Reflections on the WTO Negotiations on Prohibiting IUU Fishing Subsidies

GSI Policy Brief

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The IISD Global Subsidies Initiative (GSI) supports international processes, national governments and civil society organizations to align subsidies with sustainable development. GSI does this by promoting transparency on the nature and size of subsidies; evaluating the economic, social and environmental impacts of subsidies; and, where necessary, advising on how inefficient and wasteful subsidies can best be reformed. GSI is headquartered in Geneva, Switzerland, and works with partners located around the world. Its principal funders have included the governments of Denmark, Finland, New Zealand, Norway, Sweden, Switzerland and the United Kingdom, as well as the KR Foundation.

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1.0 Introduction

This briefing paper assesses the state of the World Trade Organization (WTO) negotiations on the prohibition on conferring subsidies to vessels and/or operators engaged in illegal, unreported and unregulated (IUU) fishing (IUU fishing subsidies). That prohibition depends primarily on three elements: the definition of a subsidy, the determination of IUU fishing, and the required nexus between the subsidy and the IUU fishing. The main focus of current discussions is on the second element.

While there is a general consensus on the need to prohibit IUU fishing subsidies, WTO Members continue to disagree on who is to decide whether there is IUU fishing, as well as on what basis that decision is to be made and according to what process(es). That disagreement is closely related to the question of how a WTO Member's obligation not to subsidize IUU fishing should depend on another Member's determination of IUU fishing, as well as the role of the WTO and its dispute settlement system in enforcing such an obligation. Although the WTO is not and cannot become a fisheries management organization (Azevêdo, 2019), it is the appropriate forum for negotiating and enforcing multilateral trade rules governing subsidies. At the same time, the rationale of existing rules under the Agreement on Subsidies and Countervailing Measures (ASCM) is fundamentally different from that of a prohibition on fisheries subsidies. As WTO Director-General Azevêdo has pointed out, the ASCM focuses on the trade-distorting effects of subsidies, whereas the negative effects of fisheries subsidies are primarily on the sustainability of fisheries resources (Azevêdo, 2019). A balance must therefore be sought between avoiding that the WTO and its dispute settlement system be given the task of deciding whether fishing is IUU, on the one hand, and ensuring that WTO rules can be used to effectively ensure that Members refrain from subsidizing those types of fishing, on the other.

The focus of this paper is specifically on proposals for the prohibition of IUU fishing subsidies and the different elements of that prohibition. The assessment in this paper is based on the Working Document found in TN/RL/W/274/Rev.6 (WTO Negotiating Group on Rules, 2018a) ("2018 Working Document") and more recent negotiating proposals. As negotiations intensify, new and more specific proposals are being tabled (such as a new draft text by India on special and differential treatment, including with respect to IUU fishing subsidies obligations) (WTO Negotiating Group on Rules, 2019a). Six facilitators are also assisting the negotiators and have produced summary papers on outstanding matters in the negotiations. Recent discussions have addressed, among other topics, the role of flag and coastal states in making determinations of IUU fishing, the conditions governing such determinations and the question of whether the application of the prohibition should be limited to cases where a serious violation of fisheries laws has been found.

Assuming an agreement on the prohibition of IUU fishing subsidies will be found, WTO Members will also need to consider whether this agreement, along with the other new fisheries subsidies rules, must become part of the ASCM, a stand-alone agreement or other sources of WTO law (Bartels & Morgandi, 2017). Other outstanding issues include the enforcement of the newly agreed rules (WTO Negotiating Group on Rules, 2019b). All of those questions relate to horizontal matters affecting the fisheries subsidies negotiations and are not the subject of this paper.

2.0 Background and State of Play

Since the 2001 Doha WTO Ministerial Declaration, WTO Members have sought to clarify and improve WTO rules governing fisheries subsidies (WTO, 2001, paras. 28 and 31). In the 2005 Hong Kong Declaration on the Doha Work Programme, Members agreed to strengthen disciplines on subsidies in the fisheries sector (WTO, 2005, Annex D, para. 9). WTO Members also called for "appropriate and effective special and differential treatment for developing and least-developed Members [being] 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" (WTO, 2005, Annex D, para. 9).

After several years of making little progress, negotiations were relaunched in 2015. That year, the United Nations General Assembly (UNGA) adopted the 2030 Agenda for Sustainable Development (UNGA, 2015, Resolution 70/1). As part of that agenda, UN Members agreed, in particular, to end overfishing and IUU fishing, to prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and to eliminate subsidies that contribute to IUU fishing by 2020. They also expressly referred to the need to guarantee appropriate and effective special and differential treatment as being an integral part of the WTO fisheries subsidies negotiations (UNGA, 2015, Sustainable Development Goals 14.4 and 14.6). Developments outside the WTO thus resulted in an ambitious time frame for WTO Members to deliver on the agenda they initially set in 2001.

WTO Members renewed their commitment to an outcome on fisheries subsidies in the Ministerial Decision of 13 December 2017 (WTO Ministerial Conference, 2017, Point 1), in which they resolved to reach "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." Furthermore, they recommitted to the implementation of existing notification obligations under Article 25.3 of the ASCM (WTO Ministerial Conference, 2017, Point 2). Given that a Ministerial Conference will take place June 8–11, 2020, in Kazakhstan, negotiators are working to complete negotiations by then.

The overall objective of negotiating WTO rules on IUU fishing subsidies is, in essence, to support the general commitment made, in other forums and pursuant to non-WTO rules, to prevent, deter and eliminate IUU fishing, which forms part of the duty to ensure the sustainable conservation and management of fish stocks (United Nations Convention on the Law of the Sea [UNCLOS], 1982, Articles 63, 64, 117 and 118; Young, 2017). In other words, trade disciplines are to be used as a tool for supporting (the enforcement of) obligations under other rules of international law. In practice, achieving an ambitious agreement on that prohibition should also result (indirectly) in a closer alignment of WTO Members' fiscal and fisheries policies and their implementation of those policies.

Despite wide support for the overall objective of this part of the negotiations, questions remain on the design and structure of the WTO obligations that would be appropriate for achieving this objective. The approach that appears to be supported by the majority of WTO Members focuses on identifying what Members or organizations may determine that a vessel and/or an operator is engaging in IUU fishing and imposing, as a matter of WTO law, certain (procedural) standards governing that determination. Once that determination is made, the vessel or operator concerned would no longer

be eligible to benefit from subsidies. As a result, WTO Members subsidizing the vessels or operators involved in the determination would be obliged to stop subsidizing those actors or refuse to grant new subsidies to them. Nonetheless, under this approach, there continue to be divergences on the question of who may determine IUU fishing, such as the flag state or the coastal state, and the distinct role of the subsidizing Member. A second approach, reflected in the 2018 Working Document but discussed less in recent months, is to design a general prohibition on conferring subsidies that contribute to IUU fishing, accompanied by certain procedural safeguards.

This paper discusses three key questions in the negotiations: how IUU fishing should be defined in the agreement, who should be able to make a determination of IUU fishing and subject to what conditions and whether the application of the prohibition of IUU fishing subsidies should be limited in some manner.

3.0 Defining IUU Fishing for the Purposes of the Subsidies Prohibition

Whatever approach is taken to the design and operation of the WTO obligations on fishing subsidies, there is a growing consensus on the need to include a definition of IUU fishing in the agreement to establish a degree of common understanding of what types of activity should be considered IUU fishing as a matter of WTO law. It indeed seems difficult to imagine how a prohibition of IUU fishing subsidies could operate effectively without first properly defining what subsidies are, in fact, prohibited.

The definition of "illegal, unreported and unregulated fishing (IUU)" in Article 1 of the 2018 Working Document refers to the description in Paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Plan of Action) of the UN Food and Agriculture Organization (FAO, 2001). It is not yet decided how the WTO fisheries subsidies rules will cross-refer to the Plan of Action.

The Plan of Action is a voluntary instrument developed within the framework of the FAO Code of Conduct for Responsible Fisheries. It offers the advantage that it is formulated in general terms and can apply to all states, entities and fishers. Paragraph 3 of the Plan of Action describes IUU fishing as (i) fishing that contravenes national laws, the rules of regional fisheries management organizations ("RFMOs") or other rules of international law, (ii) fishing that is not reported or misreported as a matter of national law and the rules of RFMOs and (iii) fishing that is not currently captured by fisheries conservation and management measures and is conducted in a manner inconsistent with state responsibilities for the conservation of living marine resources under international law (FAO, 2001). The unique feature of this description is that it does not itself prohibit or otherwise regulate fishing. Instead, Paragraph 3 refers to national law, RFMO rules and other rules of international law. It also makes it clear that it is those laws that actually define what is or is not covered by its description of IUU fishing. This devolved approach seems to be inevitable in formulating any type of common definition of IUU fishing for the purposes of a WTO agreement and does not appear to undermine the overall advantage of using a common definition.

However, some Members appear to be concerned that referring to the Plan of Action's description in a WTO agreement might render Paragraph 3 of the Plan of Action legally binding. Even though the Plan of Action is a voluntary instrument, it has been adopted by consensus by all FAO Members. In light of those concerns, proposals have been made to include language specifying that the description in Paragraph 3 applies "where applicable" and/or "as implemented in national laws." Paragraph 3 of the Plan of Action envisages that it is national or regional laws and regulations that determine what fishing activities are prohibited or not reported and that other rules of international law determine when fishing activities are considered unregulated. This means that, in the absence of such laws and regulations, Paragraph 3 itself does not impose any obligation. In any event, the reference to the description of IUU fishing in Paragraph 3 serves solely the purpose of limiting the scope of the obligation not to subsidize. That reference is not the source of any new obligation as a matter of WTO law.

There is already some practice in relying on Paragraph 3 in an international agreement. A number of WTO Members (63 in total, including the European Union) are party to the Agreement on Port State

Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Port State Measures Agreement) (FAO, 2009). The scope of the obligations under that agreement is determined by relying, in Article 1(e), on the description of IUU fishing in Paragraph 3 of the Plan of Action.

Adding the phrase "as implemented in national legislation" in a future WTO agreement could serve to underline the fact that it is the national legislation of a WTO Member or the international or regional agreements to which it is a party that define the content of what is IUU fishing, but it does not appear to be strictly necessary, given the manner in which Paragraph 3 of the Plan of Action is phrased. While the phrase "as implemented in national legislation" could contribute to clarifying the description of IUU fishing, some caution is advised with respect to any proposal to add the phrase "where applicable." That phrase could be understood as a limitation, namely that a determination of IUU fishing is relevant only if made by a WTO Member that has agreed to apply or has fully implemented the Plan of Action. Depending on the level of ambition pursued in these negotiations, adding that phrase could be unhelpful because it could offer a subsidizing Member a basis to argue that the prohibition does not apply.

WTO Members appear to prefer a "static" reference over a "dynamic" reference to the description in Paragraph 3 of the Plan of Action. Under the static approach, the new WTO agreement could cross-refer to the description found in Paragraph 3 of the Plan of Action at the time of concluding the new WTO agreement (meaning the description dating from 2001). That approach was used in, for example, footnote 11 to Article 20.16.2 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. The understanding is that that approach would signal that no later changes to the description, should they be agreed upon in the framework of the FAO, could be taken into account in enforcing the WTO prohibition. However, the static approach would not preclude that, in interpreting that part of the WTO rules, some deference might be given to the manner in which the description is understood by FAO Members. An alternative is that the full text of Paragraph 3 would be included in the new agreement. This approach could also deliver a static definition in the sense that subsequent changes agreed by the FAO would not alter the definition of IUU fishing for the purposes of the WTO agreement. However, in the absence of an express choice from WTO Members on whether or not amendments to Paragraph 3 are to be taken into account for the purposes of WTO law, subsequent interpretations by WTO panels might nonetheless take into account how the definition has evolved through action taken in the context of the FAO.

A further point to consider with respect to referencing the concept of IUU fishing in a WTO agreement is that the concept should be treated as coherently in the WTO as it is in its original context. Paragraph 3 of the Plan of Action sets out different activities that are to be considered as illegal fishing, unreported fishing and unregulated fishing. The remaining part of the Plan of Action refers to IUU fishing as a uniform concept. Thus, for example, Paragraph 23 of the Plan of Action provides that "States should, to the extent possible in their national law, avoid conferring economic support, including subsidies, to companies, vessels or persons that are involved in IUU fishing." Keeping in mind that, under other rules of international law and in other international forums, IUU fishing is essentially regarded as a specific type of fishing that requires a unique response from the international community, there is a concern that partitioning the concept into illegal, unreported and unregulated fishing in the context of a WTO agreement might undermine the coherent application of policy, including the use of subsidy rules, with respect to these types of fishing. Therefore, several

proposals rightly suggest defining the scope of the new subsidy obligations with respect to IUU fishing as a uniform concept. That choice could be made explicit in the text of the new agreement.

Against that background, this paper now assesses the different approaches to the circumstances triggering the obligation not to subsidize IUU fishing as a matter of WTO law and to the question of who may, and subject to what conditions under WTO law, determine that there is IUU fishing.

4.0 Determinations of IUU Fishing

4.1 Introduction

The main challenges in designing a prohibition on IUU fishing subsidies are finding a consensus on who may decide that a vessel or operator has engaged in IUU fishing and how to allow for an appropriate level of WTO scrutiny. This challenge follows from the fact that the application of a prohibition to subsidize depends on whether a vessel and/or an operator has engaged in the covered conduct (that is, IUU fishing), which is not a determination to be made by the WTO itself. In other words, the obligation not to subsidize under WTO law is made conditional on (what should be) an objective assessment made outside the context of the WTO of conduct sanctioned under other (national or international) rules.

As a result of the wide definition of IUU fishing, various WTO Members or organizations could have the necessary jurisdiction and responsibilities to make the required assessment of IUU fishing. At the same time, given that a determination by a WTO Member or an RFMO might trigger another WTO Member's responsibility and result in the withdrawal and repayment of the subsidy, it is understandable that a considerable number of WTO Members stress the need to subject that determination to conditions that may be reviewed and enforced at the WTO level.

Aside from the issue of who may determine IUU fishing, WTO Members are raising the question of whether it is necessary to define the term "determination" for the purposes of triggering the obligation not to subsidize IUU fishing. In practice, national laws of WTO Members are likely to use different definitions of a "determination"—ranging from a positive finding of fact and laws regarding IUU fishing that may be enforced to a finding against which local remedies either have been exhausted or are no longer available—but the understanding seems to be that a determination for the purposes of these subsidy disciplines would refer to a final decision after any appeal or review.

4.2 Who May Determine IUU Fishing?

Discussions have focused on five options for who may determine IUU fishing: (i) the WTO Member that is the flag state of the vessel engaged in IUU fishing; (ii) the subsidizing WTO Member; (iii) the WTO Member in whose waters IUU fishing is carried out by a foreign-flagged vessel (that is, the coastal state); (iv) RFMOs or arrangements; and/or (v) the FAO. The final option appears to have been dropped from the discussion due to the fact that, as things stand, the FAO does not appear to engage in formal IUU determinations. Instead, a more recent proposal suggests that port states also be recognized as a source for relevant determinations of IUU fishing. The negotiations do not envisage the option of other actors, such as non-governmental organizations, making such relevant determinations. Although these actors are active in the area of making IUU fishing determinations, WTO Members prefer to rely only on intergovernmental processes through which those determinations are to be made.

The main issue dividing negotiators is whether or not this list is over-inclusive. There appear to be two main approaches to this issue. One approach is that all of these options should be included. This position reflects the concern that there is a risk that the exclusion of any of the options would undermine the object and purpose of the prohibition on IUU fishing subsidies, which is to strengthen

the enforcement of the prohibition on IUU fishing itself. Another approach calls for a limited list that would not include, for example, the subsidizing Member or the flag state. Such a list would thus put the responsibility for determining IUU fishing on, in particular, the states or RFMOs or arrangements that have jurisdiction with respect to the waters in which IUU fishing occurs. It is worth noting that, in the references to national laws in the description of IUU fishing in Paragraph 3 of the Plan of Action, no distinction is made based on which state's laws are relevant and whether it matters if a state is a subsidizing state, a flag state (e.g., governing the activities of vessels under its flag) or a coastal state. In any event, regardless of who makes the determination, whether a determination by another Member has been properly made may be contested by, in particular, the subsidizing Member. The WTO dispute settlement likely will play an important role in resolving those disputes in light of the WTO rules governing the determination.

Before turning to each of the options, it is important to stress that Article 3.1 of the 2018 Working Document does not impose a self-standing obligation on WTO Members to trace IUU fishing. That obligation is based on national law and rules of international law, in particular in the area of the law of the sea, other than WTO law. Therefore, whatever sources of determination of IUU fishing are accepted, the model underlying Article 3 is likely to be that a WTO Member will be obliged, under the WTO agreement, not to subsidize vessels and/or operators carrying out IUU fishing based on its own determination or, more typically, that of a third party. The language used in the 2018 Working Document makes this clear, specifying that a vessel or operator will be considered to be engaged in IUU fishing "if determined." However, some Members want to ensure that the listing of flag or coastal states does not create a legal obligation to make these determinations. In response, one recent proposal has suggested the addition of a footnote confirming that no such obligation flows from the WTO agreement.

The decision of who will determine relevant IUU fishing for the purposes of WTO law is closely related to the level of ambition pursued in these negotiations. After all, excluding certain categories of Members who have jurisdiction over the activity from the source list of who can determine IUU fishing affects the effectiveness of the prohibition. Those categories might include Members having a particular jurisdictional link to the activity (such as flag registration over activities in the high seas) and may, in certain circumstances, be the only Members having the required jurisdiction and/or resources to make a determination.

First, both the flag state and the coastal state in whose waters foreign-flagged vessels fish have responsibilities, as a matter of international law, to prevent and combat IUU fishing (UNCLOS, Articles 58(3) and 62(4)). Furthermore, flag states' jurisdiction extends to ships on the high seas (UNCLOS, Article 92(1)), and flag states have an obligation to use "due diligence" to secure compliance by their vessels with the laws and regulations of coastal states (which might relate to IUU fishing) (ITLOS Advisory Opinion Case No. 21, 2015, paras. 130–140). Given that flag jurisdiction and jurisdiction over an exclusive economic zone are the main sources of jurisdiction over fishing activities, it appears essential to include both of them as possible sources of IUU determinations.

Second, including the subsidizing WTO Member might appear to be unnecessary, but it nonetheless offers some advantages. Including the subsidizing Member as a source for the determination could be understood as recognizing that a WTO Member granting subsidies to vessels and/or operators may decide to trigger its subsidy obligation through its own determination of IUU fishing. This option also raises questions regarding what interest a subsidizing Member might have in making

a determination of IUU fishing that exposes it to responsibility for breaching its WTO subsidies obligation. At the same time, a subsidizing Member (which might, but not in all circumstances, also be the flag state or the coastal state) might be uniquely placed to impose eligibility conditions on the financial support that it confers on vessels and/or operators falling within its prescriptive jurisdiction. Where the subsidizing WTO Member has accepted commitments, under national law, under the rules governing RFMOs or under other rules of international law in respect of IUU fishing, that WTO Member should be precluded from providing or maintaining subsidies to vessels or operators that it has found, in complying with those laws, to have engaged in IUU fishing. It is possible that, in some circumstances, the only effective jurisdictional link to a vessel engaged in IUU may be through the prescriptive jurisdiction a subsidizing Member has over the operator of that vessel, as the recipient of subsidies from the Member. This might be the case, for example, for vessels fishing on the high seas outside the competence of any RFMOs and under the flag of a government unable or unwilling to exercise adequate control over the vessels' activities. In this kind of circumstance, no other Member other than the subsidizing Member may be in a position to make a determination to trigger the subsidy prohibition. Although in practice the circumstances in which a subsidizing Member's jurisdiction will be the only effective connection to a vessel might be limited, that fact arguably should not preclude subsidizing Members from being able to make determinations of IUU fishing and from being obliged, under a WTO treaty, to cease subsidizing vessels or operators that are the subject of such a determination.

Third, the inclusion of RFMOs having the competence to list specific types of IUU fishing appears to be an appropriate means of supporting coherence between the trade and fisheries policies of WTO Members that also belong to that type of organization and that subsidize IUU fishing. That observation also applies to cooperating non-parties to such RFMOs. A determination of IUU fishing involves giving effect to a complex assessment of both facts and law. Although the result of that assessment could, under conditions laid down in WTO law, result in the application of the WTO obligation not to subsidize IUU fishing, that would not mean that, under other rules of international law, a subsidizing WTO Member becomes bound by the RFMO's rules and decisions (relating to, for example, transparency or due process).

A recent proposal would add port state Members to the list. As a matter of international law, those WTO Members, in particular if they are a party to the Port State Measures Agreement (FAO, 2009), may have the necessary jurisdiction and responsibilities under international law to identify IUU fishing (UN General Assembly, 1995, Article 23). The Plan of Action also identifies particular commitments of port states. Thus, a state other than the flag state or the coastal state where a vessel seeks or has been granted or refused port access might be another particularly relevant entity for the purposes of the agreement. Conceptually, allowing port states to make IUU determinations, especially on the explicit request of the flag or coastal state of the vessel concerned, could reflect the fact that a port state might often be well placed to make certain factual assessments involved in determining IUU fishing.

4.3 Conditions for Determinations of IUU Fishing

Regardless of the sources of the determination of IUU fishing, a valid concern is how to establish an appropriate level of multilateral review of those determinations in the WTO. For this purpose, negotiations currently focus on defining conditions governing such determinations that may be enforced as a matter of WTO law.

In that regard, two models appear to be put forward in the current proposals. A first model envisages that a subsidizing Member would be entitled to verify the determination made by another WTO Member. Such verification could be based on national law and possibly WTO law. The focus of subsequent WTO scrutiny would thus be on whether or not the verification was properly carried out. That verification model raises a number of challenges, however. Some proposals suggest that that verification is to be carried out according to the subsidizing WTO Member's own laws or domestic laws, regulations and administrative procedures. Without any further articulation of what multilateral disciplines would be applicable to that verification, this approach creates the risk that Article 3.1 would be unduly deferential to the subsidizing WTO Member. Furthermore, a multilateral review of the application of that provision would require a panel to examine primarily whether a WTO Member has properly applied its national laws in reviewing another WTO Member's assessment of IUU fishing according to that Member's national laws. Although a WTO Member's national laws should, in principle, also reflect the international commitments that that Member has accepted and sought to implement, it nonetheless appears that this proposal could be seen as introducing an unduly limited standard of review and as undermining the effective enforcement of the prohibition on IUU fishing subsidies. Another version of this model is that WTO law would stipulate that the verification is to focus on whether the determination was made in accordance with, among others, relevant principles of international law, principles of non-discrimination, due process, the right to review and the need for transparency. Although that type of proposal focuses particularly on multilateral review of the verification, in practice, such a review might nonetheless involve, indirectly, scrutiny of the determination itself. If that is the case, review by a WTO panel of the determination against procedural requirements in the agreement might be more effective, and therefore preferable, than envisaging a review of a WTO Member's verification.

An alternative approach, which a majority of WTO Members appear to prefer, is to focus on common conditions governing the determination of IUU fishing aimed at ensuring that that determination is made in a manner that guarantees primarily procedural fairness. Those proposals are directly linked to the standard of review to be applied in WTO dispute settlement proceedings to those determinations. Certain WTO Members, including Canada, are seeking to initiate the discussion on the applicable standard of review by inviting WTO Members to consider the role and the operation of WTO dispute settlement in enforcing a future agreement (see, e.g., WTO Negotiating Group on Rules, 2019b).

Against that background, certain negotiating proposals appear to distinguish between two types of conditions that are relevant to both circumscribing the prohibition and protecting its effectiveness. These types of conditions relate to the determination of IUU fishing by (i) an individual WTO Member and (ii) an RFMO.

The first set of conditions relates to determinations made by individual WTO Members (that are, for example, the flag state or the coastal state). Recent drafts and proposals suggest that those determinations should be based on positive evidence, respect due process and be made according to fair, transparent and non-discriminatory procedures. As a result, any subsequent WTO review of the determination of IUU fishing would be primarily process-based and not concern the substance of the determination itself. This type of review is not novel in WTO law. Obligations regarding the preparation, adoption, publication, implementation, and administrative and judicial review of WTO Members' legislation and other measures are a common feature of most WTO agreements. However, those obligations are typically defined in a more detailed manner than the broad

standards of, notably, fairness, transparency and non-discrimination used in the texts put forward in the ongoing negotiations.

For example, it could be proposed that the WTO Member concerned must clearly state the grounds for its determination and promptly notify its determination and the grounds to all WTO Members. Notification of the determination and its grounds could offer a window into how an individual determination was made. Apart from procedural obligations applying to individual determinations, additional obligations could envisage the need for non-discriminatory procedures and relate to the administration and the publication of laws and other legal instruments that lay down the procedures according to which determinations are to be made.

Proposals increasingly advance a non-discrimination standard. However, such proposals could make it clearer that that standard is to be applied to the process of making the determination and the rules governing that process rather than the substance of the determination. Furthermore, greater certainty regarding the basis of the comparison under such a standard might be helpful, in particular, whether the comparison of treatment is to be made based on, for example, the nationality of the operator or the flag of the vessel.

A separate question is whether the determination itself should be subject to the principle of non-discrimination and possibly the obligation not to create any disguised restriction on international trade. One possible difficulty with envisaging such obligations is that the prohibition on IUU fishing subsidies could be found not to be breached because, for example, the Member that made the determination of IUU fishing with respect to an operator or vessel did not likewise trace IUU fishing of an operator or vessel having a different origin. However, given that the new agreement would not impose a self-standing obligation to make IUU fishing determinations, the non-discrimination obligation could apply only to the manner in which the determination is made rather than whether or not a determination is made. This qualification of the scope of application of the obligation could be made explicit in the new agreement. If WTO law nonetheless requires that the determinations themselves need to be non-discriminatory, it appears particularly important to clarify whether that obligation would apply with respect to the treatment of all operators or vessels based on their nationality or flag or only, for example, operators or vessels in similar situations with respect to the type of fishing, the type of infringement and/or the jurisdiction of the state making the determination.

Specifying on what grounds discrimination is prohibited would narrow the scope of the procedural obligation of the Member making the determination and thus reduce the scope for subsidizing Members to "escape" application of the subsidy prohibition. In any event, the main concern with such proposals is that, in reviewing the substance of the determination, a panel or the Appellate Body could also be required to scrutinize the decisions of WTO Members regarding fisheries conservation and management and, in particular, their risk-based approach to monitoring and controlling IUU fishing. This is the case because, in practice, relevant entities for making IUU fishing determinations will prioritize the tracking of certain types of vessels or fishing in relation to their assessment of the risk of IUU fishing. Clarifying that the procedural obligations apply to how a government arrives at a determination, not how they identify IUU fishing, could be useful here.

Finally, WTO Members are discussing the possible benefits of referring to relevant rules of international law governing the procedure for making IUU fishing determinations and listing examples of relevant international agreements (such as the transparency provisions in the Port State

Measures Agreement). Broadly, references to other sources of law can result in some uncertainty regarding how the WTO obligations governing the process of determining IUU fishing relate to procedural conditions laid down in non-WTO agreements. In other words, would the standards of fairness, transparency and discrimination be self-standing obligations under WTO law or merely serve to enforce, through the WTO, obligations assumed under other rules of international law? Furthermore, any decision to list examples of relevant obligation risks being either under- or over-inclusive. It also presupposes that it is evident what provisions of other agreements relate to procedures. Clear and self-standing procedural obligations that apply to determinations for the purposes of a WTO agreement may be a simpler approach.

The second set of conditions proposed would apply specifically to determinations by RFMOs. Those conditions could require an RFMO to comply with relevant rules of international law and the procedures of the organization (including any review procedures applicable to the RFMO), as well as with the requirement not to discriminate against non-Members of the RFMO. WTO Members that are members of an RFMO could be required to promptly notify determinations by that RFMO to the WTO. Current proposals envisage subjecting determinations by RFMOs to separate conditions, partly to reflect the fact that RFMOs already operate under a set of procedural obligations. In that regard, the focus appears to be on defining a set of common, minimum procedural obligations that all RFMOs must respect in making determinations.

Alternatively, WTO Members could elect to define a uniform set of conditions that apply to all determinations, including those made by RFMOs. The advantage of that approach would be that the WTO agreement accords the same degree of deference to the conditions under which any IUU fishing determination is made. It would recognize that, although RFMO determinations might be made under a set of conditions that apply specifically to RFMOs, WTO Members' national laws may impose similar conditions.

5.0 Limiting the Application of the Prohibition of IUU Fishing Subsidies

A separate question that has emerged in the negotiations is to what extent, if at all, the application of the WTO prohibition on IUU fishing subsidies should be limited in terms of, for example, the duration of the subsidy or the type of violation of fisheries laws and regulations. In that context, it has been proposed that, for example, determinations should be proportionate, in the sense that not all infractions of fisheries laws and regulations should be the subject of a determination, trigger the application of the IUU fishing subsidies prohibition and result in dispute settlement.

The understanding among negotiators appears to be that, in practice, not every infraction should result in a relevant determination for the purposes of the application of the WTO rules. However, there is no convergence yet on whether this question should be addressed in the text itself and, if so, how to define such a limitation.

At a general level, introducing this type of limitation risks undermining the effectiveness of the prohibition. Such a limitation, regardless of its specific design, would also require a panel to engage in (possibly) a detailed review of compliance with fisheries law and thus, to some extent, fisheries conservation and management. In other words, including that type of limitation sets up a situation where a panel could be asked to decide if a subsidizing Member's decision to keep subsidizing despite an IUU determination was justified because the offence (or the penalty) was minor. Furthermore, these proposals also expose the tension between the rationale of the ASCM, which is to address trade-distorting effects of subsidies, and the distinct objective of a WTO prohibition of IUU fishing subsidies. They also appear to assume that there is a correlation between the type of infringement and the effect of withdrawing or withholding the subsidy. However, a vessel infringing fisheries law without that infringement resulting in a serious violation might receive a considerable subsidy. Conversely, a vessel that repeatedly and seriously infringes fisheries law might receive limited financial support. In the first scenario, the WTO prohibition on IUU fisheries subsidies may have a significant deterring effect, whereas it might be less effective in the second scenario.

A different option is to impose a limitation on the application of the prohibition itself by requiring, for example, that the benefit incurred as a result of the subsidy must have been enjoyed during a minimum period of time or that, following a determination, the prohibition applies during a specified minimum or maximum period. Two main concerns with this option are that designing such a threshold might be challenging, taking into account the diverse types of fisheries subsidies granted by WTO Members, and that it might undermine the overall objective of Article 3 and risk considerably lowering the ambition of the new agreement.

Putting aside those concerns, it is important to underline that the prohibition on IUU fishing subsidies entails that no vessel or operator engaged in IUU fishing may be eligible for subsidies. This means that no new subsidies may be granted and that existing subsidies might need to be withdrawn. However, it is not yet resolved if this also means that a vessel or operator is ineligible to receive subsidies only during the period of its listing for IUU fishing or whether, after delisting, the prohibition continues to apply during a given period of time or even permanently. In discussing this type of limitation, WTO Members could explore whether specifying a minimum period is more advantageous and effective than including a maximum period. Providing that the prohibition would continue to apply following a minimum period

of time after delisting could further increase the deterring effect of the WTO prohibition on IUU fishing subsidies. It would also enable those WTO Members that have set a higher level of protection against the risk of IUU fishing to apply a longer period.

Finally, in light of this, Members might consider whether a better approach is to recognize that, in practice, determinations meeting the procedural conditions are likely to be made mostly for serious offences, given the available resources of states active in tracing IUU fishing and the requirement that any subsidies (large or small) be prohibited to operators that are the subject of a determination.

6.0 Conclusion

The effectiveness of an enforceable WTO prohibition on IUU fishing subsidies depends on certainty regarding the definition of IUU fishing and clarity regarding what is the appropriate process, as a matter of WTO law, for determining IUU fishing. It would appear that most Members prefer an approach under which WTO law would impose certain conditions on the determination of IUU fishing, resulting in a process-based review by the WTO. In terms of the sources of determinations of IUU fishing, a broader approach is probably preferable, as it allows for various jurisdictional links to be used, depending on the circumstances. It seems clear that allowing a determination to trigger the prohibition does not in any way create an obligation under WTO law on a coastal or flag state or the subsidizing Member to make a determination. However, where a determination is made, it should meet certain conditions that may be enforced as a matter of WTO law without requiring the WTO to make decisions on what constitutes proper fisheries resources management.

Overall, the unique feature of these negotiations is that they are aimed at establishing a WTO obligation for the main, if not sole, purpose of supporting responsibilities or obligations of WTO Members under other rules of international law and national law. It illustrates how WTO law and other parts of international law might be mutually supportive and evolve through co-adaptation, but it also shows the challenges in defining rules in which the rationale is clearly distinct from that of trade liberalization.

References

Azevêdo, R. (2019, July 4). *Economic diversification and the blue economy – What role for a WTO Fisheries Subsidies Agreement?* https://www.wto.org/english/news_e/spra_e/spra276_e.htm

Bartels, L. & Morgandi, T. (2007). *Options for the legal form of a WTO Agreement on Fisheries Subsidies* (ICTSD Reference Paper). https://www.ictsd.org/sites/default/files/research/options_for_the_legal_form_of_a_wto_agreement_on_fisheries_subsidies.pdf

Comprehensive and Progressive Agreement for Trans-Pacific Partnership. (2018, February 21). https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/#CPTPP

Food and Agriculture Organization of the United Nations (FAO). (2009). Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. http://www.fao.org/fileadmin/user_upload/legal/docs/037t-e.pdf

Food and Agriculture Organization of the United Nations. (2001). *International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing.* http://www.fao.org/3/a-y1224e.pdf

International Tribunal for the Law of the Sea (2015). Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (Request for Advisory Opinion Submitted to the Tribunal), Case No. 21, Advisory Opinion of 2 April 2015. https://www.itlos.org/cases/list-of-cases/case-no-21/

United Nations Convention on the Law of the Sea, 1982. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

United Nations General Assembly. (1995). 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 (A/CONF.164/37). https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement

United Nations General Assembly. (2015, September 25). *Transforming our world: The 2030 Agenda for Sustainable Development* (A/RES/70/1). https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf

World Trade Organization (WTO). (2001). Doha Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1. https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=37246&CurrentCatalogueIdIndex=0&FullTextSearch=

World Trade Organization. (2005, December 18). Hong Kong Ministerial Declaration (WT/MIN(05)/DEC). https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=70196&CurrentCatalogueIdIndex=0&FullTextSearch=

World Trade Organization Ministerial Conference. (2017, December 13). Fisheries Subsidies. Ministerial Decision of 13 December 2017, (WT/L/1031WT/MIN(17)/64 and WT/L/1031). https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/64.pdf

World Trade Organization Negotiating Group on Rules. (2018a, November 18). *Fisheries Subsidies, Communication from the Chair* (Revision, TN/RL/W/274/Rev.6). https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=249645&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=False

World Trade Organization Negotiating Group on Rules. (2018b). *Fisheries Subsidies, Working Document, Communication from the Chair* (Rev. 6) (TN/RL/W/274/Rev.6). https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=249645&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=False

World Trade Organization Negotiating Group on Rules. (2019a, June 14). *Article [X]: Special and Differential Treatment, Communication from India* (TN/RL/GEN/2000). https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=254952,254716,254375,253906,252601,250362,250375,249979,249644,249645&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

World Trade Organization Negotiating Group on Rules. (2019b, May 21). *Dispute settlement in a WTO Fisheries Subsidies Agreement: Discussion paper, Communication from Canada* (TN/RL/GEN/198). https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/RL/GEN198.pdf

Young, M. (2017). *The 'Law of the Sea' obligations underpinning fisheries subsidies disciplines.* ICTSD.

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