IUU Fishing and Areas with Conflicting/Disputed Claims over Maritime or Territorial Jurisdictions, Sections 3.2 & 3.10 of TN/RL/W/274/Rev.6, NG Rules Consultation on Fisheries Subsidies*, WTO Doc. TN/RL/GEN/196/Suppl.1 (Dec. 11, 2018).

[218] See more about China's influence in the WTO: *How Influential Is China in the World Trade Organization?*, CHINA POWER (July 31, 2019), https://chinapower.csis.org/china-world-trade-organization-wto/; Henry Gao, *How China Took on the United States and Europe at the WTO, in* EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW 174, 202 (2021); Henry Gao, *From the Doha Round to the China Round: China's Growing Role in WTO Negotiations, in* CHINA IN THE NEW INTERNATIONAL ECONOMIC ORDER: NEW DIRECTIONS AND CHANGING PARADIGMS 79, 94-96 (Lisa Toohey et al. eds., 2015).

[219] 2021 Revised Draft, *supra* note 22, arts. 11.4-.5.

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thus, neither requires establishing a sound fisheries management system nor refers to adopt best practice of fisheries management on the use of subsidies. Yet, this requirement and adoption of the 2007 Proposed Draft is the most meaningful step in fisheries conservation within the WTO. The 2021 Revised Draft seems more obscure and conservative on referring to the international fisheries instruments developed outside of the WTO, by merely referring to the term "a biologically sustainable level" whose reference points include the MSY whose legal basis is Article 61 of the LOS Convention. Based on these analyses, found is that the WTO in 2021 has made some compromises by allowing certain types of fisheries subsidies, by not emphasizing on establishing fisheries management system or relevant measures, as well as by limiting its S&DT to developing countries and LDC Members for the small-scale fisheries. Yet, it takes into count the development of the law of the sea in the past years, in particular the creeping jurisdictions of coastal States, the different jurisdictions of the States over the IUU fishing, and even activities in areas beyond the subsidizing Member's jurisdiction that may include the Areas Beyond National Jurisdiction (ABNJ). Yet, with China's rise as a World power, the fisheries subsidies negotiations in the Doha Rounds Negotiations and recent years may have been facing different levels of China's influence. The wrestling between the United States and China that can be easily found in certain provisions of the 2021 Revised Draft may impact the consensus to be reached and finally shadow the outcome of negotiations.

VII. CONCLUSION

After twenty years, negotiations over fisheries subsidies within the WTO are coming to the conclusion. Harmful fisheries subsidies are to be ended. This paper with an emphasis on the Asia-Pacific region focuses on the normative analysis of the WTO's 2007 Proposed Draft and 2021 Revised Draft, as well as the CPTPP Environment Chapter. Found is that the 2021 Revised Draft seems to have made some compromises and contains fewer concerns for marine environmental challenges. It may be viewed as a drawback to the fisheries conservation and a return of the WTO to its original role in providing trade regulations. Yet, can be expected are that there could be fewer obstacles in the negotiations and that it could be more optimistic to successfully conclude the fisheries subsidies negotiations within the WTO, although the wrestling between the United States and China may still impact the outcome of negotiations.

In that case, taking into account the fisheries conservation in the Asia-Pacific region, further attention can be paid to the CPTPP. The CPTPP is the trade agreement in this region providing the robust fisheries subsidies and fisheries management regulations, as it requires Contracting Members to

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prohibit certain types of fisheries subsidies and unconditionally to establish the fisheries management system. The following analysis may give us some hope. Amongst the thirteen highest subsidizing States or entities as Ussif Rashid Sumaila observed in 2018, ten of them are the Asia-Pacific countries. Japan, Canada and Vietnam are the CPTPP Contracting Parties and shall certainly comply with its rules. China and Taiwan formally submitted their applications to join the CPTPP separately in September 2021. During their respective ongoing negotiations with the CPTPP, the issue of fisheries subsidies may have been raised. Also, Korea, Thailand and Indonesia have announced their interests to join the CPTPP in 2018. Soon, their trade talks with the CPTPP may start and the issue of fisheries subsidies will be raised. The United States may not join the CPTPP but is obliged to comply with the fisheries subsidies regulations provided by the USMCA. Thus, the question that remained would be how Russia as one of the highest subsidizing States in the Asia-Pacific region would be regulated. Needed are not merely to enhance the CPTPP expansion and improve its enforcement at the regional level but also to accelerate the WTO fisheries subsidies negotiations at the global level.

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