FROM ADDRESSING TRADE DISTORTION TO CORRECTING ENVIRONMENTAL DISTORTION: THE FISHERIES SUBSIDIES NEGOTIATION AS THE TURNING POINT OF THE WTO'S TASK

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ABSTRACT

Traditionally, the World Trade Organization (hereinafter "WTO") has been a forum to address trade distortive practices adopted by government, and has no experience in dealing with a pure environmental protection issue. The fisheries subsidies negotiation is the turning point. It starts addressing the correction of environmental distortion which is harmful to the fisheries conservation and sustainability. The WTO expanding its tasks to environmental issue could be seen as a "good mistake." While the fisheries subsidies negotiations are ongoing, the current draft negotiation text clearly shows that it intends to prohibit the listed subsidies due to their environmental harmfulness. This is the first time that the WTO addresses non-trade-related issues of high importance. The paper argues that there are certain additional features that need to be built in so as to reflect that the fisheries subsidies agreement is to correct the "environmental distortion." For instance, because the purposes and nature of subsidies of the agreement are different from the Agreement on Subsidies and Countervailing Measures (hereinafter "ASCM") and its concept of

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categorizing subsidies, Members should consider the agreement to be a "stand alone" agreement, not an annex to the ASCM. Another example is about the dispute settlement: Since the future fisheries subsidies agreement is designed to address fisheries conservation, not to bring about any trade benefit to Members, a complaining Member in a dispute settlement procedure is not supposed to make its complaint based on the fact that "a trade interest" has been nullified or impaired. The paper further explains the relation between the future fisheries subsidies agreement and the ASCM. Supposing there is an adverse economic effect or supposing the domestic fishing industry is injured because of certain fisheries subsidies granted by a WTO Member, a multilateral or unilateral action can still be triggered based on the procedures and requirements provided in the ASCM, in addition to the remedies that can be applied to address the fisheries conservation aspect arising from the subsidies.

KEYWORDS: *environmental distortion, environmental protection, fisheries subsidies, IUU, over capacity, overfished stock, overfishing, sustainability, trade distortion*

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I. INTRODUCTION

Environmental protection is one of the most pressing topics of our time. After years of efforts by the international community, there have been remarkable achievements in some areas of environmental protection. These achievements are partly reflected in the adoption of certain international environmental protection instruments, covering, for example, climate change and ozone depletion (such as the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol and the 2015 Paris Agreement), nature and biodiversity (such as the 1992 Convention on Biological Diversity (CBD) and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora), waste (such as the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal) and water (such as the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes).[1]

However, in some other areas, there is still an apparent lack of needed international instruments or collective efforts to address certain specific environmental issues. This is partly due to the diverseness of the issues which are too broad to be addressed in a timely manner and also partly due to the newness of some environmental protection issues which have recently emerged. Part of the reasons is also the slowness of building consensus on having an environmental protection instrument for specific aspects of environmental protection.

Keeping fish stocks at certain biological limits and preventing the wildlife population from depletion is an important topic of environmental protection. The ultimate purpose of protecting fish stocks is to ensure fish and fisheries to sustainably contribute to the well-being of all humanity. An important way of protecting fish stocks is to adopt various fisheries management measures, which could include "information gathering, analysis, planning, consultation, decision-making, allocation of resources and formulation and implementation, with enforcement as necessary, of regulations or rules which govern fisheries activities in order to ensure the continued productivity of the resources and the accomplishment of other fisheries objectives."[2] However, fisheries management is considered by many people to be far from sufficient in ensuring the preservation of fish stocks. They argue that government subsidies provided to fishing vessels and

[1] The categorization of international environmental agreements can be seen at *International Issues: Multilateral Environmental Agreements*, EUR. COMMISSION, https://ec.europa.eu/environment/international_issues/agreements_en.htm (last visited Sept. 12, 2021).

[2] Kevern L. Cochrane, *Fisheries Management*, *in* A FISHERY MANAGER'S GUIDEBOOK: MANAGEMENT MEASURES AND THEIR APPLICATION ch. 1, § 2 (Kevern L. Cochrane ed., 2002), http://www.fao.org/3/y3427e/y3427e00.htm#Contents.

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operators are also one of the main reasons contributing to the serious deterioration of fisheries conservation. Therefore, there has been an urgent call to enact rules to reduce or eliminate government subsidies which are harmful to the conservation fish stocks.

At the multilateral level, government subsidies are addressed exclusively by the World Trade Organization (hereinafter "WTO"). The specific rules governing subsidies are provided in the Agreement on Subsidies and Countervailing Measures (hereinafter "ASCM"). Mainly because of the key word "subsidies," the "environmentally harmful fisheries subsidies" are linked with the WTO and the ASCM. Consequently, the prohibition of certain harmful fisheries subsidies has been negotiated in connection with the "trade distorting subsidies" at the WTO's forum.

If one would characterize the use of the WTO's forum for the negotiation of the "environmentally harmful fisheries subsidies" in the context of the ASCM as a mistake, it can be considered as a "good mistake," which helps the WTO to extend its mandate to address the important environmental protection issues.

This paper explains the tasks of the WTO, which are to address various kinds of trade distortions. The WTO has not been a forum to correct purely environmental distortion. Therefore, the WTO serving as a platform to negotiate fisheries subsidies can be considered as a "mistake." But such mistake should be a good one. The paper further explains the fisheries subsidies negotiations being brought into the WTO under certain mandates. At an earlier stage, Members were still considering fisheries subsidies as being related to trade distortion. Later on, in various mandates, the concept of trade distorting practices was not mentioned any more. Apparently, Members have already accepted negotiating non-trade-related fisheries subsidies. This paper further looks at the contents of the current draft negotiation text to explain that the "prohibited subsidies" are designed to correct environmental distortion, i.e., activities which are harmful to fisheries sustainability. They are not to address trade distortion. The paper argues that there are certain additional features that need to be built in so as to reflect that the fisheries subsidies agreement is to correct the "environmental distortion," not to address trade distortion. There are also implications arising from the nature of the fisheries subsidies agreement for the settlement of fisheries subsidies disputes. This will be addressed in the later part of this paper. In addition, the paper clarifies that the trade distorting effects arising from fisheries subsidies are addressed by the ASCM, whereas the environmental distorting effects arising from fisheries subsidies are addressed by the fisheries subsidies agreement. Hence the relation of their respective functions needs to be addressed.

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II. WTO'S TRADITIONAL TASKS BEING TO ADDRESS TRADE DISTORTIONS

A. The Reason for WTO Serving as the Forum Being a "Mistake", but a Good One

The reason to describe the WTO serving as the forum "a mistake, but a good one" is that the organization is meant to address trade distortive practices adopted by governments, not to correct governments' environmentally distortive practices. It happens that the environmentally distortive fisheries subsidies were connected with the subsidies regulated under the WTO, and the WTO is considered an appropriate forum to address this important environmental issue. In this context, a brief overview of the concept of trade distortion and the WTO's tasks should be useful to understand the essence of the point.

Trade distortion can be understood as any external influences (i.e., influences not arising from the operation of the market itself) that could impede the fair competition between domestic and foreign suppliers thereby adversely affecting the level playing field and the proper operation of the market. The most obvious external influences come from government measures.

For the purpose of our discussion, government measures which can adversely affect the operation of the market and the fair competition from foreign suppliers may roughly be categorized into three types: (1) tariffs, import restriction and other market access restrictive measures; (2) non-border measures that could directly or indirectly affect the entry of foreign goods or services; and (3) government distortive financial supports.

For tariffs, import restrictions and other market access restrictive measures, the removal or reduction of such distortion mainly relies on market access negotiations (such as tariff negotiations on goods and market access commitments on services) and on the establishment of certain related rules (such as the rules governing import restrictions). For other non-border measures that could directly or indirectly affect the entry of foreign goods or services, the removal of such distortion mainly relies on the establishment of various rules (such as the rules governing technical barriers to trade and those governing sanitary and phytosanitary measures) under different WTO agreements to restrict the adoption of certain measures or to regulate the manner of applying them. For government distortive financial supports, the main approach under the WTO is to establish a set of rules to either ban the use of certain types of government subsidies or to remove the adverse effect arising from the subsidies.

Government subsidies are considered as the typical type of distorting practices which could affect fair competition between domestic and foreign

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goods. The distortive outcomes are reflected in the adverse effect as defined in Article 5 of the ASCM. The actual phenomena reflecting the distortive effect include the abnormally low prices or production costs, or abnormally higher volumes of production that make the competition unfair.

The tasks of the WTO are mainly to address these trade distortive practices. These tasks are manifested in the Preamble of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter "Marrakesh Agreement") that Members desire to enter into "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."

B. WTO Has No Previous Experiences Addressing Pure Environmental Issues

The WTO also addressed many "trade-related" cross-cutting issues, such as the "trade-related intellectual property rights" based on the Agreement on Trade-Related Aspects of Intellectual Property Rights and the "trade related investment measures" based on the Agreement on Trade-Related Investment Measures.

Concerning the environment, there are also many cross-cutting issues between international trade and environmental protection, and accordingly, the WTO has certain rules and work programs contributing to the "trade-related" environmental protection issues. Examples of trade-related environmental protection elements include the emphasis on "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment" provided in the Preamble of the Marrakesh Agreement; the establishment of the Trade and Environment Committee as a forum for governments to conduct dialogue on the mutual impacts and relations between trade and environment; and allowing Members to take "trade-restrictive environmental measures" such as those trade measures relating to the conservation of exhaustible natural resources under Article XX of the General Agreement on Tariffs and Trade (hereinafter "GATT") and those technical regulations prepared, adopted or applied for the protection of environment under Article 2.2 of the Agreement on Technical Barriers to Trade.

But the WTO does not have experience addressing a pure environmental protection issue. Since the WTO is not an environmental protection agency, there has not been any legal instrument for environmental protection under the WTO which is non-trade-related.

In this regard, there is a broadly supported statement about the tasks of the WTO in relation to the environment that "the WTO is not an

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environmental agency" and "other agencies that specialize in environmental issues are better qualified to undertake those tasks."[3] However, the fisheries subsidies negotiation changes the scenario. It was held that "[t]he fisheries subsidies negotiations are historic in that they are the first time that conservation considerations, in addition to commerce priorities, have led to the launch of a specific trade negotiation."[4]

III. THE FISHERIES SUBSIDIES NEGOTIATIONS AS THE TURNING POINT

A. In Earlier Stage, "Environmentally Harmful Fisheries Subsidies" Were Considered as Trade Distorting

The fisheries subsidies negotiations were launched in 2001 under the Doha Ministerial Declaration to clarify and improve existing WTO disciplines on fisheries subsidies. Paragraph 28 of the Doha Ministerial Declaration reads in part:

> In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at *clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures*, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including *disciplines on trade distorting practices*, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to *clarify and improve WTO disciplines on fisheries subsidies*, taking into account the importance of this sector to developing countries (emphasis added).[5]

At this early stage in the history of fisheries subsidies negotiations, the focus was to clarify and improve the ASCM's disciplines. At the time when Ministers made the Declaration, they were still thinking of fisheries

[3] *The Environment: A Specific Concern*, WORLD TRADE ORGAN. [hereinafter WTO], https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm (last visited Sept. 12, 2021).
[4] *Fisheries Subsidies, Overcapacity and Overfishing*, OCEANA (Oct. 19, 2009), https://oceana.org/sites/default/files/Fisheries_Subsidies_Backgrounder_REVISED_Oct09_FINAL_0.pdf.
[5] WTO, Ministerial Declaration of 14 November 2001, ¶ 28, WTO Doc. WT/MIN(01)/DEC/1, 41ILM 746 (2002).

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subsidies as being "trade distorting practices."

B. In Later Stages, "Environmentally Harmful Fisheries Subsidies" Have Been Recognized as Not Relating to Trade Distortion

The 2005 Hong Kong Ministerial Conference made the mandate for the fisheries subsidies negotiations clearer and more specific. Paragraph 9 of the Hong Kong Ministerial Declaration's Annex D (Rules) I. "Anti-Dumping and Subsidies and Countervailing Measures including Fisheries Subsidies" states:

> [*R*]*ecall* our commitment at Doha to enhancing the mutual supportiveness of trade and environment, note that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing, and *call on* Participants promptly to undertake further detailed work to, *inter alia*, establish the nature and extent of those disciplines, including transparency and enforceability. Appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns.[6]

Specifically, the Hong Kong Ministerial Conference listed one broad category of fisheries subsidies, which is the subsidies that contribute to overcapacity and over-fishing. The Hong Kong Ministerial Declaration does not mention the fisheries subsidies as being "trade distorting practices."

In 2015, the United Nations adopted the "2030 Agenda for Sustainable Development" to provide a "shared blueprint for peace and prosperity for people and the planet, now and into the future," which includes the 17 Sustainable Development Goals (hereinafter "SDGs") being recognized as urgent calls for action by all countries.[7] The UN Sustainable Development Goal 14 is to "[c]onserve and sustainably use the oceans, seas and marine resources for sustainable development." The UN Sustainable Development Goal Target 14.6 reads:

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[6] WTO, Ministerial Declaration of 18 December 2005, at D-2, WTO Doc. WT/MIN(05)/DEC (2006).

[7] The content of the Sustainable Development Goals can be found at *Sustainable Development Goals (SDGs)*, UNITED NATIONS, https://unosd.un.org/content/sustainable-development-goals-sdgs (last visited Sept. 12, 2021).

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> By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such 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.

Here, two broad categories of fisheries subsidies are mentioned, i.e., the "subsidies which contribute to overcapacity and overfishing" and the "subsidies that contribute to illegal, unreported and unregulated fishing" (hereinafter "IUU fishing").

To respond to the SDGs, the WTO's 2017 Buenos Aires Ministerial Conference adopted the "Ministerial Decision on Fisheries Subsidies" to indicate that:

> Members agree to continue to engage constructively in the fisheries subsidies negotiations, with a view to adopting, by the Ministerial Conference in 2019, an agreement on comprehensive and effective disciplines that prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU-fishing recognizing that appropriate and effective special and differential treatment for developing country Members and least developed country Members should be an integral part of these negotiations.[8]

And that "Members re-commit to implementation of existing notification obligations under Article 25.3 of the Agreement on Subsidies and Countervailing Measures thus strengthening transparency with respect to fisheries subsidies."[9]

Here again, two broad categories of subsidies are identified, i.e., the "subsidies [that] contribute to overcapacity and overfishing" and the "subsidies that contribute to IUU fishing." The Buenos Aires Ministerial Decision does not mention fisheries subsidies being "trade distorting practices" either.

From the twenty-year long history of fisheries subsidies negotiations, it can clearly be seen that at the beginning stage of the negotiations, Members were still thinking of fisheries subsidies that adversely contribute to the

[8] WTO, Ministerial Decision of 13 December 2017, ¶ 1, WTO Doc. WT/MIN(17)/64, WT/L/1031 (2017).
[9] *Id.* ¶ 2.

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depletion or unsustainably reduce fish stocks as being the kind of subsidies similar to the subsidies governed by the ASCM. This is reflected in the 2001 Doha Ministerial Declaration's statement of the fisheries subsidies being "trade distorting practices." In the Doha Ministerial Declaration, Members were also thinking of clarifying or strengthening the disciplines under the ASCM in order to address the environmentally harmful fisheries subsidies. In other words, at that time Members were considering environmentally unfriendly fisheries subsidies as the kind of subsidies that could adversely affect the fair competition, which are supposed to be ensured by the ASCM.

However, the subsequent ministerial declarations and decision did not refer to the kind of fisheries subsidies that Members are negotiating being "trade distorting practices." Neither did they mention that the fisheries subsidies negotiations are to clarify or strengthen the ASCM's disciplines.

Especially, since the United Nations' adoption of Goal 14, the focus has become the removal of the subsidies that are harmful to the fisheries conservation and are even undesirably depleting fish stocks.

IV. FROM THE CONTENTS OF THE FUTURE AGREEMENT: IT IS TO CORRECT ENVIRONMENTAL DISTORTION, NOT TO ADDRESS TRADE DISTORTION

A. All Listed Subsidies Are "Prohibited Subsidies" Due to Environmental Harmfulness

The fisheries subsidies negotiations are still ongoing as of the time of writing this paper. Many negotiation documents have not been released to the general public. However, the most recent negotiation text, i.e., the "Revised Draft Consolidated Chair Text" (TN/RL/W/276/Rev.1, 30 June 2021; hereinafter "Chair's Text"), has been made publicly available.[10] If we use the Chair's Text as the basis to further understand the nature of the negotiation, we can further confirm that the future fisheries subsidies agreement is purely to correct environmental distortion, not to address trade distortion.

There are three types of subsidies listed in the Chair's Text, namely the subsidies to IUU fishing as provided in Article 3 of the Chair's Text, the subsidies concerning overfished stocks as provided in Article 4, and the subsidies concerning overcapacity and overfishing as provided in Article 5.

Unlike the three categories of subsidies provided in the ASCM (including the prohibited subsidies, the actionable subsidies and the already

[10] WTO, *Negotiating Group on Rules – Fisheries Subsidies: Revised Draft Consolidated Chair Text*, WTO Doc. TN/RL/W/276/Rev.1 (June 30, 2021), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/RL/W276R1.pdf&Open=True.

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expired non-actionable subsidies), there is only one category in the Chair's Text, i.e., the prohibited subsidies. All prohibited subsidies covered by the Chair's Text are considered harmful to the conservation of fish stocks and need to be removed, of course with certain exceptions.

B. Prohibition on Subsidies to IUU Fishing—To Correct the Activities Most Harmful to Fisheries Sustainability

IUU fishing includes illegal fishing activities, which are conducted "in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization;" unreported fishing, the activities of which "have not been reported, or have been misreported, to the relevant national authority;" and unregulated fishing, the activities of which are conducted "in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization" among others.[11]

IUU fishing is considered as "one of the greatest threats to marine ecosystems due to its potent ability to undermine national and regional efforts to manage fisheries sustainably as well as endeavors to conserve marine biodiversity" [12] and consequently to inhibit "progress towards achieving the goals of long-term sustainability and responsibility."[13]

International efforts are reflected in the adoption of the FAO's Voluntary Guidelines for Flag State Performance [14] to address the IUU fishing activities. From the perspective of the fisheries subsidies negotiations, the Chair's Text adopts a direct and straightforward prohibition, without any condition or requirement being attached for imposing such prohibition. This is due to the most harmful nature of IUU fishing and due to the fact that government subsidies provided to fishing vessels or operators would encourage and could enhance IUU fishing activities. Article 3.1 of the Chair's Text thus provides that "[n]o Member shall grant or maintain any subsidy to a vessel or operator engaged in illegal, unreported and unregulated (IUU) fishing."

It is apparent that the prohibition of subsidies to IUU fishing is to help

[11] *Illegal, Unreported and Unregulated (IUU) Fishing*, FAO, http://www.fao.org/iuu-fishing/en/ (last visited Sept. 12, 2021).
[12] *Id*.
[13] *What Is IUU Fishing?*, FAO, http://www.fao.org/iuu-fishing/background/what-is-iuu-fishing/en/.
[14] Food & Agric. Org. of the United Nations [hereinafter FAO], The Voluntary Guidelines for Flag State Performance, the 2009 FAO Agreement on Port State Measures and Other Instruments Combating IUU Fishing, U.N. Doc. COFI/2014/4.2/Rev.1 (June 9-13, 2014), http://www.fao.org/cofi/24005-0 a794406c6747d10850eb7691593b6147.pdf.

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correct the fishing activities that most seriously distort the management of fisheries sustainability and the conservation of living marine resources. The prohibition of subsidies to IUU fishing does not link to, nor has anything to do with, trade distortion.

C. Prohibition on Subsidies Concerning Overfished Stocks—To Expect Rebuilding Fish Stocks

According to Article 4.2 of the Chair's Text, "a fish stock is overfished if it is recognized 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." This provision is about the authority to determine a fish stock to be overfished. In substance, "overfished stock" refers to the situation where the abundance of the stock is below the limit biomass reference point. In comparison, "overfishing" refers to the situation where the fishing mortality being exerted on the stock is above the limit fishing mortality reference point.[15]

If subsidies are provided to the fishing activities concerning overfished stock, they could either undesirably maintain the already overfished situation or could even worsen the overfished situation of a fish stock. Article 4.1 of the Chair's Text also adopts a straightforward prohibition of such subsidies. It states: "[n]o Member shall grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock." The prohibition of subsidies to fishing activities concerning overfished stock is to help preventing the continuation or the worsening of the overfished situation.

According to Article 4.3 of the Chair's Text, "a Member may grant or maintain subsidies referred to in Article 4.1 if such subsidies [and/or measures] are implemented to promote the rebuilding of the stock to a biologically sustainable level."[16] This paragraph provides leeway for Members to grant subsidies to fishing vessels or operators. The requirement is quite strict: A subsidy must be positively contributing to the rebuilding of

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[15] FAO, RESEARCH IMPLICATIONS OF ADOPTING THE PRECAUTIONARY APPROACH TO MANAGEMENT OF TUNA FISHERIES app. 2 (2001), http://www.fao.org/3/y0490e/y0490e00.htm#Contents.

[16] WTO, *supra* note 10, ¶ 4.3. The term "biologically sustainable level" is defined in *id.* at 3 n.9 of the Chair's Text as:

> [T]he 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 (MSY), or other reference points based on indicators such as [level of depletion, or level of or trend in time series data on catch per unit effort, commensurate with the data available for the fishery]; or by a relevant RFMO/A in areas and for species under its competence.

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the fish stock for the purpose of being permitted to make a grant to the fishing vessel or operator. A mere fact that a subsidy is not contributing to worsening a fish stock's biologically sustainable level is not enough for the purpose of granting the subsidy.

From the provisions of Articles 4.1 and 4.3, it is clear that whether or not a fisheries subsidy can be provided to a fishing vessel or an operator depends on whether the subsidy is linked to the fishing activities concerning overfished stock and whether it is implemented to promote the rebuilding of the fish stock to a biologically sustainable level. The prohibition or permission to provide a fisheries subsidy concerning overfished stocks has the aim of rebuilding the fish stock. It does not link to, nor has anything to do with, trade distortion.

D. Prohibition on Subsidies Concerning Overcapacity and Overfishing—To Expect Maintaining Fish Stocks

Overcapacity in relation to the fisheries sector is about an excessive capacity of fishing vessels or operators to catch fish. As explained above, "overfishing" is about the situation where the exploitation of fish stock is above the certain reference point. The means of addressing the subsidies concerning overcapacity and overfishing is different from the means of addressing subsidies concerning IUU fishing and that concerning overfished stock.

As explained above, Article 5 of the Chair's Text is about the prohibition on subsidies concerning overcapacity and overfishing. Article 5.1 provides in part that "[n]o Member shall grant or maintain subsidies to fishing or fishing related activities that contribute to overcapacity or overfishing." Article 5.1.1 further elaborates that "[a] subsidy is not inconsistent with Article 5.1 if the subsidizing Member demonstrates that measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level."

The rule is not to straightforwardly prohibit subsidies in connection with overcapacity and overfishing. Instead, the prohibition of such subsidies is linked to whether there is any measure which is implemented to maintain the respective fish stock at a biologically sustainable level. In other words, even if a subsidy might lead to overcapacity, Members are still permitted to grant such subsidy, as long as the subsidizing Members demonstrate that there is a measure which is implemented to maintain the relevant fish stock at the biologically sustainable level.

Again, the prohibition or permission to provide a fisheries subsidy concerning overcapacity and overfishing is with the aim of maintaining the relevant fish stock at certain desirable level. It does not link to, nor has anything to do with, trade distortion.

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V. ADDITIONAL FEATURES TO REFLECT THIS AGREEMENT BEING TO CORRECT ENVIRONMENTAL DISTORTION

A. Feature 1: The Outcome of Fisheries Subsidies Negotiations to Be a "Standalone Agreement" as Opposed to an Annex to the ASCM

During the negotiations, there is an issue about whether the outcome should be included as an Annex to the ASCM or whether it should be concluded as a standalone WTO agreement. On this issue, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereinafter "TPKM") submitted a "Discussion Paper on the Institutional Arrangement for the Fisheries Subsidies Disciplines" on 29 September 2020 (RD/TN/RL/127),[17] in which it explained the following:

The ASCM and the fisheries subsidies rules are vastly different concerning their fundamental purposes:

1. The fundamental purpose of the ASCM: As implied in Article XVI of the GATT, the original idea of establishing subsidies disciplines is to address the import or export effects arising from or caused by subsidies. The ASCM is also concluded for the purpose of addressing effects arising from export and import of subsidized products. For instance, Article 3 requires a subsidy not to be contingent upon export performance or upon the use of domestic goods; Articles 5 and 6 require identification of certain adverse effects (i.e., injury to the industry; nullification or impairment of benefits of another Member; and serious prejudice to the interests of another Member) for the purpose of deciding whether a subsidy is actionable. In other words, the ASCM is designed to protect trade interest and the interest of domestic industries and to reduce or prevent unfair competition arising from subsidies.
2. The fundamental purpose of fisheries subsidies rules: At the 2017 Ministerial Conference (MC11) held in Buenos Aires, ministers decided on a work program to conclude the negotiations by aiming to adopt at the next Ministerial Conference an agreement on fisheries subsidies which delivers on Sustainable Development Goal 14.6. The broad purpose of such an agreement is to conserve and sustainably use the oceans, seas and marine resources for sustainable development. Although fisheries subsidies and their disciplines would affect the trade interests and interests of fishery industries of other WTO Members, such interests are not the concern of the mandate of the fisheries subsidies negotiation. The fisheries subsidies disciplines bear a very high extent of "public interest" of protecting and sustainably conserving our common environment.

[17] The document is not made public by the WTO.

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When discussing whether to have a standalone fisheries subsidies agreement under the WTO or to merely have an annex to the ASCM, the respective purposes of the ASCM and the fisheries subsidies disciplines (i.e., correcting trade distortion and correcting environmental distortion) have to be taken into consideration.

There are also other incompatibilities between the fisheries subsidies disciplines and the ASCM. For instance, the ASCM has three categories of subsidies (the prohibited subsidies, the actionable subsidies and the already expired nonactionable subsidies) as explained above. If the fisheries subsidies disciplines are included as an annex to the ASCM, there could be an issue about how to fit the categories of fisheries subsidies into the categories. Such incompatibilities also help us understand the different nature of the fisheries subsidies disciplines.

B. Feature 2: A Needed Preamble for the Fisheries Subsidies Agreement

During the negotiations, Members have not touched upon whether there should be a preamble for the future fisheries subsidies agreement. Considering that the fisheries subsidies agreement is arguably the most important instrument to be concluded after the establishment of the WTO and also considering that the agreement is unique in that it is the first WTO agreement not addressing trade distortion issues, but intending to correct environmental distorting practices, it should be of high importance to have a set of preambular paragraphs to illustrate the negotiation backgrounds, mandates and principles. A preamble is not merely certain declarative sentences. Indeed, when Members have any doubt about the idea of any particular part of the agreement, they can look at the preamble for guidance. Also, when there is a dispute about the meaning of a particular provision in the agreement, the sentences in the preamble might serve as the "object and purpose" for the purpose of interpretation, as provided by Article 31.1 of the Vienna Convention on the Law of Treaties, which reads: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its *object and purpose* (emphasis added)."

A preamble for the fisheries subsidies agreement will have the function of guiding the future interpretation and operation of the agreement. It would be unimaginable that an enormously important agreement, like the current one, would not have its preamble. In this regard, the TPKM submitted the "Proposal on the Preamble for the Fisheries Subsidies Instrument" on 18 June 2021 (RD/TN/RL/141)[18] with the hope that the importance of having

[18] The document is not made public by the WTO.

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a preamble for this agreement could be shared by Members. Members are yet to discuss this issue.

VI. IMPLICATIONS FOR THE AGREEMENT'S FUTURE OPERATION IN CONNECTION WITH ITS NATURE BEING TO CORRECT ENVIRONMENTAL DISTORTION

A. Settlement Agreement Between Disputing Parties Not to Impede the Objective of this Agreement

Reaching a mutually agreed solution is always a preferred scenario to resolve a WTO dispute. Such a settlement agreement can be reached during the consultation stage or even after the establishment of the panel. Article 3.7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") indicates such a preference and provides in part that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred."

A solution of a fisheries subsidies dispute is also subject to Articles 3.5 and 3.6, which provide respectively that "[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements" and that "[m]utually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto."

Hence, if the disputing parties settle their fisheries subsidies dispute, their settlement agreement needs to be in conformity with the textual requirements and the objectives of the fisheries subsidies agreement. If the complaining Member decides to forgo any claim which in fact has a valid basis under the fisheries subsidies agreement, such a settlement agreement could be considered as being inconsistent with the fisheries subsidies agreement or as impeding its objective. Other Members are allowed to raise their concern. Since the settlement agreement does not bind other Members, they should be able to initiate their own dispute settlement procedures as long as the violation of obligation still exists.

B. "Nullification and Impairment of Benefit" Not a Basis for Bringing a Complaint Under this Agreement

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Since the future fisheries subsidies agreement is to address fisheries conservation, not to address trade distortion, there could be some implications for the application of the WTO's dispute settlement mechanism to fisheries subsidies disputes, due to the dispute settlement mechanism's original aim of remedying trade disputes.

One apparent implication is about whether and how to apply the requirements of "nullification and impairment of benefit accruing to the complaining Member" and "the attainment of any objective of the Agreement being impeded" in dispute settlement procedures.

Paragraph 1 of Article XXIII of the GATT provides in part that "[i]f any contracting party should consider that *any benefit accruing to it* directly or indirectly under this Agreement is *being nullified or impaired* or that *the attainment of any objective of the Agreement is being impeded* as the result of . . . the contracting party may . . . . (emphasis added)" The requirements of "nullification and impairment of benefit" and "impediment of attainment of objective" are also included in many provisions in the DSU. For instance, Article 3.5 of the DSU states: "[a]ll solutions . . . shall not *nullify or impair benefits accruing to any Member* under those agreements, nor *impede the attainment of any objective of those agreements*." Article 3.8 states: "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of *nullification or impairment*." Article 23.1 reads: "[w]hen Members seek the redress of a violation of obligations or other *nullification or impairment of benefits* under the covered agreements or *an impediment to the attainment of any objective* of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding." And Article 26.1 provides:

> Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that *any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired* or *the attainment of any objective of that Agreement is being impeded* as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement (emphasis added).

The original idea of the phrase "any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired" is about the nullification and impairment of "trade benefit." Based on this understanding, if there is a complaint brought by a WTO Member based on the fisheries subsidies agreement, there could be an issue about whether such Member

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has any "trade benefit" accruing to it under the fisheries subsidies agreement being nullified or impaired, or whether the "benefit" should be understood as the general or overall benefit arising from fisheries conservation that all Members would be able to share.

Based on the original design of GATT Article XXIII, the "benefit" should still be understood as a "trade benefit accruing to the complaining Member." If, instead, the "benefit" is understood as "the general, overall or systemic benefit arising from an agreement (such as the fisheries conservation) that all Members would be able to share," it would make this DSU's requirement redundant, because every WTO Member is supposed to enjoy such general benefit.

However, it does not mean that a WTO Member would have to prove that it has "trade benefit" for the purpose of bringing a complaint under the fisheries subsidies agreement. As explained above, the fisheries subsidies agreement is to address fisheries conservation, not to address trade distortion. Although the conservation of fish stocks would generate sustainable economic benefit to all Members, this agreement is not designed to bring about any "trade benefit" to any WTO Member (unlike the GATT which brings about "trade benefits" to Members through removal of trade barriers). Since there will be no "trade benefit" arising from the fisheries subsidies agreement, a complaining Member is not supposed to make its complaint based on the fact that "a trade interest accruing to it under this agreement" has been nullified or impaired.

Again, this does not mean that WTO Members are prevented from bringing their complaints under the DSU. A proper way to bring their complaint under the fisheries subsidies agreement is to claim that the attainment of objective of this agreement has been impeded. This would mean that there is no barrier for WTO Members to rely on the DSU to enforce WTO Members' obligations under the fisheries subsidies agreement. This would also mean that "all" WTO Members would be able to make a complaint against "any" WTO Member which breaches any of its obligations under this agreement, because a breach of an obligation under this agreement could be properly argued on the ground that the attainment of the objective of fisheries conservation has been impeded.

From this perspective, Members' performance of their obligations and their implementation of the agreement will be monitored by all other WTO Members through the dispute settlement procedures. This is very different from other WTO agreements, under which, normally, only those Members whose trade interests are nullified or impaired are able to bring a complaint.

C. Some Implementation Mechanisms Being Not Suitable

There would also be some implications for the implementation of the

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settlement of fisheries subsidies disputes under the DSU that need to be addressed during the negotiations.

At the end of a dispute settlement procedure when a panel and/or Appellate Body reports are adopted, it comes to the stage of implementation of recommendations and rules. In this regard, Article 3.7 of the DSU provides:

> In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort . . . is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

Concerning a fisheries subsidies dispute, the recommendation would most likely be requesting the complained Member to promptly withdraw the challenged fisheries subsidies which are found to be in violation of the fisheries subsidies agreement. The most desirable result is that the complained Member does promptly withdraw the challenged subsidies. In case this is not the situation, there comes an issue about whether and how to bring the challenged subsidies into conformity with the fisheries subsidies agreement.

First, since "compensation" is designed to temporarily remove the "trade loss" suffered by the complaining Member under other WTO agreements and since there is supposed to be no "trade loss" suffered by the complaining Member under the fisheries subsidies agreement, it would neither be appropriate (because of the environmental preservation nature of the this agreement) nor be technically feasible (because of the inexistence of a "trade loss") to resort to compensation.

Second, for other disputes, the suspension of concessions or other obligations are supposed to be made "with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment" or "in other sectors under the same agreement," as provided in Articles 22.3 (a) and (b). However, for fisheries subsidies disputes, suspending the application of concessions or other obligations under the same fisheries sector or under the fisheries subsidies agreement is also technically difficult. The obligations under the fisheries subsidies

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agreement are assumed to Members as a whole. These obligations are not "separately" owed to individual Members. For this reason, it is not possible for the complaining Member to suspend its obligations vis-à-vis the complained-against Member. In addition, a suspension of any obligation by the complaining Member under the fisheries subsidies agreement would mean that the complaining Member is allowed to provide certain prohibited subsidies to its fishing vessels or operators. This would immensely impede the attainment of the objective of this agreement.

Although the current Chair's Text does not prohibit suspension and hence DSU Article 22.5 (which requires the Dispute Settlement Body not to "authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension") does not apply, still a suspension of obligation under the fisheries subsidies agreement should be considered as not permitted by the nature of the agreement.

Third, for other disputes, the suspension of concessions or other obligations can also be made "under another covered agreement," as provided in Article 22.3(c). Article 22.4 further provides that "[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment." For fisheries subsidies disputes, since there is no "nullification of impairment of benefits accruing to the complaining Member," as explained above, technically, it would not be possible to calculate an authorized level of suspension of obligation which is equivalent to the level of the nullification or impairment.

Accordingly, the current implementation mechanisms through compensation and suspension of obligations are not feasible for fisheries subsidies disputes. In the remaining stage of negotiations, Members would have to consider providing other mechanisms (such as certain collective actions) to ensure the implementation of immediate withdrawal of the challenged prohibited fisheries subsides which have been found in breach of this agreement.

VII. THE ENVIRONMENTALLY HARMFUL EFFECTS AND THE TRADE DISTORTING EFFECTS TO BE CONCURRENTLY DEALT WITH

A. The ASCM's Multilateral Track vs. the Remedies Under the Fisheries Subsidies Agreement

It should be made clear that although fisheries subsidies prohibited by the fisheries subsidies agreement are harming the fisheries conservation, it does not mean that they will not create trade distortion. A fisheries subsidy could lead to an adverse conservation effect and adverse trade effects at the same time.

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Since there will be a set of fisheries subsidies disciplines in addition to the subsidies disciplines under the ASCM, an issue arises concerning the substantive relations between the future fisheries subsidies agreement and the ASCM. From the scope of the ASCM, fisheries subsidies which are covered by the fisheries subsidies agreement are still subsidies covered and regulated by the ASCM. These agreements are mutually supportive and, at the same time, overlap to some extent.

There are the multilateral track (including the substantive and procedural rules on the prohibited subsidies in Part II, the substantive and procedural rules on the actionable subsidies in Part III, and the expired substantive and procedural rules on non-actionable subsidies in Part IV) as well as the unilateral track (i.e., the requirements and procedures governing the countervailing measures provided in Part V) to address subsidies under the ASCM.

Fisheries subsidies are "prohibited subsidies" in the sense that they are environmentally harmful and thus are prohibited by the fisheries subsidies agreement. They are also subsidies governed by the multilateral track under the ASCM. But these "environmentally harmful prohibited fisheries subsidies" are not necessarily the "prohibited subsidies" under the ASCM, because the prohibited subsidies under the ASCM are strictly defined and only include "subsidies contingent upon export performance" and "subsidies contingent upon the use of domestic over imported goods." Most fisheries subsidies governed by the fisheries subsidies agreement do not include such a "contingency" requirement. It would be very likely that fisheries subsidies governed by the fisheries subsidies agreement are actionable subsidies under the ASCM (if the respective conditions are met).

The next question, then, would be whether a fisheries subsidy can be complained against both under the fisheries subsidies agreement and under the ASCM. The answer should be positive, because these two agreements are not mutually exclusive. Theoretically, they can be applied either cumulatively (i.e., resorting to the two remedies at the same time) or consecutively (i.e., resorting to the remedy under one agreement after having resorted to the other agreement), of course, under the condition that the requirements under both agreements are met.

However, since the ultimate purpose of the fisheries subsidies agreement is to expect the subsidizing Member to withdraw the challenged subsidies, hence, practically, if the challenged subsidy has been withdrawn because of the challenge brought under the fisheries subsidies agreement, there will be no basis for any Member to bring any complaint under the ASCM against the already withdrawn subsidy. On the contrary, if the challenged subsidy is an actionable subsidy under the ASCM, the possible result of the dispute settlement procedure could be either to "remove the adverse effect" arising from the challenged subsidy or to "withdraw the subsidy" (as provided in

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Article 7.8 of the ASCM). In the case that the recommendation only requires the removal of the "adverse effect," it would mean that a certain extent of the challenged subsidy is still allowed under the ASCM. In such a case, it is possible for a WTO Member to further bring a complaint against such subsidy based on the fisheries subsidies agreement for the ultimate purpose of removing such subsidy.

B. The ASCM's Unilateral Track vs. the Remedies Under the Fisheries Subsidies Agreement

The unilateral track under the ASCM is to allow Members to adopt countervailing measures against a subsidized product so as to ensure fair competition between the domestic like product and the subsidized imported product. Its purpose is vastly different from the remedy under the fisheries subsidies agreement, the purpose of which is to ensure the withdrawal of a prohibited fisheries subsidy. Therefore, the application of the unilateral countervailing measures against an imported product should not be affected by the remedy under the fisheries subsidies agreement. In principle, they certainly can be applied cumulatively and consecutively.

If the requirements of imposing the countervailing duty are met and if a countervailing duty is actually imposed, the immediate result is that the subsidized fisheries product is imposed with additional duties. The subsidizing Member does not have to withdraw its subsidy. If this is the case, then a remedy can still be activated under the fisheries subsidies agreement with the purpose of forcing the removal of such subsidy.

On the other hand, if the subsidy has been challenged under the fisheries subsidies agreement and up to the time when a countervailing procedure is initiated the subsidy has not been withdrawn, it is still possible to impose countervailing duty on the subsidized fisheries product.

VIII. SOME CONCLUDING REMARKS

This paper fundamentally argues that although the term "subsidies" sounds as if it is purely about economic interest, in fact the subsidies addressed by the future fisheries subsidies agreement are meant to correct certain environmental distortions.

Unlike the ASCM which is designed to ensure fair competition (which implies protecting private interests), the fisheries subsidies agreement is designed to ensure fisheries conservation (which implies protecting public interest). The paper uses the negotiation mandates and the Chair's Text as the basis to show the unique nature of the agreement. It also points out that the agreement with this nature of correcting environmental distortion is a turning point for the WTO to address non-trade-related issues of high

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importance.

Based on the understanding of the nature of the fisheries subsidies agreement, the paper further explains the relation between this agreement and the ASCM. Supposing there is an adverse economic effect or supposing the domestic fishing industry is injured because of certain fisheries subsidies granted by a WTO Member, a multilateral or unilateral action can still be triggered based on the procedures and requirements provided in the ASCM, in addition to the remedies that can be applied to address the fisheries conservation aspect arising from the subsidies.

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