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Trade, Law *and* Development

Vol. 9, No. 2

2017

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The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Gregory Messenger, *Sustainable Development and the Commodities Challenge: The Eventual 'Greening' of the World Trade Organization?*
9(2) TRADE L. & DEV. 171 (2017)

SUSTAINABLE DEVELOPMENT AND THE COMMODITIES
CHALLENGE: THE EVENTUAL 'GREENING' OF THE WORLD
TRADE ORGANIZATION?

GREGORY MESSENGER*

Comprehensive and concerted action by the international community is required to achieve the Sustainable Development Goals (SDGs) set out in the United Nation's 2030 Agenda. Yet, the 2030 Agenda is largely silent on a number of key issues of relevance to international regulation, most notably the impact of commodities on sustainable development. This article identifies the central role that trade in commodities plays in sustainable development while outlining the inherent tensions within the fragmented international regulation of commodities' trade. This article looks at the World Trade Organization (WTO) as a site of innovative global governance in tackling the impact of one commodity—fish—examining how the international community and the WTO have been shifting the narrative in meeting the SDGs from one of overlapping or conflicting regimes to cooperative governance.

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I. INTRODUCTION

Economic development is a core objective of the World Trade Organization¹ and forms a part of the underpinning ideological framework for trade liberalization.² Nonetheless, the relationship between trade liberalization and development has historically been a tense one, pitting entrenched developed economies against developing members and bringing competing views within each group, over the appropriate interpretation or application of development as a policy objective, in conflict.³

Further, *sustainable* development (that is, development that “meets the needs of the present without compromising the ability of future generations to meet their own needs”)⁴ presents an additional challenge, requiring trade law to accommodate the economic, environmental, and social dimensions of development.⁵ Since its creation, the WTO has struggled with this image of being skewed toward trade

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¹ “Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while 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 and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development”. Marrakesh Agreement Establishing the World Trade Organization, First recital, Preamble, Apr. 15, 1994, 1867 U.N.T.S. 154.

² See generally M. HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW 13-15 (2013); P. VAN DEN BOSSCHE & W. ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 4-30 (3d ed. 2013). For a more critical analysis, see also P. Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. ECON. LITERATURE 113 (1997).

³ For an evocative account of such debates, see N. Lamp, *The “Development” Discourse in Multilateral Trade Lawmaking*, 16 WORLD TRADE REV. 475 (2017).

⁴ Rep. of World Commission on Environment and Development, *Our Common Future*, 42nd Sess., ¶ 27, U.N. Doc. A/42/427 (Aug. 4, 1987).

⁵ On the ‘three dimensions’ of sustainable development, see U.N. Secretary-General, *Mainstreaming of the Three Dimensions of Sustainable Development Throughout the United Nations System*, ¶ 6, U.N. Doc. A/72/75-E/2017/56 (Apr. 5, 2017).

liberalization over other public policy concerns, whether meeting the development needs of members or the environmental impact of liberalization.⁶

Instead of viewing the WTO as an antagonist in the pursuit of sustainable development and the institutions of free trade as the source of challenges, this article focusses on the primary objects of trade—commodities.⁷ Rather than rooting the challenges faced by the global community in the WTO, the lens is turned toward the key role that commodities play in sustainable development. Attention is drawn to commodities as a source of instability and dependence, which necessarily creates challenges for the economic and legal frameworks on which sustainable development is built. It is argued that the WTO is shifting from a primary commercial interest’ (narrowly understood)⁸ to noting the importance of sustainable development as a principal objective,⁹ adapting both normatively and institutionally to support the global development agenda. Noting the importance of commodities in pursuing sustainable development, this shift necessarily entails engaging with commodities as a special class of goods and can be seen most explicitly in the WTO’s involvement in the United Nation’s ambitious 2030 Agenda and its Sustainable Development Goals.¹⁰

This article proceeds as follows: Part II identifies the central role that trade in commodities plays in the pursuit of the SDGs. Part III sets out the fragmented system of commodities regulation in international law at the institutional as well as normative levels. Part IV takes the example of fisheries subsidies as an instance

⁶ See the discussions in J.H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, in *THE JURISPRUDENCE OF GATT & THE WTO* 414 (2000); S. JOSEPH, *BLAME IT ON THE WTO?: A HUMAN RIGHTS CRITIQUE* (2011); J. STIGLITZ & A. CHARLTON, *FAIR TRADE FOR ALL* (2005); T. Pogge, *Recognized and Violated: the Human Rights of the Global Poor*, 18 *LEIDEN J. INT’L L.* 717 (2005); K. Conca, *The WTO and the Undermining of Global Environmental Governance*, 7 *REV. INT’L. POL. ECON.* 3, 484 (2000); *ORG. FOR ECON. COOP. & DEV., TRADE, EMPLOYMENT, AND LABOUR STANDARDS: A STUDY OF CORE WORKERS’ RIGHTS AND INTERNATIONAL TRADE* (1996); *WORLD TRADE ORGANIZATION, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM* 1-10 (2004).

⁷ On the definition of commodities, see Final Act of the United Nations Conference on Trade and Employment, *infra* note 17 & corresponding text.

⁸ “The GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets”, Appellate Body Report, *Japan— Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/ AB/ R, WT/ DS10/ AB/ R, WT/ DS11/ AB/ R 25 (Nov. 1, 1996).

⁹ Most explicitly noted in paragraph 6 of the Doha Declaration. World Trade Organization, Ministerial Declaration of November 20 2001, WTO Doc. WT/MIN(01)/DEC1.

¹⁰ Specifically SDG 14.6, Transforming Our World: The 2030 Agenda for Sustainable Development, G.A. Res. 70/1, U.N. Doc. A/Res/70/1 (Sept. 25, 2015) [hereinafter *The 2030 Agenda*].

where trade law is being used as the focus by the international community in seeking to achieve SDG 14.6, the goal which seeks to prohibit harmful fisheries subsidies. Part V concludes by drawing attention to the WTO's increasing role as a willing and self-interested part of the institutional framework for economic development and the profound shift in priorities that this marks for the WTO membership, from trade liberalization narrowly construed as 'trade and its trade effects' to one modelled on sustainable development and the effects of trade *lato sensu*.

II. TRADE IN COMMODITIES AND THE UN SUSTAINABLE DEVELOPMENT GOALS

A number of current challenges facing the international community, particularly in the pursuit of sustainable development, are intimately tied to trade and most notably trade in commodities. Note, for example, the role that the surge in food prices during the food crisis of 2007-08 played in sparking popular unrest across three continents, bringing the importance of food security into sharp relief.¹¹ Or how the unprecedented economic growth changing the political landscape in some regions such as sub-Saharan Africa has been led in part by historically high commodity prices, such as of oil, and has subsequently risked throwing some of these 'success' stories off-kilter as energy prices collapsed in 2014, and destabilized others such as Venezuela which are dependent on energy exports.¹² Trade in commodities (such as wheat, rice, and oil) and their fluctuating prices have been common factors in these developments.

This relationship is most notable when examined through the goals set out in the successor to the Millennium Development Goals (MDGs), the United Nations' 2030 Agenda. It sets out a number of targets (including indicators with which to measure their progress) – the Sustainable Development Goals. The SDGs have been designed to incorporate the lessons learnt from the experience of the MDGs which had developed organically over time. It was in the years following the original Millennium Declaration that details were added to their aims, means to measure their success were evolved, and financial support for their completion was clarified, whereas the 2030 Agenda includes from the beginning a detailed list of goals, their targets, and the means to assess their progress.

¹¹ P. LAMY, *THE GENEVA CONSENSUS: MAKING TRADE WORK FOR ALL* 68-70 (2013).

¹² *Compare* Int'l Monetary Fund, *Regional Economic Outlook: Sub-Saharan Africa* (2014), <https://www.imf.org/external/pubs/ft/reo/2014//eng/sreo0414.htm>, and *Regional Economic Outlook: Sub-Saharan Africa* (2016), <https://www.imf.org/external/pubs/ft/reo/2016/afr/eng/sreo0416.htm>.

The SDGs are also ambitious from the start, with the 2030 Agenda boldly proclaiming:

“We resolve, between now and 2030, to end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources. We resolve also to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities.”¹³

Sustainable development is a deeply integrative concept.¹⁴ The success of the 2030 Agenda and the SDGs requires concerted effort by diverse actors (international organisations, states, civil society and private enterprises), across economic, political, and environmental spheres of governance.¹⁵ However, achieving these goals necessitates awareness of how commodities underpin many of these challenges. While the SDGs make only passing reference to commodities in relation to two Goals,¹⁶ they are almost uniformly related to either historic or current trade in commodities. While the exact definition of a commodity is contested, here commodities are understood as primary materials, the treatment of which is necessary only for their extraction and marketing. This is in line with the Havana Charter definition: “any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.”¹⁷ Trade in commodities has long been a topic of concern for international markets and governments, as the following examples demonstrate.

For example, in the case of Goal 2 (“[e]nd hunger, achieve food security and improved nutrition and promote sustainable agriculture”), the cyclical pattern of sowing and harvesting of agricultural commodities, such as wheat or rice,

¹³ *Id.* ¶ 3.

¹⁴ On the integrative nature of sustainable development, see F. Ortino, *Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing*, 30 LEIDEN J. INT'L L. 71, 83-87 (2017).

¹⁵ If indeed we consider such spheres distinct rather than expressions of the ‘political’ *latu sensu*.

¹⁶ Goals 2, “End hunger, achieve food security and improved nutrition and promote sustainable agriculture” and 9, “Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation”, The 2030 Agenda, *supra* note 10.

¹⁷ Final Act of the United Nations Conference on Trade and Employment, Nov. 21, 1947-Mar. 24, 1948, Havana Charter art. 56(1), U.N. Docs. E/Conf. 2/78 (Apr. 1948).

necessarily creates difficulties for food planning.¹⁸ Where agricultural commodities are traded, an increase in prices is customarily matched by an increase in production, which in turn leads to a glut as the ability to alter supply is often limited to seasons. Where demand consistently increases such patterns are not problematic, but where response to demand is slow, as is often the case in farming, agricultural exporters are subjected to considerable price volatility.¹⁹ If further complications are added— such as inconsistent weather conditions (exacerbated by climate change), limited success in public stockholding policies, and liberalising pressures from different regimes in international economic law (i.e. the transition towards a “market-oriented agricultural trading system”²⁰)— the centrality of trade in commodities in food security policies becomes clear. The recent food crisis of 2007-08 discussed above is one such example where a range of different factors led to a spike in food prices causing serious difficulties for consumers in least developed and developing countries.²¹

Another example, Goal 5 (“[a]chieve gender equality and empower all women and girls”) is closely related to commodities’ trade in a wide number of States, particularly amongst developing countries. Note the gendered division of labour in textiles production, such as cotton, where women are traditionally restricted to tasks which overlap with other unpaid work at home. Where textiles industries develop, men often dominate management roles,²² limiting the benefits of increased employment for women (an issue that in some instances is exacerbated by age discrimination where only younger women are employed in textile

¹⁸ On the importance of domestic measures to compensate for or counter difficulties in liberalized trade in agriculture, see the examples in Food & Agr. Org., *The State of Food Insecurity in the World 2015* 33-35 (FAO, IFAD, WFP 2015), <http://www.fao.org/3/a-i4646e.pdf>.

¹⁹ On the many difficulties relating to food price, see Org. for Econ. Coop. & Dev., *Price Volatility in Food and Agricultural Markets: Policy Responses* (June 12, 2011), <http://www.oecd.org/tad/agricultural-trade/48152638.pdf>.

²⁰ Agreement on Agriculture, second recital, Preamble, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1869 U.N.T.S. 410.

²¹ Derivative markets may also play a role, though their effect is unclear. See *China – Rare Earths* and *China – Raw Materials*, *infra* note 54 and accompanying text.

²² See generally the findings of INTERNATIONAL TRADE CENTRE, WOMEN IN COTTON: RESULTS OF A GLOBAL SURVEY (2011), http://www.intracen.org/uploadedFiles/intracenorg/Content/Exporters/Sectors/Food_and_agri_business/Cotton/AssetPDF/Women%20in%20cotton%20-%202009%2011%2011%20FINAL.pdf. This need not be the case where, as with food security, domestic measures can compensate for the negative impact of industrial developments; however, these are far from certain and not necessary to take part in the global value chains underpinning the world production of cotton. See also TRADE AND GENDER: OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES 149-50 (Anh-Nga Tran-Nguyen & Americo Beviglia Zampetti eds., UNCTAD 2004).

factories).²³ Further, Goal 4 (“[e]nsure inclusive and equitable quality education and promote lifelong learning opportunities for all”) is also affected by the functioning of commodities sectors. Agricultural commodities which require intensive harvesting, for example, are customarily seasonal.²⁴ They thus require work during long hours and are dependent on itinerant workers. Both these factors place barriers to children who seek access to quality education,²⁵ either limiting their ability to attend school due to the long working hours or rendering them so tired from physical labour that their capacity to be educated is hampered. In each of these cases, the trade in that commodity and the development of the industry can have a serious impact on the educational opportunities for children and/or the position of women in the economy. These challenges can be met only by acknowledging that the nature of the commodity is linked to the difficulty faced: for example, the seasonal harvest of sugarcane or culturally embedded norms related to the expectation of women’s roles in cotton-spinning.²⁶

The limitations in achieving sustainable development in the face of grave environmental challenges (Goals 6,²⁷ 14,²⁸ and 16²⁹) are similarly related to trade in commodities. Logging, for example, raises serious concerns for biodiversity and sustainable land management and is nonetheless essential for global timber trade (on which the economies of States may depend).³⁰ Meanwhile, extractive industries are especially problematic as they often involve the use of hazardous chemicals for extraction and purification. The gold mining industry, for example, is heavily dependent on cyanide for the production process (whether wet or dry)³¹ and on

²³ See the findings in JANE KORINEK, TRADE AND GENDER: ISSUES AND INTERACTIONS 15 (OECD Trade Policy Working Paper No. 24, 2005), <https://www.oecd.org/tad/35770606.pdf>.

²⁴ See, e.g., the impact of seasonal agricultural work on the education of child workers in Turkey. B. Gulcubuk, *Child Labor Under the Worst Conditions: Child Laborers in Cotton Production in Turkey*, 5(12) AFR. J. AGR. RES. 12, 1388-90 (2010).

²⁵ 70% of child labourers work in the agricultural industry. See P. Hurst with Paola Termine & Marilee Karl, *Agricultural Workers and Their Contribution to Sustainable Agriculture and Rural Development* 27-29 (Food & Agr. Org., 2005), http://www.fao-ilo.org/fileadmin/user_upload/fao_ilo/pdf/eng_agricultureC4163.pdf.

²⁶ On the systematic exclusion of women from the modernization of agricultural sectors, see Tran-Nguyen & Zampetti, *supra* note 22, at 278.

²⁷ “Ensure availability and sustainable management of water and sanitation for all”.

²⁸ “Conserve and sustainably use the oceans, seas and marine resources for sustainable development”.

²⁹ “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.

³⁰ J. A. Tobias, *Biodiversity: Hidden impacts of logging*, 523 NATURE 163 (2015).

³¹ See, e.g., S. Seck, *Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law*, 37 CANADIAN Y.B. OF INT’L L. 139, 139-43 (1999).

mercury in small-scale extraction projects³². Thus, the dual nature of the commodity gives rise to challenges: high demand and slow cultivation time in the case of timber, and high demand and toxic extraction processes for gold.

More structural issues facing the international community are no less influenced by trade in commodities. The pursuit of Goal 10 (“[r]educe inequality within and among countries”) is linked to trade in commodities, both as a result of historical colonial relationships which coerced colonies into becoming specialised centres of resource extraction and the subsequent economic specialisation and dependency on such goods as a result of post-colonial economic policies.³³ Such policies were further exacerbated by historically differential tariff treatment for manufactured goods and the varied effect of productivity gains across the globe.³⁴ Cotton, for example, has played a key role in determining the structure of the global economic system.³⁵ Global value chains where goods are manufactured across jurisdictions and the effect of specialisation and mechanisation are all part of the cotton industry’s history.³⁶ Most important is the role of the cotton industry in the ‘great divergence’—the point at which the economies of India, China and Turkey (*inter alia*) diverged from their comparable equivalence with the economies of Western Europe.³⁷ Levels of industrialisation diverged as harvesting remained necessarily in the fields while spinning and weaving moved to the industrial heartland of England. Early industrialisation in States such as India and Turkey was reversed, leaving a legacy of North-South relationships that is still felt today in spite of recent economic advances.³⁸ The British Empire may have been “built on a huge

³² Artisanal and small-scale gold miners have come under particular focus on the use of mercury as States seek to meet their obligations under the Minamata Convention on Mercury, Oct. 10, 2013, 27 U.N.T.S. 17, <http://www.mercuryconvention.org>.

³³ A. ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 263-68 (2004). See also the discussions in United Nations Conf. on Trade & Dev., *50 Years of Research and Policy Advice on Commodities and Development: The Role of UNCTAD*, UNCTAD/WEB/SUC/2014/3 (Apr. 11, 2014).

³⁴ G. COREA, TAMING COMMODITY MARKETS: THE INTEGRATED PROGRAMME AND THE COMMON FUND IN UNCTAD 5 (1992).

³⁵ E. HOBBSBAWM, INDUSTRY AND EMPIRE 34 (1999).

³⁶ See generally S. BECKERT, EMPIRES OF COTTON: A NEW HISTORY OF GLOBAL CAPITALISM (2014).

³⁷ *Id.* at 29-50. See also K. POMERANZ, THE GREAT DIVERGENCE: CHINA, EUROPE, AND THE MAKING OF THE MODERN WORLD ECONOMY (2001).

³⁸ Note the distortions within the global cotton market, and the push to provide a subsequent Ministerial Decision on cotton at Nairobi in 2015. World Trade Organization, Ministerial Declaration of 19 December 2015, WTO Doc. WT/MIN(15)/46 WT/L/981 (2015). For analysis of the processes involved in cotton negotiations at the WTO and their context, see M. EAGLETON-PIERCE, SYMBOLIC POWER IN THE WORLD TRADE ORGANIZATION 84-120 (2012).

sugar, caffeine and nicotine rush”³⁹, but it was cotton that brought factories and centralized production.⁴⁰ In the case of sugar and cotton, as well as other commodities such as coffee and tobacco, the relationship between commodities and State-sponsored imperial projects was central, still marking international relations and opportunities for cooperation.⁴¹

Each of the Goals has at its core a necessary or substantial overlap with the international regulation of commodities (either as primary goods or as financial instruments). This exacerbates the challenges faced by individual States and the international community as they pursue the completion of the SDGs.

Yet, in spite of trade in commodities being at the heart of the interlocking challenges confronted in the pursuit of sustainable development, the 2030 Agenda makes few references to their trade or regulation and the potential impact this may have on achieving sustainable development or pursuing the completion of the SDGs. Only Goals 2 (“[e]nd hunger, achieve food security and improved nutrition and promote sustainable agriculture”) and 9 (“[b]uild resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation”) contain explicit references to trade in commodities.

III. INTERNATIONAL LAW’S FRAGMENTED REGULATION OF COMMODITIES

It should be of no surprise that the 2030 Agenda has not treated commodities’ regulation in a coherent fashion; after all, the regulation of commodities is at best a wildly fragmented sub-system in international law. Competing interests and systemic biases of different legal regimes have created tensions for their effective regulation. World trade law, international environmental law, energy law, international financial law and the law of the sea all play a role, and yet, they approach the challenges of commodities’ trade in radically different ways, indeed, conceptualising the challenges themselves differently.⁴²

For some systems such as trade law, the externalities associated with trade in commodities can be seen as unfortunate side-effects of an otherwise effective regime (counterpoising their regulation with the development-minded economic

³⁹ N. FERGUSON, *EMPIRE: HOW BRITAIN MADE THE MODERN WORLD* 15 (2004).

⁴⁰ See BECKERT, *supra* note 36, at xvii-xix & 56-57.

⁴¹ On how European economic development is dependent upon overseas trade, see K. POMERANZ, *supra* note 37, at 4-7. For a compelling analysis of the institutional legacies of sugar on the world trade system, see M. FAKHRI, *SUGAR AND THE MAKING OF INTERNATIONAL TRADE LAW* (2014).

⁴² Indeed, *within* systems, variations of conceptualisation exist. Note, for example, the account given in F. SMITH, *AGRICULTURE AND THE WTO*, ch. 2 (2009).

policies of the 1950s to mid-1970s which sought to either restrict imports so as to encourage domestic production or stabilise their prices through the use of buffer stocks, subsidies, or export and import restraints).⁴³ Price fluctuations in commodities have been a concern in trade law since the 1920s, when they were seen as a sufficiently serious problem during the inter-War period to constitute a key issue at Bretton Woods. Sensitive to the disorder caused by price fluctuations during times of war, the negotiators sought to regulate the use of international commodity agreements (ICAs) comprehensively under the Havana Charter.⁴⁴ Yet, trade law's ability to regulate commodities comprehensively was scuppered by the Havana Charter's demise, and the GATT 1947 served as a poor relative, with the provisions of Art XI on permissible restrictions and Art XVI on the use of subsidies relating to 'primary products' only.⁴⁵

In trade circles, commodities increasingly became connected to development concerns as it was developing countries that were most dependent on their export and were hampered by a lack of resources from enabling diversification within their economies and thus minimising the impact of price fluctuations. Focus moved to the United Nations Conference on Trade and Development (UNCTAD) and as part of the wider movement for a New International Economic Order,⁴⁶ there was nominal interaction with the GATT framework.⁴⁷ International commodity agreements, which sought to minimize price fluctuations, largely failed (or so the narrative goes),⁴⁸ and their failure became linked to the wider oppositional relationship between development studies and neoliberal economics, the UNCTAD and the GATT, and import-substitution policies and the

⁴³ For a more detailed account in the context of trade law, see M. Trebilcock, *Between Theories of Trade and Development: The Future of the World Trading System*, 16 J. WORLD INV. & TRADE 122 (2015); M. Fakhri, *supra* note 41, at 173-208.

⁴⁴ See Proposals for Expansion of World Trade and Employment, State Department Publication No. 2411, Dec. 1945, in D. IRWIN ET AL., *THE GENESIS OF THE GATT* 244-61 (2009), in particular note at 249- "Release From Fear of Disorder in the Markets for Primary Commodities" as a core element in encouraging trade.

⁴⁵ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

⁴⁶ Declaration on the Establishment of a New International Economic Order, G.A. Res. S-6/3201, U.N. Doc. A/Res/ (May 1, 1974).

⁴⁷ S. ROLLAND, *DEVELOPMENT AT THE WTO* 69 (2012). See also Working Party on Commodity Problems, Brief Notes on the General Discussion at the Second and Third Meetings Spec 274/55 (Sept. 3, 1955), for the UK's (amongst others) insistence that any new multilateral agreement on commodities be closely linked to the GATT system.

⁴⁸ For the view that commodity agreements had been ineffective and that trade distortive measures were at the root of the problem in agricultural trade, see Note by the Secretariat, Summary of Studies on Problems Affecting Trade in Agriculture and Their Causes MTN.GNG/NG5/W/3 (Mar. 31, 1987). For a more comprehensive and nuanced account against this, see M. FAKHRI, *supra* note 41, at 173-200.

Washington Consensus.⁴⁹ The accuracy of the narrative is clearly dubious as other important factors (such as a lack of financial commitment on the part of States) played an important role; yet, the narrative is a powerful one.⁵⁰ ICAs could be viewed as unsuccessful because they sought to regulate a market that would work best without intervention, an account that fit in with the ascendant neoliberal trend in trade theory at the time.⁵¹ Trade law subsequently treated commodities like all other goods, with special treatment given inconsistently and without logical underpinnings. Agriculture was to have its own trade regime; oil was excluded for a number of key exporters (OPEC); yet, copper was to be traded like anything else. It is notable that there are no equivalent commodity provisions under the GATS as under the GATT because by the time of the Uruguay Round the movement away from seeing ICAs as a solution for commodity price instability was complete.⁵² As a result, trade law's view of the negative effects of trade in commodities was that it was a problem to be managed but with no clear mandate or appreciation of how to tackle these challenges and with only minor concessions made on food security, public stockholding, cotton, and agricultural export subsidies.⁵³ Further, the obligations within the system impose differing disciplines over imports and exports. Save for explicit commitments (either scheduled or through their accession protocols), WTO members have far fewer obligations with regard to exports than imports thus restricting the ability of non-commodity-producing members to influence the price of commodities through import restraints.⁵⁴

For financial markets, trade in commodities offers opportunities not only for investors but also for producers. Futures markets can be used as early warning systems, indicating potential situations of over-supply or unmet demand. Yet, public perception links 'speculation' with increased volatility in food prices,

⁴⁹ The ideological shift in the 1980s went hand in hand with reduced commodity prices that benefited developed rather than developing States. G. COREA, *supra* note 34, at 181.

⁵⁰ See, e.g., *supra* note 48.

⁵¹ See A. LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM* 232-38 (2011).

⁵² See also the Agreement on Agriculture's commitment to a market-oriented system, *supra* note 20.

⁵³ See World Trade Organization, Ministerial Conference, Public Stockholding for Food Security Purposes, Ministerial Decision of 7 December 2013, WT/MIN(13)/38 WT/L/913 (2013); World Trade Organization, Ministerial Conference, Export Competition, Ministerial Decision of 19 December 2015, WT/MIN(15)/45 WT/L/980 (2015); World Trade Organization, Ministerial Conference, Cotton, Ministerial Decision of 19 December 2015, WT/MIN(15)/46 WT/L/981 (2015); World Trade Organization, Ministerial Conference, Special Safeguard Mechanism for Developing Country Members, Ministerial Decision of 19 December 2015, WT/MIN(15)/43 WT/L/978 (2015).

⁵⁴ The China litigation on this point is most telling, for which see Panel Report, *China – Rare Earths*, WTO Doc. WT/DS431/R/Add.1, (Mar. 26, 2014) and Panel Report, *China – Raw Materials* WTO Doc. WT/DS394/R, WT/DS395/R, WT/DS398/R (Jul. 5, 2011).

encouraging policy makers in affected areas to respond through a variety of measures such as subsidies or regulatory investigation.⁵⁵ New international instruments that may have an effect on this dynamic (such as MiFID II or Dodd Frank) also do not appear to correct the concerns of civil society and food vulnerable States.⁵⁶

For other regimes, such as international environmental law, trade in commodities itself is not the problem, but rather the attendant negative consequences for biodiversity such as farmers specialising in limited cash crops,⁵⁷ or for environmental protection as extractive industries (for example) cause potential harm to the ecosystem.⁵⁸ Of course, possible government intervention in protecting such interests may well find itself in tension with international investors who may feel that such acts are not pursued in public interest, but rather constitute violations of fair and equitable treatment, or entail a form of indirect expropriation.⁵⁹ Here, international investment law may act as a counterpoint, not especially concerned with commodity trade *per se* but still engaged as the subject-matter of a number of disputes which arise from existing and putative obligations under international investment law is commodity-based.⁶⁰

Commodities are explicitly examined by a number of institutions, yet they form a patchwork of competing perspectives rather than a coherent network. The Food and Agriculture Organization (FAO) takes particular interest in this regard, principally through its Committee on Commodity Problems.⁶¹ The UNCTAD has a specific Division of International Trade and Commodities (DITC) under which it

⁵⁵ See the discussion in Office of the United Nations High Comm'r for Human Rights, O. de Schutter, *Food Commodities Speculation and Food Price Crises: Regulation to reduce the risks of price volatility*, Briefing Note 2 (Sept. 2010), http://www2.ohchr.org/english/issues/food/docs/Briefing_Note_02_September_2010_EN.pdf.

⁵⁶ A. Chadwick, *Regulating Excessive Speculation: Commodity Derivatives and the Global Food Crisis*, 66 INT'L & COMP. L.Q. 625, 625-54, (2017).

⁵⁷ E.g., *Tobias*, *supra* note 30 and corresponding text.

⁵⁸ P. SANDS ET AL., *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 548 (3d ed. 2012).

⁵⁹ E.g., *Glamis Gold Ltd v. USA*, Award (June 8, 2009).

⁶⁰ The expectation that investments be taken for a 'certain duration' lend themselves to focussing on commodities where extraction or harvest can take years before profitable returns are met. *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶ 43 (July 11, 1997), 37 I.L.M. 1378.

⁶¹ Constitution of the Food and Agriculture Organization art. V(6)(b), C.T.S. 1945/32, 40 A.J.I.L. Supp. 76. It is the FAO that has pushed for the amendments to the HS Nomenclature 2017 Edition relating to food security (which constitute the majority of changes).

has established a Special Unit on Commodities.⁶² At a more general level, the UNCTAD also established the Global Commodities Forum in 2010, and more recently in 2014, the Working Group on Commodities Governance. The Common Fund for Commodities (CFC) functions as a specialized development agency, financing commodity projects in developing States.⁶³ The remit of the UN Special Rapporteur on the Right to Food similarly involves questioning the regulation of commodities in international relations.⁶⁴ A number of ICAs still exist, covering cocoa, coffee, cotton, grains, olive oil, sugar, and tropical timber.⁶⁵ However, they no longer attempt to stabilize prices as had previously been the case. Instead, they function as forums where producers and consumers can engage, identifying issues and coordinating policies.⁶⁶ An increasing number of non-State actors are also involved, such as the International Council on Mining and Metals, which sets guidelines and distributes good practices for mining industries, or the Marine Stewardship Council which sets (private) standards and provides certification to promote sustainable use of fish stocks.

Aside from diversity in legal regimes the regulation of commodities differs in objectives, with each regime perceiving the concerns that commodities raise differently. They may be seen as essential goods required for current models of economic growth (the position of the EU in its Critical Raw Materials initiative),⁶⁷ or as sources of instability (as seen in the development policy and ICA discussions), or as challenges to be resolved *per se* (the concerns relating to normative fragmentation between legal regimes such as trade and the environment). Competing conceptions of how commodities are examined have an impact on the architecture of the legal regime, which subsequently encourages regulatory divergence among regimes.

The logic and legal structure of the regulation of commodities is diverse at best, inconsistent at worst.⁶⁸ Does such a lack of coherence over a fundamental issue in sustainable development paint a bleak picture for pursuing the goals of the 2030 Agenda? This would appear to be an example *par excellence* of both institutional and normative fragmentation within international law, with no coherent legal regime managing trade in commodities nor, therefore, the achievement of the SDGs.

⁶² Accra Accord, UNCTAD XII, ¶ 183, UNCTAD/IAOS/2008/2 (Apr. 25, 2008).

⁶³ Agreement Establishing the Common Fund for Commodities, 1980, 1538 U.N.T.S. 3.

⁶⁴ See Report of the Special Rapporteur on the Right to Food, Addendum: Mission to the World Trade Organization, A/HRC/10/5/Add.2 (Feb. 4, 2009).

⁶⁵ There also exist a number of International Study Groups which serve a similar purpose. P. MAVROIDIS, *TRADE IN GOODS* 351 (2d ed. 2012).

⁶⁶ *Id.*

⁶⁷ See Report of the EU Ad hoc Working Group on Defining Critical Raw Materials, *Report on Critical Raw Materials for the EU* (May 2014).

⁶⁸ *Supra* note 57 and corresponding text.

Confronting the underlying inconsistency in commodities regulation is essential for the international community to achieve the goals set out in the 2030 Agenda and sustainable development more generally. Yet, while such inconsistency presents a great deal of challenges to the completion of the 2030 Agenda, there are commonalities in approaches to commodity regulation that suggest areas where common ground might be found.

Some common measures have been proposed to assuage issues across regulatory areas. For example, in the case of commodities as financial instruments, in food markets, information asymmetry within the primary market (i.e. between producers and consumers of the primary good in question) is considered to be a problem that these derivatives may aid in rectifying (underlying this assumption is the concern relating to a lack of data between producers and consumers creating price fluctuations in agricultural commodities such as coffee or sugar).⁶⁹

Within regulatory regimes as diverse as human rights, trade, and the environment (amongst others), transparency obligations in the form of notifications play an important role in attempting to resolve information gaps or data asymmetries. Indeed, the common current form of ICAs is one where stakeholders (both importers and exporters) share a forum so as to more effectively share information.⁷⁰ At the WTO, transparency obligations come in a number of forms: the creation of national enquiry points,⁷¹ the requirement to notify measures to the relevant WTO committee,⁷² or the need to publish relevant rules or regulations in an official WTO language (i.e. English, Spanish, and French).⁷³ In fisheries, which will be examined in greater detail in the following section, the lack of information on subsidies which may contribute to overfishing presents such a challenge.⁷⁴

⁶⁹ See, e.g., *supra* note 55 and corresponding text.

⁷⁰ See K.U.R. KHAN, *THE LAW AND ORGANISATION OF INTERNATIONAL COMMODITY AGREEMENTS* (1982).

⁷¹ Agreement on Technical Barriers to Trade art. 10.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement]; Agreement on the Application of Sanitary and Phytosanitary Measures art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

⁷² These vary but are frequently used in a number of areas. Note the TBT Information Management System has currently logged 21473 regular notifications, <http://tbtims.wto.org>, while the SPS Information Management System has logged 7676, <http://spsims.wto.org>.

⁷³ See e.g., Accession of the People's Republic of China, Decision of 10 November 2001, WTO Doc. WT/L/ 432 8 (Nov. 2001).

⁷⁴ This has been recognised by UNCTAD, the FAO and the UNEP. See UNCTAD, FAO & UNEP, Joint Statement, *Regulating Fisheries Subsidies Must be an Integral Part of the*

Indeed, more broadly, the move to sustainability in primary goods requires a multi-faceted mix of actors and actions to be pursued, which necessarily entails providing appropriate information to all parties concerned.⁷⁵

The appeal to information gathering and transparency may well be seen as a weak attempt to manage systemic fragmentation; however, current practice in the realm of fisheries subsidies tells a different story. The following section identifies how, in pursuing the achievement of SDG 14, States and international organizations have turned to a strategy of instrumentalization of the diversity of systems of rules and expertise, building on common techniques of (1) rule elaboration in regional and multilateral forums, and (2) information gathering, thereby maximising the strengths of institutional actors such as the World Trade Organization. By identifying one comparative strength (the WTO as a nexus for information gathering), international actors have been able to ‘ratchet’ efforts towards specific legal disciplines on the use of subsidies.

IV. THE WORLD TRADE ORGANIZATION AND THE SUSTAINABLE DEVELOPMENT GOALS

The WTO is identified in the 2030 Agenda, not as an actor which is to meet obligations, but as a forum or site of activity where States are able to pursue the SDGs. Thus, it is *through* the WTO that progress is to be made in improving access to medicines, reducing inequality between developing and developed members, including duty and quota free access for least-developed countries (LDCs), and eliminating harmful fisheries subsidies.⁷⁶ This shift in identifying the WTO not only as institutional actor but also as a forum, allows for an approach to inter-institutional relations that does not focus on conflicting or competing regimes, but on identifying the constituent actors as responsible for meeting the SDGs. Nonetheless, the ideological and epistemic underpinnings of the organization cannot be excluded so easily,⁷⁷ and the WTO has long been viewed and even viewed itself as first-and-foremost a trade body.⁷⁸ In this section, the development of a nascent fisheries policy in trade law institutions is analysed, noting the recent increase in attention at the WTO and the possibility that meaningful progress be

Implementation of the 2030 Sustainable Development Agenda, ¶ 6.1 (July 20, 2016), http://unctad.org/meetings/en/SessionalDocuments/U14ditc_d16_FishSub_Statement_en.pdf.

⁷⁵FOOD & AGR. ORG., BUILDING A COMMON VISION FOR SUSTAINABLE FOOD AND AGRICULTURE 36-38 (2014), <http://www.fao.org/3/a-i3940e.pdf>.

⁷⁶The 2030 Agenda, *supra* note 10, ¶¶ 3b, 10a, 17.12, & 14.6 respectively.

⁷⁷See G. MESSENGER, THE DEVELOPMENT OF WORLD TRADE ORGANIZATION LAW: EXAMINING CHANGE IN INTERNATIONAL LAW 47-58 (2016).

⁷⁸See the discussions in note 6 for an evocative set of examples.

made on what is a ‘trade matter’ in only the broadest sense. The subsidisation of fisheries (through the subsidisation of fishing) is an interesting example exactly because it is a trade issue only if one takes a holistic view of trade as proposed above, acknowledging that commodities’ trade has multiple effects on labour, economic development, the environment, and resource utilisation. The impact of fishing subsidies on stocks is also a matter of pressing importance for the international community and has long been recognised as a topic in need of attention.⁷⁹ That it should receive such attention now, and at the WTO, is a noteworthy development that indicates a broader shift in trade law’s place in the international system.

A. Fisheries Regulation and the 2030 Agenda

The subsidization of fisheries affects a number of different regimes and raises specific concerns for the 2030 Agenda. Fisheries subsidies are specifically referred to under SDG 14 (“Conserve and sustainably use the oceans, seas and marine resources for sustainable development”) which instructs:

“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.”⁸⁰

As identified by the Agenda, the principal worry for interest groups is that subsidization of the fisheries industry might encourage the overuse of fish stocks and/or contribute to illegal, unreported and unregulated (IUU) fishing.

The picture is, however, a nuanced one. Fisheries subsidies can take a number of forms, like income support for fishermen, fuel subsidies, fishing boat purchases, support for downstream industries within the processing or sales sectors, and the provision of new nets or other equipment.⁸¹ The principal concern from the perspective of SDG 14 is that by supporting fishing industries (whether on the

⁷⁹ See WORLD BANK & FOOD & AGR. ORG., *THE SUNKEN BILLIONS: THE ECONOMIC JUSTIFICATION FOR FISHERIES REFORM* (World Bank 2009).

⁸⁰ SDG 14.6, The 2030 Agenda, *supra* note 10. Other specific targets are set under Goal 14, but the focus here is on 14.6 and fisheries subsidies.

⁸¹ Commonly fisheries subsidies are divided into beneficial, capacity-enhancing, and ambiguous. See G. Munro & U.R. Sumaila, *The Impact of Subsidies upon Fisheries Management and Sustainability: The case of the North Atlantic*, 3 FISH & FISHERIES 233 (2002).

high seas, on territorial waters or inland), subsidies increase capacity and thus encourage overfishing⁸² which in turn can have a dramatic impact on the sustainability of fish stocks and diversity in the ecosystem.⁸³ While some subsidies encourage the farming of fish, which may have negative consequences for wider fish stocks, many others encourage sustainable fishing through the provision of more advanced boats, shoal detection equipment, or nets.⁸⁴ Further, the interests in protecting fish stocks may well run against other competing interests such as protecting local communities from economic deprivation, guarding indigenous communities' pursuit of traditional practices, or promoting food security.⁸⁵

Nor is it clear whether fisheries subsidies have a meaningful trade impact in the narrow sense. Under the Agreement on Subsidies and Countervailing Measures (SCM Agreement),⁸⁶ to challenge a subsidy directly through dispute settlement, or to have recourse to a self-help remedy in the form of a countervailing duty, the subsidy must either be prohibited (that is, the most harmful type of subsidy from a trade perspective, those contingent on export performance or use of local content),⁸⁷ or it must be demonstrated that the subsidy causes an adverse effect (in direct challenges) or causes material injury (in the case of direct challenges or countervailing duties).⁸⁸ In each case, the impact of subsidies is principally measured through the harm caused to the industry.⁸⁹ However, fisheries subsidies are not considered harmful only when injuring other industries and they need not be intended for export.⁹⁰ Indeed, many fisheries industries are not targeted toward exports, but rather internal consumption.⁹¹

⁸² This assumption is challenged strongly by some members such as the Republic of Korea.

⁸³ See Eur. Parl., Directorate Gen. for Internal Policies, Note, Global Fisheries Subsidies (2013), [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/513978/IPOL-PECH_NT\(2013\)513978_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/513978/IPOL-PECH_NT(2013)513978_EN.pdf).

⁸⁴ Acknowledged in *supra* note 67, ¶ 3. Note, this does not mean that there are no other problems: the feed used for the fish during the farming process may well come from unsustainable fish source, while questions exist over the potential health impacts of intensively farmed fish.

⁸⁵ See J. He, *Chinese Public Policy on Fisheries Subsidies: Reconciling Trade, Environmental and Food Security Stakes*, 56 MARINE POL'Y 106 (2015).

⁸⁶ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Annex 1A, Marrakesh Agreement Establishing the World Trade Organisation, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

⁸⁷ SCM Agreement, *supra* note 86 art. 3.1.

⁸⁸ SCM Agreement, *supra* note 86 arts. 5 & 11.2.

⁸⁹ See Art. 15 SCM Agreement.

⁹⁰ See *supra* note 79.

⁹¹ See the questions raised in S.W. Chang, *WTO Disciplines on Fisheries Subsidies: A Historic Step Towards Sustainability?*, 6 J. INT'L ECON. L. 4, 879 (2003); Y. Chou & C.S. Ou, *The Opportunity to Regulate Domestic Fishery Subsidies Through International Agreements*, 63 MARINE POL'Y 118 (2016).

Instead, the harm that fisheries subsidies cause *may* be of a kind foreseen by the SCM Agreement but the principal concern is the harm that such subsidies cause for the resource upon which fishing industries depend, i.e., the depletion of shared resources.⁹² While it could be possible to calculate the value of the subsidy in question, it would be harder (though not impossible) to calculate the harm caused to the fish stocks by the subsidy.⁹³ This problem is compounded by the limited number of empirical studies on the contribution of fisheries subsidies to the fishing practices contemplated under SDG 14.6, and the current value of fisheries subsidies or how they are best to be calculated.⁹⁴ An endemic lack of transparency in the provision of such subsidies by governments exacerbates this difficulty.⁹⁵ Thus, a second challenge is raised by fisheries subsidies: if they are a problem, but cause little disruption to trade, is the WTO the appropriate forum to tackle them?

The maintenance of fish stocks and responsible use of maritime resources is already the focus of a number of different international organizations.⁹⁶ For instance, regional fisheries management organizations (RFMOs) form a complex network of actors that cover geographic regions (such as the North-East Atlantic Fisheries Commission) or are subject-specific within a region, such as the Indian Ocean Tuna Commission. Most are not strictly regional in the sense of membership but in the area of interest, thus ensuring that States with fishing interests in those regions are also present. They are the ‘cornerstone’ of fisheries management, with many having important powers for pursuing the conservation and management of fish stocks, including designating total allowable catches, monitoring vessels, and sharing information and data, amongst others.⁹⁷ A key limitation of such bodies, aside from predictable issues arising from a lack of

⁹² Alice V. Tipping, A “Clean Sheet” Approach to Fisheries Subsidies Disciplines 8 (ICTSD 2015), http://e15initiative.org/wp-content/uploads/2015/04/E15_Subsidies_Tipping_final.pdf.

⁹³ See L. BARTELS & T. MORGANDI, OPTIONS FOR THE LEGAL FORM OF A WTO AGREEMENT ON FISHERIES SUBSIDIES 4 (ICTSD Nov. 2017), <https://www.ictsd.org/themes/environment/research/options-for-the-legal-form-of-a-wto-agreement-on-fisheries-subsidies>.

⁹⁴ For discussion on this point, see U.R. Sumaila et al., *Global fisheries subsidies: An Updated Estimate*, MARINE POL’Y (2016). A notable exception is the ‘Sunken Billions’ report of the World Bank and the FAO in 2009 and the ‘Sunken Billions Revisited’ report of the World Bank in 2017.

⁹⁵ In part due to a lack of compliance with existing notification obligations. C-J Chen, *Fisheries Subsidies under International Law* 6-7 (2010). See further *infra* note 175 and accompanying text.

⁹⁶ For a clear and concise overview, see M.A. Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law*, ch. 2 (2011).

⁹⁷ Food & Agr. Org., *Report: The State of World Fisheries and Aquaculture* 69 (2008).

political will or resources, is their limited ability to affect management policies on the high seas.⁹⁸

RFMOs are only one set of bodies within the fisheries management network, existing as part of a wider UN network, where States are instructed to create further regional bodies where necessary.⁹⁹ These different UN bodies play a role, not only alongside RFMOs but also independently. The FAO, the UNEP and the United Nations Conference on Environment and Development (UNCED) are all participants in fisheries management and also contribute to the legal network of treaties and codes that seek to help conserve and manage fish stocks.¹⁰⁰

More recently, three key agencies have coordinated efforts to encourage movement on the issue of fisheries subsidies. In July 2016, UNCTAD, the FAO, and the United Nations Environment Programme (UNEP) released a joint statement building on the ‘momentum’ of the SDGs (in particular SDG 14), to encourage progress in trade negotiations and declare themselves “ready to support Members States in achieving policy coherence and provide capacity building and technical assistance” in pursuing SDG 14.¹⁰¹

Other less obvious participants also play a role, such as the Organisation for Economic Cooperation and Development (OECD), which has been active in determining the scale and scope of the overlap between fisheries conservation and management and the prevalence of subsidies in the fisheries sector.¹⁰² It is here that the clear role for non-environmental or law of the sea bodies becomes contentious. While there is a pressing need to regulate fishing to ensure equitable and sustainable use of stocks, it is not clear whether fisheries subsidies which may contribute to overfishing or IUU fishing have a trade impact of the kind customarily covered by world trade law.¹⁰³ Yet, the hope of many is, at least in part, focused on results at the WTO.¹⁰⁴

⁹⁸ On the challenges faced in tuna, see Food & Agr. Org., I Performance Reviews by Regional Fishery Bodies: Introduction, Summaries, Synthesis and Best Practices 26 (2012).

⁹⁹ United Nations Convention on the Law of the Sea art. 118, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

¹⁰⁰ See, e.g., UNCLOS, 1993 FAO Compliance Agreement, 1995 FAO Code of Conduct for Responsible Fisheries, 1992 UNCED Agenda 21, 1995 UN Fish Stocks Agreement, 2009 FAO Agreement on Port State Measures.

¹⁰¹ UNCTAD-FAO-UNEP Joint statement, *supra* note 74, ¶ 6.

¹⁰² See generally the work of the OECD Fisheries Division, for example, A. COX & C-C. SCHMIDT, OECD DIRECTORATE OF AGRICULTURE, FOOD AND FISHERIES, SUBSIDIES IN THE OECD FISHERIES SECTOR: A REVIEW OF RECENT ANALYSIS AND FUTURE DIRECTIONS, <http://www.oecd.org/tad/fisheries/2507604.pdf>.

¹⁰³ *Supra* note 7891.

¹⁰⁴ UNCTAD-FAO-UNEP Joint statement, *supra* note 74, ¶ 5.

B. *Pursuing Sustainable Fisheries through the Trade Regime: Multilateral to Regional and Back Again.*

In the pursuit of SDG 14 and specifically target 14.6 (the prohibition of “certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing”), debates over how to proceed invariably involve questions over the appropriate forum and method. From an environmental perspective, such subsidies could hinder the pursuit of sustainability of fish stocks or increase welfare amongst fishing communities and their attendant economies, increasing their ability to fish sustainably, while from a trade perspective the principal concern is the need to guard against the adverse trade effects of such subsidies on competing fishermen (if indeed they exist).¹⁰⁵ Thus, just as with the example of mining and the competing interests of investment law and environmental law, trade law and environmental or maritime law might view fisheries subsidies differently as well.¹⁰⁶

There exists a common thread underpinning these discussions on fisheries and other commodities identified earlier: the complexity of problems, the difficulties in identifying responses, and the fragmented regulatory space in which responses can be formulated.¹⁰⁷ This can be noted in the language of the 2030 Agenda itself, which makes continued references to the need for coordination, coherence, and communication.¹⁰⁸ It is here that the WTO has a particular strength: while it is noted for its set of primary rules and dispute settlement, it is also highly adept at developing systems of transparency and notifications.¹⁰⁹

Until recently the state of negotiations at the WTO on fisheries subsidies did not appear particularly hopeful. What follows is a brief account of the development of the negotiations at the WTO, from 2001 to 2018, highlighting the difficulties faced and also the advances that have been made in this process of cross-jurisdictional and collaborative rule elaboration.

¹⁰⁵ Such questions are not new. World Bank Technical Paper No. 406, Milazzo, Subsidies in World Fisheries: A Re-examination (1998).

¹⁰⁶ *Supra* note 57 and corresponding text.

¹⁰⁷ Note, fish as a commodity, Havana Charter 1947, *supra* note 17 art. 56.1 (“For the purposes of this Charter, the term “primary commodity” means any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.”) (emphasis added).

¹⁰⁸ The 2030 Agenda, *supra* note 10, ¶¶ 17.13-19.

¹⁰⁹ See *infra* note 159 and accompanying text.

Slow progress has been made since the original mandate in the Doha Declaration in 2001,¹¹⁰ in large part as a result of the requirement that all subjects of negotiation be dealt with together (that is, lack of agreement on one topic holds back agreement on all others). Nonetheless, in an attempt to move discussions forward, a draft text was proposed in 2007 by the chair of the Negotiating Group on Rules (the Chair). It served as the central point of discussion.¹¹¹ It sought to prohibit subsidies for the following purposes subject to a set of exceptions: vessel acquisition, construction, repair or other modifications, transfer of vessels to a third country (for example forms of vessel buyback programs where the excess capacity is exported instead of being scrapped), support on operating costs (for example fuel and license fees) of fishing and land-based processing activities, port infrastructure exclusively or predominantly for fisheries activities, income support, price support, and acquisition of fishing access to foreign waters.¹¹² A number of concerns were raised at the time and subsequently relating to: the scope of the special and differential treatment (S&DT) provisions for developing members with smaller fisheries industries, the possibility of *de minimis* exceptions, and the role of fisheries management systems.¹¹³ As a result, progress was slow and held back by the need to agree on all Doha mandated topics at the Negotiating Group on Rules (reform of the Anti-Dumping and Subsidies Agreements, clarification and improvement of rules on regional trade agreements, and disciplines on fisheries subsidies) following the WTO tradition of the single undertaking where “nothing is agreed until everything is agreed”.¹¹⁴ Subsequently, work continued at the other fisheries bodies (UNCTAD, the FAO, and so on) and yet, at the WTO, advances grounded to a halt until recently.

In May 2016, spurred by the adoption of the 2030 Agenda in September of the previous year during an informal meeting of the Negotiating Group on Rules, WTO Members indicated willingness to move forward on the topic (albeit still held

¹¹⁰ Fisheries are discussed in a number of areas, from subsidies to trade and the environment.

¹¹¹ See Draft Consolidated Chair Texts of the AD and SCM Agreements, Negotiating Group on Rules, Annex VIII, TN/RL/W/213, https://www.wto.org/english/tratop_e/rulesneg_e/rules_chair_text_nov07_e.htm (Nov. 30, 2007) [hereinafter Draft Consolidated Chair Texts].

¹¹²*Id.* art. I.I.1.

¹¹³ See Submission by India, Indonesia and China, Need for Effective Special and Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies Text, WTO Doc. TN/RL/GEN/155/Rev.1 (2008); Communication from Brazil, China, India and Mexico, “Fisheries subsidies - special and differential treatment”, TN/RL/GEN/163(2010); Communication from Canada, Fisheries subsidies – Article II *de minimis* Exemption, WTO Doc. TN/RL/GEN/156/Rev.1 (2011).

¹¹⁴ Doha Declaration, *supra* note 9, ¶¶ 28-29.

back by related issues under attention, being held as bargaining chips by others).¹¹⁵ It is telling that this move was not to propose a new text; instead, New Zealand's proposal was to gather information through "a series of questions with a view to sharing information on such developments as a background for further discussions on fisheries subsidies disciplines."¹¹⁶ This seemed a modest step forward, though in keeping with the trend toward information collection identified above. While negotiations at the WTO moved slowly, they were to advance dramatically elsewhere,¹¹⁷ in part inspired by movement at the regional level, where the parties to the Trans-Pacific Partnership (TPP) had four months earlier agreed on a text including disciplines on fisheries subsidies.

In keeping with the common practice of the WTO over the last 20 years, a lack of agreement at the multilateral level was compensated for by activity at the regional level. The negotiating parties of the TPP¹¹⁸ included a limitation on fisheries subsidies within the agreement, which specifically provided:

- "...no Party shall grant or maintain any of the following subsidies within the meaning of Article 1.1 of the SCM Agreement that are specific within the meaning of Article 2 of the SCM Agreement:
- (a) subsidies for fishing that negatively affect fish stocks that are in an overfished condition; and
 - (b) subsidies provided to any fishing vessel while listed by the flag State or a relevant Regional Fisheries Management Organisation or Arrangement for IUU fishing in accordance with the rules and procedures of that organisation or arrangement and in conformity with international law."¹¹⁹

It is noteworthy that while the TPP draft prohibits subsidies which contribute to IUU fishing or negatively affect overfished stocks, it also places great focus on notification and data collection as part of a wider fisheries management network. It stresses the importance of ensuring effective fisheries management "based on the

¹¹⁵ 2016 News Items, World Trade Organisation, WTO members affirm interest in new international fisheries subsidies rules, but differ on way forward (June 29, 2016), https://www.wto.org/english/news_e/news16_e/rule_06jul16_e.htm.

¹¹⁶ World Trade Organization Communication, Negotiating Group on Rules, Identifying the WTO Contribution to the 2030 Agenda for Sustainable Development: Fisheries Subsidies Questions, WTO Doc. TN/RLW/272 (May 24, 2016).

¹¹⁷ See *infra* note 126 and corresponding text.

¹¹⁸ At the time, the expected membership included Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

¹¹⁹ Trans-Pacific Partnership, Feb. 4, 2016, art. 20.16(5), <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [hereinafter TPP].

best scientific evidence available and on internationally recognized best practices for fisheries management” which includes FAO guidance.¹²⁰ The TPP draft also specifically instructs parties to ensure that catch data, fleet capacity, status of stocks, and that total imports and exports are included in their notifications of prohibited fisheries subsidies,¹²¹ while non-prohibited subsidies are still to be notified “to the extent possible” including “information in relation to other fisheries subsidies that the Party grants or maintains... in particular fuel subsidies.”¹²² It is noteworthy that the recently revised version of the treaty text (*sans* the United States) under the name Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) has maintained the provisions on fisheries subsidies.¹²³ While such a move would have a significant impact, the CPTPP’s future is still unclear, and its scope (though wide) is regional.¹²⁴

Nonetheless, a number of CPTPP parties (and some others) have moved to begin negotiations to ban fisheries subsidies along the lines of the original TPP draft. Argentina, Australia, Canada, Chile, Colombia, New Zealand, Norway, Papua New Guinea, Peru, Singapore, Switzerland, Uruguay, and the United States have begun to prepare negotiations “to work with each other and with like-minded participants to conclude an ambitious, high standard agreement, while at the same time working with all WTO Members to make progress toward a multilateral agreement in the WTO”.¹²⁵ What comes of the discussions will be important, though the absence of China, Japan, and the EU is troubling given their high impact on fisheries.¹²⁶

In response, the EU has become especially active at the WTO, seeking to prohibit harmful fisheries subsidies, in part building on its Common Fisheries Policy as a model to eliminate subsidies that increase capacity or support IUU fishing.¹²⁷ The

¹²⁰ See TPP, *supra* note 119 art. 20.16(3).

¹²¹ See TPP, *supra* note 119 art. 20.16(10).

¹²² See TPP, *supra* note 119 art. 20.16(11).

¹²³ A list of the suspended provisions from the TPP text are available at <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/annex2-annexe2.aspx?lang=eng>.

¹²⁴ With the USA’s notification that it does not intend to become a member, at the time of writing the assumption is that the remaining ‘TPP 11’ will move ahead amongst themselves to conclude the CPTPP.

¹²⁵ Joint Statement Regarding Fisheries Subsidies, Washington DC (Sept. 14, 2016), https://ustr.gov/sites/default/files/09142016_STATEMENT_joint_statement_fisheries_partners_FINAL.pdf.

¹²⁶ See *Group of WTO Members Announces Talks to Ban Harmful Fisheries Subsidies*, ICTSD BRIDGES (Sept. 22, 2016) <http://www.ictsd.org/bridges-news/bridges/news/group-of-wto-members-announces-talks-to-ban-harmful-fisheries-subsidies>.

¹²⁷ C. Malmström, *Protecting global fisheries through the WTO*, EUROPEAN COMMISSION BLOG (Oct.17, 2016), <https://ec.europa.eu/commission/2014->

EU proposal, first circulated on October 18, 2016,¹²⁸ and subsequently revised,¹²⁹ has offered suggestions that target Goal 14.6 closely and with the wider special and differential treatment obligations closely integrated. Clearly, the first EU proposal was merely a new ‘starting point’ and it was responded to carefully by a number of groups, most notably: New Zealand, Iceland, and Pakistan; Argentina, Colombia, Costa Rica, Panama, Peru, and Uruguay; the ACP group; and the LDC group. Individual members also introduced proposals subsequently, including Indonesia, the US, and China.¹³⁰ These specific proposals are discussed in the following section, though at this stage it is important to note the trajectory of the talks on fisheries subsidies, across jurisdictional boundaries.

The renewed involvement of the EU, New Zealand, and a number of other TPP parties (along with international organizations such as the UNCTAD and the FAO) has once again placed fisheries subsidies firmly on the agenda at the WTO. There has been an explicit attempt to decouple fisheries from other contentious issues examined by the Negotiating Group on Rules, and there is now increased hope that the WTO will be in a position to offer an outcome at its 12th Ministerial Conference at the end of 2019. While there was hope that a package could be agreed upon at the 11th Ministerial Conference in Buenos Aires in December 2017, there has been at least the start of an agreement which could lay the foundation for further work, with Members committing to agree on a comprehensive package to discipline harmful fisheries subsidies by the 12th Ministerial Conference.¹³¹ Members have, of course, committed to agree on new disciplines before, but the added pressure of Goal 14.6’s instruction to prohibit subsidies that contribute to IUU fishing by 2020, and the commitment demonstrated by a range of diverse Members that negotiated strongly for much of 2016 and 2017, might lead one to consider it possible. More importantly, as discussed further below, fisheries subsidies disciplines represent a nexus of interests, between a WTO in need of an environmentally sound and development focused ‘win’ and an international

2019/malmstrom/blog/protecting-global-fisheries-through-wto_en. Note, the EU also includes sustainable fishing provisions in its proposed economic partnership agreements (EPAs). *See* Economic Partnership Agreement between the West African States, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA), of the one part, and the European Union and its Member States, of the other part art. 47, COM/2014/0578 final.

¹²⁸ *See* EU proposal, WTO Doc. TN/RL/GEN/181 (Oct. 20, 2016)

¹²⁹ *See* EU proposal, WTO Doc. TN/RL/GEN/181/Rev.1 (Jul. 6, 2017). This proposal is the point of reference for EU proposals discussed below.

¹³⁰ A useful ‘matrix’ compiling the different elements of proposals, as of 28 July 2017, was circulated to Members of the WTO. World Trade Organization, *Compilation Matrix of Textual Proposals Received to Date*, WTO Doc. TN/RL/W/273 (Jul. 18, 2017).

¹³¹ World Trade Organization, Ministerial Conference, Ministerial Decision on Fisheries Subsidies, Ministerial Decision of 13 December 2017, ¶ 1, WT/MIN(17)/W/5 (2017).

community that needs a binding commitment from States beyond general exhortation that is embedded in an institution praised (rightly or wrongly) for its compliance mechanisms.¹³²

The interest in meeting SDG 14.6 is also a pressing one, and while the WTO may be seen as an ideal option in many quarters, the completion of the Goal has overcome any explicit preference for a specific institution. For example, note the EU Trade Commissioner's frustration at the end of the 11th Ministerial Conference, that "the sad reality is that we did not even agree to stop subsidizing illegal fishing" as a result of a few blocking Members, and that "short-term plurilateral arrangements within the WTO framework" were the most likely target for agreements in the meantime.¹³³ The US similarly echoed the view that progress amongst "like-minded" groups of Members was more likely than at the WTO.¹³⁴ This suggests that in the short term, while negotiations may continue at the WTO, they will also continue in other forums, ensuring that Members' interests in shaping such future rules are embedded as early as possible. However, as the development of the fisheries talks shows, this is not a binary decision of selecting between regional or multilateral institutions, or between environmental or trade regimes, but rather part of the cross-jurisdictional rule-elaboration process that increasingly marks international law.¹³⁵

Each interested party from governments, civil society, and international organisations to private industries, has pushed for an agreement where it is most possible at that moment in time, be it at the multilateral level at the WTO, at the regional level in the CPTPP (and historically in the EU), or at the plurilateral level with the 'go-it-alone' group of CPTPP and other States.

C. The Envisaged Role for the WTO in the Regulation of Fisheries Subsidies.

It is one thing to decide that the WTO should be the forum where the subsidisation of fisheries is regulated, and another to determine the scope and method of such regulation.¹³⁶ A number of proposals and papers have been tabled

¹³² See *infra* Part V.

¹³³ WTO meeting ends in discord, ministers urge smaller-scale trade talks, REUTERS (Dec. 13, 2017), <https://www.reuters.com/article/us-trade-wto/wto-meeting-ends-in-discord-ministers-urge-smaller-scale-trade-talks-idUSKBN1E71IJ>.

¹³⁴ *Id.*

¹³⁵ See MESSENGER, *supra* note 77.

¹³⁶ This article does not examine the legal nature of the proposed discipline. For a recent treatment of this issue, see L. BARTELS & T. MORGANDI, *supra* note 93.

by members at the Negotiating Group on Rules.¹³⁷ These proposals seek to clarify and develop a set of rules which will support the achievement of SDG 14.6.

There are a number of contentious points relating, in the first instance, to the application of such disciplines. For example, to what extent should they apply to developing members or LDC members? The proposals provide a variety of possibilities on this point, from excluding the application of some disciplines to LDC members where fish stock management plans are in place¹³⁸ to excluding the application of the disciplines to LDC or developing members' subsidies for small boats involved in subsistence fishing or small-scale artisanal fishing.¹³⁹

Related to the scope of the disciplines are the provisions for technical assistance and capacity building. Appreciating that S&DT is only one part of an effective system for integrating developing and LDC Members and to ensure an equitable distribution of obligations, technical assistance and capacity building play a greater role in a number of proposals.¹⁴⁰ This arguably represents a continuation of the policies enacted in the Trade Facilitation Agreement (TFA),¹⁴¹ seeking to embed technical assistance and capacity building within the legal framework of the WTO, whereby developing and LDC Members can seek targeted assistance in implementing the TFA.

A further challenge is the jurisdictional scope of the proposed disciplines. This too has an important S&DT dimension as a possible exclusion of particular note is the use of subsidies for fishing within the exclusive economic zone (EEZ) of a member.¹⁴² The ACP proposal would exclude for LDCs and developing Members “[f]ishing activities, which exclusively exploit domestic fish stocks whose ranges are confined to the Members’ EEZ”.¹⁴³ This position is echoed by the LDC group.¹⁴⁴ This is of particular concern given the SDG 14.6 mandate which does not specifically target fisheries subsidies for fishing outside of waters under national jurisdiction but rather IUU, overfishing, and overcapacity, wherever it may take place.

¹³⁷ *Supra* note 128.

¹³⁸ *See supra* note 129 art. 4.2.

¹³⁹ *See supra* note 129 art. 4; Argentina, Colombia, Costa Rica, Panama, Peru, and Uruguay proposal, WTO Doc. TN/RL/GEN/187/Rev.2 ¶ 1.1.4 (July 17, 2017) respectively.

¹⁴⁰ *See* Indonesia proposal, WTO Doc. TN/RL/GEN/189 art. 3.6 (June 6, 2017); Argentina *et al* proposal, *supra* note 139 art. 4.1; LDC proposal, WTO Doc. TN/RL/GEN/193 art. 3.4 (July 17, 2017).

¹⁴¹ Trade Facilitation Agreement, Feb. 22, 2017, art. 21, https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm.

¹⁴² *See* Indonesia proposal, *supra* note 140 art. 3.4.

¹⁴³ *See* ACP paper, WTO Doc. TN/RL/GEN/192, ¶ 4.2 (2017).

¹⁴⁴ *See* LDC paper, TN/RL/GEN/193, ¶ 2.2.b.

It is telling that a number of separate issues are also examined in varying degrees within the proposals, requiring discussions within a forum more accustomed to contemplating rules that engage with trade more narrowly. For example, what of the inclusion of disciplines to cover subsidies relating to inland fisheries or aquaculture where the possible harm is not related to fish stocks *per se*, or the issue of whether there should be exclusions for instances of disaster relief?¹⁴⁵ Should the disciplines apply to maritime zones which are subject to a dispute between Members?¹⁴⁶ Each of the questions tests the resolve and appropriateness of the trade system to manage issues that are customarily within the remit of the law of the sea or general international law.

The proposals demonstrate a fascinating willingness to engage in innovative approaches to problems that trade law has not had to tackle. For example, the proposals are largely in agreement that the attribution of prohibited subsidies to a Member is not determined by the flag of the vessel which benefits, as flag of convenience is a common practice and that it is more effective to tackle the subsidy at the source.¹⁴⁷

While innovative solutions are required, Members have been quick to buttress their proposals with the existing strengths of the WTO system, such as on the issue of the existence of a ‘subsidy’.¹⁴⁸ Here, proposals indicate that the subsidies to be covered are those that constitute subsidies under Article 1.1 of the SCM Agreement, and are specific in terms of Article 2 of the SCM Agreement. The SCM Agreement would still apply in absence of any specific fisheries subsidy.¹⁴⁹ The disciplines would thus apply to a *specific* subsidy with a purpose or effect listed (such as contributing to IUU fishing). This ensures that the additional rules on fisheries subsidies form a part of the WTO’s wider system for regulation of harmful subsidies.

D. *The Role of the Law of the Sea Regime*

The use of other regimes of global governance is an important feature of the fisheries proposals, particularly the law of the sea regime.¹⁵⁰ For example, it is

¹⁴⁵ See Argentina *et al* proposal, *supra* note 139, n. 3.

¹⁴⁶ See China proposal, WTO Doc. TN/RL/GEN/195 arts. 3.1-3.3 (Nov. 1, 2017).

¹⁴⁷ See New Zealand, Iceland, and Pakistan proposal, WTO Doc. TN/RL/GEN/186 art. 3 (June 6, 2017); *supra* note 129, art. 1 n. 1.

¹⁴⁸ *Supra* note 86, art. 11.

¹⁴⁹ See *supra* note 147, ¶ 3.6.

¹⁵⁰ For a concise account of the dynamics between the law of the sea and fisheries subsidies; see M. YOUNG, *The ‘Law of the Sea’ Obligations Underpinning Fisheries Subsidies*

expected that the concept of IUU fishing will be understood in line with the 2001 FAO International Plan of Action on IUU fishing,¹⁵¹ which once incorporated in the new disciplines will become the reference point for WTO law.¹⁵² Similarly, RFMOs are expected to play a core role as it is their lists of vessels engaged in IUU fishing that are to be presumed to be valid,¹⁵³ as well as determine which stocks are overfished.¹⁵⁴ Members' own national authorities will also be able to make equivalent determinations on the basis of the best evidence available to them. Some proposals have gone further by classifying those subsidies as prohibited that contribute to *any* fishing for stocks in waters where the member is not a party to the relevant RFMO, an approach which chimes with the assumption that international fishing fleets are the primary causes of injury in this field.¹⁵⁵

Measures to ensure compliance with the new disciplines have also been proposed to be linked to the law of the sea regimes. For example, the Port State Measures Agreement (PSMA) model,¹⁵⁶ whereby access to ports by vessels engaged in IUU fishing is denied,¹⁵⁷ has been suggested as an approach under the disciplines on fisheries subsidies.¹⁵⁸ The exact mechanics for this under WTO law is unclear, particularly in light of the obligations on freedom of transit under Article V of the GATT.¹⁵⁹ Further, whether this would be the only form of remedy is not settled. Direct challenge to a subsidies programme under the dispute settlement system

Disciplines(ICTSD, Nov. 2017), <https://www.ictsd.org/themes/environment/research/the-law-of-the-sea-obligations-underpinning-fisheries-subsidies>.

¹⁵¹ All but the ACP proposal use the definition provided therein as a model. Food & Agr. Org. Fisheries & Aquaculture Dep't., International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Mar. 2, 2001), <http://www.agriculture.gov.au/SiteCollectionDocuments/fisheries/iuu/ipoa.pdf>.

¹⁵² The nature of the reference (i.e. direct incorporation or dynamic reference) will depend on the legal form the disciplines take and their precise wording. See the discussion in the EU context, Yoshimichi Ishikawa, *Post-Buenos Aires: Tackling Fisheries Subsidies Contributing to IUU Fishing through Unilateral Trade Measures?*, EJIL: TALK! (JAN. 12, 2018), <https://www.ejiltalk.org/post-buenos-aires-tackling-fisheries-subsidies-contributing-to-iuu-fishing-through-unilateral-trade-measures/>.

¹⁵³ See *supra* note 129, art. 2.1; *supra* note 147, art.1.1.1; ACP proposal, WTO Doc. TN/RL/GEN/192 n. 3 (July 14, 2017).

¹⁵⁴ See ACP proposal, *supra* note 153, Definitions; EU proposal, *supra* note 129, n. 3*bis*; New Zealand et al. proposal, *supra* note 147, Definitions; LDC proposal, WTO Doc. TN/RL/GEN/193 n. 4 (July 17, 2017).

¹⁵⁵ E.g., New Zealand et al. proposal, *supra* note 147, art.1.1.2.

¹⁵⁶ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009, 55 I.L.M.6, 1157 (2016) [hereinafter PSMA].

¹⁵⁷ *Id.* art. 9.4.

¹⁵⁸ See, e.g., New Zealand et al. proposal, *supra* note 147, ¶ 3.8.

¹⁵⁹ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1867 U.N.T.S. 167.

would be legally unproblematic but arguably less effective given the length of time and costs involved which can serve to discourage Members where a faster self-help remedy could be preferable.¹⁶⁰ A form of countervailing duty, perhaps calculated to the value of the subsidy irrespective of its impact on local fishing industries is also an option.¹⁶¹

Further, the extent to which measures target not only vessels engaged in IUU fishing but also their operators is contentious. While proposals identify both vessels and operators (that is the ships and their owners), the question that arises is how instances where an operator has multiple vessels and only one is engaged in IUU fishing are to be managed. The proposal by Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay shields the other vessels, limiting the application of disciplines to the vessels of the operator specifically identified as engaging in IUU,¹⁶² with the alternative holding the subsidised operator to account for the IUU fishing of any vessels.¹⁶³ Without greater clarity on the measures to be used, however, it is hard to determine. If port closure is the approach taken, then operator-focussed liability could be more effective to ensure compliance (and would be in keeping with the rejection of flag-based claims to avoid oversight elsewhere in the proposals).

All proposals on the content of the disciplines, definitions, and possible remedies demonstrate a willingness to extend the traditional trade rules outside of their customary application, thus reframing common trade terms and concepts to adapt to the objectives of the negotiating groups involved. The use of RFMOs, in particular, is a notable change in the *degree* to which the WTO is expected to engage with other international organizations. Echoing the Chair's 2007 text,¹⁶⁴ and the subsequent provisions in the TPP stressing the need to ensure effective fisheries management "based on the best scientific evidence available and on internationally recognized best practices for fisheries management",¹⁶⁵ the use of RFMOs has existing parallels in WTO law. Note the approaches taken in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), where specific institutions are identified and standards produced which are presumed to comply with the SPS Agreement, or the Agreement on Technical Barriers to Trade

¹⁶⁰ It is noteworthy that the vast majority of disputes over subsidies at the WTO are over the imposition of countervailing duties rather than the original (alleged) subsidy itself.

¹⁶¹ See *supra* note 93 and corresponding text.

¹⁶² Argentina *et. al* proposal, *supra* note 139 art. 2.1.1. Depending on the nature of the subsidy, should the operator be the beneficiary (rather than a discrete vessel), one would expect the benefit could be passed through to all vessels of the operator. For example, fuel duty rebates granted to the operator would be one such instance.

¹⁶³ EU proposal, *supra* note 129, art. 2.

¹⁶⁴ See Draft Consolidated Chair Texts, *supra* note 111, art. V.

¹⁶⁵ TPP, *supra* note 119 art. 20.16(3).

(TBT Agreement) where specific bodies are not identified but relevant international standards may also be used to presume compliance with obligations under the Agreement.¹⁶⁶ There are differences in this instance, not least that an RFMO would not constitute an ‘international standardizing body’ in the sense of the TBT Agreement as RFMOs are not open to all Members, only those with an interest in the fish stock and maritime area in question.¹⁶⁷ Further, while there is concern over the capacity of RFMOs to make such determinations effectively, considering their scope, and the weight to be given to them,¹⁶⁸ should the analysis be sound, and used as the basis for a Member’s determination that a vessel is engaged in IUU fishing, or that certain stocks are overfished, one could foresee *de facto* (if not *de jure*) acknowledgement of RFMO determinations via WTO law.

A related element of evolutionary innovation in WTO governance, discussed in the following section, is the proposed increase in the use of notification requirements where the WTO is to act as a nexus for trade-related data to support compliance and further rule-elaboration.

E. Coordinating Strategies: Information Exchange

The WTO is customarily identified as a body concerned with tariff and non-tariff barriers, which is most notable for its comparatively effective dispute settlement system and formally egalitarian (if deadlocked) negotiating arm. Yet, in a post-Doha world, some of the WTO’s greatest achievements come not from formal dispute settlement (though this has a role to play) or dramatic rule creation but through its network of developed Committees functioning as soft-law creators and informal dispute settlement forums.¹⁶⁹ Within this world, transparency is a key tool of the Membership.

In the proposals, a common element is the expansion of the transparency obligations under the SCM Agreement. This includes notifying the ‘legal authority for the programme’ which will be of potential use in instances of direct challenge through dispute settlement.¹⁷⁰ This is an area where Special and Differential Treatment is of particular importance given the increased burden this will place on Members. While one might consider that if a member is capable of administering a

¹⁶⁶ SPS Agreement, *supra* note 71 art. 2.4 and TBT Agreement, *supra* note 71, art. 2.5 respectively.

¹⁶⁷ See Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 359, WT/DS381/AB/R (Oct. 26, 2017).

¹⁶⁸ The Argentina *et. al* proposal, *supra* note 139, and the EU proposal, *supra* note 129, speak to these concerns.

¹⁶⁹ See MESSENGER, *supra* note 77, at 59-68.

¹⁷⁰ See EU proposal, *supra* note 129, art. 3.

subsidy programme, that member may be assumed to also be able to notify it (at least as required by Article 25 of the SCM Agreement), this is not always the case, not least where a Member does not consider its support to constitute a subsidy.

The use of transparency instruments is a standard technique in WTO law which contains a number of notification requirements from technical barriers to trade, to sanitary and phytosanitary measures, to regional trade agreements, and services commitments.¹⁷¹ The WTO increasingly functions as an overwhelmingly large database of trade data and regulatory information. Indeed, one might consider that the quantity of data is so great that it is hard to separate the wheat from the chaff. Yet, in an age of big-data analysis and transparency, this ought to be welcomed. As systems for data access and analysis improve, the hope is that interested parties with limited resources will be able to identify measures which could affect them, in a way that they could not have previously done (this applies as much to small and medium sized enterprises as resource-limited Members).

This model of notifications is already used widely at the WTO, and including fisheries data could help to open the possibility of increased compliance through publicity of measures,¹⁷² and by alerting interested parties to the possibility of raising concerns or a subsequent claim (though such action would, potentially, require the involvement of national investigating authorities to investigate the alleged prohibited or harmful subsidy).

It is also noteworthy that the prior regional proposal found in the TPP similarly identifies notifications as a key tool. The TPP model focuses on notifications and data collection as part of a wider fisheries management network. The TPP specifically instructs parties to ensure that catch data, fleet capacity, status of stocks, and total imports and exports are included in their notifications of prohibited fisheries subsidies,¹⁷³ while non-prohibited subsidies are still to be notified “to the extent possible” including “information in relation to other fisheries subsidies that the Party grants or maintains... in particular fuel subsidies”.¹⁷⁴ The regional approach has been useful in clarifying certain possible lines of action for discussion at the multilateral level rather than as a source of conflict. Indeed, the Ministerial Decision on Fisheries Subsidies from the 2017

¹⁷¹ With varying levels of success. See the criticism in Communication from the United States, Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements, JOB/GC/148 (Oct. 30, 2017). Nonetheless, as with dispute settlement, the WTO’s success on this front is relative not absolute.

¹⁷² On such processes at the WTO, see M. Footer, *Some Theoretical and Legal Perspectives on WTO Compliance*, 38 NETH. Y.B. INT’L L. 61 (2007).

¹⁷³ TPP, *supra* note 119 art. 20.16(10).

¹⁷⁴ TPP, *supra* note 119 art. 20.16(10).

11th Ministerial added a specific pledge from Members to “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.”¹⁷⁵

Here transparency is used not only to encourage compliance and good governance, but also to support the rule-making process, with the USA’s proposal on transparency explicitly singling out fisheries subsidies as an area where greater notification requirements can support Members and “[w]ith a more comprehensive picture of existing programs and their trade and conservation impacts, Members will be better positioned to develop fisheries subsidies obligations that would be effective in achieving the objectives of addressing the worst forms of subsidies, including those that contribute to overfishing, overcapacity, and IUU fishing.”¹⁷⁶ Trade measure notifications are thus being used to inform rule-elaboration on a matter essential for the pursuit of sustainable development.

V. CONCLUSION

It is the nature of the WTO as an institution to act as a nexus for ‘trade-related’ issues. The WTO confronts and engages with matters of global interest which overlap with its trade remit. This is not wishful thinking but borne out by the practice of the institution, whether at a superficial level as in the Committee on Trade and Environment, through legal decisions with environmental elements such as *US-Shrimp* or *China-Rare Earths*,¹⁷⁷ through rule elaboration such as the Amendment on public health to the Agreement on Trade-Related Aspects of Intellectual Property Rights,¹⁷⁸ or subsequent debates over private standards in the TBT and SPS committees.¹⁷⁹ This is not to say that the WTO will regulate all matters of ‘non-trade’ issues, but rather that its competence to act is in practice determined not only by the explicit provisions of the WTO agreements but also through the complex interactions of the ideological framework in which it exists and the epistemic community that administers and embodies it. The WTO acts as a forum for government representatives, standard setters, ‘internal’ institutional

¹⁷⁵ World Trade Organisation, 11th Ministerial Conference, Draft Ministerial Decision on Fisheries Subsidies, WTO Doc. WT/MIN(17)/W/5 ¶ 4 (Dec. 1, 2017).

¹⁷⁶ *Supra* note 171, ¶ 10.

¹⁷⁷ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Nov. 6, 1998); Panel Report, *China – Rare Earths*, WTO Doc. WT/DS431/R/Add.1 (Mar. 26, 2014).

¹⁷⁸ See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 31 bis, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869 U.N.T.S. 299.

¹⁷⁹ See MESSENGER, *supra* note 77, at 150-57.

actors such as the Appellate Body, and so on.¹⁸⁰ But it is also an independent actor, one whose identity is built on its successes. Having faced seventeen years of near complete deadlock and increasing challenges from its previously strongest supporters, the WTO is in need of a ‘win’. On this point fisheries subsidies provide a convenient shared interest as the international community seeks to achieve the SDGs and requires a place where it considers rules are upheld and disputes are resolved (something the other principal actors on this topic are unable to achieve alone).¹⁸¹

No longer does the WTO only examine matters understood in narrow trade terms, nor does it seek to conclude a complete set of agreements and nothing less. Instead, the WTO is being empowered to regulate not only the trade effects of trade, but also the non-trade effects of trade by trading on its comparative strengths: a relatively effective mechanism for ensuring compliance (both through notifications and negotiations), and failing this, a respected system for resolving disputes. The WTO’s central role in providing coherence and coordination in pursuing the 2030 Agenda should be noted:

“We recognize the role the WTO can play in contributing towards achievement of the 2030 Sustainable Development Goals, in so far as they relate to the WTO mandate, and bearing in mind the authority of the WTO Ministerial Conference.

We recognize the importance of *strengthened coherence* in global economic policy-making. We underscore the Marrakesh coherence mandate, and encourage initiatives for cooperation with other international organizations in pursuit of our common objectives, while respecting the competence of each organization.”¹⁸²

Turning to problems in commodities’ trade beyond fish, the lack of data with which to take coordinated and considered decisions is one of the greatest challenges. Here, the proposals on fisheries can serve as a possible model, with the WTO as an information source, with near universal membership serving to

¹⁸⁰ On the response of the Appellate Body to the pressures to adapt over the past twenty years, see R. Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27(1) EUR. J. INT’L L. 9 (2016).

¹⁸¹ One could also present a less positive view, that the WTO is in crisis and that success on this front would constitute the bare minimum to ensure that the existing legal structures that entrench the power of capital globally are maintained. On the role of transnational capital and reform, see B.S. CHIMNI, *The World Trade Organization, Democracy and Development: A View From the South*, 40(1) J. WORLD TRADE 5 (2006).

¹⁸² World Trade Organization, Ministerial Declaration of 19 December 2015, WTO Doc. WT/MIN(15)/DEC ¶¶ 8-9 (2015) (emphasis added).

support the aims of competing interests through the provision of information and a forum to deal with the trade-related aspects of such discussions. This need not imply an expansion of the WTO's competence or the use of the dispute settlement system to pursue strictly environmental or social claims – in the case of fisheries subsidies. It is only in those instances where fishing subsidies cause adverse effects for other Members that such issues arise – as they already do under the SCM Agreement. It is important not to elide the dispute settlement system of the WTO, the purpose of which is to enforce rights and obligations under the covered agreements, with the WTO's role as a coordinating and negotiating forum for matters in trade. There are good reasons to take a restrictive view of what panels or the Appellate Body may examine in interpreting and applying the law *proprio motu* (as, in effect, judicial bodies exercising delegated authority), while also taking an expansive view of those matters the Membership wish to raise within the WTO as a forum for trade matters.¹⁸³

Moving from the ideological commitment of unity in a legal order to viewing competing international organizations as providers of different forms of expertise has allowed a subtle cooperative process of rule-development in the case of fisheries. Whether or not an agreement is concluded at the WTO, the subtle coordination and distribution of work between the FAO, UNEP, UNCTAD, the WTO, the OECD, RFMOs, individual States, and civil society has allowed fisheries subsidies and SDG 14.6 to at least raise the possibility of an early harvest for the SDG project. Indeed, even the seemingly 'conflictual' approach, whereby rules are developed by the EU or under the TPP (now CPTPP) rather than at the WTO, serves to push the forward the wider process by fleshing out approaches to be taken and allowing experimentation in norm development.¹⁸⁴

This process is premised on an instrumentalising logic; institutions are not viewed as embodying systems of rules but rather systems of options. In the case of the WTO, which has long faced criticism for its treatment of 'non-trade' values or objectives, to contribute so explicitly to a global priority entails great reputational gains, and supports the view that it is still an institution where agreement can be reached.

¹⁸³ Compare Marrakesh Agreement Establishing the World Trade Organization art. II.1, Apr. 15, 1994, 1867 U.N.T.S. 154 ("The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters *related to* the agreements and associated legal instruments included in the Annexes to this Agreement"), with Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, 1869 U.N.T.S. 401 ("The Members recognize that it serves to preserve the rights and obligations of Members *under the covered agreements...*") (emphasis added in both instances).

¹⁸⁴ On the EU's recent 'internal' developments, see *supra* note 152.

This is of particular interest when reflecting on the opportunities that engage with commodities as a specific class of goods offer for the pursuit of sustainable development and the completion of the 2030 Agenda. The fragmentation of international law, which we might equally refer to as specialisation, has had a more limited impact on the *normative* coherence of the international legal order than might have been feared but it has had a greater impact on the *conceptual* coherence of the system; one which increasingly tackles complex societal problems through nuanced legal instruments at the sharp end of the crisis, rather than at its root. While the WTO is increasingly sensitive to the impact of commodity price fluctuations and their relationship with wider trade questions such as market access,¹⁸⁵ there has been little by way of innovation in approaching the challenges of commodities' trade outside of piecemeal agreements on cotton or food security.

Nonetheless, the process of the negotiations over fisheries subsidies offer interesting insights where accepting a wider conception of trade law's purpose as supportive of, and critical for, sustainable development has accompanied 'a new form of pragmatic multilateralism',¹⁸⁶ seeking agreement wherever it may be possible. For the WTO, this may mean a renewed interest in its ability to offer solutions to the problems presented by commodities' trade, acting as a nexus for different regimes in trade, and finally progressing beyond the slumber of the Doha Round.

¹⁸⁵ See WTO's Substantive Input for the 2017 High Level Political Forum on Sustainable Development, ¶ F(3), <https://sustainabledevelopment.un.org/content/documents/14240wtomc.pdf>.

¹⁸⁶ World Trade Organization, Statement by United States Trade Representative at Ministerial Conference, Nairobi, WTO Doc. WT/MIN(15)/ST/121 (Jan. 25, 2016).