

FISHERIES SUBSIDIES NEGOTIATIONS AT THE WTO: THE REAL CATCH



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Section 1: Introduction²

Fish is a major source of protein for a large portion of the world's population. Even though fish is a renewable resource, it is not imperishable. Fishery resources around the world are threatened by overexploitation and a host of other factors (Kahn, 2005,376).

More than 75% of the global fish produce is used for direct human consumption.³ Fish that is not utilized for direct human consumption is used as an input in the global value chain for the production of other goods. For example, fish is used as an input for fishmeal and animal feed for livestock. Further, the bi-product from fish is used to produce fish oil, which is a rich source of omega-3.

The global market for fishmeal & fish oil is projected to reach a value of USD 14.28 billion by 2022.⁴ The growing trade in fishmeal & fish oil can be attributed to the increasing demand for aquaculture and quality fish in the export markets. On the basis of industrial application, statistics for the year 2016 reveal that fishmeal & fish oil were most widely consumed in the pharmaceutical industry, for the production of Omega-3 fatty acids and antibiotics, respectively.

The fisheries sector is vital for the economic development of developing states. According to the 2016 FAO Report on the State of the World of Fisheries and Aquaculture, both “fisheries and aquaculture remain an important source of food, nutrition, income and livelihoods for hundreds of millions around the world”. The report also shows that in 2016 the developing countries accounted for more than half of the fish exports. In other words, the developing countries hold a greater share of the fisheries market as compared to the developed economies. As a result, for developing and least developed countries, fish is not just used for human consumption but also adds to the upstream and downstream values.

Emerging landlocked developing countries, that are exporters of pharmaceutical products, including generics of fish oil, use fish as a raw material for the production of medicines. The disciplines on fisheries subsidies being negotiated at the WTO will affect the price of and

² The author is grateful to Abhijit Das for his comments on the paper.

³ See <http://www.fao.org/fisheries/utilization_trade/en>.

⁴See <<https://www.reportlinker.com/p04884888/Fishmeal-Fish-Oil-Market-by-Source-Livestock-Application-Industrial-Application-and-Region-Forecast-to.html>>.

access to fish. This will have an impact on the landlocked economies that use fish as a raw material for medicinal purposes.

Under the current round of negotiations, the WTO members have been steadfast in their resolve to obtain an outcome on disciplines in relation to fisheries subsidies. As countries are preparing for the 11th WTO Ministerial Conference (MC11) in Argentina in December, negotiations have intensified.

The scheme of the paper is as follows. Section 2 will discuss fisheries resource management in view of the existing legal instruments and the role of the Regional Fisheries Management Organizations (*hereinafter* RFMO). Further, this section will briefly discuss the existing mandates on fisheries subsidies negotiations including the Doha and Hong Kong declarations. Section 3 of the paper will examine the current fisheries subsidies proposals and their implications for developing countries. Section 4 will delve into fisheries subsidies disciplines and its inextricable link to market access as opposed to sustainability. The following Section 5, based on the assessments from Sections 2 and 4, will discuss the implications of the WTO subsidies negotiations and the asymmetrical outcomes for developing countries. Finally, Section 6 ends with a conclusion.

Section 2: Fisheries Resource Management and Existing Fisheries Instruments

This section is divided into five subsections. Section 2.1 discusses the definitions and extent of the maritime boundaries, as stipulated under the United Nations Convention on the Law of the Sea, 1982. Section 2.2 explains the provisions on fisheries management under legally binding international instruments. Section 2.3 elaborates the role of RFMOs with respect to fisheries management. Section 2.4 provides an overview of the non-binding international instruments in relation to fisheries. Finally, Section 2.5 discusses the subsidies obligations entailed under the Agreement on Subsidies and Countervailing Measures.

Section 2.1: Maritime Boundaries under the UNCLOS

At the outset, it is important to understand the demarcation of the ocean area and the ownership and control that coastal States can exercise. The borders of the sea/ocean are known as maritime boundaries. The United Nations Convention on the Law of Sea, 1982 (*hereinafter* UNCLOS) has specified seven maritime boundaries. These are the internal

waters, territorial waters, contiguous zone, exclusive economic zone (*hereinafter* EEZ), high seas, continental shelf and international seabed (Hall S,2014, 655).

The internal waters comprise waters lying on the landward side of the baseline of the territorial sea.⁵ Under the UNCLOS, States have a sovereign right over their internal waters and can therefore regulate access to their ports (Hall S, 2014, 664).

The territorial waters or national sea is the belt of water adjacent to the land territory of a coastal State, over which the coastal State has sovereign rights. The UNCLOS allows Member States to establish the breadth of the territorial sea to a limit not exceeding 12 nautical miles as measured from the baselines.⁶ The convention clarifies that the “sovereignty of a coastal State extends, beyond its land territory and internal waters...to an adjacent belt of sea, described as the territorial sea”.⁷ States accordingly enjoy, in principle, all the rights of sovereignty over their territorial sea, including foreign vessels and persons located therein, that they enjoy in their land territory and internal waters. This sovereignty extends to the airspace above and subsoil beneath the territorial sea. (Hill, 2014, 666).

The EEZ is an area beyond and adjacent to the territorial sea which shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. As per Article 56(1)(a) UNCLOS, within the EEZ the coastal State has “(s)overeign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superadjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds”. In other words, a coastal State has the right to harvest fish and any other marine creatures and to prospect for and exploit any oil and mineral lying beneath or on the seabed. This also includes fish resources within the EEZ. Given that the right to engage in these activities is sovereign, the coastal State may exclude any person and any other State from pursuing activities, or permit activities of such persons, on such terms as the coastal State decides.

The high sea consists of an ocean area which lies beyond the internal waters, territorial sea, EEZ and archipelagic waters of coastal States. It represents about 64% of the world’s marine

⁵ Article 8, United Nations Convention of the Law of the Sea, 1982.

⁶ *Ibid*, Article 3.

⁷ *Ibid*, Article 2.

surface and 45% of the entire surface of the world (Hill, 2014, 686). The high sea is beyond the jurisdiction of any State. Under UNCLOS I (1958), the freedom of the high seas included the freedom of fishing, laying submarine cables and pipelines and the freedom of over flight. UNCLOS III (1982), added to this list the construction of artificial islands and other installations permitted by international law and the freedom to conduct scientific research.

In addition to stipulating the broad maritime zones, the UNLOS has laid down the legal framework for marine resource management. The following sub-section examines the extant legal instruments and the role of the RFMOs in fisheries management. The subsection argues against the adoption of stringent fisheries management obligations as part of the disciplines on fisheries subsidies at the WTO.

Section 2.2: Legally Binding International Instruments in Marine Resource Management

In the current negotiations on fisheries subsidies at the WTO, the proposals forwarded by the EU (TN/RL/GEN/181) and Indonesia (TN/RL/GEN/189) have made strong linkages to management measures as a condition for the special and differential treatment for developing countries. For other major developing countries the argument has been that fisheries management issues should not be part of the disciplines on fisheries subsidies. This is evident in the ACP proposal (TN/RL/GEN/192) that focuses on the core role of the WTO as a trade organization and its mandate on trade. The onerous legal obligations viz. fisheries resource management under the existing Multilateral Environmental Agreements must not be transposed into binding obligations under the WTO. In other words, fisheries management measures need to be outside the purview of the WTO.

At present, there are two major legally binding Multilateral Environmental Agreements that deal with fisheries resource management within the EEZ and the high seas – the UNCLOS and the UN Fish Stocks Agreement (1995). Given this context, it is essential to discuss the existing international legal instruments relevant for fisheries resource management.

a) UNCLOS

Under the UNCLOS, Member States have the sovereign right to explore, exploit, conserve and manage the fisheries in their EEZ. Most developing countries that are coastal states, must exercise caution in the fisheries negotiations - by particularly ensuring that their obligations

with regard to fisheries management must not compromise their sovereign rights as enshrined under the UNCLOS.

Article 61, UNCLOS of the “Conservation of Living Resources” states that “the coastal state, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that maintenance of living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal state and competent international organizations, whether subregional, regional or global are required to cooperate”. It further states that “ such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing states...”.

In practice, the management of resources within the EEZ is conducted through the formulation and development of national fisheries legislations and policies. In doing so, various economic, social and environmental factors are given due regard. Member States cooperate with regional or sub-regional agencies that assist them through the training of observers and providing scientific advice. On the basis of the said scientific advice, States develop national regulations for issuing licenses or permits to the local and foreign vessels for fishing in their EEZ.

Sub-regional systems of collaboration are present in different regions. For example, in the Pacific region, the regulation of fisheries in the EEZ is achieved through the assistance of sub-regional organizations such as the Forum Fisheries Agency (FFA), the South Pacific Community (SPC) and the Parties to the Nauru Agreement (PNA for per seine fisheries). The coastal states within a certain region are members of these sub-regional organizations. These organizations have the skills and expertise to provide management advice to the coastal States.

The FFA was established to assist coastal States to sustainably manage the fisheries resources within their EEZ. The FFA provides advisory and technical assistance as well as other support to its members, viz. formulating national regulations on their tuna resources. Member States also participate in regional decision making in tuna management through agencies such as the Western Central Pacific Fisheries Commission. The FFA provides advice on 1)

fisheries development which includes the development of capacity of members to sustainably harvest, process and market tuna to create livelihood, 2) fisheries management which provides policy and legal frameworks for sustainable management of tuna and 3) fisheries operations by supporting monitoring, control and surveillance of fisheries as well as treaty administration, information technology, vessel registration and monitoring.⁸ The members of FFA include Australia, Cook Islands, FSM, Fiji, Kiribati, RMI, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu.

The Pacific Community (SPC) within the Pacific region was established in 1947 and its principle role is to provide scientific and technical advice in the Pacific region. The SPC also provides scientific advice to member countries in relation to fisheries. The SPC's Oceanic Fisheries Programme serves as the Western Central Pacific Commissions (WCPFC) Science Services Provider and Data Manager.⁹ This relationship ensures that there is no duplication of effort in the area of collection and processing of scientific data on fishing activities in the region. The member countries of the SPC include, USA, Australia, New Zealand, American Samoa, Australia, Cook Islands, Federated States of Micronesia, Fiji, France, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, Northern Mariana Islands, Papua New Guinea, Pitacain Island, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu and Wallis and Futuna.¹⁰

The PNA controls the world's largest sustainable tuna purse seine fishery. Many of the PNA measures are the first in the world and these include high sea closures to fishing, controls on fish aggregate devices (FADs), protection of whale sharks and 100% coverage of per seine fishing vessels with observers. The focus on PNA efforts to sustainably manage tuna is the vessel day scheme. The PNA members agree on a limited number of fishing days for the year based on scientific advice about the status of the tuna stock. Fishing days are then allocated by country and sold to the highest bidder. The PNA members include Federated States of Micronesia, Kiribati, Republic of Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands and Tuvalu.¹¹

In relation to the management of the high seas, Article 118 of the UNCLOS stipulates that "States shall cooperate with each other in the conservation and management of living

⁸ See <www.ffa.int>.

⁹ See <www.wcpfc.int>.

¹⁰ See <www.spc.int>.

¹¹ See <www.pna.com>.

resources in the areas of the high seas. States, whose nationals exploit identical living resources or different living resources in the same area, shall enter into negotiations with a view to taking the measure necessary for conservation of the living resources concerned. They shall as appropriate, cooperate to establish sub-regional or regional fisheries organizations to this end.” This cooperation has resulted in the establishment of RFMOs.

b) UN Fish Stocks Agreement

The UNCLOS is complemented by the UN Fish Stocks Agreement (*hereinafter* UNFSA). The UNFSA’s objective is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory stocks through effective implementation. Article 5 of the UNFSA states that in order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal states and states fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the convention to “(a) adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization, (b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing states, and taking into account fishing patterns, the interdependence of stock and any generally recommended international minimum standards, whether subregional, regional or global....h) take measures to prevent or eliminate overfishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources...i) take into account the interest of artisanal and subsistence fisheries”.

Part VII on the UN Fish Stock Agreement recognizes the special requirements of developing countries. It stipulates that States shall give full recognition to the special requirements of developing states in relation to conservation and management of straddling fish stocks. It states that “(i)n giving effect to the duty to cooperate in the establishment of conservation and management measures, States shall take into account the special requirements of developing states in particular (a) the vulnerability of developing states which are dependent on the exploitation of living marine resources, (b) the need to avoid adverse impact and ensure access to fisheries by subsistent, small scale and artisanal fisheries and (c) the need to ensure

that such measures do not result in transferring directly or indirectly, a disproportionate burden of conservation action into developing states”¹².

In the application of the management of the fisheries resources in the high seas, these are governed by a number of RFMOs. The participants of the RFMOs comprise the Members and Cooperating Non-Members. However, it is imperative to note that the Conservation and Management Measure so adopted must not impose a “disproportionate burden” on developing states.

Section 2.3: Regional Fisheries Management Organizations

a) The Western Central Pacific Fisheries Commission (WCPFC)

In the Pacific region, the Western Central Pacific Fisheries Commission (WCPFC) is the established RFMO. The WCPFC was established by the Convention on the Management of Highly Migratory Fish Stock in the Western Central Pacific Ocean. The convention draws from the UNFSA and also takes into account the political, socio-economic, geographical and environmental characteristics of the Western Central Pacific Ocean region.

The Convention establishes a governing body known as the Commission which comprises representatives from members, cooperating non-members and participating territories (collectively, CCMs). The Commission holds annual meetings and is presided over by a Chairman and a Vice-Chairman, who are elected from amongst the membership. The members of the WCPFC include Australia, China, Canada, Cook Islands, the European Union, Federated States of Micronesia, Fiji, France, Indonesia, Japan, Kiribati, Republic of Korea, Republic of Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Samoa, Solomon Islands, Chinese Taipei, Tonga, Tuvalu, United States of America and Vanuatu.

The WCPFC Convention seeks to address problems in the management of high seas fisheries resulting from unregulated fishing, over-capitalization, excessive fleet capacity, vessel re-flagging to escape controls, insufficiently selective gear, unreliable databases and insufficient multilateral cooperation in respect to conservation and management of highly migratory fish

¹² Article 24(2), UN Fish Stocks Agreement, 1995.

stocks. Some other noteworthy features of the WCPFC are that it provides a framework for: (i) the participation of fishing entities in the Commission which legally binds fishing entities to the provisions of the Convention; (ii) the participation by territories and possessions in the work of the Commission; (iii) recognition of special requirements of developing States and (iv) cooperation with other RFMOs, whose respective areas of competence overlap with the WCPFC. The above features reflect the unique geo-political environment in which the Commission operates. The Commission provides support to three subsidiary bodies; the Scientific Committee, the Technical and Compliance Committee, and the Northern Committee.¹³

The Scientific Committee (SC) meets in August and ensures that the Commission has the best available scientific information on which to consider appropriate conservation and management measures. The Scientific Committee utilizes the services of expert fisheries scientists and its meetings usually comprise scientific and other related technical representatives. The SC also coordinates with the Technical and Compliance Committee on certain matters to ensure consistent advice is provided to the Commission.

The Technical and Compliance Committee (TCC) meets in October and is the “enforcement” committee of the Commission. The TCC reviews members’ adherence to Commission decisions and monitors individual countries’ implementation of those measures. The TCC also makes recommendations to the Commission with respect to encouraging, improving and enforcing compliance by members with the decisions of the Commission.

The decisions of the Commission are taken by consensus. In cases where decisions have to be taken by vote, usually on substantive matters, a “two-chamber system” applies. The FFA members of the Commission comprise one chamber, while the non-FFA members form the other chamber. Decisions are taken by a three-fourths majority of those present and voting in each chamber and no proposal can be defeated by two or fewer votes in either chamber.

To ensure compliance the WCPFC Convention mandates each member to establish and maintain a record of fishing vessels that are authorized to fish in the Convention Area, beyond that member’s area of national jurisdiction. The Secretariat maintains a central

¹³ See <www.wcpfc.int>.

database of each member's authorized list of fishing vessels, which acts as a verification tool to ensure that fishing vessels are legally operating in the Convention Area.

The WCPFC establishes a number of monitoring, control and surveillance (MCS) programmes to ensure the Members' compliance with conservation and management measures and other decisions of the Commission (such as in relation to requirements concerning data submission). One such programme is the Regional Observer Programme (ROP), which manages the placement of personnel on board fishing vessels to observe and collect data on fishing operations. Data collected by the observers is critical in assessing the effectiveness of measures, as well as providing scientists with important fishery independent information on the size and weight of the species taken. In addition, the role of an observer can be useful in ensuring compliance, through verification of fishing information such as vessel location, the time of year and species caught.

Complementing the ROP is the Commission's vessel monitoring system (VMS). Vessels fishing in the Convention Area are required to install a transmitting device known as an Automatic Location Communicator (ALC), which transmits a signal to a land-based receiving station where fisheries managers can view and track the location of the fishing vessels. This tool allows fisheries managers to better promote compliance with any area closures or restrictions that may be in place at any given time. It also helps scientists and managers understand the nature of fishing operations and where fishing is taking place. The Commission's Vessel Monitoring Control became operational in April 2009. By the end of 2009, over 2,000 vessels were reporting to the system.

A third important monitoring, control and surveillance element is the boarding and inspection of fishing vessels on the high seas by patrol vessels registered with the Commission by CCMs. These patrol vessels conduct routine operations throughout the Pacific Ocean. Under an important measure adopted by the Commission, members have agreed to allow their fishing vessels to be boarded and inspected by the patrol vessels of other members. Patrol vessels provide the Commission with an important tool with which to monitor and in some situations, take action against, fishing violations on the high seas.

Another critical component in the Commission's compliance is the list of vessels that have engaged in Illegal, Unregulated or Unreported (IUU) activities. Vessels that have been found, through sufficient evidence, to have committed violations as described by the Commission,

are placed on what is known as an “IUU List”. Members are prohibited from engaging in fishing activities or other related transactions with vessels that are on the IUU List. This can act as a strong incentive for countries to closely monitor and regulate the activities of their fishing vessels.

The WCPFC has concluded a number of Memoranda of Understandings (MOU) with related fisheries organizations, including the Inter-American Tropical Tuna Commission (IATTC), the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the Indian Ocean Tuna Commission (IOTC) and the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). These MOUs help foster a close relationship between the WCPFC and these organizations and ensures that the lines of communication are open to discuss matters of common interest.¹⁴

Table 1: Summary of CMM by WCPFC¹⁵

| CMM | Title | Description |
|---------|---|--|
| 2009-06 | Regulation on Transshipment | The provisions of this measure shall not apply to transshipment of highly migratory fish stocks where fish is taken and transshipped wholly in archipelagic waters or territorial seas. Transshipment in ports or in waters under national jurisdiction of a member shall take place in accordance with appropriate national laws. |
| 2009-10 | To monitor landing of purse seine vessels at ports so as to ensure reliable catch data by species | The Commission and the CCMs concerned shall work together to establish in 2010 an arrangement with a non-CCM to enable collection of species and size and compensation data from canneries in non-CCMs regarding purse seine catch in the convention area. Data obtained under the CMM shall be handled in non-public domain. (Retain confidentiality of catch data) |
| 2010-06 | A list of vessels presumed to have | The CMM defines what may constitute IUU, the information regarding the alleged vessel, the draft IUU list, |

¹⁴ See <www.wcpfc.int>.

¹⁵ See <www.wcpfc.int>.

| | | |
|---------|--|---|
| | carried out IUU | provisional and current vessel list of IUU, modification of vessel list including the removal of vessels. |
| 2013-06 | Criteria for developing Conservation and Management Measures | States that the CMMS must not result in transferring directly or indirectly a disproportionate burden of conservation action on small States. As such the new proposal on CMMs to be assessed against set criteria. In cases where transfer of disproportionate burden of conservation is present, this needs to be mitigated by phased or delayed implementation, exemption from specific obligations, proportional or rotational implementation and the establishment of compensatory funds. |
| 2013-07 | Special Requirements of Small Island Developing States | These includes capacity development including training, institutional support, technical training on data collection, scientific research, stock assessment, by-catch mitigation, fisheries science and administration. Assistance provided for Monitoring, Control and Surveillance, technology transfer, support for domestic fisheries sector including ensuring that SIDS and territories account for 50% of total catch and value of highly migratory fish stocks by encouraging investment and collaborative arrangement with SIDS. The action to not constraint coastal processing and use of transshipment facilities and associated vessels of SIDS to undermine legitimate investment in SIDS. The CCMs shall take action to eliminate barriers to trade in fish and fisheries products and promote activities of domestic fisheries sector and fisheries related businesses in SIDS and territories. |

b) International Commission for the Conservation of Atlantic Tunas¹⁶(ICCAT)

The ICCAT is responsible for the conservation of tuna and tuna-like species in the Atlantic Ocean and adjacent seas. The organization was established at a Conference of

¹⁶ See <<http://www.iccat.es/Documents/SCRS/Manual/CH1/CH1-ENG.pdf#page=3>>.

Plenipotentiaries, which prepared and adopted the International Convention for the Conservation of Atlantic Tunas signed in Rio de Janeiro, Brazil, in 1966. After a ratification process, the Convention entered formally into force in 1969. The Commission's work requires the collection and analysis of statistical information relative to current conditions and trends of the fishery resources in the Convention. About 30 species are covered by the Convention: Atlantic Bluefin.

The Commission is composed of Contracting Parties. The Commission may be joined by any government that is a member of the United Nations, any specialized UN agency, or any inter-governmental economic integration organization constituted by States that have transferred to it competence over the matters governed by the ICCAT Convention. There are 51 contracting parties to ICCAT. Some of which are the USA, Japan, South Africa, Ghana, Canada, France, Brazil, Korea, Cote D Ivoire, Angola, Russia, Gabon, Venezuela, Panama, China, United Kingdom, Namibia, Vanuatu, Guatemala, El Salvador and Honduras.

The Commission has also created a special status known as Cooperating Non-Contracting Party, Entity or Fishing Entity. Parties, entities or fishing entities that are granted this status have many of the same obligations, and are entitled to many of the same privileges, as are Contracting Parties.

The ICCAT has two standing committees: (1) Administration and Finance and (2) Research and Statistics. The Standing Committee on Research and Statistics (SCRS) recommends to the Commission all policy and procedures for the collection, compilation, analysis and dissemination of fishery statistics. The SCRS is entrusted with ensuring that the Commission has available at all times complete and current statistics concerning fishing activities in the Convention Area as well as biological information on the stocks that are fished. The Committee also coordinates various national research activities, develops plans for special international cooperative research programs, carries out stock assessments, and advises the Commission on the need for specific Conservation and Management Measures. The SCRS is composed of other subsidiary bodies that examine different species or different topics. These include the Species Groups (working groups that assess the status of the various stocks), and two Sub-Committees: Statistics and Ecosystems.

These types of fishery-dependent data are mandatory according to the ICCAT Convention and to various international agreements. The most basic data type that must be collected and

reported to the ICCAT is total annual catch by species, flag, stock area and gear. Other types of data such as catch/effort samples and size samples also need to be collected and reported to the ICCAT. Some of the specific types of data required by ICCAT is as follows:

- a) Data on Nominal Catches: Nominal catch estimates (targeted and by-catch species) and dead discards, classified by fishing fleet, species, year, gear, region, fishing waters (EEZ or high seas). Task I should include all catches, including recreational fisheries and those of research and training vessels of all tuna and tuna-like species and sharks, whether taken as target species or by-catch. Where fish are fattened in fish farms, Task I statistics should include the weight of the fish at the time of their capture. Where fish farm products are exported, the weight of fattened fish exported should be reported separately.
- b) Data on Catch & Effort: Catch (species catch composition) and effort statistics, classified by fishing fleet, gear, time strata and area strata, in accordance with the ICCAT coding system currently under development. This data may be estimates (always raised to the total catches) and/or observed data obtained through various data sources (log-books, auction sales, port sampling, landing ports, transshipments etc).
- c) Size samples: Size frequencies of the samples measured for each species classified by fishing fleet, species, gear, sample units, time strata, area strata. • Task II catch-at-size: Reported catch-at-size estimates classified by fishing fleet, gear, time strata, and area strata for the major species (bluefin, albacore, yellowfin, bigeye, skipjack and swordfish) and by sex in the case of swordfish,

Four Panels are responsible for keeping under review the species, group of species, or geographic area under its purview: Panel 1: Tropical Tunas (yellowfin, skipjack and bigeye); Panel 2: Northern Temperate Tunas (albacore and bluefin); Panel 3: Southern Temperate Tunas (albacore and southern bluefin); and, Panel 4: Other species (swordfish, billfishes, sharks). The Panels review scientific and other information and make recommendations for joint action by the Contracting Parties aimed at maintaining the stocks at levels that will permit maximum sustainable catches. The Panels may also recommend to the Commission studies and investigations necessary for obtaining information relating to its species, group of species, or geographic area, as well as the co-ordination of research programs by the Contracting Parties.

The compliance matters are reviewed by two different bodies: The Conservation and Management Measures Compliance Committee (reviews matters related to Contracting Parties), and the Permanent Working Group on ICCAT Statistics and Conservation Measures (reviews matters related to Non-contracting Parties). The main sources of data for compliance are from logbooks, observer programs, port sampling, factory/market sampling, and international trade (import/export) statistics. In some cases, remote systems such as telephone and mail surveys are used.

c) Indian Ocean Tuna Commission (IOTC)

The Indian Ocean Tuna Commission was established in 1993 through the Agreement Establishing the IOTC. There are 31 members of the IOTC. Some of the members are Australia, China, Comoros, EU, France, India, Indonesia, Japan, Kenya, Korea, Malaysia, Phillipines, South Africa, United Kingdom, Mauritius, Thailand, Seychelles and Tanzania. The Cooperating Non Contracting Parties are Senegal, Bangladesh and Liberia.

The sub-committees of the Commission include the Compliance Committee, the Administration and Finance and the Scientific Committee which provides scientific advice.

Table 2: Summary of CMMs by the IOTC Commission.¹⁷

| Resolution | Title | Description |
|------------------|---|--|
| Resolution 17/03 | On establishing a list of vessels pressured to have carried out IUU | The resolution provides definition of IUU fishing activities. The submission of information for IUU fishing activities, the draft IOTC IUU vessel list, the provision of IOTC IUU vessels list, the action against IUU vessels, the vessel delisting procedures, the publication of IUU vessel list and change of details of vessels including IUU list. |
| Resolution 17/06 | On establishing a program for transshipment by large | A program to monitor transshipment at sea applies only to large scale tuna long line fishing vessels. |

¹⁷ IOTC Resolutions Compendium.

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| | scale fishing vessels. | |
| Resolution 16/02 | On harvest control rules for skipjack tuna in the IOTC area of competence. | One of the provisions states that stock shall be assessed every three years. |
| Resolution 15/02 | Mandatory statistical reporting requirements for IOTC contracting and non-contracting parties. | Members to provide data on total catch by species and gear. The catch and effort data for the surface fishers, long line fishers and coastal fishers. |
| Resolution 15/04 | Concerning IOTC record of vessels authorized to operate in the IOTC Area of Compliance | The Commission shall maintain an IOTC Record of fishing vessels that are: a) 24 meter in length and above and b) in case of vessels less than 24 meters, those operating in waters outside the EEZ of the flag state and authorized to fish tuna and tuna-like species. It further states that the provision shall not apply to vessels less than 24 m in length overall operating inside EEZ of the flag state. |
| Resolution 10/10 | Concerning Market Related Measures | The CPC that imports tuna and tuna-like products from IOTC area or in whose ports those products are landed or transshipped should as much as possible collect and examine relevant data on imports, landing or transshipment. |
| Resolution 03/01 | On the limitation of fishing capacity of contracting parties and cooperating non-contracting parties | The Contracting Parties and Cooperating Non-contracting Parties (CPC) which have more than 50 vessels on the 2003 IOTC record of vessel shall limit in 2004 and following years the number of fishing vessels larger than 24 meters in length. The limitation number shall commensurate with the corresponding overall tonnage expressed |

| | | |
|------------------|--|---|
| | | in Gross Registered Tonnage or in Gross Tonnage and where vessels are replaced the over tonnage shall not be exceeded. |
| Resolution 99/02 | Call for action against fishing activities by large scale flag of convenience (FOC) in long line vessels | The CP and CNP of IOTC shall refuse landing and transshipment by the FOC vessels which are engaged in fishing activities diminishing the effectiveness of measures adopted by IOTC. The CP and CNP shall take every possible action consistent with their relevant laws and (i) urge their importers, transporters and other concerned business people to refrain from transacting in and transshipping tunas and tuna-like species caught by vessels carrying out FOC fishing activities; (ii) to inform their general public of FOC fishing activity by tuna long line vessels which diminish the effectiveness of IOTC CMM and urge them not to purchase fish harvested by such vessels and (iii) to urge their fish manufacturers and other concerned business people to prevent their vessels and equipment/devices from being used for FOC long-line fishing operators. |

Section 2.4: Non-Binding International Instruments in Relation to Fisheries

Apart from the binding agreements of the UNCLOS and UN Fish stock agreement in the area of fisheries governance, countries have also developed other guidelines and policies to manage fisheries resources. These are guidelines are without legal effect and thus non-binding on members. These include the following:

1. FAO Code of Conduct for Responsible Fishing
2. International Plan of Action (IPOA-IUU)

- International Plan of Action for reducing Incidental Catch of Seabirds in Longline fishing
 - International Plan of Action for Conservation and Management Measures (CMMs) of Sharks
 - International Plan of Action for Fishing Capacity
3. FAO Voluntary Guidelines for Securing Small Scale Fisheries
 4. FAO Agreement on Port State Measures

a) *FAO Code of Conduct on Responsible Fishing*

The FAO Code of Conduct on Responsible Fishing is a voluntary guideline. Article 2 of the guideline specifies the objectives of the code, which include *inter alia* to “establish principles, in accordance with the relevant rules of international law, for responsible fishing and fisheries activities, taking into account all their relevant biological, technological, economic, social, environmental and commercial aspects.” It further outlines the objective of “facilitating and promoting technical, financial and other cooperation in conservation of fisheries resources and fisheries management and development and the contribution of fisheries to food security”. The code also states in its objectives that the promotion and trade of fish and fishery products be in conformity with relevant international rules and avoid the use of measures that constitute a hidden barrier to trade.

Article 5 of the FAO Code of Conduct on Responsible Fishing provides for the consideration of Special and Differential Treatment which is known as the special requirements of developing countries. It states that the capacity of developing countries to implement the recommendations of the code should be taken into account. In this relation, to support the effective implementation, countries, relevant international organizations, whether governmental or non-governmental and financial institutions should give full recognition to the special circumstances and requirements of developing countries, including in particular the least developed among them and Small Island Developing States.

States, relevant intergovernmental and non-governmental organizations and financial institutions should work for the adoption of measures to address the needs of developing countries, especially in the areas of financial and technical assistance, technology transfer,

training and scientific cooperation and in enhancing their ability to develop their own fisheries as well as to participate in high seas fisheries, including access to fisheries.

On the management of fisheries resources, Article 7 of the code states that “within areas under national jurisdiction, states should seek to identify relevant domestic parties having a legitimate interest in the use and management of fisheries resources and establish arrangements for consulting them to gain their collaboration in achieving responsible fisheries”. As regards trans boundary fish stocks, straddling fish stocks, highly migratory fish stocks and high seas fish stocks, where these are exploited by two or more states, the states concerned, including relevant coastal states in the case of straddling and highly migratory stocks, should cooperate to ensure effective conservation and management of the resources. This should be achieved, where appropriate, through the establishment of a bilateral, sub-regional or regional fisheries organization or arrangement.

The formation of a sub-regional or regional fisheries management organization or arrangement should include representatives of States within whose jurisdictions the resources occur, as well as representatives from States which have a real interest in the fisheries or the resources outside national jurisdictions. In instances where a subregional or regional fisheries management organization or arrangement exists and has the competence to establish Conservation and Management Measures, those states should cooperate by becoming members of such organization or a participant in such arrangement and actively participate in its work. A state which is not a member of a subregional or regional fisheries management organization or is not a participant in a subregional or regional fisheries management arrangement should nevertheless cooperate, in accordance with relevant international agreements and international law, in the conservation and management of the relevant fisheries resources by giving effect to any conservation and management adopted by such organization or arrangements.

The FAO Code of Conduct on Responsible Fisheries further reinforces that the role of fisheries management is best suited under the competence of the regional and sub-regional organizations that are in existence. It further recognizes the Special and Differential Treatment that has to be accorded to developing states in relation to fisheries management and elaborates on such assistance including technical, financial and technology transfers.

b) FAO-IUU Plan of Action

The second voluntary guideline in relation to fisheries management is the FAO-IUU Plan of Action. The discussion will be focused on the International Plan of Action for Fishing Capacity given its links to capacity control and subsidies in the fisheries negotiations. It states that members should take measures to prevent or eliminate excess fishing capacity and should ensure that levels of fishing effort are commensurate with the sustainable use of fishery resources. In doing so, it provides for major strategies, which include conducting national, regional and global assessment of capacity and improvement of the capability for monitoring fishing capacity, the preparation and implementation of national plans to effectively manage fishing capacity and of immediate actions for coastal fisheries requiring urgent measures, the strengthening of regional fisheries organizations and related mechanisms and improved management of fishing capacity at regional and global levels. In developing of national plans and policies it further states that countries should develop, implement and monitor national plans of action for managing fishing capacity taking into account, *inter alia*, the effect of different resource management systems on fishing capacity.

In developing the national plan, the Code of Conduct on Capacity underscores that States should give due consideration, in the development of national plans, to socio-economic requirements, including the consideration of alternative sources of employment and livelihood for fishing communities, which must bear the reductions in fishing capacity. The code further states that in instances where it is found that the national plan to manage capacity is not necessary, states should ensure that the matter of fishing capacity is addressed in an ongoing manner in fishery management. At a minimum, in at least four years, States should review the implementation of its national plans to manage capacity for the purpose of identifying cost effective strategies for increasing effectiveness.

The Code also stipulates that States, when developing their national plans for the management of fishing capacity should assess the possible impact of all factors, including subsidies, contributing to overcapacity on the sustainable management of their fisheries, distinguished between factors including subsidies, which contribute to overcapacity and unsustainability and those which produce a positive effect or are neutral. The Code further emphasizes that States should reduce and progressively eliminate all factors, including subsidies and economic incentives and other factors which contribute directly or indirectly to

the build-up of excessive fishing capacity thereby undermining the sustainability of marine living resources, giving due regard to the needs of artisanal fisheries. In this connection, States should cooperate, where appropriate, through regional fisheries organizations or arrangements and other forms of cooperation, with a view to ensuring the effective management of fishing capacity.

c) FAO Voluntary Guidelines for Securing Small Scale Fisheries

The FAO Voluntary Guidelines for Securing Small Scale Fisheries recognizes the need for responsible and sustainable use of aquatic biodiversity and natural resources to meet the developmental and environmental requirements of the present and future generations. It focuses on small scale fisheries that need to have secure tenure rights to the resources that form the basis for their social and cultural well-being, their livelihood and sustainable development. It further encourages that all parties should provide support to small scale fishing communities. This support may be in the form of technical and financial assistance, exchanging and improving traditional knowledge of aquatic ecosystems. The implementation of the voluntary guidelines should be supported by States through South-South Cooperation, technical cooperation, financial assistance, institutional capacity development, knowledge sharing and exchange of experiences, assistance in developing national small-scale fisheries policies and transfer of technology.

d) FAO Port State Measures

The FAO Port State Measures (PSMA) is another agreement that is related to management of fisheries and IUU. Not all members of the WTO are signatories of the PSMA. The objective of this agreement is to prevent, deter and eliminate IUU fishing through the implementation of effective port state measures. It is only binding on members that are parties to the PSMA.

In its application, the agreement states that a party may in its capacity as a port state not apply this agreement to vessels chartered by its nationals exclusively for fishing in areas under its national jurisdiction and operating under its authority. The PSMA also recognized the sovereign rights of members over its jurisdiction. It states that “(n)othing in the Agreement shall prejudice the rights, jurisdiction and duties of parties under international law. In particular, nothing in this agreement shall be construed to affect: (a) the sovereignty of parties over their internal, archipelagic and territorial waters or their sovereign rights over their

continental shelf and in their exclusive economic zones; and the exercise by Parties of their sovereignty over ports in their territory in accordance with international law, including their right to deny entry thereto as well as to adopt more stringent port state measures than those provided for in this agreement, including such measures adopted pursuant to a decision of a regional fisheries management organization.”

Article 21 of the PSMA fully recognizes the special requirements of developing states. It states that parties shall provide assistance to developing state parties in order to a) enhance their ability, in particular the least-developed among them and small island developing states, to develop a legal basis and capacity for implementation of effective port state measures, b) facilitate their participation in any international organizations that promote the effective development and implementation of port state measures; and c) facilitate technical assistance to strengthen the development and implementation of port state measures by them, in coordination with relevant international mechanisms. It further states that parties shall cooperate to establish appropriate funding mechanisms to assist developing states in the implementation of the agreement.

It must be noted that the above are guidelines for member states to follow and are not legal instruments. Guidelines usually evolve with time and are not static. As per the EU’s proposal Special and Differential Treatment is conditioned to disciplines on fisheries management including the abovementioned guidelines. Developing countries need to be cautious of the EU’s proposal, which would translate the said non-binding guidelines into legally binding obligations under the WTO. Furthermore, some of the CMMs agreed to in various RFMOs, which are non-binding, are under discussion at the WTO fisheries negotiations, with the view to legally bind not just the members of the RFMOs but also other WTO members who are not part of the said RFMO. It clearly shows that implicitly the proponents of stringent fisheries management intend to discipline fisheries management as opposed to fisheries subsidies at the WTO. Further, in pursuance of this attempt they have imposed a disproportionate burden on developing states. This will be discussed *infra* in the paper.

Section 2.5: Agreement on Subsidies and Countervailing Measures (ASCM)

The ASCM is an agreement agreed to by the Members of the World Trade Organization that aims to discipline subsidies in non-agricultural products. The agreement provides set criteria

for the determination of subsidies and measures that Member States can take in the event of damage or injury incurred to its domestic industries due to subsidization. The agreement focuses on disciplines in relation to specific subsidies.

Article 1.1 of the ASCM states that a subsidy is said to exist if (i) there is a financial contribution by a government or any public body within the territory of a member, i.e. where (i) government practice involves a direct transfer of funds (e.g. grants, loans and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantee); (ii) government revenue that is otherwise due is forgone and not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure or purchase goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private sector body to carry out one or more of the functions from (i) –(iii).

Subsidies have been classified into three broad categories under the ASCM:

- A. Non-Actionable Subsidies – Subsidies which are non-specific and available to all industries, enterprises and regions within the jurisdiction of the granting authority.
- B. Prohibited Subsidies – Subsidies that are not allowed under the disciplines. For example subsidies related to exports, locational subsidies and capacity enhancing subsidies
- C. Actionable Subsidies - Subsidies that do not fall in the categories of non-actionable and prohibited subsidies. There are permissible yet actionable through countervailing measures.

The discussions on the disciplines on fisheries subsidies in all the proposals make reference to the ASCM and target disciplines in relation to specific subsidies within the fisheries negotiations.

Section 3: Mandates on Fisheries Negotiations

Section 3 is an excursus on the development of disciplines on fisheries subsidies at the WTO. It is bifurcated into three subsections. Section 3.1 discusses the mandates on fisheries subsidies negotiated during the successive Ministerial Conferences of the WTO. Section 3.2 stipulates other international developments that have spurred the prompt negotiation of

fisheries disciplines at the WTO. Finally, Section 3.3 analyses the proposals forwarded by States as the basis to negotiate fisheries disciplines at MC 11.

Section 3.1: WTO Mandates

In the context of the multilateral trading rules in the World Trade Organization, the issue of fisheries subsidies negotiation has been an ongoing debate since the Doha Mandate of 2001.

a) Doha Mandate

Annex D of the Doha Mandate on the *Rules on Anti-Dumping and Subsidies and Countervailing Measures including Fisheries Subsidies in Relation to Fisheries* recalls the commitment at Doha on “enhancing the mutual supportiveness of trade and environment, noted that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over fishing and Call on Participants to promptly undertake further detailed work, to inter alia, establish the nature and extent of those disciplines, including transparency and enforceability”.

The Doha mandate in relation to fisheries also stated that “appropriate and effective Special and Differential Treatment for developing and least-developed members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction and livelihood and food security concerns”.

b) Hong Kong Mandate

The importance of fisheries negotiations was further augmented in the Hong Kong Mandate of the WTO. The mandate given by Ministers in Hong Kong was to strengthen the disciplines on subsidies that contribute to overcapacity, overfishing and the provision of appropriate and effective Special and Differential Treatment(S&DT) for developing countries. The mandate refers in detail to the S&D treatment issue, stating that “appropriate and effective” Special and Differential Treatment for developing and least-developed members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns.

The Hong Kong Mandate reflects the reality of the challenge for developing countries. While requiring the prohibition of subsidies that negatively impact fisheries resources, the mandate recognizes that the fisheries sector is crucial for many developing countries, where the role of

fisheries subsidies cannot be excluded. As such subsidies disciplines and developmental aspirations are not contradictory and need to be reconciled to achieve meaningful results in the fisheries subsidies negotiations.

c) Nairobi Ministerial Declaration

In 2015, at the Nairobi Ministerial Meeting, the WTO Members had further aimed at reaching a conclusion on fisheries subsidies negotiations. However, due to divergences, an agreement could not be reached. On the sidelines, a group of 28 States had issued a Ministerial Statement on the importance of the fisheries sector.

Since Nairobi, WTO members have tried to intensify negotiations on formulating disciplines on fisheries subsidies. Members are steadfast in achieving an outcome on fisheries subsidies negotiations in Buenos Aires in December 2017. Some members have premised the negotiations on specifics of the SDG 14.6 goals which further make reference to the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing; elimination of subsidies that contribute to Illegal, Unreported and Unregulated fishing and refraining for introducing new subsidies.

Section 3.2: Mandates on fisheries subsidies outside the WTO

a) SDG 14.6 Mandate

SDG 14.6 in particular states that members are to prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing and eliminate subsidies that contribute to IUU 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 WTO fisheries subsidies negotiation.

b) UN Call for Action on Oceans Conference and WTOs Role

The Call for Action at the Oceans Conference in New York from 5-9 June 2017, also emphasised that members act decisively to 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, including through accelerating work to complete negotiations at the World Trade Organization on this issue, recognizing that appropriate and effective special and differential

treatment for developing and least developed countries should be an integral part of those negotiations.

Section 3.3: Assessment of Proposals on Fisheries Subsidies Disciplines at the WTO

The members of the WTO are discussing a compilation text on the Rules on fisheries subsidies. The consolidated text is a compilation of the 7 proposals by various proponents. In addition, a new proposal by China has been circulated to members in November, 2017. Table 3, contains the list of proposals by members.

Table 3: List of Fisheries Subsidies Proposal

| Proposals | Document Number |
|---|---------------------|
| 1. European Union | TN/RL/GEN/181/Rev.1 |
| 2. Indonesia | TN/RL.GEN.189/Rev.1 |
| 3. Norway | TN/RL/GEN/191 |
| 4. Argentina, Colombia, Peru Costa Rica, Panama, Uruguay (ACCPU) | TN/RI/GEN/187 |
| 5. African Carribean Pacific | TN/RL/GEN/192 |
| 6. Least Developed Countries | TN/RL/GEN/184 |
| 7. New Zealand | TN/RL/GEN/186 |
| 8. China | TN/RL/GEN/195 |

Source: www.wto.org

In the current negotiation on fisheries subsidies, the proponents focus on Articles 1 and 2 of the Agreement on Subsidies and Countervailing Measures (ASCM). Articles 1 and 2 of the ASCM provide for disciplines in relation to specific subsidies. Given that most developed countries (e.g EU) have shifted their specific subsidies to non-specific subsidies, the issue is whether in the outcomes of the fisheries subsidies negotiations, the developed countries would be making any substantial commitments. The EU provides 3.4 approximately billion euro of annual subsidies to its fisheries sector, nearly 1 billion euro comes from the EU budget notably in the form of structural aid. The national level aid, which is regulated at the EU level is estimated at 973 million euro per year. This is in addition to the foregone revenue resulting from fuel tax exemptions (approximately 1.5 billion euro per year).¹⁸ In addition, Table 4 provides a list of countries granting budgetary support to the fisheries marine capture.

¹⁸ Reforming EU Fisheries Subsidies, 2011.

According to the OECD data Australia, Canada, Japan, New Zealand and the EU provide high levels of budgetary support (non-specific subsidies) to the fisheries marine capture.

Table 4: Fisheries Marine Capture Budgetary Estimates for 2015

| Unit | US dollar |
|----------------|------------------|
| Year | 2015 |
| Australia | 120,891,070 |
| Belgium | 4,274,555 |
| Canada | 655,422,543 |
| Czech Republic | 235,805 |
| Denmark | 59,459,302 |
| Estonia | 6,023,009 |
| France | 91,155,662 |
| Germany | 34,298,168 |
| Greece | 37,022,339 |
| Iceland | 6,138,469 |
| Ireland | 34,291,900 |
| Japan | 1,196,601,137 |
| Netherlands | 7,454,300 |
| New Zealand | 47,483,044 |
| Norway | 197,036,369 |
| Portugal | 3,151,032 |
| Slovenia | 849,382 |
| Spain | 130,422,847 |
| Sweden | 64,084,217 |
| United Kingdom | 36,041,237 |
| United States | 1,820,680,000 |

(Source: OECD Database)

It is also interesting to note that the developed countries like New Zealand, who are strongly advocating for the elimination of specific subsidies in fisheries were once providers of these subsidies. Two policy instruments that were used by New Zealand to encourage the expansion of their domestic fleets into the EEZ included (1) package of financial incentives

to domestic industry including duty free vessel importation, concessionary interest and suspensory loans, investment allowances and tax incentives and (2) Joint Ventures which enabled domestic fishing companies to acquire technology and expertise, gaining access to international markets and supplying on-shore processing facilities. The foreign partners contributed equity to joint venture, provided capital for plant and equipment and assisted with access to international markets. The companies in New Zealand could charter foreign vessels. The chartered vessels were used to provide the supply of raw materials necessary to establish on-shore processing and distribution facilities. It was also recognized that the industry's rapid expansion was largely attributable to joint ventures. (Sharp, 1997, np).

For the USA, in 1960s¹⁹ the US Government had also provided substantial specific subsidies to the fisheries sector. The US Government has transferred fishing equipment to the private sector, presumably at no cost. In addition, the US implemented the Fishing Vessel Construction Differential Subsidy Programme and other subsidy programmes were instituted to promote the expansion and modernization of the American fishing fleet. Starting in 1957, the Fisheries Loan Fund was used to encourage the expansion of the fishing fleet, through the refinancing of old debt or the creation of new debt for vessel construction. This programme, evolved into the Fishing Vessel Obligation Guarantee Programme and then the Fisheries Finance Programme. The Vessel Mortgage Insurance Programme was established in 1960 to provide insurance for mortgages taken to finance fishing vessel construction.

In relation to the European Union, within the period of 2000-2006²⁰, the EU has granted subsidies of more than 480 million Euros for the construction of new vessels and more than 227 million euros for increasing processing capacities amounting to 707 billion euros for expanding fishing fleet capacity. In addition, fuel tax exemption remains an additional subsidy provided by the EU. In relation to the subsidization by region, from 200-2008²¹, EU has given a total of 34.5 million to subsidize its Mediterranean Tuna Fishing Fleet. With 23 million euros on construction of new boats and an additional 10.5 million euros given to modernise existing vessels where 1 million euros was used to decommission vessels.

The proposal of New Zealand, Iceland and Pakistan, includes a standstill provision which ironically states that no member shall introduce new or extend or enhances existing, subsidies

¹⁹ See <<http://www.fao.org/docrep/006/Y4647E/y4647e06.htm>>.

²⁰ See <https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/pro_wildlife_en.pdf>.

²¹ See <https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/pro_wildlife_en.pdf>.

within the meaning of Article 1.1 of the SCM Agreement, to the extent they are specific within the meaning of Article 2 of the SCM Agreement, that contribute to overfishing or overcapacity. While these prohibitions appear to be inspired by the Trans Pacific Partnership (TPP) text, it is a clear reflection of how developed economies are aiming to ensure that it retains the market dominance and the first mover advantage in the fisheries sector globally.

Most developing countries including the least developed countries are in the early stages of their fisheries sector development and these economies are not major contributors to the problem of IUU, their growth of the fisheries sector is likely to be hampered by disciplines on specific fisheries subsidies. Table 5 provides examples of specific subsidies provided by the developing countries between 2003-2009. It is also interesting to note that the United States is also a major provider of specific subsidies to its fisheries sector as well. The disciplines on fisheries subsidies will therefore affect some of the developed countries while benefitting a selected few that have a commercial interest in the sector.

Table 5: Illustrative List of Specific Subsidies provided by Developing Countries and USA

| Specific Subsidies | Year | USD (000) China | USD (000) India | USD (000) Russia | USD (000) USA |
|--|------|--------------------|--------------------|---------------------|------------------|
| Boat construction, renewal and modernization | 2003 | 24200 | 164688 | 100000 | 7567 |
| | 2009 | 6259 | 4035 | 148971 | 17720 |
| Fishery development and support services | 2003 | 125 | 26489 | 0 | 20297 |
| | 2009 | 28549 | 3751 | 0 | 14552 |
| Fishing port construction and renovation | 2003 | 64625 | 121259 | 280000 | 0 |
| | 2009 | 1232 | 4062 | 350069 | 0 |

| | | | | | |
|--|------|----------|--------|---------|--------|
| Marketing support and storage infrastructure | 2003 | 100 | 22219 | 0 | 28285 |
| | 2009 | 119 | 4035 | 159261 | 216732 |
| Tax exemption | 2003 | [126781] | 284 | [29385] | 29431 |
| | 2009 | 166399 | 123957 | 0 | 91313 |
| | 2009 | 235282 | 0 | 88615 | 13439 |
| Fuel subsidies | 2003 | 1814000 | 221710 | 491000 | 52061 |
| | 2009 | | | 1032504 | 242690 |
| | 2009 | | | | 85296 |
| Rural fisheries community development | 2003 | 191203 | | | |
| | 2009 | 2905 | | | |

Source: www.searoundus.org

A reduction of such specific subsidies will curtail the development of their fisheries sector. This will result in others exiting the market. If any balance in the fisheries negotiation outcomes in subsidies is to be achieved then developed countries should take major commitments toward eliminating or reducing their non-specific subsidies and vessel capacity.

The United States has expressed its interest to include inland fisheries as part of the fisheries subsidies disciplines. USA is not a major exporter of inland fisheries. Table 6 below shows the list of the major players for inland fisheries. These include New Zealand, the EU, Argentina, Korea and Japan. An inference in relation to market access would be that the disciplines for inland, level playing field would be created should such disciplines target the major providers of inland fisheries subsidies. In other words, it may allow for greater market entry of other players in the inland fisheries, including the USA.

Table 6: Inland Fisheries Exports in Local Currency by Countries

| Measure | | National Currency | | |
|-------------|--------------------|-------------------|----------------|-------------|
| Species | | GRAND TOTAL | | |
| Year | | 2012 | 2013 | 2014 |
| Country | Unit | | | |
| Denmark | Danish Krone | 2,054,427 | 2,031,519 | 2,199,005 |
| New Zealand | New Zealand Dollar | 3,527,297 | 3,530,845 | 3,040,182 |
| Estonia | Euro | 5,164,258 | 4,640,643 | 4,706,715 |
| Sweden | Swedish Krona | 102,927,827 | 79,003,686 | 82,666,838 |
| Argentina | Argentine Peso | 80,616,900 | 100,109,330 | 164,080,948 |
| Finland | Euro | 10,530,000 | .. | .. |
| Germany | Euro | 22,702,680 | .. | .. |
| Greece | Euro | .. | .. | .. |
| Hungary | Forint | 1,073,754,980 | .. | .. |
| Iceland | Iceland Krona | 29,600,000 | .. | .. |
| Japan | Yen | 18,022,000,000 | 16,944,000,000 | .. |
| Korea | Won | 70,188,087,000 | 50,511,023,000 | .. |

Source: OECD database

In relation to overcapacity, the developed countries have a greater fleet capacity in relation to the number of vessels and the gross tonnage. Table 7 shows the ratio of fleet capacity in tonnes per vessel for countries. For EU, New Zealand and Argentina the ratio of gross tonnage per number of vessel are significant..

Table 7: Fleet Capacity Gross Tonnes per Vessel by Country

| Measure | Gross tonnage (GT) | | Number of Vessels (NV) | | GT/NV |
|----------------|--------------------|-----------|------------------------|--------|-----------|
| | Total Vessels | | Total Vessels | | in tonnes |
| Unit | Tonnes | | Number | | |
| Year | 2013 | 2014 | 2013 | 2014 | 2014 |
| Country | | | | | GT /NV |
| European Union | .. | 1,725,938 | .. | 87,445 | 19.74 |
| Norway | 381,146 | 392,468 | 6,126 | 5,939 | 66.08 |
| Spain | 372,617 | 379,209 | 9,872 | 9,895 | 38.32 |
| United Kingdom | 198,560 | 198,598 | 6,481 | 6,415 | 30.96 |
| France | 166,561 | 177,860 | 7,158 | 7,143 | 24.9 |
| Argentina | 179,806 | 167,646 | 902 | 911 | 184.02 |
| Italy | 163,892 | 163,788 | 12,691 | 12,675 | 12.92 |
| Netherlands | 148,934 | 150,097 | 904 | 864 | 173.72 |
| New Zealand | 122,111 | 119,620 | 1,367 | 1,334 | 89.67 |
| Greece | 78,103 | 76,866 | 15,860 | 15,883 | 4.84 |
| Denmark | 65,271 | 69,138 | 2,632 | 2,455 | 28.16 |
| Ireland | 63,795 | 64,251 | 2,164 | 2,202 | 29.18 |
| Germany | 61,061 | 61,794 | 1,530 | 1,538 | 40.18 |
| Australia | 35,713 | 40,741 | 306 | 309 | 132 |
| Poland | 33,949 | 33,729 | 899 | 832 | 40.54 |
| Finland | 16,524 | 16,467 | 3,219 | 3,210 | 5.13 |
| Belgium | 14,645 | 14,985 | 80 | 82 | 182.74 |
| Korea | 607,224 | .. | 71,287 | .. | |
| Japan | .. | .. | 253,017 | .. | |
| Canada | .. | .. | 18,452 | .. | |

Source: OECD Database and authors own calculation

The developed countries have the capacity to fish and with reduction and or elimination of subsidies in global fisheries trade, the developed countries will once again enjoy greater policy space while the developing countries will pay a higher price. This is similar to the

situation of the agricultural fisheries subsidies. The latter is an issue which the developing countries are still trying to reverse to date.

There have been discussions on the need to combat IUU and thus the elimination of subsidies being the reason. It is obvious fact that no country whether developed or developing favour IUU and it is a problem that requires a solution. However, to deal with responsible fisheries WTO can only discuss this from a trade perspective with actual solutions that do not undermine development.

In some of the proposals (EU and Indonesia), the Special and Differential Treatment for developing countries are linked to conditions on fisheries management. In the EU proposal in order for developing countries to develop their fishing capacity, the vessel benefitting from the subsidy should not target fish stocks that are in an overfished condition; the targeted stocks are managed on the basis of the best available science at the disposal of the concerned member, consistent with the conservation and cooperation obligations under the relevant international law, as reflected in UNCLOS, conservation and management measures of competent RFMOs, and generally accepted standards for conservation and management of fisheries resources and the subsidizing member has a management plan for the fleet segment it intends to subsidise. Furthermore, the EU defines the management plan in a footnote of its text and also aims to legally bind the guidelines and generally accepted standards which otherwise only reference documents such as the FAO Code of Conduct. These are management conditions that are in fact aimed to deter the development of the fisheries sector for the developing countries.

As highlighted earlier in this paper, the management of fisheries resources is complex. There are respective RFMOs that are specialised to discuss issues in relation to management measures including undertaking fish stock assessment. In the context of the WTO negotiations these issues should be left to the RFMO. The proposal submitted by China recognizes the role of the RFMO. On the other hand from the EU and the Indonesian proposal and to some extent the New Zealand proposal on transparency, the provision requires members to notify CMM and catch data by species which are all linked to management measures. These are measures that are discussed in the RFMOs. Refer to Tables 1 and 2 on the list of CMMs.

Members need to be cautious as there is an explicit and implicit attempt to push resolutions from the RFMOs in the WTO fisheries subsidies text. In other words, the WTO is sought to

be used as a forum to implement fisheries management measures, mainly prevailing in RFMOs. As discussed earlier, in many of the RFMOs for example the WCPFC and the IOTC, CMMs are negotiated and agreed by member states. As such WTO is further sought to be used as a forum by the developed countries to obtain the negotiating leverage on management issues on which they may not be able to obtain a consensus in the RFMOs. In the context of the RFMOs, the conservation and management measures are negotiated decisions. In the RFMO forum the developed and developing countries negotiate CMMs taking into account the special requirements of the developing countries. In the event where EU and the developed countries may not be able to negotiate and achieve the required outcomes of a CMM in the RFMOs, they will utilize the WTO dispute settlement to challenge the measure and impose on the developing countries.

For example, on the issue of transshipment at sea, at the WCPFC, regulation 2009-06 states that the measures shall not apply to transshipment of highly migratory fish stocks where fish is taken and transhipped wholly in archipelagic or territorial seas. Transshipments in ports or in waters under national jurisdictions of a member shall take place in accordance with appropriate national laws. Furthermore the IOTC Resolution 17/06 states that a program to monitor transshipment at sea applies only to a large scale tuna long line fishing vessel. In the WTO, transshipment issues are also covered in the fisheries text including extending it to small scale fishing activities.

Another example is the CMM 2009-10 of the WCPFC. It provides for the monitoring the landing of purse seine vessels at ports so as to ensure reliable catch data by species. The CMM further states that such information will be collected from the canneries and shall be handled in “non-public domain” i.e. kept confidential. Catch data is important to determine the commercial interest of competitors as well. For the EU, ACCPU and New Zealand, the provision of such data in the public domain through WTO transparency mechanisms is a means for them to provide access to such data for their industries to have competitive advantage in catch as well. The IOTC Resolution 15/02 provides the caveat for mandatory statistical reporting requirements for IOTC contracting and non-contracting parties. The members are required to provide data on total catch by species and gear (catch and effort data only) for surface fishers, long line fishers and coastal fishers.

In the 9th Regular Session of the WCPFC in 2012 a resolution was agreed by members on “best available science”. In the EU proposal in the WTO, the members are discussing the

issue of “best available science” within the context of the fisheries subsidies negotiation, although this is an issue for the RFMOs.

This highlights (1) the strategy of the developed countries to bring the management issue, which is well placed in the RFMOs, into the WTO and impose it on all members and (2) the issue of “cherry picking” certain decisions of the RFMO to have it implemented legally in another forum. Should members plan on using RFMO resolutions in the WTO fisheries subsidies, the appropriate resolution would be the “Resolution on the Reduction of Overcapacity” of the WCPFC agreed on 12 December 2005. The resolution calls for developed countries to reduce overcapacity by a certain period of time. The developing countries must therefore exercise caution in the fisheries subsidies negotiations

In relation to Illegal, Unreported and Unregulated fishing (IUU), most of the proposal have made a direct reference to FAO Code of Conduct on IUU with exception to the ACP proposal that has an Annex listing and also refers to the national legislations. One must be cognizant that the FAO Code of Conduct on IUU is a guideline which may evolve in future. As such a direct importation of the guidelines may lock further space for discussions should situations evolve? Secondly, members should also be provided the option to be guided by their national laws and regulation. The FAO Code of Conduct and most Members’ legislation separates the definition of I, U, U. This is a practical means of resolving and reaching some level of convergence. In the proposal from China and the ACP it moves away from this position of explicitly referencing the Code itself. Both proposals provide room for determination as per the national legislation and thus retaining policy space. The Chinese proposal on IUU in its determination further references the RFMOs procedures which are consistent given that many RFMOs have set guidelines and procedures for listing and delisting vessels. For example the WCPFC CMM measure 2010-06 and the IOTC Resolution 17/03 both provide for definition of IUU, vessel listing and delisting procedures and the required information to be submitted by parties concerned.

It is obvious that no member country would deliberately allow for illegal fishing. In order to combat IUU in relation to management these need to be discussed outside the WTO in the relevant forums. As highlighted earlier, member countries collaborate at the national, sub-regional and regional level with Monitoring, Control and Surveillance and penalties.

Another important consideration in relation to IUU that needs to be examined is the need to provide technical and financial resources to the developing countries to improve their

regulation and reporting. This could be through legislative changes, having observers on the boat or GPS systems etc. on the boats. This should therefore be part of the Special and Differential Treatment. Some members are debating the possibility of providing a transitional period for countries to adapt to measures of responsible fishing. Time period is one aspect that is appreciated; however, the technical and financial assistance to implement effective and responsible fisheries measures is even more critical.

Members need to be cautious about the acceptance of unilateral IUU measures that may be used by some as a disguised restriction to favour their own fishing vessels over others, should such liberty be provided. The EU proposal also makes a reference to generally accepted standards. At present the EU and the United States impose unilateral measures in relation to IUU. The EU applies trade related measures to combat IUU in the form of yellow card (identification of non-cooperating countries) and a ban on imports from the particular country. These are applied broadly to all fish and all fleet of a particular country regardless of the IUU fishing that triggered the identification, which means it is more likely to have a disproportionate impact on small-scale fisheries. The US IUU trade related measures are designed to target only fleet, species and product type directly tied to IUU that has given rise to the identification. As such the EU system is more opaque than the US system. (Hosch G, 2016)). It is therefore imperative for members to ensure that while developing the disciplines of fisheries subsidies, unilateral measures such as that of the EU are not multilateralized. As such these measures should not be used as a disguised restriction to trade while setting disciplines on fisheries subsidies.

On the issue of IUU and the maritime boundaries, the ACP proposal is the one that should be favoured as it carves out the EEZ. There cannot be a presumption that within the EEZ the Member States are committing IUU or encouraging such practices. Member States are the owners of their EEZ and have their national and sub-regional collaboration and management measures in place to combat IUU. This again is an issue of management that should be discussed in the relevant forums outside the WTO. Under the UNCLOS, coastal states have a sovereign right over their EEZ and have the obligation to manage the resources. Members need to be cognizant of their legally binding rights under the UNCLOS in relation to their EEZ and these rights must not be compromised or diluted. The Agreements Establishing the RFMOs and the resolutions passed by the RFMOs, for example the resolutions of the WCPFC and the IOTC, recognize the sovereign right of a coastal state over its EEZ in managing its fish resources. Another strategy that is clear in the fisheries negotiations is that

the developed countries are aiming to limit the sovereign rights of Member States in their EEZs.

On the issue of transparency, the proposals of New Zealand, Pakistan and Iceland, require members to submit information which is beyond the existing notification requirements under the ASCM. The highly ambitious transparency obligations proposed by New Zealand, Pakistan and Iceland are mirrored in the Trans Pacific Partnership (TPP) Agreement. The proposal of the ACCPU also has a similar expanded list, which is not favourable to the developing countries.

Given that the discussions are on fisheries subsidies, the transparency obligations should be in accordance with Article 25.3 of the ASCM. The latter requires information pertaining to the form of subsidy, the subsidy per unit, or in case where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year), the policy objectives and or purpose of a subsidy, duration of a subsidy and/or any other time-limits attached to it and statistical data permitting an assessment of the trade effects of a subsidy. Furthermore, footnote 34 of the ASCM also recognizes that nothing in this notification provision requires the provision of confidential information, including confidential business information.

New Zealand, Iceland and Pakistan's proposal on transparency goes beyond the ASCM. The additional information required is part of fisheries management. Information related to management should be discussed in the RFMO. This includes the information related to "vessel and operators fishing in areas beyond national jurisdiction for which subsidy is granted", "the catch data by species", "the fleet capacity in the fishery", "the status of the stock for which the subsidy is granted, "the conservation and management measures in place for the relevant fish stock" and the EU's inclusion of a "fishing capacity management plan." The transparency obligation requires data on the export and import per species. The data may also be used by member countries for commercial interests. As such as per the ASCM, a qualifier has to be included in the text to ensure that the privacy laws of the Member States are respected and that commercially confidential information is not subjected to the disciplines.

The broad basis of Special and Differential Treatment should not only provide differentiated timelines for developed and developing countries but must include additional flexibilities to ensure the development of the fisheries sector. As per the WT/COMTD/W/196, there is a six-

fold typology to Special and Differential Treatment. This includes the provisions aimed at increasing trade opportunities to developing country members, provisions under which WTO members should safeguard the interests of developing country member, flexibility of commitments of action, and use of policy instruments, transitional time-period, technical assistance and provisions in relation to LDC members.

The SDT sought to be incorporated in the WTO fisheries disciplines, is also an integral element in other binding and non-binding agreements as discussed in Section I. These are called “Special Requirements of Developing Countries”. In the RFMOs, members recognize SDT with the term of “disproportionate burden”. In several RFMO resolutions on development of measures, the Special and Differential Treatment of developing countries is taken into account. The WCPFC Resolution on the special requirements of developing countries lists a number of areas for technical and financial assistance for developing countries in relation to fisheries. These also extend to enhanced market access for fish and fish products from the developed countries.

Some of the fisheries texts that are currently under discussion have accommodated different levels of SDT. However, some are more burdensome linking it to management. As a result it is futile in terms of its operationalization. The EU SDT is stringent and links conditions to management practises and plans of countries. The attempt of the EU is to discipline fisheries management within the WTO. The Indonesian proposal on SDT also follows a similar path. Such stringent conditions would make it impossible for small economies with limited resources to develop their fisheries sector. Through such stringent linkages, the EU and Indonesian proposals are aiming to limit the entry of fishers from countries into their fisheries sector. As discussed previously, there are relevant international organizations that deal with management measures more effectively and the WTO is not the appropriate forum to this effect. This reflects a pure market deterrent strategy by the proponents.

The ACP proposal of SDT has a pro-development agenda for the fisheries sector, mindful of the special needs of the developing and least developed countries. The ACP proposal provides for transition periods for the implementation of the reporting and regulatory obligations. In tandem with this, the LDC proposal recognizes the rights of developing countries under the UNCLOS and therefore allows for developing countries to grant and maintain subsidies for (i) fishing activities related exclusively to artisanal and small scale fisheries or the subsistence and livelihood of the fishermen and their families. It also allows

for the granting and maintaining of subsidies for fishing activities which exclusively exploit fish stock within the EEZ of the Member granting the subsidy; and for fishing activities, which exclusively exploit quotas or any other rights, established by an RFMO or a regional fisheries management arrangement. In relation to the RFMO quotas and its exclusion, the ACP proposal is similarly aligned with the LDC proposal.

The ACP proposal also carves out small scale commercial fishing. The ACP has further enhanced the SDT on account of the capacity constraints of developing countries and LDCs. It requires the developed countries, developing countries in a position to do so and relevant agencies, to provide targeted technical assistance and capacity building to developing countries, in particular LDCs and small, vulnerable economies (SVEs). SDT is further provided in the form of establishing reporting mechanisms and regulations to prevent unreported and unregulated fishing, conducting stock assessment and assistance to provide Monitoring, Control and Surveillance of stock as well as assistance in research and development.

The pro-development stance of the ACP proposal is strengthened by the inclusion that the operationalization of disciplines on fisheries subsidies should not impede the ability of developing countries and LDCs to develop and diversify their fisheries sector. This is a critical element in the text to avoid the notion of IUU measures being used as a disguised restriction to trade in light of the unilateral IUU measures implemented by developed countries. It also seeks to avoid repeating those mistakes in fisheries subsidies negotiations, which resulted in asymmetries and imbalances in the Agreement on Agriculture.

Section 4: Fisheries Policies; Subsidies and Market Access

Section 4.1 is devoted to assessing the two kinds of fisheries policies, namely the open access and the limited entry policy. The following subsection examines whether the momentum to discipline fisheries subsidies is in fact a market access issue and not a sustainability concern.

Section 4.1: Fisheries Policy

a) Open Access Policy

Another critical element of the disciplines on fisheries subsidies is the Open Access and Limited Entry Policies in the fisheries sector. Kahn (2015), explained the difference between ‘open access’ and ‘limited entry techniques’ in fisheries policy extensively. The Open-Access

Regulations modify the fishing behaviour of the participants in the fishery without directly affecting their participation. The Open Access regulations typically raise the cost of fishing. However, they may indirectly affect the participation in the fishery by causing the marginal fisher to become unprofitable and leave the fishery. It is designed to maintain fish stocks at some target level. Fish stocks consistent with maximum sustainable yield were often the theoretical target of fishery management although often management schemes were not put into place until stocks had shrunk well below the level consistent with the maximum sustainable yield. Open access regulations generally take the form of restrictions on how fish may be caught, which fish may be caught, where fish may be caught and how many fish may be caught.

The primary effect of open-access regulations is to raise the cost of catching fish. If individual fishers are already operating in the most cost effective manner, any restriction of their activity must raise the cost of catching fish. On the other hand, these regulations generally increase the size of the fish population, and consequently lower the cost. The increase in cost generated by such regulations has the impact of eliminating the rent in the fishery at a lower level of fishing effort than would occur without the restriction. In other words, the increase in cost created by these restrictions make it less profitable to be involved in fishing, because the restrictions increase the resources required to catch a given amount of fish.

At the same time, the increase in fish populations associated with the regulations and reduced level of effort serve to reduce the cost of catching a given amount of fish. The net effect of the regulations, however, will be to increase the cost of fishing. Finally, the impact of the regulations on the catch of fish must be examined. If the current fish population is greater than the population associated with the maximum sustainable yield, then the restriction will serve to reduce catch. However, if the fishery is highly exploited and the current fish population is lower level associated with the maximum sustainable yield, then the restriction will increase the catch. Thus, open access fishing raises the cost of protecting the fish stock. As a result it exacerbates the problem by devoting too many resources to the fishery an imposing additional inefficiencies.

b) *Limited Entry Policy*

The Limited Entry Technique (LET) policy is similar to the open access policy in the sense that it increases the costs for the fishers. For example taxes and other types of incentives may

raise the cost of fishers but they do so in a manner that the extra cost represents a transfer within the society rather than a loss of resources.

In relation to fisheries a limit is imposed on the total catch and each fisher in the fishery is allocated a portion of this total catch. The initial allocation can be conducted through several means, for example by auction, lottery or based on previous catch data. This allocation is with the individual fishers quota and he or she can sell all or part of the quota. The level of effort is limited because the cost of effort increases as people must now buy the quotas to fish. Note that this increase in cost has occurred without increasing the amount of resources needed to catch the fish. This cost increase serves to eliminate the disparity between the social and private cost of fishing associated with the open-access externality.

The limited entry technique can also be structured relative to effort instead of catch. For example, the fishery management could decide that only a fixed number of boats would be allowed in the fishery. In other words, this is a means to control the capacity of boats that enter into a fishery. (Kahn, 2015,np)

Table 8: Impact of Open Access and Limited Entry Technique in Fisheries

| Variables | Open Access | LET |
|----------------------------------|--------------------|-------------------|
| Cost of Fishers | Increase | Increase |
| Resources used in Fishing | Increase | Decrease |
| Population of Fish | Increase | Increase |
| Catch of Fish | Increase/Decrease | Increase/Decrease |
| Consumer/Producer Surplus | Increase/Decrease | Increase/Decrease |

(Source: Kahn, 2015,np)

Section 4.2: Fisheries Subsidies disciplines as a Market Access Issue

In the current fisheries negotiations at the WTO, the members are working towards developing a set of rules to discipline fisheries subsidies. The developed country members have shown a strong concern on the depletion of the fisheries resources and thus are advocating sustainability of the resources at the WTO. On the other hand, the membership at the WTO shares the common view that sustainability of the fisheries resources is critical to

the food security and livelihood of the developing and least developed countries. However, there are also concerns with respect to the economic growth and development of the fisheries sector in relation to the disciplines on fisheries subsidies. These concerns of the developing countries are also enshrined in the existing fisheries instruments under the “special requirements of developing countries”.

Grynberg 2003 further reveals the motives of the developed countries in the fisheries subsidies negotiation. “In the case of the fisheries, proponents are a mixed collection of countries with commercial interest and those which believe that fisheries subsidies disciplines will constitute an important step towards environmental sustainability. With the friends of fish group, substantial and clearly demonstrable commercial interest is at stake for Iceland and New Zealand. Both the nations have a highly efficient and competitive fishing fleet but neither carry significant bargaining power. Iceland fisheries constitutes 75% of export earnings and hence the government simply cannot compete with other WTO members on subsidies i.e., the Icelandic economy cannot subsidise. In the case of New Zealand, which has pursued a policy of aggressive unilateral liberalization, there is no opposition to such subsidies.

In other words New Zealand and Iceland will both benefit from the exit of other players, which are currently subsidising from the fisheries market. The EU has reduced its subsidies over time and has achieved the required level of fleet capacity. It is therefore advocating for an even stronger position in relation to the elimination of subsidies, as it will also benefit from less players in the fisheries market. The issue of sustainability is used as a disguise for enhancing market access in the sector. If the EU and the other so called friends of fish were genuinely interested in fish stock depletion, fisheries would have been a component of the disciplines on Agreement on Agriculture. However “during the Uruguay round, political opposition to the inclusion of fisheries under the reduction on Agreement on Agriculture came from the EU and countries called the “friends of fish”. (Grynberg, 2003,505).

The application of the disciplines on fisheries subsidies is therefore an application of the LET fisheries policy that will provide a competitive advantage and increase the market share of the developed countries such as the EU, Iceland and New Zealand. If caution is not exercised in the fisheries negotiations, the resultant disciplines would mirror the loss of policy space of the developing countries and asymmetric outcomes as seen in the context of the agriculture negotiations in the Uruguay Round.

The developed countries held high levels of agricultural support during the Uruguay round agreement in 1994. Even though ceilings on some type of subsidies were applied under the agreement, most of the developed countries have retained the high level of support through “box shifting” i.e. moving most of their subsidies into the “Green Box” under which unlimited subsidies can be provided. Even though the Green Box entitlements are available to the developing countries, however, due to resource constraints (fiscal budgetary restraints), they are unable to utilize them fully. As a result, imbalances exist in the context of agriculture to date.

Under the WTO negotiations, the existing proposals on the table from the European Union, New Zealand, Pakistan and Iceland and Latin America focus on disciplines on fisheries subsidies in relation to specific subsidies as opposed to horizontal subsidies. This is a replication of the agriculture subsidies negotiations. According to the OECD database on subsidies, the EU member countries have progressively, over the years, moved their specific subsidies into budgetary support. The EU provides approximately 3.4 billion of annual subsidies to the EU fisheries sector, nearly 1 billion of which is from the EU budget in the form of structural aid. At the national level aid is estimated at 975 million and this is in addition to the lost revenue resulting from fuel tax exemptions. Few EU fleets are profitable with no public support. (Reforming EU Subsidies, 2011, np). For small economies the fisheries sector is unorganized and small, thus government support is required. Developed countries have managed shift to non-specific fisheries subsidies from specific subsidies. As a result, under the current disciplines on fisheries negotiations, the developed countries will not be making any major substantial commitments. On the other hand, the developing countries which still provide specific subsidies would be “caught in the net” i.e. required to discipline subsidies by 2020, which is a span of three years. For countries such as the EU, it took more than 20 years to undertake their fisheries sector reforms.

At present there are several world marine producers in the fisheries market. Table 9 shows that the major worlds marine catch producers are China (17.7%), Indonesia (6.54%), Peru (6.28%), USA (5.6%), EU-28 (5.17%), India (4.92%), Russia (4.65%), Myanmar (4.05%), Japan (4%), Vietnam (3%), Philippines (2.5%), Chile (2.45%), Norway (2.38%), Thailand (1.97%) and the rest of the world (28.75%). The data clearly shows the market share in fisheries from the top 14 countries. Out of these 9 economies are developing countries. The major competing developed countries are USA, Japan and Norway.

Table 9: Total Catch of Worlds Marine Catch Producers

| Country | Marine Catch (Volume in tonnes) | Marine Catch (%) |
|--------------------|--|-------------------------|
| China | 16557949 | 17.7 |
| Indonesia | 6120137 | 6.54 |
| Peru | 5876322 | 6.28 |
| USA | 5242379 | 5.6 |
| EU-28 | 481560 | 5.17 |
| India | 4645182 | 4.92 |
| Russia | 4351209 | 4.65 |
| Myanmar | 3786840 | 4.05 |
| Japan | 3741959 | 4 |
| Vietnam | 2803800 | 3 |
| Philippines | 2335404 | 2.5 |
| Chile | 2288874 | 2.45 |
| Norway | 2228513 | 2.38 |
| Thailand | 1843747 | 1.97 |
| Others | 26899394 | 28.75 |

(Source: EC Facts and Figures in Common Fisheries Policy, 2016).

The removal of subsidies will translate into some of the dominant players exiting the fisheries market. As previously mentioned, given that the EU and the “friends of the fish” have shifted most of their specific subsidies to non-specific categories, the removal of specific subsidies by others will benefit the developed countries. It will boost their competitive edge in the global fisheries market.

The disciplines on fisheries subsidies will act as a deterrent to the entry of vessel owners from developing countries, to access the fisheries resources. For small developing coastal states the fisheries activities include (i) revenue generation from access fees from distant water fleets, (ii) domestic and foreign fishers operating for export in the EEZ and territorial sea to supply canneries, loining facilities and domestic processing facility and (iii) artisanal fishers within the territorial sea for domestic and export markets. Further, in the fisheries sector many small

vulnerable coastal states governments have been attempting to localise the distant water fisheries as well as developing linkages between inshore fishing in the territorial sea and other sectors of their economies, which includes tourism. (Grynberg, 2003, 504).

As a result, the disciplines on fisheries subsidies will impede the development of the fisheries sector for small coastal states within the large EEZ. For low income poor resource fishers, the disciplines on subsidies will increase their cost of operations. Most of the fishing vessels for low income resource poor fishers are traditional and not motorised. These low income resource poor fishers will further be marginalised due to elimination of subsidies. It will prevent the small fishers from engaging in economical fisheries activities for their livelihood and food security purposes.

The Government would not be in a position to assist the small commercial fisheries sector to fully utilize its own fisheries resources - even though under the UNCLOS coastal States have the right to manage and exploit the fisheries resources within their EEZ. Independent of the disciplines on fisheries subsidies, coastal states apply management measures as per the national legislation in their territorial waters and in co-operation with sub-regional fisheries organizations in their EEZ.

Even in the event that small scale fishers are carved out from the application on fisheries subsidies disciplines, the scale and magnitude of small scale fisheries differ from that of a developed country. As a result, the small scale fisheries of small coastal States will be marginalised and market access of fisheries captured by developed countries will remain unaffected.

Consequently, the inability of the coastal States to utilise their own fisheries resources will translate into a greater share of the fish stock resources being available for the distant water fishing nations (DWFN). The DWFNs who will remain efficient in the market will be the EU and the countries composed of the “friends of fish”. This group of countries (including EU, Iceland and New Zealand) have already shifted most of their specific subsidies to non-specific category. Initially with other players in the fish access market including the developing countries, there would be competition to bid for the access rights. However, if subsidies are eliminated and should most of the developing countries exit the fisheries market, these few developed countries will remain as dominant players and will bid for fish access rights. The developed countries will have greater bargaining power to determine the price of the access rights.

In other words, the elimination of fisheries subsidies will accord to the developed nations (EU and the Friends of Fish) a greater share of the existing fish quota rights of fish. given that the elimination of fisheries subsidies will drive the developing countries out of the market. On the demand side of fishing access rights, due to the reduction of specific subsidies in forms of fuels, vessel modernization and other related subsidies, the developing nations that were once competitors may be compelled to move out of the market, and those that may aspire to enter the commercial fishing sector may never be able to reach that level. This reduction in the market demand for fish access rights would lead to a surplus supply of fish access rights.

The ultimate result will be that a few distant water fishing nations that have already developed their fishing vessels and have shifted most of their specific subsidies to non-specific category for example the EU and New Zealand, (prior to the negotiations on disciplines on fisheries subsidies) will dominate the demand side of fishing access rights. Developed countries such as the United States may also be affected by the fisheries disciplines due to their inability to provide specific subsidies. The few developing distant water fishing nations including the EU would therefore be pure profit maximisers and gain economic rent would be created in their favour. The bargaining power of small coastal States would decline and the few Distant Water Fishing Nations would dictate the price at which the access rights would be purchased. This would create a monopoly or oligopoly over access rights and lead to market domination by developed countries.

Section 5: Implications of WTO Negotiations: Asymmetric Outcomes

Based on the assessments from Sections 2 and 4, the present section will discuss the implications of the WTO subsidies negotiations and the asymmetrical outcomes for developing countries.

Section 5.1: Developing Countries decapitated to utilize its fisheries resources

The developed and developing countries including the least developed economies are at different levels of development and subsidisation. As highlighted in the previous sections, the developed countries such as the EU and the “friends of fish” are advocating for the elimination of fisheries subsidies that they had themselves provided in the past in order to boost their fisheries sector.

A situation prevails where the developed countries are now in a position to dominate the global fisheries market, after building their fishing capacity on the basis of generous subsidies from the government. . The elimination of fisheries subsidies will decapitate the developing countries from utilizing their own fisheries resources. Several strategies have been applied by the proponents such as linking the special and differential treatment to stringent management measures which are burdensome for small states to achieve. With the cost of implementation outweighing the benefits, it is obvious that the small states would never be able to utilize their own fisheries resources. Secondly, the standstill provision proposed by New Zealand, aims to undermine the policy space for developing countries to develop its fisheries sector. The developing and least developed countries rely on fisheries for food security and livelihood. Further, some coastal states aim to domesticate their fisheries industry. However, the elimination of subsidies will derail such aspirations. In addition, if developing countries are prohibited from providing subsidies for capacity enhancement, then they are unlikely to develop fishing fleets to exploit their own marine resources in future.

Section 5.2: Shift in Bargaining Power towards few Developed countries DWFN for fish access rights.

The fisheries sector constitutes a demand and supply equation for fisheries access rights. The developing countries including the coastal States and LDCs are the holders of fish resources. The coastal States with their maritime boundaries, own a major share of the fish resources extending up to their EEZ. Under UNCLOS, these coastal states have the right to manage and exploit the resources within their EEZ. In doing so, the coastal States also have rights over the fisheries resources within their EEZ and will determine its management measures as well. As discussed in the previous section, the coastal States cooperate at the national and sub-regional level with various institutions to manage their fisheries resources. For highly migratory and straddling stock such as tuna and cooperation in the high seas, the coastal States are members of RFMOs and negotiate management measures to sustainably manage the resource.

Consequently, the coastal States are the owners of the fish resource and thus the holders of fish access rights. Most of the developed countries such as EU and the “friends of fish” are owners of fishing vessels. In order for these countries to fish in the EEZ of other countries, they have to bid for access rights i.e. buy rights to fish from the coastal states. Currently, there are several distant water fishing nations that compete for access rights, including China,

Japan, Korea, Thailand, EU and others. As a result the small coastal States that are holders of fish resources, have the opportunity to sell the access fishing rights of its EEZ to the highest bidder i.e. whoever provides the best price for the fisheries resources will get the right to fish. The developing countries therefore have some bargaining power. The coastal States also ensure that while providing the fishing rights, the right holder also adheres to the conservation and management measures in place. Even when the highest bidder gets the resources, fishing happens in a sustainable manner.

With the elimination of fisheries subsidies, the developing countries that possess fishing vessels and provide specific subsidies may be compelled to exit the market over time due to the high operating costs. However, the developed countries that are vessel owners and have undertaken fisheries reforms (and have a commercial interest), will remain. There will be few demanders of fish access rights in the market i.e. the EU and the “friends of fish”. The coastal states and other developing countries would not be able to develop their fisheries sector, given the constraints of disciplining fishery subsidies.

As a result, the developed countries with large fishing fleets will dictate the price of the fishery access rights to the small coastal states and thus there will be a shift in the bargaining power for fish access rights in the hands of a few developed countries. The developed countries can then dictate the price of the access rights, i.e. purchase the rights to fish at a lower price; thereby, monopolizing the entire fisheries market.

Section 5.3: Stifling the Future Development of Commercial Fisheries Sector

The global trend in the fisheries sector currently shows that the developing countries’ export of fish and fish products exceeds that of the developed countries. The developing countries include coastal States that are owners of large fish resources within their EEZs and also providers of specific subsidies. Furthermore, the small vulnerable coastal states also envisage development of their fisheries sector and some would want to venture into commercial fisheries. Given that these countries are already members of RFMOs and sub-regional arrangements, their resources will be utilised in a sustainable manner. However, the provision of subsidies will be integral to ensure the development of their fisheries sector. The imposition of disciplines, such as the elimination of fisheries subsidies and stringent conditions to provide the subsidies will affect the development aspiration of these countries.

This would stifle the future commercial fisheries sector development in the developing countries.

Section 5.4: Binding decisions of different RFMOs in relation to Management and imposing it multilaterally on members

At the global level, countries are committed to conserving and sustainably managing the fisheries resources. This is evident from the commitments and membership of countries to the UNCLOS, the UN Fish Stocks agreement and the participation of countries in the RFMOs, sub-regional fisheries management and at the national level. In order to ensure that fish resources are sustainably managed, the coastal states, the Distant Water Fishing Nations and Cooperating Non-Members negotiate conservation and management measures. There are several management measures negotiated as highlighted in Table 1 and 2 as examples in the WCPFC and the IOTC. These management measures are negotiated, taking into account the conservation of resources and also the socio-economic conditions that prevail within the region. As such, the element of disproportionate burden is crucial in the negotiations.

In the current fisheries negotiations at the WTO, members that are linking management to the fisheries disciplines are using the WTO as a forum to impose the management measures under a legally binding framework on all the members and in the context of the WTO these measures do not take into account the full extent of the disproportionate burden on developing countries, in particular the least developed countries. Secondly some of the management measures imposed in the RFMOs are for the high seas jurisdiction. However in the context of the WTO, some proponents have extended these to territorial waters and EEZ.

For example, on the issue of transshipment at sea, the WCPFC regulation 2009-06 states that the measures shall not apply to transshipment of highly migratory fish stocks where fish is taken and transhipped wholly in archipelagic or territorial seas. Transshipments in ports or in waters under the national jurisdiction of a member shall take place in accordance with appropriate national laws. Furthermore the IOTC Resolution 17/06 states that a program to monitor transshipment at sea applies only to a large scale tuna long line fishing vessel. In the WTO, transshipment issues are also covered in the fisheries text including extending it to small scale fishing activities.

Another illustration is that of the issue of enhanced transparency that proponents such as the EU, ACCPU and New Zealand have been advocating. The proponents are demanding

information such as catch data by species, the status of fish stock, the kinds of conservation and management measures applied and the fish capacity management plan.

The request for catch data by species is purely a management issue. The CMM 2009-10 of the WCPFC provides for the monitoring of landing of purse seine vessels at ports so as to ensure reliable catch data by the species. The CMM further states that such information will be collected from the canneries and shall be handled in the “non-public domain” i.e. kept confidential. Catch data is important to determine the commercial interest of the competitors as well. For the EU, ACCPU and New Zealand, the provision of such data in the public domain through WTO transparency mechanisms is a means for them to provide access to such data for their industries to have a competitive advantage. The IOTC Resolution 15/02 also provides the caveat for mandatory statistical reporting requirements for the IOTC contracting and non-contracting parties. The members are to provide data on total catch by species and gear (catch and effort data only) for surface fishers, long line fishers and coastal fishers.

The issue of flag of convenience in the proposal from Indonesia is also an issue from the IOTC RFMO. It is linked to management measures. The Resolution 99/02 provides that the CP and the CNP shall take every possible action consistent with their relevant laws and (i) urge their importers, transporters and other concerned business people to refrain from transacting in and transshipping tunas and tuna-like species caught by vessels carrying out FOC fishing activities; (ii) to inform their general public of FOC fishing activity by tuna long line vessels which diminish the effectiveness of IOTC CMM and urge them not to purchase fish harvested by such vessels; and (iii) to urge their fish manufacturers and other concerned business people to prevent their vessels and equipment/devices from being used for FOC long-line fishing operators.

The developed countries have been selective in imposing management measures from the RFMOs which (i) have been agreed through negotiations within the RFMOS by members states. It is obvious that given that these proponents may not have achieved the negotiated outcomes in the relevant RFMOs, such measures are sought to be introduced into the WTO forum and to exacerbate it further, if caution is not exercised will be imposed on all WTO members under a legal framework.

However the proponents EU, New Zealand, Iceland and others that have linked management aspects under different provisions and shadowed it with the explanation of development, have in effect ignored other fundamental aspect of the CMM that are development driven. A few examples of requirements under the CMMs that are missing from WTO negotiations are provided below:

- IOTC Resolution 03/01 on the Limitation of Fishing Capacity of Contracting Parties and Cooperating non-Contracting Parties states that the parties which have more than 50 vessels on the 2003 IOTC record of vessel shall limit in 2004 and following years the number of fishing vessels larger than 24 meters in length. The limitation number shall commensurate with the corresponding overall tonnage expressed in Gross Registered tonnage and where vessels are replaced the over tonnage shall not be exceeded.
- The WCPC resolution 2013-06 on the criteria for developing CMMs states that the CMMs must not result in transferring directly or indirectly a disproportionate burden of conservation action on small states. As such new proposals on CMMs have to be assessed against set criteria. In cases where transfer of disproportionate burden of conservation is present, this needs to be mitigated by phased or delayed implementation, exemption from specific obligations, proportional or rotational implementation and the establishment of compensatory funds.
- The WCPFC resolution of 2013-07 on Special Requirements of Small Island Developing States provides for a list of areas for assistance that must be provided to developing countries for implementation. These include capacity development training, institutional support, technical training on data collection, scientific research, stock assessment, by catches mitigation, fisheries science and administration. The CMM further states that assistance should also be provided for monitoring control and surveillance, technology transfer, support for domestic fisheries sector including ensuring SIDS and territories to account for 50% of total catch and value of highly migratory fish stocks by encouraging investment and collaborative arrangement. It further states the actions should not constrain coastal processing and use of transshipment facilities and associated vessels of SIDS to undermine legitimate investment in SIDS. The CCMs shall take action to eliminate barriers to trade in fish and fisheries products and promote activities of domestic fisheries sector and fisheries related businesses in SIDS and territories.

From the above, the strategy of the developed countries is virtually clear in that in the WTO it aims to (i) selectively bind the conservation and management measures of the different RFMO, that are serves its own commercial interest and (ii) modify some of the RFMOs CMM decisions that were negotiated among members in the RFMO and further expand their own interest in the process to achieve the outcomes they prefers and (iii) ignore the full development aspect in relation to developing countries even in the development of management measures in the RFMOs i.e. the element of disproportionate burden and special requirements of developing countries as a special and differential element in the WTO.

Section 5.6: Undermining Development Provisions (SDT) in the Fisheries Subsidies Negotiations

The special and differential treatment provisions are integral in the fisheries subsidies negotiations. The current proposals in the fisheries negotiations focus mainly on the transition period for the implementation of the subsidies reform by members. Some proposals have also adopted a format similar to that of the trade facilitation agreement on declaring the capacity constraints and assistance needed to implement the fisheries disciplines. However, it should be noted that fisheries subsidies disciplines differ from trade facilitation and thus the latter approach may not be feasible. According to WT/COMTD/W/196, there is a six- fold typology to the special and differential treatment. These include (i) provisions aimed at increasing trade opportunities to developing country members, (ii) provisions under which WTO members should safeguard the interests of developing country member, (iii) flexibility of commitments of action, (iv) the use of policy instruments (v) transitional time-period and (vi) technical assistance and provision in relation to LDC members.

The fisheries proposal has limited the scope of the special and differential treatment to only selected time periods for implementation with the exception of the ACP proposal that has listed additional types of assistance. Through the WTO process of fisheries negotiations which is a legally binding agreement, the developed countries further aim to reduce the special and differential aspect of fisheries and at the same time expand on other commitments. The principle of special and differential treatment is embedded in other internationally legally binding instruments in relation to fisheries such as the UNCLOS and UN Fish Stock Agreement. Other non-legally binding agreements also have the recognised special and differential treatment (known as Special Requirements of Developing Countries).

The UN Fish Stocks Agreement for instance recognizes (i) the vulnerability of developing states which are dependent on the exploitation of living marine resources, (ii) the need to avoid adverse impact and ensure access to fisheries by subsistent, small scale and artisanal fisheries and (iii) the need to ensure that such measures do not result in transferring directly or indirectly, a disproportionate burden of conservation action upon developing states.

The fisheries proposal from the developed countries are either overriding or reducing the scope of the special and differential treatment. In the EU proposal for example, the SDT is conditioned on the implementation of fisheries management measures. The Indonesian proposal also has a similar language. It completely ignores the special and differential treatment provisions that members are entitled to under international agreements and disregards the aspect of “disproportionate burden”. The WTO process is selective in relation to the six-fold approach and only stipulates transition period as an accepted SDT practice. The Indonesian proposal recognizes special and differential treatment but with stringent measures that the assistance has to be mutually agreed by developed and developing countries. This defeats the purpose of assistance and also undermines the special requirements of developing countries which the members are obliged to provide without reason or negotiation should there be issue of disproportionality in international fisheries agreement. As a result, the special and differential treatment is undermined.

Section 5.7: Strategy to shift market dominance of fisheries into the hands of few developed countries- tuna related products too

Globally the demand for fish and fish products is projected to grow in 2022. The global fishmeal & fish oil market is projected to reach a value of USD 14.28 billion by 2022. The market is driven by factors such as growing trend in fishmeal & fish oil trade and the increasing global demand for quality fish. Moreover, the demand for aquaculture is increasing in export markets, which influences the supply of improved fishmeal & fish oil for animal production. On the basis of industrial application, fishmeal & fish oil were most widely consumed in 2016 in the pharmaceuticals industry.

According to the FAO 2016 State of the World Fisheries report, the share of the world fish production that is used for human consumption has risen substantially from 67% in the 1960s up to 87%. About 146 million tonnes of the fish are used for human consumption. The reminder 21 million tonnes are used for non-food products of which 76% was used in 2014

for fishmeal and fish-oil. The rest were largely used for numerous purposes including raw material for direct feeding in aquaculture. As such the by-product of the fisheries is also becoming an important industry.

The report further states that fish and fishery products represent the most traded segment of the world food sector and 78% of seafood products are estimated to be part of the international trade competition. In terms of the market share of fisheries trade, the developing countries world fisheries trade rose from 37% in 1976 to 54% of total fishery export value by 2014. The trade in fish and fishery product is primarily driven by the demand from developed countries, which dominate the fisheries import covering a share of 73% of the world imports. In the developed countries there is high dependence on imports to meet the demand for domestic consumption of fish. (FAO State of World Fisheries, 2016, 58)

As a result, the removal of fish subsidies would constrain the developing countries from developing their fisheries sector due to the inability of the small-scale fisheries to expand into commercial fisheries. Secondly, those developing countries that may be in a position to export fisheries product and are still in the competitive fishing industry, may exit the market once fisheries subsidies are eliminated. The only remaining players in the global fisheries industry would be the developed countries that have large fishing fleet with high gross tonnage. These will primarily include the EU and the “friends of the fish” group of countries including New Zealand and Iceland that will dominate the fisheries market. As a result the fisheries resources would be in the hands of a few developed countries who would control the entire fisheries market. Those countries such as India that are major players in the pharmaceutical industry for generic medication will also be affected. The second effect will be that these industries will also control the global value chain. The likely outcome will be that the developed countries will become the producers and manufacturers of fish and fish related products as well as global exporters, holding a major share of the global fish market. In other words, a reversal of the current state of global fish exports, the developed countries becoming the dominating players.

Section 5.8: Replicating Box Shifting Effects of Agreement on Agriculture in Fisheries Subsidies Negotiations

The fisheries subsidies negotiations and the prohibition of subsidies is a replication of the strategy employed by the developed countries for agricultural subsidies. The issue of agricultural subsidy is an ongoing debate in the WTO. The developed countries provided high

levels of agriculture support during the Uruguay round agreement in 1994. Even though restrictions were applied under the agreement, most of the developed countries have retained the high level of support through “box shifting” i.e. moving most of its limited subsidies into the “Green Box” of subsidies. Even though the Green Box entitlements are available to the developing countries, however, due to resource constraints (fiscal budgetary restraints), they are unable to fully utilise these.

As a result, the imbalances exist to date in agriculture. Most of the developing countries are providing specific subsidies whereas the developed countries such as the EU and the friends of fish have shifted their fisheries subsidies towards non-specific subsidies. Negotiations on fisheries subsidies risk meeting a similar fate, whereby the developed countries may enjoy greater policy space in comparison to the developing and least developed countries. Under the current subsidies negotiations members are targeting disciplines as per Article 1 of the ASCM which targets specific subsidies. Accordingly, the developing countries will be the ones making substantial commitment while the developed countries will gain greater policy space and a competitive edge.

Section 6: Conclusions

The negotiation of fisheries disciplines at the WTO is a complex proposition. Despite the momentum by negotiators to reach an agreement in December at the MC 11 many issues need to be successfully resolved. As discussed above, the proponents have projected the disciplines on fisheries subsidies as a sustainability concern. However, a closer examination reveals the concern for market access as a more prominent driver.

Fish is a major trading commodity that is in high demand. Furthermore, one of the by-products of fish is used to produce fish oil which is a source of omega-3 for human consumption. The global fishmeal & fish oil market is projected to reach a value of USD 14.28 billion by 2022. The market is driven by factors such as growing trade in fishmeal & fish oil as well as the increasing global demand for quality fish. Moreover, the demand for aquaculture is increasing in export markets, which influences the supply of improved fishmeal & fish oil for animal production. On the basis of industrial application, fishmeal & fish oil were most widely consumed in 2016 in the pharmaceutical industry. Fish oil is used

in the pharmaceutical industry in the form of omega-3 fatty acids; while fishmeal is used in the production of antibiotics.

Binding rules on fisheries management have been enunciated under the UNCLOS and the UN Fish Stocks Agreement. Further, non-binding obligations on fisheries management are entailed under the FAO Code of Conduct. These are in fact complex issues and therefore at the regional, sub-regional and national levels the relevant management organizations collaborate in ensuring that fish resources are managed sustainably. Given that fish unlike land resource involves the issuance of fisheries access rights, as such there is a sea of competition to access the resources at a reasonable price. The countries with a large fleet capacity would eventually be the ones bidding for the access rights to fish in the EEZ of developing countries.

The disciplines on fisheries subsidies should therefore ensure that stringent conditions are not imposed on developing countries so as to deter their ability to develop their fisheries sector and enter the fisheries market. Some of the smaller developing countries are aspiring to enter the market and thus need to be provided with an equal opportunity. Historically, countries for example the EU and New Zealand have been providing specific subsidies to develop their fleets. However, these countries have shifted the specific subsidies into non-specific budgetary support. Should there be disciplines on specific subsidies alone, there would be an imbalance created once again and greater policy space will be accorded to developed countries. The negotiators need to learn lessons from subsidies disciplines in the agriculture sector.

Secondly, entangling issues of management at the WTO is complicated and countries need to be vigilant as IUU measures should not be a disguised restriction to international trade. Fisheries mechanisms are in place at the regional and national level in order to enable countries to address IUU fishing in a concerted manner. If States wish to strengthen the regime on fisheries management, they must negotiate the same in a forum outside the purview of the WTO.

In order to achieve an outcome on fisheries subsidies at the WTO, the focus must remain on the trade element. Considering that countries are at different levels of development and subsidization, there can be no one size fits all approach to disciplining fisheries subsidies. Those countries that are yet to develop their fisheries sector need to be provided with an effective and implementable Special and Differential Treatment. Transition period alone is

insufficient for these economies to develop the sector. Credence must be placed on the ACP proposal that expands the areas of technical and financial assistance to developing and least developed countries.

Another critical factor that the negotiators need to be vigilant about is to ensure that their rights and obligations under international fisheries treaties (UNCLOS and UN fish stock agreement) are retained. In addition, though the FAO guidelines on fisheries management are an important benchmark, they are nonetheless not a legally binding text. As a result, countries must ensure that such guidelines are used as a reference but not incorporated into the fisheries disciplines as a legal text. The decision to grant a legally binding status to the guidelines on fisheries management would require negotiation in the relevant forums outside of the WTO, which would have the skills and expertise to do so. Secondly, developing countries have a certain degree of flexibility in implementing these guidelines based on their level of development and their domestic policy objective choices. Imposing these guidelines in a legally binding form at the WTO would have repercussions for the development of the domestic fisheries sector of developing countries.

For any successful outcomes in fisheries negotiations, the focus should be on S&DT, which needs to be delinked from the complex issue of fisheries management.

Given the global imbalance in the fisheries sector between the developed and developing nations, Special and Differential Treatment is of vital significance. The disciplines on fisheries subsidies have a market access agenda and a clear commercial interest of selected developed countries. Therefore, developing countries need to ensure that the history of the imbalance suffered from the disciplines on agriculture subsidies during the Uruguay round is not repeated in fisheries subsidies.

Reference

European Commission, 2016, Facts and Figures on the Common Fisheries Policy, European Union.

Fisheries Subsidies,-A Joint NGO Discussion Paper and Technical Resource, 2011 World Wide Fund for Nature.

Grynberg R, 2003, WTO Fisheries Subsidies Negotiations: Implications for Fisheries Access Arrangements and Sustainable Management, *Marine Policy* 27 (2003) 499-511.

Hall S, 2014, *Principles of International Law*, Lexis Butterworth's, Australia.

Hosch G, 2016, Trade Measures to Combat IUU Fishing, a Comparative Analysis of Unilateral and Multilateral Approaches, International Center for Trade and Sustainable Development.

Kahn J, 2005, *The Economic Approach to Environmental and Resource Management*, South Western Thomas Corporation.

Sharp B, 1997, From Regulated Access to Transferable Harvesting rights: Policy insights from New Zealand, *Marine Policy*, Vol.21, No.6, pp 201

Pro wildlife (2009), Ten Requirements for a Reform of CFP, <https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/pro_wildlife_en.pdf>.

The State of World Fisheries and Aquaculture, 2016, Food and Agriculture Organization, Rome, 517.

Web Links:

http://www.fao.org/fisheries/utilization_trade/en

<http://www.fao.org/docrep/006/Y4647E/y4647e06.htm><http://www.iccat.es/Documents/SCRS/Manual/CH1/CH1-ENG.pdf#page=3>

<https://www.wto.org>

www.ffa.int

www.pna.com

www.wcpfc.int