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SUSTAINABLE DEVELOPMENT AND THE COMMODITIES CHALLENGE: THE EVENTUAL ‘GREENING’ OF THE WORLD TRADE ORGANISATION?

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

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I. INTRODUCTION

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

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

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1 "Recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development”. Marrakesh Agreement Establishing the World Trade Organisation, First recital, Preamble, Apr. 15, 1994, 1867 U.N.T.S. 154.


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


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

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

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

7 On the definition of commodities, see Final Act of the United Nations Conference on Trade and Employment, infra note 17 & corresponding text.
where trade law is being used as the focus by the international community in seeking to achieve SDG 14.6, the goal which seeks to prohibit harmful fisheries subsidies. Part V concludes by drawing attention to the WTO’s increasing role as a willing and self-interested part of the institutional framework for economic development and the profound shift in priorities that this marks for the WTO membership, from trade liberalisation narrowly construed as ‘trade and its trade effects’ to one modelled on sustainable development and the effects of trade *lato sensu*.

II. TRADE IN COMMODITIES AND THE UN SUSTAINABLE DEVELOPMENT GOALS

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

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

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

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

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

Trade in commodities has long been a topic of concern for international markets and governments, as the following examples demonstrate.

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

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13 Id. ¶ 3.
15 If indeed we consider such spheres distinct rather than expressions of the ‘political’ lato sensu.
16 Goals 2, “End hunger, achieve food security and improved nutrition and promote sustainable agriculture” and 9, “Build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation”, The 2030 Agenda, supra note 10.
necessarily creates difficulties for food planning.\textsuperscript{18} Where agricultural commodities are traded, an increase in prices is customarily matched by an increase in production, which in turn leads to a glut as the ability to alter supply is often limited to seasons. Where demand consistently increases such patterns are not problematic, but where response to demand is slow, as is often the case in farming, agricultural exporters are subjected to considerable price volatility.\textsuperscript{19} If further complications are added—such as inconsistent weather conditions (exacerbated by climate change), limited success in public stockholding policies, and liberalising pressures from different regimes in international economic law (i.e. the transition towards a “market-oriented agricultural trading system”\textsuperscript{20})—the centrality of trade in commodities in food security policies becomes clear. The recent food crisis of 2007-08 discussed above is one such example where a range of different factors led to a spike in food prices causing serious difficulties for consumers in least developed and developing countries.\textsuperscript{21}

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

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


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

\textsuperscript{22} \textit{See generally} the findings of \textit{INTERNATIONAL TRADE CENTRE, WOMEN IN COTTON: RESULTS OF A GLOBAL SURVEY} (2011), http://www.intracen.org/uploadedFiles/intracenorg/Content/Exporters/Sectors/Food_and_agri_business/Cotton/AssetPDF/Women%20in%20cotton%20-%20VOL%20GIN%20%20FINAL.pdf. This need not be the case where, as with food security, domestic measures can compensate for the negative impact of industrial developments; however, these are far from certain and not necessary to take part in the global value chains underpinning the world production of cotton. \textit{See also} \textit{TRADE AND GENDER: OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES} 149-50 (Anh-Nga Tran-Nguyen & Americo Beviglia Zampetti eds., UNCTAD 2004).
Further, Goal 4 (“[e]nsure inclusive and equitable quality education and promote lifelong learning opportunities for all”) is also affected by the functioning of commodities sectors. Agricultural commodities which require intensive harvesting, for example, are customarily seasonal. They thus require work during long hours and are dependent on itinerant workers. Both these factors place barriers to children who seek access to quality education, either limiting their ability to attend school due to the long working hours or rendering them so tired from physical labour that their capacity to be educated is hampered. In each of these cases, the trade in that commodity and the development of the industry can have a serious impact on the educational opportunities for children and/or the position of women in the economy. These challenges can be met only by acknowledging that the nature of the commodity is linked to the difficulty faced: for example, the seasonal harvest of sugarcane or culturally embedded norms related to the expectation of women’s roles in cotton-spinning.

The limitations in achieving sustainable development in the face of grave environmental challenges (Goals 6, 14, and 16) are similarly related to trade in commodities. Logging, for example, raises serious concerns for biodiversity and sustainable land management and is nonetheless essential for global timber trade (on which the economies of States may depend). Meanwhile, extractive industries are especially problematic as they often involve the use of hazardous chemicals for extraction and purification. The gold mining industry, for example, is heavily dependent on cyanide for the production process (whether wet or dry) and on

26 On the systematic exclusion of women from the modernisation of agricultural sectors, see Tran-Nguyen & Zampetti, supra note 22, at 278.
27 “Ensure availability and sustainable management of water and sanitation for all”.
28 “Conserve and sustainably use the oceans, seas and marine resources for sustainable development”.
29 “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.
31 See, e.g., S. Seck, Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law, 37 Canadian Y.B. of Int’l L. 139, 139-43 (1999).
mercury in small-scale extraction projects. Thus, the dual nature of the commodity gives rise to challenges: high demand and slow cultivation time in the case of timber, and high demand and toxic extraction processes for gold.

More structural issues facing the international community are no less influenced by trade in commodities. The pursuit of Goal 10 (“[t]o reduce inequality within and among countries”) is linked to trade in commodities, both as a result of historical colonial relationships which coerced colonies into becoming specialised centres of resource extraction and the subsequent economic specialisation and dependency on such goods as a result of post-colonial economic policies. Such policies were further exacerbated by historically differential tariff treatment for manufactured goods and the varied effect of productivity gains across the globe. Cotton, for example, has played a key role in determining the structure of the global economic system. Global value chains where goods are manufactured across jurisdictions and the effect of specialisation and mechanisation are all part of the cotton industry’s history. Most important is the role of the cotton industry in the ‘great divergence’—the point at which the economies of India, China and Turkey (inter alia) diverged from their comparable equivalence with the economies of Western Europe. Levels of industrialisation diverged as harvesting remained necessarily in the fields while spinning and weaving moved to the industrial heartland of England. Early industrialisation in States such as India and Turkey was reversed, leaving a legacy of North-South relationships that is still felt today in spite of recent economic advances. The British Empire may have been “built on a huge


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

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

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

III. INTERNATIONAL LAW’S FRAGMENTED REGULATION OF COMMODITIES

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

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

40 See Beckert, supra note 36, at xvii-xix & 56-57.
41 On how European economic development is dependent upon overseas trade, see K. Pomeranz, supra note 37, at 4-7. For a compelling analysis of the institutional legacies of sugar on the world trade system, see M. Fakhri, Sugar and the Making of International Trade Law (2014).
42 Indeed, within systems, variations of conceptualisation exist. Note, for example, the account given in F. Smith, Agriculture and the WTO, ch. 2 (2009).
policies of the 1950s to mid-1970s which sought to either restrict imports so as to encourage domestic production or stabilise their prices through the use of buffer stocks, subsidies, or export and import restraints.\textsuperscript{43} Price fluctuations in commodities have been a concern in trade law since the 1920s, when they were seen as a sufficiently serious problem during the inter-War period to constitute a key issue at Bretton Woods. Sensitive to the disorder caused by price fluctuations during times of war, the negotiators sought to regulate the use of international commodity agreements (ICAs) comprehensively under the Havana Charter.\textsuperscript{44} Yet, trade law’s ability to regulate commodities comprehensively was scuppered by the Havana Charter’s demise, and the GATT 1947 served as a poor relative, with the provisions of Art XI on permissible restrictions and Art XVI on the use of subsidies relating to ‘primary products’ only.\textsuperscript{45}

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

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

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


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

\textsuperscript{48} For the view that commodity agreements had been ineffective and that trade distortive measures were at the root of the problem in agricultural trade, \textit{see} Note by the Secretariat, Summary of Studies on Problems Affecting Trade in Agriculture and Their Causes MTN.GNG/NG5/W/3 (Mar. 31, 1987). For a more comprehensive and nuanced account against this, see M. FAKHRI, \textit{supra} note 41, at 173-200.
Washington Consensus. The accuracy of the narrative is clearly dubious as other important factors (such as a lack of financial commitment on the part of States) played an important role; yet, the narrative is a powerful one. ICAs could be viewed as unsuccessful because they sought to regulate a market that would work best without intervention, an account that fit in with the ascendant neoliberal trend in trade theory at the time. Trade law subsequently treated commodities like all other goods, with special treatment given inconsistently and without logical underpinnings. Agriculture was to have its own trade regime; oil was excluded for a number of key exporters (OPEC); yet, copper was to be traded like anything else. It is notable that there are no equivalent commodity provisions under the GATS as under the GATT because by the time of the Uruguay Round the movement away from seeing ICAs as a solution for commodity price instability was complete. As a result, trade law’s view of the negative effects of trade in commodities was that it was a problem to be managed but with no clear mandate or appreciation of how to tackle these challenges and with only minor concessions made on food security, public stockholding, cotton, and agricultural export subsidies. Further, the obligations within the system impose differing disciplines over imports and exports. Save for explicit commitments (either scheduled or through their accession protocols), WTO members have far fewer obligations with regard to exports than imports thus restricting the ability of non-commodity-producing members to influence the price of commodities through import restraints.

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

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

50 See, e.g., supra note 48.


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


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

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

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

\textsuperscript{55} See the discussion in Office of the United Nations High Cmm’r for Human Rights, O. de Schutter, Food Commodities Speculation and Food Price Crises: Regulation to reduce the risks of price volatility, Briefing Note 2 (Sept. 2010), http://www2.ohchr.org/english/issues/food/docs/Briefing_Note_02_Sepember_2010_EN.pdf.
\textsuperscript{57} E.g., Tobsias, supra note 30 and corresponding text.
\textsuperscript{58} P. Sands et al., Principles of International Environmental Law 548 (3d ed. 2012).
\textsuperscript{59} E.g., Glamis Gold Ltd v. U.S.A, Award (June 8, 2009).
\textsuperscript{60} The expectation that investments be taken for a ‘certain duration’ lend themselves to focussing on commodities where extraction or harvest can take years before profitable returns are met. Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶ 43 (July 11, 1997), 37 I.L.M. 1378.
\textsuperscript{61} Constitution of the Food and Agriculture Organisation art. V(6)(b), C.T.S. 1945/32, 40 AJ.I.L. Supp. 76. It is the FAO that has pushed for the amendments to the HS Nomenclature 2017 Edition relating to food security (which constitute the majority of changes).
has established a Special Unit on Commodities. At a more general level, the UNCTAD also established the Global Commodities Forum in 2010, and more recently in 2014, the Working Group on Commodities Governance. The Common Fund for Commodities (CFC) functions as a specialised development agency, financing commodity projects in developing States. The remit of the UN Special Rapporteur on the Right to Food similarly involves questioning the regulation of commodities in international relations. A number of ICAs still exist, covering cocoa, coffee, cotton, grains, olive oil, sugar, and tropical timber. However, they no longer attempt to stabilise prices as had previously been the case. Instead, they function as forums where producers and consumers can engage, identifying issues and coordinating policies. An increasing number of non-State actors are also involved, such as the International Council on Mining and Metals, which sets guidelines and distributes good practices for mining industries, or the Marine Stewardship Council which sets (private) standards and provides certification to promote sustainable use of fish stocks.

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

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

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65 There also exist a number of International Study Groups which serve a similar purpose. P. MAVRODIS, TRADE IN GOODS 351 (2d ed. 2012).
66 Id.
68 Supra note 57 and corresponding text.
Confronting the underlying inconsistency in commodities regulation is essential for the international community to achieve the goals set out in the 2030 Agenda and sustainable development more generally. Yet, while such inconsistency presents a great deal of challenges to the completion of the 2030 Agenda, there are commonalities in approaches to commodity regulation that suggest areas where common ground might be found.

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

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

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69 See, e.g., supra note 55 and corresponding text.
72 These vary but are frequently used in a number of areas. Note the TBT Information Management System has currently logged 21473 regular notifications, http://tbtims.wto.org, while the SPS Information Management System has logged 7676, http://spsims.wto.org.
74 This has been recognised by UNCTAD, the FAO and the UNEP. See UNCTAD, FAO & UNEP, Joint Statement, Regulating Fisheries Subsidies Must be an Integral Part of the
Indeed, more broadly, the move to sustainability in primary goods requires a multi-faceted mix of actors and actions to be pursued, which necessarily entails providing appropriate information to all parties concerned.\(^ {75}\)

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

**IV. THE WORLD TRADE ORGANISATION AND THE SUSTAINABLE DEVELOPMENT GOALS**

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

In this section, the development of a nascent fisheries policy in trade law institutions is analysed, noting the recent increase in attention at the WTO and the possibility that meaningful progress be

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\(^{76}\) The 2030 Agenda, supra note 10, ¶¶ 3b, 10a, 17.12, & 14.6 respectively.


\(^{78}\) See the discussions in note 6 for an evocative set of examples.
made on what is a ‘trade matter’ in only the broadest sense. The subsidisation of fisheries (through the subsidisation of fishing) is an interesting example exactly because it is a trade issue only if one takes a holistic view of trade as proposed above, acknowledging that commodities’ trade has multiple effects on labour, economic development, the environment, and resource utilisation. The impact of fishing subsidies on stocks is also a matter of pressing importance for the international community and has long been recognised as a topic in need of attention. That it should receive such attention now, and at the WTO, is a noteworthy development that indicates a broader shift in trade law’s place in the international system.

A. Fisheries Regulation and the 2030 Agenda

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

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

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

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

80 SDG 14.6, The 2030 Agenda, supra note 10. Other specific targets are set under Goal 14, but the focus here is on 14.6 and fisheries subsidies.
81 Commonly fisheries subsidies are divided into beneficial, capacity-enhancing, and ambiguous. See G. Munro & U.R. Sumaila, The Impact of Subsidies upon Fisheries Management and Sustainability: The case of the North Atlantic, 3 FISH & FISHERIES 233 (2002).
high seas, on territorial waters or inland), subsidies increase capacity and thus encourage overfishing\footnote{This assumption is challenged strongly by some members such as the Republic of Korea.} which in turn can have a dramatic impact on the sustainability of fish stocks and diversity in the ecosystem.\footnote{See Eur. Parl., Directorate Gen. for Internal Policies, Note, Global Fisheries Subsidies (2013), http://www.europarl.europa.eu/RegData/etudes/note/join/2013/513978/IPOL-PECH_NT(2013)513978_EN.pdf.} While some subsidies encourage the farming of fish, which may have negative consequences for wider fish stocks, many others encourage sustainable fishing through the provision of more advanced boats, shoal detection equipment, or nets.\footnote{Acknowledged in supra note 67, ¶ 3. Note, this does not mean that there are no other problems: the feed used for the fish during the farming process may well come from unsustainable fish source, while questions exist over the potential health impacts of intensively farmed fish.} Further, the interests in protecting fish stocks may well run against other competing interests such as protecting local communities from economic deprivation, guarding indigenous communities’ pursuit of traditional practices, or promoting food security.\footnote{See J. He, Chinese Public Policy on Fisheries Subsidies: Reconciling Trade, Environmental and Food Security Stakes, 56 MARINE POL’Y 106 (2015).}

Nor is it clear whether fisheries subsidies have a meaningful trade impact in the narrow sense. Under the Agreement on Subsidies and Countervailing Measures (SCM Agreement),\footnote{Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Annex 1A, Marrakesh Agreement Establishing the World Trade Organisation, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].} to challenge a subsidy directly through dispute settlement, or to have recourse to a self-help remedy in the form of a countervailing duty, the subsidy must either be prohibited (that is, the most harmful type of subsidy from a trade perspective, those contingent on export performance or use of local content),\footnote{SCM Agreement, supra note 86 art. 3.1.} or it must be demonstrated that the subsidy causes an adverse effect (in direct challenges) or causes material injury (in the case of direct challenges or countervailing duties).\footnote{SCM Agreement, supra note 86 arts. 5 & 11.2.} In each case, the impact of subsidies is principally measured through the harm caused to the industry.\footnote{See Art. 15 SCM Agreement.} However, fisheries subsidies are not considered harmful only when injuring other industries and they need not be intended for export.\footnote{See supra note 79.} Indeed, many fisheries industries are not targeted toward exports, but rather internal consumption.\footnote{See the questions raised in S.W. Chang, WTO Disciplines on Fisheries Subsidies: A Historic Step Towards Sustainability?, 6 J. INT’L ECON. L. 4, 879 (2003); Y. Chou & C.S. Ou, The Opportunity to Regulate Domestic Fishery Subsidies Through International Agreements, 63 MARINE POL’Y 118 (2016).}
Instead, the harm that fisheries subsidies cause may be of a kind foreseen by the SCM Agreement but the principal concern is the harm that such subsidies cause for the resource upon which fishing industries depend, i.e., the depletion of shared resources.92 While it could be possible to calculate the value of the subsidy in question, it would be harder (though not impossible) to calculate the harm caused to the fish stocks by the subsidy.93 This problem is compounded by the limited number of empirical studies on the contribution of fisheries subsidies to the fishing practices contemplated under SDG 14.6, and the current value of fisheries subsidies or how they are best to be calculated.94 An endemic lack of transparency in the provision of such subsidies by governments exacerbates this difficulty.95 Thus, a second challenge is raised by fisheries subsidies: if they are a problem, but cause little disruption to trade, is the WTO the appropriate forum to tackle them?

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

95 In part due to a lack of compliance with existing notification obligations. C.-J Chen, Fisheries Subsidies under International Law 6-7 (2010). See further infra note 175 and accompanying text.
96 For a clear and concise overview, see M.A. Young, Trading Fish, Saving Fish: The Interaction between Regimes in International Law, ch. 2 (2011).
political will or resources, is their limited ability to affect management policies on the high seas.98

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

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

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

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103 Supra note 7891.
104 UNCTAD-FAO-UNEP Joint statement, supra note 74, ¶ 5.
B. Pursuing Sustainable Fisheries through the Trade Regime: Multilateral to Regional and Back Again.

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

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

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

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106 Supra note 57 and corresponding text.
107 Note, fish as a commodity, Havana Charter 1947, supra note 17 art. 56.1 (“For the purposes of this Charter, the term "primary commodity" means any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.”) (emphasis added).
109 See infra note 159 and accompanying text.
Slow progress has been made since the original mandate in the Doha Declaration in 2001, in large part as a result of the requirement that all subjects of negotiation be dealt with together (that is, lack of agreement on one topic holds back agreement on all others). Nonetheless, in an attempt to move discussions forward, a draft text was proposed in 2007 by the chair of the Negotiating Group on Rules (the Chair). It served as the central point of discussion. It sought to prohibit subsidies for the following purposes subject to a set of exceptions: vessel acquisition, construction, repair or other modifications, transfer of vessels to a third country (for example forms of vessel buyback programs where the excess capacity is exported instead of being scrapped), support on operating costs (for example fuel and license fees) of fishing and land-based processing activities, port infrastructure exclusively or predominantly for fisheries activities, income support, price support, and acquisition of fishing access to foreign waters. A number of concerns were raised at the time and subsequently relating to: the scope of the special and differential treatment (S&DT) provisions for developing members with smaller fisheries industries, the possibility of de minimis exceptions, and the role of fisheries management systems. As a result, progress was slow and held back by the need to agree on all Doha mandated topics at the Negotiating Group on Rules (reform of the Anti-Dumping and Subsidies Agreements, clarification and improvement of rules on regional trade agreements, and disciplines on fisheries subsidies) following the WTO tradition of the single undertaking where “nothing is agreed until everything is agreed”. Subsequently, work continued at the other fisheries bodies (UNCTAD, the FAO, and so on) and yet, at the WTO, advances grounded to a halt until recently.

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

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


112 Id. art. I.1.


114 Doha Declaration, supra note 9, ¶¶ 28-29.
back by related issues under attention, being held as bargaining chips by others).\textsuperscript{115} It is telling that this move was not to propose a new text; instead, New Zealand’s proposal was to gather information through “a series of questions with a view to sharing information on such developments as a background for further discussions on fisheries subsidies disciplines.”\textsuperscript{116} This seemed a modest step forward, though in keeping with the trend toward information collection identified above. While negotiations at the WTO moved slowly, they were to advance dramatically elsewhere,\textsuperscript{117} in part inspired by movement at the regional level, where the parties to the Trans-Pacific Partnership (TPP) had four months earlier agreed on a text including disciplines on fisheries subsidies.

In keeping with the common practice of the WTO over the last 20 years, a lack of agreement at the multilateral level was compensated for by activity at the regional level. The negotiating parties of the TPP\textsuperscript{118} included a limitation on fisheries subsidies within the agreement, which specifically provided:

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

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

\textsuperscript{117} See infra note 126 and corresponding text.
\textsuperscript{118} At the time, the expected membership included Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.
best scientific evidence available and on internationally recognised best practices for fisheries management” which includes FAO guidance.\textsuperscript{120} The TPP draft also specifically instructs parties to ensure that catch data, fleet capacity, status of stocks, and that total imports and exports are included in their notifications of prohibited fisheries subsidies,\textsuperscript{121} while non-prohibited subsidies are still to be notified “to the extent possible” including “information in relation to other fisheries subsidies that the Party grants or maintains... in particular fuel subsidies.”\textsuperscript{122} It is noteworthy that the recently revised version of the treaty text (\textit{sans} the United States) under the name Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) has maintained the provisions on fisheries subsidies.\textsuperscript{123} While such a move would have a significant impact, the CPTPP’s future is still unclear, and its scope (though wide) is regional.\textsuperscript{124}

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

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

\textsuperscript{120}See TPP, supra note 119 art. 20.16(3).
\textsuperscript{121}See TPP, supra note 119 art. 20.16(10).
\textsuperscript{122}See TPP, supra note 119 art. 20.16(11).
\textsuperscript{124}With the USA’s notification that it does not intend to become a member, at the time of writing the assumption is that the remaining ‘TPP 11’ will move ahead amongst themselves to conclude the CPTPP.
\textsuperscript{127}C. Malmström, Protecting global fisheries through the WTO, EUROPEAN COMMISSION BLOG (Oct.17, 2016), https://ec.europa.eu/commission/2014-
EU proposal, first circulated on October 18, 2016, and subsequently revised, has offered suggestions that target Goal 14.6 closely and with the wider special and differential treatment obligations closely integrated. Clearly, the first EU proposal was merely a new ‘starting point’ and it was responded to carefully by a number of groups, most notably: New Zealand, Iceland, and Pakistan; Argentina, Colombia, Costa Rica, Panama, Peru, and Uruguay; the ACP group; and the LDC group. Individual members also introduced proposals subsequently, including Indonesia, the US, and China. These specific proposals are discussed in the following section, though at this stage it is important to note the trajectory of the talks on fisheries subsidies, across jurisdictional boundaries.

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

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

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

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

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

community that needs a binding commitment from States beyond general exhortation that is embedded in an institution praised (rightly or wrongly) for its compliance mechanisms.\footnote{See infra Part V.}

The interest in meeting SDG 14.6 is also a pressing one, and while the WTO may be seen as an ideal option in many quarters, the completion of the Goal has overcome any explicit preference for a specific institution. For example, note the EU Trade Commissioner’s frustration at the end of the 11th Ministerial Conference, that “the sad reality is that we did not even agree to stop subsidising illegal fishing” as a result of a few blocking Members, and that “short-term plurilateral arrangements within the WTO framework” were the most likely target for agreements in the meantime.\footnote{WTO meeting ends in discord, ministers urge smaller-scale trade talks, \textit{REUTERS} (Dec. 13, 2017), https://www.reuters.com/article/us-trade-wto/wto-meeting-ends-in-discord-ministers-urge-smaller-scale-trade-talks-idUSKBN1E711J.}

This suggests that in the short term, while negotiations may continue at the WTO, they will also continue in other forums, ensuring that Members’ interests in shaping such future rules are embedded as early as possible. However, as the development of the fisheries talks shows, this is not a binary decision of selecting between regional or multilateral institutions, or between environmental or trade regimes, but rather part of the cross-jurisdictional rule-elaboration process that increasingly marks international law.\footnote{Id.}

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

\textbf{C. The Envisaged Role for the WTO in the Regulation of Fisheries Subsidies.}

It is one thing to decide that the WTO should be the forum where the subsidisation of fisheries is regulated, and another to determine the scope and method of such regulation.\footnote{See MESSENGER, supra note 77.} A number of proposals and papers have been tabled

\footnote{This article does not examine the legal nature of the proposed discipline. For a recent treatment of this issue, see L. BARTELS & T. MORGANDI, \textit{supra} note 93.}
by members at the Negotiating Group on Rules. These proposals seek to clarify and develop a set of rules which will support the achievement of SDG 14.6.

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

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

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

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137 *Supra* note 128.
138 *See supra* note 129 art. 4.2.
139 *See supra* note 129 art. 4; Argentina, Colombia, Costa Rica, Panama, Peru, and Uruguay proposal, WTO Doc. TN/RL/GEN/187/Rev.2 ¶ 1.1.4 (July 17, 2017) respectively.
140 *See* Indonesia proposal, WTO Doc. TN/RL/GEN/189 art. 3.6 (June 6, 2017); Argentina *et al* proposal, *supra* note 139 art. 4.1; LDC proposal, WTO Doc. TN/RL/GEN/193 art. 3.4 (July 17, 2017).
142 *See* Indonesia proposal, *supra* note 140 art. 3.4.
143 *See* ACP paper, WTO Doc. TN/RL/GEN/192, ¶ 4.2 (2017).
144 *See* LDC paper, TN/RL/GEN/193, ¶ 2.2.b.
It is telling that a number of separate issues are also examined in varying degrees within the proposals, requiring discussions within a forum more accustomed to contemplating rules that engage with trade more narrowly. For example, what of the inclusion of disciplines to cover subsidies relating to inland fisheries or aquaculture where the possible harm is not related to fish stocks *per se*, or the issue of whether there should be exclusions for instances of disaster relief?\(^\text{145}\) Should the disciplines apply to maritime zones which are subject to a dispute between Members?\(^\text{146}\) Each of the questions tests the resolve and appropriateness of the trade system to manage issues that are customarily within the remit of the law of the sea or general international law.

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

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

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

The use of other regimes of global governance is an important feature of the fisheries proposals, particularly the law of the sea regime.\(^\text{150}\) For example, it is

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\(^{145}\) See Argentina *et al* proposal, *supra* note 139, n. 3.

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

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

\(^{148}\) *Supra* note 86, art. 11.

\(^{149}\) See *supra* note 147, ¶ 3.6.

\(^{150}\) For a concise account of the dynamics between the law of the sea and fisheries subsidies, see M. Young, *The ‘Law of the Sea’ Obligations Underpinning Fisheries Subsidies*.
expected that the concept of IUU fishing will be understood in line with the 2001 FAO International Plan of Action on IUU fishing,\textsuperscript{151} which once incorporated in the new disciplines will become the reference point for WTO law.\textsuperscript{152} Similarly, RFMOs are expected to play a core role as it is their lists of vessels engaged in IUU fishing that are to be presumed to be valid,\textsuperscript{153} as well as determine which stocks are overfished.\textsuperscript{154} Members' own national authorities will also be able to make equivalent determinations on the basis of the best evidence available to them. Some proposals have gone further by classifying those subsidies as prohibited that contribute to any fishing for stocks in waters where the member is not a party to the relevant RFMO, an approach which chimes with the assumption that international fishing fleets are the primary causes of injury in this field.\textsuperscript{155}

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


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

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

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

\textsuperscript{155} E.g., New Zealand et al. proposal, supra note 147, art.1.1.2.

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

\textsuperscript{157} Id. art. 9.4.

\textsuperscript{158} See, e.g., New Zealand et al. proposal, supra note 147, ¶ 3.8.

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

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

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

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

\textsuperscript{161} See supra note 93 and corresponding text.

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

\textsuperscript{163} EU proposal, supra note 129, art. 2.

\textsuperscript{164} See Draft Consolidated Chair Texts, supra note 111, art. V.

\textsuperscript{165} TPP, supra note 119 art. 20.16(3).
(TBT Agreement) where specific bodies are not identified but relevant international standards may also be used to presume compliance with obligations under the Agreement.\textsuperscript{166} There are differences in this instance, not least that an RFMO would not constitute an ‘international standardising body’ in the sense of the TBT Agreement as RFMOs are not open to all Members, only those with an interest in the fish stock and maritime area in question.\textsuperscript{167} Further, while there is concern over the capacity of RFMOs to make such determinations effectively, considering their scope, and the weight to be given to them,\textsuperscript{168} should the analysis be sound, and used as the basis for a Member’s determination that a vessel is engaged in IUU fishing, or that certain stocks are overfished, one could foresee de facto (if not de jure) acknowledgement of RFMO determinations via WTO law.

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

\textit{E. Coordinating Strategies: Information Exchange}

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

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

\footnotesize{\textsuperscript{166} SPS Agreement, supra note 71 art. 2.4 and TBT Agreement, supra note 71, art. 2.5 respectively.}  
\footnotesize{\textsuperscript{167} See Appellate Body Report, United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, ¶ 359, WT/DS381/AB/R (Oct. 26, 2017).}  
\footnotesize{\textsuperscript{168} The Argentina et. al proposal, supra note 139, and the EU proposal, supra note 129, speak to these concerns.}  
\footnotesize{\textsuperscript{169} See MESSENGER, supra note 77, at 59-68.}  
\footnotesize{\textsuperscript{170} See EU proposal, supra note 129, art. 3.}
subsidy programme, that member may be assumed to also be able to notify it (at least as required by Article 25 of the SCM Agreement), this is not always the case, not least where a Member does not consider its support to constitute a subsidy.

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

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

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

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

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

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

174 TPP, supra note 119 art. 20.16(10).
11th Ministerial added a specific pledge from Members to “re-commit to implementation of existing notification obligations under Article 25.3 of the Agreement on Subsidies and Countervailing Measures thus strengthening transparency with respect to fisheries subsidies.”

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

Trade measure notifications are thus being used to inform rule-elaboration on a matter essential for the pursuit of sustainable development.

V. CONCLUSION

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

176 Supra note 171, ¶ 10.
179 See MESSENGER, supra note 77, at 150-57.
actors such as the Appellate Body, and so on. But it is also an independent actor, one whose identity is built on its successes. Having faced seventeen years of near complete deadlock and increasing challenges from its previously strongest supporters, the WTO is in need of a ‘win’. On this point fisheries subsidies provide a convenient shared interest as the international community seeks to achieve the SDGs and requires a place where it considers rules are upheld and disputes are resolved (something the other principal actors on this topic are unable to achieve alone).

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

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

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

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


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

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

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

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

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

\(^{184}\) On the EU’s recent ‘internal’ developments, *see supra* note 152.
This is of particular interest when reflecting on the opportunities that engage with commodities as a specific class of goods offer for the pursuit of sustainable development and the completion of the 2030 Agenda. The fragmentation of international law, which we might equally refer to as specialisation, has had a more limited impact on the normative coherence of the international legal order than might have been feared but it has had a greater impact on the conceptual coherence of the system; one which increasingly tackles complex societal problems through nuanced legal instruments at the sharp end of the crisis, rather than at its root. While the WTO is increasingly sensitive to the impact of commodity price fluctuations and their relationship with wider trade questions such as market access, there has been little by way of innovation in approaching the challenges of commodities’ trade outside of piecemeal agreements on cotton or food security.

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

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