



REMEDIES APPLICABLE TO A NEW WTO FISHERIES SUBSIDIES FRAMEWORK

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Executive Summary

Since 2001, the World Trade Organization (WTO) has been developing rules to prohibit certain subsidies toward fishing operators. Fisheries subsidies accelerate fish stock depletion, causing both economic and environmental harm to countries that rely on fish as a source of income and sustenance. After years of negotiations, the WTO Negotiating Group on Rules (NGR) recently committed to finalizing a fisheries subsidies regime by the end of 2019. In preparation, groups of WTO Members submitted proposed rules that would prohibit certain subsidies toward fishing operations.

Despite the NGR's recent progress, none of its proposals meaningfully provide for remedies necessary to induce violating Members to comply with the agreement's prohibitions. Without a remedies framework tailored to fisheries subsidies, the new agreement will likely default to the remedies framework contained in the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), which provides baseline rules regulating the use of subsidies. As this paper will outline, the SCM Agreement's remedies framework in its current form is largely unworkable as applied in the fisheries subsidies context.

Members are unlikely to bring fishery subsidy challenges in the Dispute Settlement Body (DSB) to begin with given that fisheries subsidies primarily cause global environmental harm, not harm attributable to particular countries. Furthermore, neither remedy available under the SCM Agreement's prohibited subsidies regime, which would govern fisheries subsidies prohibitions, adequately captures the unique challenges fisheries subsidies present. Subsidy withdrawal is the primary remedy available in response to a prohibited subsidy. Yet, fishing operators often channel fisheries subsidies into vessel upgrades and other equipment, allowing fleets to continue benefiting from the subsidy long after it is withdrawn. If a violating Member fails to withdraw its subsidy, the complaining Member may impose countermeasures, which are traditionally based on the subsidies' trade effects. But calculating the trade effects fisheries subsidies cause is complex and unlikely to lead to meaningful amounts attributable to individual claimants. WTO jurisprudence permits tailoring countermeasures to fit a particular case, which could encompass countermeasures based on the level of environmental harm a fisheries subsidy causes. But countermeasures are meant only to induce subsidy withdrawal, not compensate for past harm, so even

countermeasures based on environmental harm will not fully address the harm fisheries subsidies cause.

Adapting remedies available under the SCM Agreement to the fisheries subsidies context can address some of these challenges. To increase the effectiveness of withdrawing a subsidy toward vessel construction and equipment, the new fisheries subsidies agreement could require violating Members to pay back the subsidy value prorated over the remaining average useful life (AUL) of the equipment or the full value of the subsidy instead of simply discontinuing subsidies prospectively. The new agreement could also provide for remedies that require violating Members to pay compensation based on the level of environmental harm their subsidies cause, which a neutral body would direct toward fishery restoration efforts. Alternatively, the WTO could require violating Members to reduce their fish catch in proportion to the additional fishing their unlawful subsidies enable.

New approaches beyond merely adjusting the SCM agreement are also necessary. The NGR proposals begin to outline a transparency and notification mechanism, which the NGR could augment with provisions allowing Members to challenge inadequate subsidy notifications without resorting to dispute settlement and that would impose penalties on Members for egregious notification violations. Furthermore, the new agreement could require Members to codify Illegal, Unreported, and Unregulated (IUU) fishing prohibitions and stiffen penalties for violations under their domestic laws, along the lines of domestic enforcement provisions in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). To address the limited incentives Members have to challenge prohibited fishery subsidies in dispute settlement proceedings, the new agreement could authorize the WTO Committee on Subsidies and Countervailing Measures (WTO Subsidies Committee) to initiate suits. In addition, the agreement could introduce a class action provision permitting complaining Members to certify a class of affected states, which could reduce the cost and increase the benefit of fishery subsidy litigation.

Whatever approach it takes, the NGR cannot simply default to the SCM Agreement's existing remedies framework. Should it do so, the WTO may struggle to induce Members to comply with the new fishery subsidy prohibitions, which have been almost twenty years in the making.

1. Introduction

Global fish stocks face an existential threat. Over 30% of global fisheries were in an overfished condition as of 2014,¹ and the fraction of fish stocks within biologically sustainable levels has decreased from 90% in 1974 to 67% in 2015.² Fishery subsidies contribute to fish stock depletion. Recent studies estimate global fisheries subsidies at \$35 billion a year—30-40% of the value of the annual global catch³—and \$20 billion of these subsidies go toward capacity-enhancements for fishing operators. As a result, the capacity of the global fishing fleet is two-and-a-half times larger than is needed to fish at sustainable levels.⁴ Overcapacity contributes to overfishing and fish stock depletion,⁵ which cause both economic and environmental harm to countries that rely on fish as a source of income and sustenance.

Recognizing this problem, the WTO is developing rules that would prohibit certain types of fisheries subsidies.⁶ After years of negotiations, the NGR recently committed to finalize a fisheries subsidies regime by the next Ministerial Conference, which was originally scheduled for December 19, 2019.⁷ In preparation, groups of WTO Members have submitted proposed rules that would prohibit certain fisheries subsidies.

¹ FAO. 2018. *The State of World Fisheries and Aquaculture 2018 - Meeting the sustainable development goals*. Rome. Licence: CC BY-NC-SA 3.0 IGO [hereinafter FAO Report 2018], 6, 45, <http://www.fao.org/3/i9540en/i9540EN.pdf> (All website addresses cited in this article were last visited in May 2019.)

² *Id.* at 39-40.

³ Sumaila, U. Rashid. 2016. *Trade Policy Options for Sustainable Oceans and Fisheries*. E15 Expert Group on Oceans, Fisheries and the Trade System – Policy Options Paper [hereinafter Sumaila, et al.], 6, http://www3.weforum.org/docs/E15/WEF_Fisheries_report_2015_1401.pdf. Some regions account for a greater percentage of the total than others, but countries in every region tend to confer fisheries subsidies at some level. See, e.g., U.R. Sumaila, et al., *A bottom-up re-estimation of global fisheries subsidies*, 12 J. BIOECON [hereinafter Sumaila, et al.], 201, 216 (2010).

⁴ World Wildlife Fund, *Threat of Overfishing*, <https://www.worldwildlife.org/threats/overfishing>.

⁵ Sumaila, *supra* note 3, at 6.

⁶ WT/MIN(01)/DEC/1, *Ministerial Declaration*, 4th Sess. (Adopted on 14 November 2001) [hereinafter Doha Ministerial Declaration], ¶ 28.

⁷ WT/MIN(17)/64, WT/L/1031, *Fisheries Subsidies: Ministerial Decision of 13 December 2017*, 11th Sess. (Adopted on 18 December 2017) [hereinafter Buenos Aires Ministerial Decision on Fisheries Subsidies], ¶¶ 1 and 2.

At a meeting of the WTO's General Council on 18 October 2018, WTO members agreed that the organization's next Ministerial Conference will take place from 8 to 11 June 2020 in Astana, Kazakhstan. See WTO, *WTO members fix dates for Astana Ministerial Conference*, https://www.wto.org/english/news_e/news18_e/gc_18oct18_e.htm. Although the next Ministerial Conference has been rescheduled, Members are still committed to reaching consensus on fisheries subsidies before the original December 19 deadline.

Despite the NGR's recent progress, the frameworks WTO Member groups proposed do not meaningfully provide for remedies necessary to induce Members to comply with any new fishery subsidy prohibitions. This memorandum seeks to fill that gap by addressing three related issues: first, the extent to which the remedies framework within the SCM Agreement could be directly applied as part of a new fisheries subsidies regime; second, the extent to which the existing remedies framework under the SCM Agreement would need to be adjusted to be applied effectively in the fisheries subsidies context; and third, whether amending the SCM Agreement or adopting a separate fisheries subsidies agreement would most effectively implement these reforms.

This memorandum proceeds as follows. Part 2 provides background on the problems that fisheries subsidies pose and recent WTO fisheries subsidies reform efforts. Part 3 applies the SCM Agreement in its current form to fisheries subsidies and highlights areas in which the Agreement will fail to provide effective remedies against the fisheries subsidies the NGR plans to prohibit. Part 3 also offers proposed solutions, including draft treaty text, to compliment the SCM agreement and develop an effective fisheries subsidies framework. Part 4 proposes additional reforms external to the SCM Agreement itself that are designed to enhance compliance with any new fisheries subsidies rules. Finally, Part 5 discusses the mechanisms available to bring the reforms proposed in Parts 3 and 4 into effect.

2. Background

Fisheries subsidies fall into three general categories: (1) beneficial subsidies, (2) ambiguous subsidies, and (3) harmful subsidies.⁸ Beneficial subsidies are those that lead to investment in natural capital assets such as fish stocks, enhancing the growth of the stocks through conservation and monitoring catch rates.⁹ Ambiguous subsidies are those whose impacts are undetermined or can lead to either positive or negative impacts, including fisher assistance programs, vessel buyback programs, and rural fisher community development programs.¹⁰ Harmful subsidies, or capacity-enhancing subsidies, are those that result in disinvestments in natural capital assets where

⁸ Sumaila, et al., *supra* note 3, at 203-207.

⁹ *Id.* at 203. Beneficial subsidies include those for research and development, fisheries management, the development and maintenance of protected areas, and fishermen's safety. *Id.*

¹⁰ *Id.* at 206.

overcapacity and overexploitation of the resource prohibit achieving a long-term net benefit.¹¹ These include fuel subsidies, vessel construction, renewal and modernization subsidies, port construction and renovation programs, price and marketing support, processing and storage infrastructure programs, and foreign access agreements.¹²

Harmful fisheries subsidies have a uniquely pernicious effect compared to subsidies in other industries. In the context of agricultural subsidies, for example, when one country grants a subsidy to its domestic industry and another country does not, the first country gains a competitive economic advantage, but it does not deprive the second country of any agricultural resource. A fishery subsidy, in contrast, both confers an economic advantage on the subsidizing country and deprives the non-subsidizing country of scarce fish resources. The result is often not only harm to the non-subsidizing Member's fishing industry and the environment, but also non-economic effects such as malnutrition within populations dependent on fish for a balanced diet.

Due to the unique harm fisheries subsidies pose, the 2001 Doha Development Agenda established a mandate for WTO Members to "clarify and improve disciplines applicable to fisheries subsidies."¹³ Members elaborated on that mandate in the Hong Kong Declaration in December 2005, emphasizing the need to prohibit certain fisheries subsidies that contribute to overcapacity and over-fishing.¹⁴ Although the Members failed to reach consensus on a set of draft rules proposed in 2007,¹⁵ they resumed negotiations at the Tenth Ministerial Conference in 2015.¹⁶ In December 2017, the NGR tabled seven textual proposals from Member groups before the WTO's Eleventh Ministerial Conference,¹⁷ but the Members again failed to reach an agreement on

¹¹ *Id.* at 204.

¹² *Id.* at 204-06.

¹³ Doha Ministerial Declaration, *supra* note 6, at ¶ 28.

¹⁴ WT/MIN(05)/DEC, *Doha Work Programme Ministerial Declaration* (Adopted on 18 December 2005), 6th Sess., Annex D, ¶ 9.

¹⁵ TN/RL/W/213, *Draft Consolidated Chair Texts of the AD and SCM Agreements* (30 November 2007).

¹⁶ WTO, *Briefing note: Negotiations on rules — anti-dumping and subsidy disciplines (including fisheries subsidies) and regional trade agreements*, https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_antidumping_e.htm;

TN/RL/27, *Negotiating Group on Rules - Report by the Chairman, H.E. Mr Wayne McCook to the Trade Negotiations Committee* (7 December 2015), ¶ 14.

¹⁷ The seven proposals tabled in the first half of 2017 are from: New Zealand, Iceland and Pakistan (TN/RL/GEN/186); EU (TN/RL/GEN/181/Rev.1); Indonesia (TN/RL/GEN/189/Rev.1); ACP Group (TN/RL/GEN/192); Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay (TN/RL/GEN/187/Rev.21); LDC Group (TN/RL/GEN/193); Norway (TN/RL/GEN/191). They were collated into a vertical compilation text in September 2017 (RD/TN/RL/29/Rev.3), key elements of which were subsequently streamlined. See TN/RL/W/273, *Compilation Matrix of Textual Proposals*

binding disciplines. Instead, the Eleventh Ministerial Decision re-affirmed Members' commitment to convert these proposals into a new fisheries subsidies agreement by the next Ministerial Conference.¹⁸

Although the NGR proposals contain important differences, overall the proposals focus on four types of subsidy prohibitions:¹⁹ 1) subsidies for operators or vessels on an IUU fishing list or otherwise engaged in IUU fishing; 2) subsidies that contribute to overfishing and fishing in overfished stocks;²⁰ 3) capacity-enhancing subsidies; and 4) subsidies toward operating costs.²¹ All proposals except Australia's prohibit subsidies for operators or vessels that are on an IUU fishing list or are otherwise engaged in IUU fishing.²² Seven proposals prohibit subsidies that contribute to fishing in overfished stocks, defined either by a national jurisdiction or a regional fisheries management organization (RFMO), or as stocks below a certain level of sustainability.²³ Five proposals prohibit capacity-enhancing subsidies.²⁴ And four proposals prohibit subsidies for operating costs.²⁵

Received to Date (28 July 2017) [hereinafter *Compilation Matrix*]. Three other Members added proposals in the second half of 2017 and thus were not collated into the streamlined text: China (TN/RL/GEN/195), the Philippines (TN/RL/GEN/196, TN/RL/GEN/196/Supp.1) and the U.S. (JOB/GC/148, JOB/CTG/10, 30 October 2017, updated 12 March 2018, JOB/GC/148/Rev.1, JOB/CTG/10/Rev.1). In February 2019, Australia, Iceland, and New Zealand provided additional proposals. RD/TN/RL/77, Negotiating Group on Rules–Fisheries Subsidies: Australian Draft Text on Overfished Stocks. [RESTRICTED]; RD/TN/RL/79, Negotiating Group on Rules–Fisheries Subsidies: New Zealand And Iceland Draft Text on Overfishing and Overcapacity. [RESTRICTED].

¹⁸ Buenos Aires Ministerial Decision on Fisheries Subsidies, *supra* note 7, ¶¶ 1 and 2.

¹⁹ The one exception is a proposal from the United States that does not address any issue related to prohibitions.

²⁰ Overfishing and overfished stocks refer to two different concepts. Although there is no universally agreed definition of overfishing, one approach provides that overfishing occurs when the observed fish mortality in a particular stock is above the optimal mortality in that stock. *See* M. Castro De Souza et al., *Overfishing, Overfished Stocks, and the Current WTO Negotiations on Fisheries Subsidies*, International Centre for Trade and Sustainable Development, Information Note, 5 (April 2018). In contrast, a stock is overfished when the level of biomass in the stock is below the stock's maximum sustainable yield. *Id.*

²¹ *See* *Compilation Matrix*, *supra* note 17.

²² *See id.*; All proposals defining IUU fishing use the same term defined in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate IUU Fishing of FAO.

²³ *See supra* note 17. The New Zealand, Iceland, and Pakistan Proposal is the one proposal to define overfished stocks as those “at such a low level that mortality from fishing needs to be restricted to allow the stock to rebuild to a level that produces maximum sustainable yield.”

²⁴ *See* *Compilation Matrix*, *supra* note 17.

²⁵ *See id.*

	IUU Fishing	Overfished Stocks	Capacity-Enhancing	Operating Costs
ACP Group	✓	✓*	✓	✓
Argentina, Colombia, Costa Rica, Panama, Peru, Uruguay	✓	✓	✓	
Australia		✓*		
China	✓			
EU	✓	✓*	✓	
Indonesia	✓		✓	✓
LDC Group	✓	✓	✓	✓
New Zealand and Iceland	✓	✓		✓**
Norway	✓			
Pakistan	✓	✓		
Philippines	✓			

*Limited to subsidies that negatively affect overfished stocks.

**Limited to subsidies that negatively affect fish stocks.

Pursuant to the Doha Mandate,²⁶ the majority of NGR proposals also include special and differential treatment provisions for developing and least developed countries (LDCs). These proposals either lift the prohibitions after covered countries and operators fulfil certain conditions²⁷ or grant extensions for Members to bring subsidy programs into compliance with the prohibitions.²⁸ Many proposals also provide for technical assistance and capacity building to developing countries and LDCs.²⁹

Despite reaching some level of agreement regarding the types of subsidies that will be prohibited, the NGR proposals do not specify the remedies that will be available to Members in response to a violation. The NGR proposals refer back to the SCM Agreement in certain areas, but they neither explicitly adopt the remedies available under the SCM Agreement nor clarify the remedies available in response to a fisheries subsidy violation.³⁰

²⁶ See *supra* note 6, ¶ 28 (noting that the WTO should take “into account the importance of [the fishing sector] to developing countries”).

²⁷ See *e.g.*, *supra* note 17, EU (TN/RL/GEN/181/Rev.1), art. 4; Indonesia (TN/RL/GEN/189/Rev.1), art. 3.

²⁸ See *e.g.*, *supra* note 17, ACP Group (TN/RL/GEN/192), art. 4; LDC Group (TN/RL/GEN/193), art. 3.

²⁹ The ACP proposal extends this treatment to “small, vulnerable economies (SVEs).” See ACP Group (TN/RL/GEN/192), *supra* note 17, art. 4.4.

³⁰ The NGR proposals are not unique in failing to provide specific remedies associated with prohibitions on fisheries subsidies. Both the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA) prohibit subsidies for fishing in

Because the proposed rules contain prohibitions without any corresponding remedies, the NGR will need to adopt a framework containing remedies for fisheries subsidies violations. As this memorandum will establish, the SCM Agreement can provide a baseline for such a framework, but complimentary remedies will be necessary to ensure compliance with the new subsidy prohibitions.

3. Application of the SCM Agreement and Complementary Remedies

This Part of the memorandum will apply the current SCM Agreement to the fisheries subsidies context. It will proceed in three sections. The first and second sections will address the SCM Agreement’s “actionable subsidies” and “countervailing duties” (CVDs) regimes, respectively. Each of these regimes is currently available in response to fisheries subsidies but, as the first and second sections will illustrate, neither regime will likely provide effective remedies in this context. The third section covers the SCM Agreement’s “prohibited subsidies” framework, which will likely govern any new fisheries subsidies agreement. This section will describe how the prohibited subsidies framework would apply to fisheries subsidies in its current form and recommend supplementary remedies designed to address certain shortcomings of this framework in the fisheries subsidies context.

3.1. Actionable Subsidies

The “actionable subsidies” regime is a framework under the SCM Agreement that permits a WTO Member to bring a challenge against any type of subsidy that satisfies the criteria under Article 1 and Part III of the SCM Agreement. Fisheries subsidies that satisfy these criteria are therefore all actionable currently, irrespective of whether the WTO reaches a new fisheries subsidies agreement.

Yet, actionable subsidies likely will not provide effective remedies against fisheries subsidies. Not a single country has challenged a fishery subsidy under the actionable subsidies regime. As this section will demonstrate, the actionable subsidies regime is geared entirely toward subsidies that cause economic harm to the complaining Member.

overfished stocks and for IUU fishing. But neither agreement specifies any remedies other than by referring back to the generally applicable Dispute Settlement Chapter within each treaty, which parties may invoke in response to a prohibited fishery subsidy. *See* CPTPP, Environment Chapter, art. 20.16: Marine Capture Fisheries; USMCA, Article 24.20: Fisheries Subsidies, art. 24.21: IUU Fishing.

The primary purpose behind prohibiting fisheries subsidies is to eliminate the environmental harm fisheries subsidies cause, and there is no room to interpret actionable subsidy provisions to encompass environmental harm. Thus, the actionable subsidies framework would require substantial alterations in order to provide effective remedies against fishery subsidies.

To challenge a subsidy under the actionable subsidies regime, the complaining Member must show that the subsidy caused “adverse effects to the interests of other Members.”³¹ There are three ways to establish “adverse effects” under the SCM Agreement, each of which focuses only on the economic harm the subsidy causes.³²

- “Material injury” to the domestic industry producing the like product in the importing country;³³
- “Nullification or impairment of benefits” Members possess under GATT;³⁴
- “Serious prejudice to the interests of another Member.”³⁵

All three definitions of “adverse effects” require demonstrating a level of economic harm that will be difficult to establish in regard to fisheries subsidies. For example, demonstrating an “injury” to the complaining Member’s domestic industry requires showing a “significant increase in subsidized imports” of a like product and “significant price undercutting by the subsidized imports” or price depression “to a significant degree.”³⁶ The complaining Member must also prove that the subsidies *caused* these effects.³⁷ Proving that fisheries subsidies cause trade effects in a complaining Member will be difficult as is. But the actionable subsidies regime adds the more substantial hurdle of proving that the subsidy *materially* injured the complaining Member’s domestic injury. Taking fuel subsidies for fishing operators as an example, subsidy levels are relatively low even among countries with large fishing industries,³⁸ indicating

³¹ SCM Agreement, art. 5.

³² SCM Agreement, art. 5.

³³ SCM Agreement, art. 5(a). “Injury” is defined as a “material injury, a threat of material injury, or material retardation of the establishment of a domestic industry,” which is the same definition used in the context of CVDs. *See* SCM Agreement art. 5(a) n.11 and art. 15 n.45.

³⁴ SCM Agreement, art. 5(b). “Nullification or impairment of benefits” has the same meaning under Article 5 of the SCM Agreement as it does in Article XXIII of the GATT. SCM Agreement art. 5 n. 12.

³⁵ SCM Agreement, art. 6.

³⁶ SCM Agreement, art. 15.2.

³⁷ SCM Agreement, art. 15.5; Panel Report, *EC and certain member States — Large Civil Aircraft*, WTO Doc. WT/DS316/R (circulated 30/06/2010), ¶ 7.2082.

³⁸ *See* RD/TN/RL/78, Negotiating Group on Rules – Fisheries Subsidies: Fuel Subsidies to The Fisheries Sector [RESTRICTED] [hereinafter Fuel Subsidies Proposal], 13 (noting that in 2013, Brazil and Canada, two large countries with large fishing industries, maintained \$3 million and \$6 million in fuel subsidies, respectively).

that proving fisheries subsidies have caused injury to a domestic industry will be particularly challenging.³⁹

Even if the complaining Member can establish that the fishery subsidy caused “adverse effects,” the two remedies available under the actionable subsidies regime likely cannot account for environmental harm.⁴⁰ First, the violating Member may choose to withdraw the subsidy or remove its adverse effects.⁴¹ If the subsidy is for vessel construction or equipment, withdrawing the subsidy may not necessarily stop the subsidy from causing environmental harm given that the capacity-enhancing equipment will remain in place even after the subsidy is withdrawn. Furthermore, because “adverse effects” include only economic harm, a violating Member need not eliminate the environmental harm the subsidy causes in removing the “adverse effects” of its subsidy.

If the violating Member fails to withdraw the subsidy or remove its adverse effects, the complaining Member may request authorization to impose “countermeasures,” the second remedy available under the actionable subsidies regime.⁴² However, countermeasures under the actionable subsidies regime must be “commensurate with the degree and nature of the adverse effects” the subsidies cause.⁴³ “Adverse effects” again include only economic harm,⁴⁴ not environmental harm, indicating that the level of countermeasures a Member may impose against an actionable subsidy will likely be limited. Thus, countermeasures under the actionable subsidies regime may not effectively induce violating Members to withdraw their unlawful fisheries subsidies.

³⁹ Demonstrating “serious prejudice” or “nullification or impairment of benefits” carries similar challenges. “Serious prejudice” does not exist unless the subsidy causes an “increase in the world market share of the subsidizing Member” that follows a consistent trend, “significant price undercutting,” the displacement of another country’s products from a third country market, or the displacement of another country’s imports into the subsidizing Member’s market. *See* SCM Agreement, art. 6.3. Again, a \$6 million fuel subsidy is unlikely to cause these effects.

⁴⁰ “[I]n addition to having...direct competition-distorting effects...[fisheries subsidies] also have a significant ‘adverse effect’ on the sustainability of the underlying resource being produced (fish), which threatens the viability of all other Members’ fishing industry.” Alice V. Tipping, *A ‘Clean Sheet’ Approach to Fisheries Subsidies Disciplines*, 8 (April 2015).

⁴¹ SCM Agreement, art. 7.8.

⁴² SCM Agreement, art. 7.9.

⁴³ *Id.*

⁴⁴ *See* Decision of the Arbitrator, *U.S. - Upland Cotton (Article 22.6 – U.S.) (Actionable subsidies)*, WTO Doc. WT/DS267/ARB/2 (circulated 31/08/2009) [hereinafter *U.S. - Upland Cotton (Article 22.6 – U.S.) (Actionable subsidies) Arbitrator Decision*], ¶ 4.55 (emphasis added) (noting that the difference in wording between Art. 7.9 and Art. 4.10 (prohibited subsidies) indicates that “the terms of Article 7.9...are intended to closely tailor...the countermeasures to the legal basis for the underlying findings,” which under the actionable subsidies regime includes only the trade effects the subsidy causes).

3.2. Countervailing Duties

Instead of seeking recourse through the Dispute Settlement Understanding (DSU) under the prohibited or actionable subsidies regimes, the complaining Member may impose CVDs in response to another Member's subsidies.⁴⁵ To impose CVDs, the complaining Member must satisfy three main requirements:

- There must be a subsidy that is “specific” as defined in the SCM Agreement;⁴⁶
- There must be a material injury to an established domestic industry producing a like product, or the subsidy must retard materially the establishment of a domestic industry;⁴⁷
- The subsidy must cause the material injury.⁴⁸

As with actionable subsidies, CVDs are available currently as a remedy against fishery subsidy violations. But for reasons similar to those applicable to actionable subsidies, imposing CVDs likely will not be effective in this context. Members will face the same challenges in establishing that a fishery subsidy caused material injury to their domestic industry. Furthermore, even if a material injury or threat thereof is established, a complaining Member may base the CVD only on “the full amount of the subsidy” or “less than the full amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry.”⁴⁹ The amount of the subsidy may be small and likely will not correspond with the broader environmental harm the subsidy causes. Thus, the level of the CVD may not be high enough to induce the violating Member to withdraw its subsidy. Finally, Members generally may only apply CVDs prospectively—that is, to imports that enter their markets after they determine a particular subsidy is causing injury to their domestic industry.⁵⁰ Thus, the CVD will not prevent any harm that accumulated up until that point.

In addition to these substantive challenges, imposing CVDs carries additional procedural burdens that are particularly acute in the fisheries subsidies context and may dissuade Members from invoking CVDs as a remedy.

⁴⁵ Article 10 of the SCM Agreement provides that the use of CVDs must be in accordance with Article VI of the GATT and the terms of the SCM Agreement.

⁴⁶ SCM Agreement, art. 1.2, 11.2, 19.1.

⁴⁷ SCM Agreement, art. 19.1. This analysis is the same as proving “injury to the domestic industry” for the purpose of “adverse effects” under the actionable subsidies regime.

⁴⁸ SCM Agreement, art. 19.1.

⁴⁹ SCM Agreement, art. 19.2.

⁵⁰ SCM Agreement, art. 20.1.

- **Evidentiary Burdens:**⁵¹ Although some Members regularly notify certain fisheries subsidies to the WTO,⁵² other Members may bury subsidies toward fishing operators in cross-industry subsidy programs, making it difficult to isolate the amount going toward fisheries in particular. Unlike subsidies toward, for example, interest rate support, which may be discernible by examining a competitor’s prices and publicly disclosed borrowing costs, it may be difficult to identify fleets that have received subsidies based on fleet performance alone. Gathering evidence needed to impose a CVD may therefore be particularly costly for a Member’s domestic industry or investigating authority.
- **Investigation Initiation:** A substantial portion of the relevant domestic industry must apply to initiate a CVD investigation,⁵³ or in “special circumstances” the investigating authorities may launch an investigation *sua sponte*.⁵⁴ Before the authorities may begin an investigation, there must be sufficient evidence that a subsidy exists and that it caused injury to the Member’s domestic industry.⁵⁵ Because gathering evidence and establishing causation may be particularly challenging in the fisheries subsidies context, a sufficient portion of the domestic industry and the investigating authorities may lack the incentive to initiate a CVD investigation.

3.3. Prohibited Subsidies

The “prohibited subsidies” framework provides remedies against subsidies that are unlawful *per se*, without any further showing of harm to the complaining Member. The SCM Agreement currently prohibits two types of subsidies: those contingent on export performance⁵⁶ (“export-contingent subsidies”) and those contingent upon the use of

⁵¹ Any decision to impose CVDs must be based on information and arguments on the written record available to interested Members and interested parties, excluding confidential information. SCM Agreement, art. 12.2.

⁵² *See, e.g.*, Fuel Subsidies Proposal, *supra* note 38, at 13 (noting that in 2013, Brazil and Canada, two large countries with large fishing industries, maintained \$3 million and \$6 million in fuel subsidies, respectively).

⁵³ SCM Agreement art. 11.4. Entities representing over 25 percent of the complaining Member’s domestic production in the subsidized product must submit an application to the complaining Member’s investigating authorities, and the application must have the support of domestic producers accounting for at least 50 percent of production of those producers expressing support or opposition.

⁵⁴ SCM Agreement arts. 11.1, 11.6.

⁵⁵ SCM Agreement, art. 11.2.

⁵⁶ “Subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance . . .” SCM Agreement, art. 3.1(a).

domestic goods over imported goods⁵⁷ (“import substitution subsidies”). The SCM Agreement explicitly prohibits members from granting or maintaining any export subsidies or import substitution subsidies.⁵⁸ These subsidies do not need to be specific⁵⁹ to any particular industry, as is required under the actionable subsidies regime, because the SCM Agreement deems all export and import substitution subsidies to be specific automatically.⁶⁰ Violating Members must “withdraw” prohibited subsidies “without delay,” which means they must withdraw their subsidies within the period the DSB specifies in its withdrawal order. Normally the DSB requires withdrawal within 90 days after the DSB adopts the relevant panel and Appellate Body reports.⁶¹ If a member fails to withdraw its subsidy within that period, the complaining Member may impose “countermeasures” based on the subsidy the violating Member continues to provide after the DSB’s withdrawal period expires.

3.3.1. “Prohibited” Subsidies Under the SCM Agreement and Proposed Fishery Subsidy Prohibitions

The NGR fishery subsidy proposals fit within the SCM Agreement’s prohibited subsidies regime given that they explicitly prohibit certain types of fishery subsidies, but in their current form the NGR’s prohibitions will not automatically qualify as prohibited subsidies under the SCM Agreement. Fisheries subsidies are not normally limited to goods that will be exported or serve as import-substitutes, meaning they are unlikely to fall into one of the two types of subsidies the SCM Agreement currently prohibits. This memorandum therefore proposes that the NGR make explicit in the new

⁵⁷ “Subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.” SCM Agreement, art. 3.1(b).

⁵⁸ SCM art. 3.2; *see e.g.*, SCM Annex 1 (noting “[t]he provision by governments of direct subsidies to a firm or an industry contingent upon export performance” and “[c]urrency retention schemes or any similar practices which involve a bonus on exports” as types of export subsidies). These subsidies are especially pernicious because they inherently distort trade.

⁵⁹ *See* SCM art. 2.1.

⁶⁰ *See* SCM art. 2.3.

⁶¹ SCM art. 4.7. “Without delay” typically means 90 days after the DSB adopts the Panel or Appellate Body report finding a violation and ordering withdrawal. *See* Panel Report, *Brazil – Aircraft*, WTO Doc. WT/DS46/R (circulated 14/04/1999) [hereinafter *Brazil – Aircraft Panel Report*], ¶ 8.5. *See also* Panel Report, *Canada – Aircraft*, WTO Doc. WT/DS70/R (circulated 14/04/1999) [hereinafter *Canada – Aircraft Panel Report*], ¶ 10.4; Appellate Body Report, *Canada – Aircraft*, WTO Doc. WT/DS70/AB/R (circulated 2 August 1999) [hereinafter *Canada – Aircraft Appellate Body Report*], ¶ 221; Panel Report, *Canada – Aircraft Credits and Guarantees*, WTO Doc. WT/DS222/R (circulated 28 January 2002) [hereinafter *Canada – Aircraft Credits and Guarantees Panel Report*], ¶ 8.4. However, some panels have granted longer withdrawal periods. *See, e.g.*, Panel Report, *U.S.— Upland Cotton*, WTO Doc. WT/DS267/R (circulated 08/09/2004) [hereinafter *U.S.— Upland Cotton Panel Report*], ¶ 8.3.

fisheries subsidies agreement that the prohibitions it enumerates qualify as prohibited subsidies under Articles 3 and 4 of the SCM Agreement. Although the agreement has not been finalized, this Part will assume that the new fisheries agreement will prohibit the following subsidies:

- Subsidies provided to any vessel or operator engaged in IUU fishing;
- Subsidies toward fishing in overfished stocks;
- Subsidies toward capacity enhancements for fishing fleets;
- Subsidies used to cover fishing fleet operating costs.

Even if the new fisheries subsidies agreement specifies that its prohibitions qualify as prohibited subsidies under the SCM Agreement, not all fishery subsidy prohibitions will automatically qualify as “prohibited.” Almost every proposal received to date for the new fisheries subsidies agreement requires that the subsidy provided be “specific” within the meaning of Article 2 of the SCM Agreement⁶² in order for it to be prohibited.⁶³ This differs from the two existing types of prohibited subsidy (export-contingent and import substitution) under the SCM Agreement, which are deemed specific automatically. For this reason, proving that a fishery subsidy is “prohibited” under the SCM Agreement will involve an extra step compared to export-contingent and import substitution subsidies. For example, a fuel subsidy to fishing operators may be defined as “prohibited.” If, however, the subsidy is also provided to all other economic operators it may not be “specific” and hence its provision may not be a violation of the agreement.

3.3.2. *Withdrawal*

Once a Member demonstrates that a subsidy is “prohibited,”⁶⁴ it may request that the DSB issue an order requiring the violating Member to withdraw the subsidy. This section will (1) address how withdrawal under the current SCM Agreement will operate if the new fisheries subsidies agreement does not adopt any additional provisions related to remedies and demonstrate the problems that this omission would cause, and (2) propose solutions to help address these issues, including draft provisions for the new fisheries subsidies agreement.

⁶² SCM art. 2.1 states that a subsidy is specific “[w]here the granting authority ... explicitly limits access to a subsidy to certain enterprises.” This can be *de jure* or *de facto*.

⁶³ See Compilation Matrix, *supra* note 17.

⁶⁴ Or “prohibited” and “specific” in the case of the proposed fisheries subsidies.

3.3.2.1. Withdrawal of Fisheries Subsidies under the SCM Agreement

If the DSB determines that a measure is a prohibited subsidy, the subsidizing Member must “withdraw the subsidy without delay.”⁶⁵ The WTO Appellate Body defines “withdraw” as to “‘remove’, . . . ‘take away’, [or] ‘to take away what has been enjoyed.’”⁶⁶ WTO panels have interpreted the scope of this definition in two ways. Panels typically require only that the subsidy be withdrawn prospectively, which aligns with the WTO’s general requirement that remedies have only prospective effect.⁶⁷ In contrast, in *Australia—Automotive Leather II*, the Panel decided that withdrawal meant the violating Member must repay the subsidy “in full.”⁶⁸ The Panel found that withdrawal requires the recipient to repay the value of the prohibited subsidy.⁶⁹ However, no other panel has applied this approach. The Appellate Body has not addressed the issue squarely, and panels continue to require withdrawal on only a prospective basis.⁷⁰ Given the state of WTO jurisprudence and the DSU’s reluctance to interpret withdrawal to include retrospective repayment, this section proceeds under the assumption that the DSU will continue to treat withdrawal as a prospective remedy and not require repayment.

Once the DSB adopts a report finding that the subsidies at issue are prohibited, the violating Member must withdraw the subsidies within the withdrawal implementation

⁶⁵ SCM art. 4.7.

⁶⁶ Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, WTO Doc. WT/DS46/AB/RW (circulated 21/07/2000) [hereinafter *Brazil – Aircraft (Article 21.5 – Canada) Appellate Body Report*], ¶ 45.

⁶⁷ See Panel Report, *Canada – Aircraft (Article 21.5 – Brazil)*, WTO Doc. WT/DS70/RW (circulated 09/05/2000) [hereinafter *Canada – Aircraft (Article 21.5 – Brazil) Panel Report*], ¶¶ 5.47 – 5.48.

⁶⁸ Panel Report, *Australia – Automotive Leather II (Article 21.5 – the U.S.)*, WTO Doc. WT/DS126/RW (circulated 21/01/2000) [hereinafter *Australia – Automotive Leather II (Article 21.5 – the U.S.) Panel Report*], ¶ 6.48. The U.S. had proposed repayment only of the ongoing benefit conferred by the subsidy since the adoption of the panel report, which had to be calculated by allocating the subsidy amount over the useful life of productive assets. But the Panel rejected the method of repaying on the “prospective portion” of the subsidy because the SCM Agreement did not provide any guidance on calculation, *see id.* ¶ 6.44.

⁶⁹ *Id.* ¶ 6.23.

⁷⁰ See Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, WTO Doc. WT/DS267/RW (circulated 18/12/2007) [hereinafter *US – Upland Cotton (Article 21.5 – Brazil) Panel Report*], ¶ 14.38 (noting that the Panel need not address the issue of whether withdrawal under art. 4.7 was retrospective, that Brazil is only seeking prospective remedies, and that Brazil considers the WTO Agreements and the SCM Agreement in particular not to provide retrospective remedies); Panel Report, *US – Large Civil Aircraft (2nd complaint)(Article 21.5 – EU)*, WTO Doc. WT/DS353/RW (circulated 09/06/2017) [hereinafter *US – Large Civil Aircraft (2nd complaint)(Article 21.5 – EU) Panel Report*], ¶ 6.38, citing Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, WTO Doc. WT/DS267/AB/RW (circulated 02/06/2008) [hereinafter *US – Upland Cotton (Article 21.5 – Brazil) Appellate Body Report*], fn. 494, noting that “remedies in WTO law are generally understood to be prospective in nature.”

period the DSB specifies. Panels typically require that Members withdraw their subsidies within 90 days after adoption by the DSB of the relevant panel and Appellate Body report,⁷¹ although some panels have granted longer withdrawal periods.⁷² If the new fisheries subsidies agreement does not include any specific provisions related to remedies, withdrawal of the subsidy will proceed under Article 4.7 of the SCM Agreement, meaning that withdrawal will be prospective only, albeit within an expedited framework.⁷³

Prospective subsidy withdrawal will not provide an effective remedy where the violating Member disburses the subsidy before the DSB issues its withdrawal order and the violating Member directs the subsidy toward goods that continue to deliver benefits well after the subsidy is expended. Subsidies for vessel construction, a type of capacity-enhancement subsidy, demonstrate this problem related to one-time, past subsidies. If a Member grants a vessel construction subsidy as a one-time payment and an operator uses that subsidy to construct a vessel before the DSB issues its withdrawal order, there will be no prospective subsidy to withdraw. The vessel will continue to contribute to the Member's catch, allowing the Member to benefit from the subsidized vessel long after it "withdraws" the subsidy. Even if the vessel construction subsidy is paid over time and the DSB orders withdrawal before the subsidy is paid in full, the operator will still continue to benefit from the portion of the subsidy it received before the DSB's withdrawal order. In either case, the Member's fleet will continue to fish above the capacity it would have reached without the subsidy, potentially leading to overfishing and other environmental harm even after the subsidy is withdrawn.

Subsidies used to cover operating costs present similar challenges. Fuel subsidies, for example, can represent up to 60% of fishing costs.⁷⁴ Providing discounted fuel allows fishing operators to increase effort and capacity, leading to overfishing and contributing to overfished stocks. Prospective withdrawal would only prevent violators

⁷¹ See, e.g., Brazil – Aircraft Panel Report, *supra* note 61, ¶ 8.5.

⁷² See, e.g., U.S.— Upland Cotton Panel Report, *supra* note 61, ¶ 8.3.

⁷³ Implementation periods under SCM art. 4.7 average 3.5 months, whereas implementation periods average 11.5 months under DSU art. 21.3(c) and 9.8 months under DSU art. 21.3(b). <http://worldtradelaw.net/databases/implementationaverage.php>.

⁷⁴ Fuel Subsidies Proposal, *supra* note 38, citing Scientific, Technical and Economic Committee for Fisheries [STECF], *The 2018 Annual Economic Report on the European fishing fleet*, Publications Office of the European Union (Luxembourg, 2018); Sumaila et al., *The World Trade Organization and global fisheries sustainability*, 88 FISHERIES RES. 1 (2007); Sumaila et al., *Fuel subsidies to fisheries globally: Magnitude and impacts on resource sustainability* (2006).

from receiving future fuel subsidies; it would not cover fuel subsidies issued before the end of the (90 day) implementation period. While withdrawal may help deter future harm to fish stocks, it does nothing to remedy the harm already inflicted. Indeed, it may, perversely, provide an incentive to Members to subsidize in one-off ways, thereby circumventing any prospective withdrawal order.

3.3.2.2. Additional Withdrawal Proposals

In order to address the problems facing withdrawal under Article 4.7 of the SCM Agreement noted in the previous section, the negotiators should consider adopting new remedies provisions in the fisheries agreement. The following sections propose two possible solutions. The first would apply broadly to all types of fisheries subsidies while the second tailors withdrawal remedies based on the specific type of subsidy at issue.

3.3.2.2.1. Broad Approach

The broad approach applies the same withdrawal language to any fisheries subsidy that the agreement prohibits. The extent to which Members are willing to accept a particular proposal will likely depend on the scope of the withdrawal provision. This section offers three proposals, each of which increasingly expands the scope of the withdrawal provision compared to the last.

3.3.2.2.1.1. Prospective-Plus Withdrawal

The first approach maintains the SCM Agreement's prospective-only withdrawal regime but adds protection against future subsidies payments to violators.

Proposed Provision: Prospective-Plus Withdrawal

Subsidies that the Dispute Settlement Body determines to be prohibited under the Fisheries Agreement must be withdrawn without delay. Withdrawal under this Agreement means the violating Member must cancel all outstanding and continuing subsidies enumerated under this agreement that are under challenge in the pending dispute. Vessels and operators that received a subsidy while listed on an IUU fishing list by a flag state, coastal state, subsidizing state, or RFMO, or that are determined to have fished an overfished stock, may not receive any subsidies, including subsidies not enumerated in this agreement, for ___ years, or until they have demonstrated to the relevant authority that procedures are in place to prevent future violations.

Although this approach is not optimal given that it fails to address the inadequacies of prospective-only withdrawal in the fisheries subsidies context, it would prevent a

violating Member from reactivating unlawful fisheries subsidies after the Member complies with the DSB's initial withdrawal order.

3.3.2.2.1.2. Remaining Value Repayment

The second approach breaks from the traditional requirement that remedies apply only prospectively by requiring that violating Members withdraw prohibited subsidies and that subsidy recipients pay back the value of the subsidy remaining after the implementation period for withdrawal. The remaining value of the subsidy is calculated by stretching the subsidy out over the AUL⁷⁵ of the assets the subsidy creates and then prorating that value based on the useful life of the asset that remains after the DSB's withdrawal order. An alternative approach could require withdrawal of the value of the subsidy remaining after the DSB proceeding is filed. This approach prevents Members from benefiting by keeping their subsidies in place during the withdrawal implementation period and any appeals process.

Example

A vessel is determined to have received a prohibited construction subsidy in 2019. The vessel received the \$200,000 construction subsidy in 2014. The AUL of the fishing vessel is 10 years. The vessel is required to pay back \$100,000 of the subsidy, calculated as the \$200,000 subsidy reduced by half because withdrawal was required half way through the AUL of the vessel.

This approach addresses the difficulties of withdrawing vessel construction and similar asset-based subsidies. The repayment mechanism extracts value out of assets constructed using subsidies that the operator fully expended before the DSB's withdrawal order issues. This option can help deter governments from providing prohibited subsidies given that they will seek to avoid litigation over subsidies their constituents ultimately will have to repay.

Proposed Provision: Repayment of Remaining Value

Subsidies that the Dispute Settlement Body determines to be prohibited under the Fisheries Agreement must be withdrawn without delay. Withdrawal under this Agreement means the violating Member must:

⁷⁵ The AUL is the averaged expected lifespan of a fixed asset, during which it can be used for the purpose it was acquired. See, e.g., *Useful Life*, <https://www.investopedia.com/terms/u/usefullife.asp>. Examples in the fisheries context include fishing vessels or gear.

Proposed Provision: Repayment of Remaining Value

- Cancel all outstanding and continuing subsidies enumerated under this agreement that the complaining Member is challenging pursuant to this agreement, and
- Require any vessel or operator that received or continues to receive a subsidy enumerated under this agreement that the complaining Member is challenging under this agreement to repay the value of the subsidy remaining after the DSB requires the violating Member to withdraw the subsidy. The remaining value of the subsidy must be calculated as: The total value of the subsidy, divided by the number of years that comprise the subsidized asset's average useful life, multiplied by the number of years remaining in the asset's average useful life at the time the DSB orders that the subsidy be withdrawn.

Vessels and operators that received a subsidy while listed on an IUU fishing list by a flag state, coastal state, subsidizing state, or RFMO, or that are determined to have fished an overfished stock, may not receive any subsidies, including subsidies not enumerated in this agreement, for __ years, or until they have demonstrated to the relevant authority that procedures are in place to prevent future violations.

The partial repayment remedy proposed in this section contains one important limitation related to subsidies toward operators or vessels engaging in IUU fishing. This remedy is applicable to subsidies toward assets with an AUL, which is the basis of the remaining value repayment calculation. Fishery subsidies toward assets will typically qualify as capacity-enhancement subsidies, which most NGR proposals treat as prohibited subsidies under the new agreement. NGR proposals also prohibit Members from granting subsidies to vessels or operators that are on an IUU fishing list or are otherwise engaged in IUU fishing at the time the Member grants the subsidy.⁷⁶ If a Member grants an asset-based capacity-enhancement subsidy to an operator on an IUU list, the subsidy will be subject to the partial repayment remedy outlined in this section. However, if a Member grants a subsidy to an operator or vessel on an IUU fishing list that is not directed toward an asset, the remaining value repayment mechanism will not provide a suitable remedy given that there will be no AUL on which to calculate the remaining value to be repaid. The next section, which proposes full repayment of a subsidy, helps address this problem.

⁷⁶ See, e.g., EU (TN/RL/GEN/181/Rev.1), *supra* note 17 (providing that “[a] party shall not grant or maintain any subsidy benefitting an operator if its fishing vessel...is included in the IUU fishing vessel list of that Party or of a [RFMO/A].”); LDC Group (TN/RL/GEN/193), *supra* note 17 (providing that “Members shall not grant or maintain any...[s]ubsidies provided to any vessel or operator engaged in [IUU fishing]. Such vessels or operators shall be defined as those...[i]ncluded in an IUU list of [an RFMO or] ...[i]dentified by the flag state, the subsidizing state, or the coastal state.”).

3.3.2.2.1.3. Full Subsidy Repayment

The third approach requires the violator to fully repay the subsidy a Member is challenging. Full repayment includes the entire value of the subsidy the operator received, not just the value remaining after the withdrawal implementation period.

Example

An operator is determined to have received a prohibited construction subsidy worth \$200,000, a prohibited fuel subsidy worth \$100,000, and another type of subsidy that is not otherwise prohibited under the fisheries subsidies agreement worth \$40,000. The operator was on an IUU fishing list at the time the Member granted the subsidy. The DSB adopts a report requiring the withdrawal of the subsidies. The operator must repay all \$340,000 of the subsidies received.

This option will provide an even stronger deterrent than the partial repayment model for governments to refrain from providing unlawful fisheries subsidies. Furthermore, full subsidy repayment does not depend on calculating the remaining AUL of a subsidized asset. Full repayment therefore accounts for subsidies that are not directed toward assets with an AUL and which would not violate the fisheries subsidies agreement but for the fact that they were granted to operators engaged in IUU fishing.

Proposed Provision: Full Subsidy Repayment

Subsidies determined to be prohibited under the Fisheries Agreement must be withdrawn without delay. Withdrawal under this Agreement means the violating Member must:

- Cancel all outstanding and continuing subsidies enumerated under this agreement that the complaining Member is challenging pursuant to this agreement, and
- Require any vessel or operator that received or continues to receive a subsidy enumerated under this agreement that the complaining Member is challenging pursuant to this agreement to repay the entire amount of that subsidy to the violating Member.

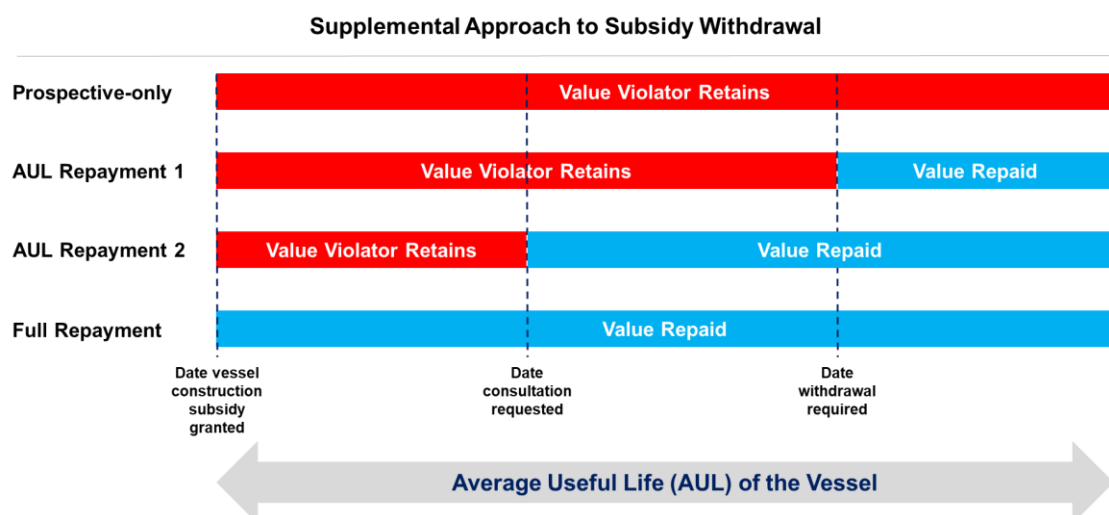
Vessels and operators that received a subsidy while listed on an IUU fishing list by a flag state, coastal state, subsidizing state, or RFMO, or that are determined to have fished an overfished stock, may not receive any subsidies, including subsidies not enumerated in this agreement, for __ years, or until they have demonstrated to the relevant authority that procedures are in place to prevent future violations.

One point of clarification is necessary regarding repayment of subsidies in connection with IUU fishing. As noted in the previous section, NGR proposals prohibit Members from granting subsidies to vessels or operators that are on an IUU fishing list

at the time the Member grants the subsidy.⁷⁷ The European Union’s proposal, as one example, provides that a “Party shall not grant or maintain any subsidy benefiting an operator...if its fishing vessel...is included in the IUU fishing vessel list of that Party or of [an RFMO].”⁷⁸ The proposals do not clearly prohibit, and thus do not clearly require withdrawal of, subsidies granted to operators who then engage in IUU fishing after receiving the subsidy. Furthermore, requiring an operator that engages in IUU fishing after receiving a subsidy to repay that subsidy would present practical challenges. For example, if an operator lawfully received a \$100,000 subsidy and subsequently engaged in IUU fishing by failing to report its catch during one reporting period, it is not clear what portion of the subsidy the operator ought to repay. For these reasons, the subsidy repayment remedy proposed in this section only applies when the vessel or operator was on an IUU fishing list or otherwise designated as engaged in IUU fishing at the time it received a subsidy.

* * *

The figure below uses a vessel construction subsidy as an example to illustrate the three main approaches to subsidy withdrawal proposed in this section. As an additional option for negotiators, this figure breaks the “remaining value repayment” option into two sub-options. The first bases repayment on the value of the subsidy remaining at the time the DSB requires withdrawal, and the second is based on the value remaining when the Member requests consultation.



⁷⁷ See *id.*

⁷⁸ See EU (TN/RL/GEN/181/Rev.1), *supra* note 17.

3.3.2.2.2. Subsidy-Specific Approach

As an alternative to withdrawal remedies that cover all prohibited fisheries subsidies, a second approach involves withdrawal remedies specific to particular types of subsidies. This approach requires designating harmful fisheries subsidies⁷⁹ as prohibited under the agreement and then tailoring withdrawal remedies to each prohibited subsidy. The following harmful subsidies should be addressed at a minimum.

3.3.2.2.2.1. Vessel Construction, Modernization, and Fishing Equipment Subsidies

Subsidies for vessel construction, modernization, and fishing equipment increase effort, capacity, and detection capabilities, all of which can contribute to overfishing and fish stock depletion. As Section 3.3.2.1 noted, prospectively withdrawing a subsidy that an operator already spent on vessel construction, modernization, or fishing equipment does not eliminate fishing using the subsidized equipment. An alternative approach is to extract value from the vessel, which is consistent with the definition of withdrawal as “taking away what has been enjoyed.”⁸⁰ Vessel construction, modernization, and fishing equipment subsidies could be “withdrawn” using a combination of the following options:

- Requiring vessels that have received construction, modernization, or fishing equipment subsidies that are under challenge in the pending dispute to repay all or part of those subsidies, as proposed in Sections 3.3.2.2.1.2-3 above.
- Requiring operators or vessels that received a construction, modernization, or fishing equipment subsidy that is under challenge in the pending dispute to commit to enhanced reporting requirements beyond the base notification obligations applicable to all Members under the fisheries subsidies agreement to ensure the operator or vessel is not engaged in IUU fishing or fishing in overfished stocks.
- Requiring the vessel that received a subsidy under challenge in the pending dispute to be repurposed.
- Requiring the vessel that received a subsidy under challenge in the pending dispute to be scrapped or sunk, or the equipment to be removed.

⁷⁹ Or a specific list of subsidy types.

⁸⁰ WT/DS46/AB/RW, *Brazil – Aircraft (Article 21.5 – Canada) Appellate Body Report*, *supra* note 66, ¶ 45.

3.3.2.2.2.2. Fuel Subsidies

Fuel subsidies can be defined as the difference in price for fuel paid by fishers as compared to the national price of fuel. These subsidies allow fishers to stay out on the water and increase effort, which leads to overexploitation of fish stocks. Fuel subsidies are not locked into a particular asset, as is the case with vessel construction subsidies, so they can be withdrawn simply by preventing future payments and ending fuel subsidies programs for fishing operators. Fuel subsidies could be “withdrawn” using a combination of the following options:

- Ending the fuel subsidy program that is under challenge in the pending dispute.
- Ceasing payments to fishers under the fuel subsidy program that is under challenge in the pending dispute.
- Requiring Members to demand that operators or vessels that received a fuel subsidy repay any amount of the subsidy under challenge in the pending dispute that the operator or vessel had not yet expended at the time the panel or Appellate Body report determines that a violation occurred.
- Requiring Members to demand that vessels or operators repay to the violating Member the entire value of fuel subsidies they received from the violating Member that are under challenge in the pending dispute.

3.3.2.2.2.3. Price Supports

Market price supports in the fisheries context occur when the government drives the domestic price of a product above the world market price by, for example, purchasing surplus fish from fishers.⁸¹ This practice is inherently distortive as it upsets the natural competition model. Price support subsidies could be “withdrawn” using a combination of the following options:

- Requiring Members to eliminate any governmental surplus purchasing programs that are under challenge in the pending dispute.
- Requiring Members to cease governmental purchases of surplus fish that are under challenge in the pending dispute.
- Requiring operators and vessels to repay any governmental purchases of surplus fish that are under challenge in the pending dispute.

⁸¹ OECD (2017), “Support to fisheries: Levels and impacts”, *OECD Food, Agriculture and Fisheries Papers*, No. 103, OECD Publishing, Paris. <http://dx.doi.org/10.1787/00287855-en>.

3.3.2.2.3. Special and Differential Treatment

Existing NGR proposals provide for special and differential treatment through exemptions to certain subsidy prohibitions, allowing specific groups of countries⁸² to provide otherwise prohibited fisheries subsidies to certain types of fishers⁸³ or fishing activities.⁸⁴ However, if special and differential treatment cannot be agreed upon as applied to the prohibitions, another option is to apply special and differential treatment to remedies. Applying special and differential treatment to withdrawal would focus on the same countries and groups noted in the existing proposals and apply a more lenient withdrawal standard to those groups. For example, developed countries and developing countries ranking in the top 20 in terms of marine capture production⁸⁵ would be subject to the full scope of withdrawal, while artisanal and subsistence fishers⁸⁶ in developing countries and LDCs would be exempt from repaying any portion of a prohibited subsidy that has been granted. Applying special and differential treatment to the withdrawal remedy could address the concerns of developing countries and LDCs if the negotiators do not agree to apply the treatment to the prohibitions themselves.

3.3.3. Countermeasures

Countermeasures are the second remedy available to complaining Members under the SCM Agreement's prohibited subsidies regime, in the event the first remedy of "withdrawal" does not occur. This section first explains how the SCM countermeasures regime applies in its current form against prohibited fisheries subsidies; second, this section identifies additional remedies that the SCM Agreement does not currently authorize but that the NGR could adopt in the new fisheries subsidies agreement to supplement the SCM Agreement's countermeasures regime.

⁸² Current proposals apply special and differential treatment to some combination of (1) LDCs, (2) developing countries, (3) developing countries not engaged in large scale industrial distant water fishing, and (4) developing countries excluding those ranking in the top [x] in terms of marine capture production. See Compilation Matrix, *supra* note 17.

⁸³ Current proposals apply special and differential treatment to some combination of (1) artisanal fishers, (2) subsistence fishers, and (3) small-scale fishers. *Id.*

⁸⁴ Current proposals apply special and differential treatment to some combination of (1) fishing activities, which exclusively exploit fish stocks within the economic exclusive zone, (2) fishing activities to exploit underexploited resources, (3) fishing activities relating to rights held under an RFMO/RFMA, (4) fishing activities that do not target stocks in an overfished condition, and (5) fishing activities that do not negatively affect fishery resources of other members or an RFMO. *Id.*

⁸⁵ See, e.g., EU (TN/RL/GEN/181/Rev.1), *supra* note 17, art. 4.2 bis.

⁸⁶ See, e.g., Indonesia (TN/RL/GEN/189/Rev.1), *supra* note 17, arts. 3.1-2.

3.3.3.1. Countermeasures Available in Response to Fisheries Subsidies under the SCM Agreement

If the violating Member fails to withdraw its subsidies within the implementation period the DSB specifies, the complaining Member may request authorization from the DSB to take “appropriate countermeasures” against the subsidizing Member for as long as the subsidies have not been “withdrawn.”⁸⁷ The DSB must authorize the complaining Member to impose countermeasures unless the DSB decides by consensus to reject the complaining Member’s request.⁸⁸ Violating Members may also request arbitration pursuant to Article 22 of the DSU to determine whether the level of countermeasures the complaining Member proposes is “appropriate.”⁸⁹ Once the DSB authorizes the complaining Member’s countermeasures, the complaining Member may then apply countermeasures against subsidies the violating Member continues to provide after the DSB’s withdrawal implementation period expires.⁹⁰

Whether a countermeasure is “appropriate” under the SCM Agreement depends on two issues: first, whether the *level* of the countermeasure is appropriate; and second, whether the *type* of countermeasure is appropriate. This section analyzes how the SCM Agreement’s countermeasures framework applies to fisheries subsidies along three dimensions: The typical timeline associated with imposing countermeasures; how a complaining Member could measure the level of countermeasures against fisheries subsidies; and the type of countermeasures that would be available.

3.3.3.1.1. Timeline Associated with Imposing Countermeasures

Substantial time typically elapses between the beginning of a subsidies dispute and the point at which a complaining Member receives authorization to impose countermeasures should the violating Member fail to comply with the DSB’s withdrawal order. *Brazil—Aircraft* illustrates the amount of time that typically elapses before a complaining Member may impose countermeasures under Article 4.10:

⁸⁷ SCM Agreement art. 4.10.

⁸⁸ SCM Agreement art. 4.10.

⁸⁹ SCM Agreement art. 4.11.

⁹⁰ See Decision of the Arbitrator, *Brazil – Aircraft (Art. 22.6 – Brazil) (Prohibited Subsidies)*, WTO Doc. WT/DS46/ARB (circulated 28/08/2000) [hereinafter *Brazil – Aircraft (Art. 22.6 – Brazil) (Prohibited Subsidies) Arbitrator Decision*], ¶¶ 3.63-65.

06/1996	04/1999	08/1999	09/1999	05/2000	08/2000	12/2000
Canada Requests Consultations ⁹¹	Panel Orders Withdrawal Within 90 Days ⁹²	Appellate Body Adopts Panel Report ⁹³	DSB Adopts 90-Day Withdrawal Order ⁹⁴	Request to Impose Counter-measures ⁹⁵	Arbitrator Approves Counter-Measures ⁹⁶	DSB Authorizes Counter-measures ⁹⁷

This timeline limits the effectiveness of countermeasures. In *Brazil—Aircraft*, over three years elapsed between Canada’s request for consultations related to Brazil’s subsidy program and the DSB’s order that Brazil withdraw its subsidies within 90 days. Appeals and recourse to arbitration added an additional year and four months before Canada received authorization to impose countermeasures. In a fisheries subsidies case, considerable environmental harm would have continued to accumulate before the complaining Member received authorization to impose countermeasures. Furthermore, complaining Members may only impose countermeasures against subsidies that a violating Member continues to provide *after* the expiration of the DSB’s withdrawal implementation period.⁹⁸ Thus, the level of countermeasures complaining Members receive authorization to impose may be limited, restricting their effectiveness at inducing withdrawal.

3.3.3.1.2. Level of Countermeasures

The SCM Agreement does not define “appropriate countermeasures” other than by clarifying that countermeasures may not be “disproportionate” in light of the prohibited subsidy.⁹⁹ However, WTO arbitrators agree that the purpose of countermeasures under Article 4.10 is to induce the subsidizing Member to withdraw its subsidies.¹⁰⁰

⁹¹ See Request for Consultations by Canada, *Brazil – Aircraft*, WTO Doc. WT/DS46/1 (circulated 21/06/1996).

⁹² See *Brazil – Aircraft* Panel Report, *supra* note 61, ¶8.5.

⁹³ See Appellate Body Report, *Brazil – Aircraft*, WTO Doc. WT/DS46/AB/R (circulated 02/08/1999).

⁹⁴ See Action by the Dispute Settlement Body, *Brazil – Aircraft*, WTO Doc. WT/DS46/10 (circulated 06/09/1999).

⁹⁵ See Recourse by Canada to Article 4.10 of the SCM Agreement and 22.2 of the DSU, *Brazil – Aircraft*, WTO Doc. WT/DS46/16 (circulated 11/05/2000).

⁹⁶ See *Brazil – Aircraft* (Art. 22.6 – Brazil) (Prohibited Subsidies) Arbitrator Decision, *supra* note 90.

⁹⁷ See Panel Report, *Brazil – Aircraft* (Art. 21.5 – Canada), WTO Doc. WT/DS46/RW/2 (circulated 26/07/2001), ¶ 1.6.

⁹⁸ See *Brazil – Aircraft* (Art. 22.6 – Brazil) (Prohibited Subsidies) Arbitrator Decision, *supra* note 90, ¶¶ 3.63-65.

⁹⁹ SCM Agreement, *Fn.* 9.

¹⁰⁰ See *e.g.*, *Brazil – Aircraft* (Art. 22.6 – Brazil) (Prohibited Subsidies) Arbitrator Decision, *supra* note 90, ¶¶ 3.44, 3.54, 3.57 and 3.58; Decision of the Arbitrator, *U.S. – FSC (Article 22.6 – the U.S.) (prohibited subsidies)*, WTO Doc. WT/DS108/ARB (circulated 30/08/2002) [hereinafter *U.S. – FSC (Article 22.6 – the U.S.) (prohibited subsidies) Arbitrator Decision*], ¶¶ 5.52, 5.41 and 5.57; Decision of the Arbitrator, *Canada – Aircraft (Article 22.6 – Canada) (prohibited subsidies)*, WTO Doc. WT/DS222/ARB (circulated 17/02/2003) [hereinafter *Canada – Aircraft (Article 22.6 – Canada)*].

Furthermore, arbitrators interpret “appropriate” to mean that “countermeasures should be ‘adapted’ to the particular circumstances [of each case such] that there may be a degree of...variability in what [is] ‘appropriate’”¹⁰¹ and that countermeasures ought to account for the purpose behind the particular subsidy prohibition at issue.¹⁰²

Arbitrators have applied two different approaches to measuring the level of countermeasures. The first approach, which has largely been displaced, is based on the amount of the subsidy the government provides. The second—and now prevailing—approach is based on the trade effects the subsidies cause to the complaining member. However, because arbitrators interpret “appropriate” to permit tailoring countermeasures “to the particular circumstances,” arbitrators could read “appropriate” to encompass countermeasures based on environmental harm as well. Under existing SCM jurisprudence, complaining Members could seek to base countermeasures against fishery subsidy violations on each of these three measures—the amount of the subsidy, trade effects, and environmental harm.

3.3.3.1.2.1. Amount of the Subsidy

The “amount of the subsidy” is the value of the subsidy the violating Member continues to provide after the DSB’s withdrawal implementation period expires.¹⁰³ Complaining Members could base countermeasures in response to fishery subsidy violations on this measure. An example using fuel subsidies illustrates how this measure would apply. Assuming the DSB’s withdrawal implementation period ends January 1, 2020, the complaining Member could impose countermeasures based on the entire amount of fuel subsidies the violating Member plans to provide to fishing operators in 2020. The complaining Member could derive the amount of planned subsidies based on the violating Member’s average historical fuel consumption in the fishing industry, the level at which it subsidized fuel, and the projected price of fuel during that year. For example, assuming the violating Member will use 1 million liters of fuel at \$2 per liter,

(*prohibited subsidies*) Arbitrator Decision], ¶¶ 3.47-3.48; Decision of the Arbitrator, *U.S. – Upland Cotton (Article 22.6 – the U.S.) (prohibited subsidies)*, WTO Doc. WT/DS267/ARB/1 (circulated 31/08/2009) [hereinafter *U.S. – Upland Cotton (Article 22.6 – the U.S.) (prohibited subsidies) Arbitrator Decision*], ¶4.108.

¹⁰¹ *U.S. – Upland Cotton (Article 22.6 – the U.S.) (prohibited subsidies) Arbitrator Decision*, *id.* ¶ 4.46.

¹⁰² *See id.* ¶ 4.56.

¹⁰³ *See e.g.*, *Brazil – Aircraft (Art. 22.6 – Brazil) (prohibited subsidies) Arbitrator Decision*, *supra* note 90, ¶¶ 3.64-3.65 (basing the level of countermeasures on subsidies the violating Member continued to provide after the DSB’s withdrawal implementation period expired).

40% of which the violating Member will subsidize, the complaining Member could impose countermeasures equal to \$800,000—for example, a 100% tariff on imports from the violating country of a total value worth \$800,000.

This approach nonetheless has two critical shortcomings in the fisheries subsidies context. First, the amount of the subsidy likely will not correspond with the environmental harm the subsidy causes. As discussed further below, environmental harm can encompass many factors, including fish stock restoration costs and even the health effects on a community of reduced fish resources. There is no reason why the economic value of these factors would necessarily correspond with the value of a Member's subsidies.

Second, the amount of subsidies the complaining Member continues to provide after the DSB's implementation period expires may be small. For example, in 2013, Brazil and Canada—both large countries with large fishing industries—notified approximately \$6 million and \$3 million, respectively, in fuel subsidies for their fishing industries.¹⁰⁴ Given the timeline involved in a typical subsidies case, the complaining Member may lack an incentive to seek countermeasures because the cost of litigation may approach or exceed the value of the countermeasure it ultimately receives authorization to impose. Similarly, the level of authorized countermeasures may fall well below the economic benefits the violating Member derives from the subsidy, causing it to retain the subsidy and continue to impose environmental harm notwithstanding the complaining Member's countermeasure.

3.3.3.1.2.2. Trade Effects

The trade effects approach, the preferred method under WTO jurisprudence, entails imposing countermeasures based on the level of economic harm the complaining Member experiences due to the subsidies a violating Member continues to provide after the DSB's withdrawal implementation period expires. An arbitrator first applied this approach in *U.S.—Cotton*, a case involving interest rate discounts the United States provided to importers of U.S. agricultural products.¹⁰⁵ The Arbitrator measured the trade effects based on the additional U.S. exports that would not have occurred absent

¹⁰⁴ See Fuel Subsidies Proposal, *supra* note 38, at 13.

¹⁰⁵ U.S. – Upland Cotton (Article 22.6 – the U.S.) (prohibited subsidies) Arbitrator Decision, *supra* note 100, ¶ 4.278.

the subsidy program,¹⁰⁶ apportioned by the specific effects on Brazil's market, and limited to the subsidies provided after the implementation period.¹⁰⁷ The Arbitrator then calculated the trade effects as both the domestic agricultural sales and exports to third countries Brazil lost to subsidized U.S. exports in those markets.¹⁰⁸

A complaining Member could apply a countermeasure based on the trade effects it incurs due to the fishery subsidies a violating Member provides after the DSB's implementation period ends. Taking fuel subsidies as an example, the complaining Member must measure the amount of additional fishing a fuel subsidy allows, and then link that additional fishing to trade harm. Measuring the additional catch a fuel subsidy would allow requires identifying both the additional amount of fishing time a unit of fuel confers on the subsidized fleet and the total catch capacity of the fleet. The measurement would also require understanding which boats received subsidized fuel, as a given amount of fuel directed toward a higher-capacity boat would likely yield a larger catch than the same amount of fuel directed toward a lower-capacity boat. Calculating trade effects on the complaining Member would then require estimating the reduced sales for domestic fishermen, reduced exports to third countries, and any price suppression or depression in the complaining Member's fishing industry.

As with the amount of the subsidy approach, the trade effects approach is not optimal as applied to fisheries subsidies. Because the trade effects approach is still limited to subsidies continuing after the DSB's withdrawal implementation period ends, it may yield an insignificant dollar value on which the complaining Member could base its countermeasure. In addition, *U.S.—Cotton* requires that countermeasures include only the trade effects on the complaining Member, not on all Members.¹⁰⁹ The level of countermeasures therefore may fall well below the benefit the violating Member derives, which again may not induce it to withdraw its subsidies and would allow environmental harm to accumulate further. Finally, the trade effects approach still does not capture the level of environmental harm the subsidized fishing causes. Omitting the

¹⁰⁶ *Id.* ¶ 4.183.

¹⁰⁷ *Id.* ¶¶ 4.199–4.200. In this case, the trade effects included an estimate of the amount of the interest rate subsidy, which served as a proxy for the distortion of cotton prices that impacted Brazilian producers. *Id.* ¶ 4.231.

¹⁰⁸ *Id.*, ¶ 4.253 (finding that “part of the trade-distorting impact of [the relevant subsidy program] is its displacement of Brazilian production in its home market and Brazilian exports in third country markets.”).

¹⁰⁹ *Id.* ¶¶ 4.199–200.

principal harm fisheries subsidies cause from the countermeasure calculation further limits the amount of the countermeasure, reducing the extent to which countermeasures effectively induce withdrawal.

3.3.3.1.2.3. Environmental Harm

A complaining Member could also seek to impose countermeasures based on the environmental harm caused by any fisheries subsidies still in place after the DSB implementation period ends. Under *U.S.—Cotton*, “countermeasures should be ‘adapted’ to the particular circumstances”¹¹⁰ of the case at hand, and they should account for the purpose behind prohibiting the particular type of subsidy at issue¹¹¹ and the “particular characteristics of the prohibited subsidy.”¹¹² *U.S.—Cotton* noted that countermeasures based on the trade distortion agricultural export subsidies cause are “appropriate” in part because the purpose of prohibiting export subsidies is to prevent trade distortion.¹¹³ Similarly, complaining Members could impose countermeasures against prohibited fisheries subsidies based on environmental harm in part because that is the type of harm prohibitions against fisheries subsidies are designed to prevent. Applying countermeasures based on environmental harm also ensures that the countermeasures fit “the particular circumstances” of a fishery subsidy case given that countermeasures based on trade effects will not adequately account for the primary harm fisheries subsidies inflict.

Measuring and monetizing the environmental harm fisheries subsidies cause is complex, but at least two approaches are available.

1. **Fishery Restoration Costs:** The first, and more modest, approach would be based on the cost of restoring the stock where the subsidized fishing occurs back to a sustainable level. This approach could apply to subsidized fishing in any stock where restoration efforts are ongoing. The level of the countermeasure would equal the additional restoration cost the violating Member imposes due to its subsidized fishing in that stock. To calculate the

¹¹⁰ *Id.* ¶ 4.46.

¹¹¹ *See id.* ¶ 4.56 (justifying the trade effects approach in part because “it is precisely the high likelihood of such trade-distorting effects arising from the granting of export subsidies that explains their prohibition under the *SCM Agreement*.”)

¹¹² *Id.* ¶ 4.59.

¹¹³ *Id.* ¶ 4.56.

additional catch the prohibited subsidy enables, the complaining Member could apply the same methodology proposed in the previous section on trade effects. Restoration costs could equal the marginal restoration cost caused by additional depletion in a particular stock. For example, assume that based on historical cost data, further depleting a particular stock by X% yields additional restoration costs of \$Y, and that the additional fishing a subsidizing country conducts using subsidies depletes that stock by X%. The complaining Member could then impose countermeasures equal to \$Y. This approach is modest in that restoration costs may capture only a small portion of the total environmental harm subsidized fishing causes.

2. **Comprehensive Environmental Costs:** The second approach would account for a more comprehensive array of environmental harms. This measure would include an estimate of the reduction in biomass that fisheries subsidies cause and the corresponding economic impacts on different countries that rely on fish for income.¹¹⁴ To the extent accurate modeling is available, it could also account for the health effects resulting from fish stock depletion on those who rely on fish as their primary source of protein.

Although “appropriate” countermeasures under Article 4.10 can be interpreted to encompass environmental harm, WTO case law limits the extent of the harm on which a complaining Member may base its countermeasure. *U.S.—Cotton* permitted Brazil to impose countermeasures based only on the level of harm U.S. subsidies caused to Brazil in particular, not on the level of harm U.S. subsidies caused globally.¹¹⁵ In *Brazil—Aircraft*, an earlier case, the arbitrator concluded that Canada may apply countermeasures which “correspond[] to the *total* amount of the subsidy,” even though Canada incurred only a portion of the economic harm those subsidies caused.¹¹⁶ *Brazil—Aircraft* reasoned that the violating Member may not have an adequate

¹¹⁴ A model from the World Bank that estimates the impact of fisheries subsidies on levels of biomass and corresponding economic impacts on communities that rely on fish for income and sustenance could provide the basis for measuring the comprehensive economic costs fisheries subsidies cause. See, e.g., World Bank. 2017. *The Sunken Billions Revisited: Progress and Challenges in Global Marine Fisheries*. Washington, DC: World Bank. Environment and Sustainable Development series. doi:10.1596/978-1-4648-0919-4. License: Creative Commons Attribution CC BY 3.0 IGO. <https://openknowledge.worldbank.org/handle/10986/24056>.

¹¹⁵ U.S. – Upland Cotton (Article 22.6 – the U.S.) (prohibited subsidies) Arbitrator Decision, *supra* note 100, ¶ 4.253.

¹¹⁶ Brazil – Aircraft (Art. 22.6 – Brazil) (Prohibited Subsidies) Arbitrator Decision, *supra* note 90, ¶¶ 3.53, 3.60 (emphasis added).

incentive to withdraw its subsidy if the countermeasure only captures a portion of the benefit the violating Member derives from its subsidy program.¹¹⁷ Nevertheless, *U.S.—Cotton* is now the prevailing case governing countermeasure determinations. Arbitral bodies are therefore likely to uphold countermeasures based only on the environmental harm the complaining Member experiences.

Limiting the level of countermeasures in this manner is problematic in the fisheries subsidies context because fisheries subsidies cause global environmental harm that is difficult to attribute to particular countries. *U.S.—Cotton* illustrated that it is possible to isolate the trade effects subsidies cause to individual Members based on the value of the complaining Member’s domestic sales and exports to third countries that the violating Member’s subsidized exports displace. Because most fisheries are global resources that no particular country controls, it would be difficult to isolate the amount of harm any one country experiences based on degradation in a particular fish stock. The “Additional Countermeasure Proposals” below therefore propose remedies to supplement the existing countermeasures regime that would account for the global environmental harm fisheries subsidies cause.

3.3.3.1.3. Types of Countermeasures

WTO arbitral bodies have only authorized one type of countermeasure: the withdrawal of trade concessions equal to the level of countermeasures the arbitrator authorizes. This approach permits the complaining Member to withdraw any trade concessions previously granted to the violating Member, such as tariff bindings, even if those concessions are in a different industry or under a different WTO agreement than the one in which the violation occurred.¹¹⁸ The only constraint is that the value of suspended concessions must not surpass the value of authorized countermeasures.¹¹⁹

Removing trade concessions could help to partially address the harm fisheries subsidies prohibitions are designed to confront. If the level of authorized countermeasures is sufficiently high, withdrawing trade concessions in that amount

¹¹⁷ See *id.* ¶ 3.54.

¹¹⁸ See, e.g., *id.* ¶¶ 4.1-4.3. Here the Arbitrator authorized Canada to suspend tariff concessions or other obligations to Brazil under GATT 1994, the Agreement on Textiles and Clothing, and the Agreement on Import Licensing Procedures, even though the prohibited subsidy at issue was restricted to the aircraft industry. The practice of withdrawing trade concessions under a different WTO agreement is known as cross-retaliation.

¹¹⁹ *Id.*

could incentivize the violating Member to withdraw its prohibited subsidy, which would stop the environmental harm the subsidies were causing. Removing concessions can be particularly effective insofar as complaining Members can target industries in which the withdrawal will be especially painful for the violating Member.

But even if the level of withdrawn concessions eventually induces the violating Member to withdraw its subsidy, countermeasures by their nature are not intended to compensate for the harm a prohibited subsidy causes before the subsidy is withdrawn. At most, countermeasures help offset the trade distortion a Member's subsidy causes. Fishery subsidy prohibitions, however, are primarily concerned with environmental harm, not trade distortion. For these reasons, the "Additional Countermeasure Proposals" below offer complementary remedies designed to offset the environmental harm that accumulates after the DSB's implementation period expires.

3.3.3.2. Remedies to Complement the SCM Agreement Countermeasures Regime

To enhance the SCM Agreement's countermeasures framework as applied to fisheries subsidies, we propose the following additions to the new fisheries subsidies agreement. These proposals contain remedies designed to complement the SCM's countermeasures regime.

3.3.3.2.1. Monetary Assessment

Compensation is not available as a type of remedy for subsidies under current WTO law. Rather, in certain cases parties decided that the violating Member would compensate the complaining Member based on the subsidies it continued to provide after the DSB's withdrawal period ended as an alternative to facing countermeasures. In *U.S.—Cotton*, the parties agreed that the violating Member would compensate the complaining Member based on the level of trade effects instead of withdrawing trade concessions worth an equivalent amount.¹²⁰

¹²⁰ See Notification of a Mutually Agreed Solution, *U.S.—Upland Cotton*, WTO Doc. WT/DS267/46 (circulated 23/10/2014), at 2. The agreement required the United States to transfer funds to Brazil within the amount the Arbitrator authorized, and it specified that the funds would be transferred to the Brazil Cotton Institute and could only be used for specified activities related to assisting the Brazilian cotton industry. *Id.* at 2–3. Similarly, in *U.S.—Copyright*, the United States and European Union agreed that the United States would continue to pay monetary compensation instead of removing a copyright law that is unlawful under the TRIPS Agreement. See Mutually Satisfactory Temporary Agreement, *U.S.—Copyright*, WTO Doc. WT/DS160/23 (circulated 26/06/2003).

Other free trade agreements, however, make monetary compensation available explicitly as a type of remedy. Under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), when a party fails to withdraw a measure that violates certain labor or environmental regulations, the complaining Member may request that the panel impose an annual monetary assessment against the violating Member.¹²¹ The panel must determine the amount of the monetary assessment within 90 days after reconvening.¹²² Panels must base the level of monetary assessment on factors such as the trade effects the violating measure causes, the “pervasiveness and duration” of the violation, the “reasons for the party’s failure” to prevent the violation, the efforts the party makes to remedy the violation, and “other relevant factors.”¹²³ The violating party then must pay a monetary assessment into a fund that a neutral body then expends on appropriate labor and environmental initiatives.¹²⁴

The new fisheries agreement could adopt a provision similar to the monetary assessment model in CAFTA-DR. The provision could permit complaining Members to request that a WTO panel impose a monetary assessment on the violating Member if it fails to withdraw its subsidy within the DSB’s withdrawal period. Alternatively, it could permit violating Members to elect to pay a monetary assessment instead of facing countermeasures. In determining the amount of the monetary assessment, the agreement could require panels to consider the amount of the subsidy, the value of the environmental harm the subsidy causes, and the number and scale of previous fishery subsidy violations the violating Member had committed. Panels would have the power to impose a monetary assessment based on the global environmental harm the fishery subsidy causes, not merely the harm to the complaining Member in particular. If the violating Member had committed a previous violation fishery subsidy violation, the panel could impose a monetary assessment worth double the value of the assessment it would impose if the violating Member had no previous violations.

¹²¹ See CAFTA-DR, art. 20.17.1 (providing that the “complaining Party may at any time thereafter request that the panel be reconvened to impose an annual monetary assessment on the Party complained against.”).

¹²² See CAFTA-DR, art. 20.17.2.

¹²³ *Id.*

¹²⁴ See *id.* art. 20.17.4.

The violating Member would pay the monetary assessment into a fund that a neutral body controls.¹²⁵ The agreement would charge that body with expending monetary assessment funds on initiatives designed to address the global environmental harm fisheries subsidies cause. Under CAFTA-DR, cabinet-level representatives from the parties to the dispute comprise the neutral body charged with dispersing monetary assessment funds,¹²⁶ which is one option for the new fisheries subsidies agreement. Alternatively, the WTO Subsidies Committee could control the compensation funds and decide where to direct environmental restoration expenditures.

Below is a proposed monetary assessment provision for the new fisheries agreement, modelled on the monetary assessment provision in CAFTA-DR.

Proposed Provision: Monetary Assessment

1. If the violating Member fails to withdraw a subsidy found to violate this agreement within the period required by the Dispute Settlement Body, the complaining Member may at any time thereafter request that the panel impose an annual monetary assessment on the violating Member.
2. The panel shall determine the amount of the monetary assessment within 90 days after it convenes under paragraph 1. In determining the amount of the monetary assessment, the panel shall take into account:
 - a. The amount of the subsidy the violating Member provided in violation of this agreement, beginning on the date immediately following the last day of the period during which the Dispute Settlement Body required the violating Member to withdraw its subsidy;
 - b. The total level of environmental harm the subsidy caused, beginning on the date immediately following the last day of the period during which the Dispute Settlement Body required the violating Member to withdraw its subsidy;
 - c. The number and scale of previous violations of this agreement the violating Member committed.
3. On the date on which the panel determines the amount of the monetary assessment under paragraph 2, or at any time thereafter, the complaining Member may provide notice in writing to the violating Member demanding payment of the monetary assessment. The violating Member must pay the monetary assessment in quarterly instalments beginning 60 days after the complaining Member provides such notice.

¹²⁵ See *id.* art. 20.17.4.

¹²⁶ See *id.* art. 20.17.4 n.8.

Proposed Provision: Monetary Assessment

4. Assessments shall be paid into a fund established by the WTO Committee on Subsidies and Countervailing Measures. The Committee shall expend the funds on fisheries restoration initiatives.
5. If the violating Member fails to pay a monetary assessment within the period provided in paragraph 4, the complaining Member may request authorization to impose countermeasures against the violating Member under any WTO agreement. If a complaining Member is authorized to impose countermeasures against the violating Member under this paragraph, it shall be permitted to impose countermeasures that cover the period beginning on the date immediately following the last day of the period during which the Dispute Settlement Body required the violating Member to withdraw its subsidy.

3.3.3.2.2. Fish Catch Reduction

The monetary compensation model permits Members that fail to withdraw their fisheries subsidies to continue providing subsidies and causing environmental harm so long as they pay an amount that can be used to offset that environmental harm. As an alternative approach, the new fisheries subsidies agreement could permit WTO panels to restrict a violating Member's fish catch so long as the unlawful fishery subsidy remains in place.

This approach would work in the following manner. When a violating Member fails to withdraw its fishery subsidy within the DSB's implementation period, the complaining Member could request that the panel prospectively restrict the violating Member's catch so long as it continues providing the subsidy. The panel would reduce the violating Member's permitted catch in proportion to the additional catch the subsidy allows it to attain, which the panel would measure using the approach outlined above in Section 3.3.3.1.2.2 related to measuring the trade effects a subsidy causes. For example, if the DSB's subsidy withdrawal implementation period expires on January 1, 2020, the panel would restrict the violating Member's permitted fish catch based on the level of subsidies the Member plans to provide in 2020¹²⁷ and the corresponding additional fish catch those subsidies will yield. The restriction would be based on the total catch rights a Member granted to its fishing industry or for which it possesses rights in RFMOs during that year. The restriction could apply across-the-board, to any

¹²⁷ Alternatively, the complaining Member could calculate the violating Member's planned subsidies based on the historical three-year average the Member granted for that particular type of subsidy.

type of fishery, or it could be targeted to the fishery where the violating Member had been applying the subsidy. The panel would require that the violating Member submit evidence annually that it reduced its catch in compliance with the panel's requirements.

Because WTO panels do not have inherent authority over Members' fish catches, this remedy would likely require coordination with the RFMOs that control fish catch rights in specific fisheries. Geographic RFMOs are responsible for conservation and management for fisheries in particular regions, and species-specific RFMOs manage highly-migratory species that no single region can control.¹²⁸ Many of these RFMOs maintain fish catch quotas among member states associated with each fishery within their jurisdiction.¹²⁹ To impose a fish catch reduction remedy, WTO negotiators must gain authorization from each RFMO to restrict the fish catch of WTO Members who violate a fishery subsidy prohibition. The new fisheries subsidies agreement also must contain a provision authorizing a WTO panel to impose a catch reduction remedy as an alternative to monetary assessment. Finally, because a WTO panel may experience difficulty enforcing a violating Member's compliance with a catch reduction order, the new agreement must authorize complaining Members to impose countermeasures in response to the violating Member's failure to comply.

This approach is the inverse of the monetary compensation regime in CAFTA-DR. Whereas monetary compensation permits the violating Member to continue to cause environmental harm and simply pay back the level of the damage, reducing a Member's fish catch forces it to forego imposing any additional environmental harm by reducing its catch to the level it would attain without the subsidy. The main benefit of the fish catch reduction approach is that, whereas there is no guarantee monetary compensation will correct the environmental harm fisheries subsidies cause, restricting a Member's catch prevents the environmental harm from occurring in the first place.

Below is a proposed fish catch reduction provision for the new agreement.

¹²⁸ See, e.g., Regional Fisheries Management Organizations, https://ec.europa.eu/fisheries/cfp/international/rfmo_en.

¹²⁹ See, e.g., Northwest Atlantic Fisheries Organization, *Conservation and Enforcement Measures* (2019), <https://www.nafo.int/Portals/0/PDFs/COM/2019/comdoc19-01.pdf>; Southeast Atlantic Fisheries Organization, *Conservation Measures*, <http://www.seafo.org/Management/Conservation-Measures>.

Proposed Provision: Fish Catch Reduction

1. If the violating Member fails to withdraw a subsidy found to violate this agreement within the period required by the Dispute Settlement Body and the complaining Member seeks to impose a monetary assessment pursuant to the previous section, the violating Member may, in the place of paying a monetary assessment, elect to reduce its fish catch in proportion to the amount of additional catch it obtains as a result of providing a subsidy prohibited under this agreement.
2. A panel shall determine the amount by which a complaining Member must reduce its catch within 90 days of receiving notice from the violating Member pursuant to paragraph 1 of this section. In its calculation of the amount by which a complaining Member must reduce its catch, the panel shall include any subsidy that the violating Member provides beginning on the date immediately following the last day of the period during which the Dispute Settlement Body required the violating Member to withdraw its subsidy. The panel shall require the violating Member to maintain its fish catch reduction obligations under this section until the violating Member withdraws all subsidies covered in the Dispute Settlement Body's withdrawal order.
3. From the date on which the panel determines the amount by which the violating Member must reduce its catch, the panel shall receive verification each quarter from each RFMO of which the violating Member is a party that the violating Member has complied with its catch reduction obligations.
4. If the violating Member fails to comply with its fish catch reduction obligations under this section, the complaining Member may request authorization to impose countermeasures against the violating Member under any WTO agreement. If a complaining Member is authorized to impose countermeasures against the violating Member, it shall be permitted to impose countermeasures that cover the period beginning on the date immediately following the last day of the period during which the Dispute Settlement Body required the violating Member to withdraw its subsidy.

3.3.3.3. Special and Differential Treatment

As discussed in Section 3.3.2.2.3, should the NGR fail to agree upon provisions exempting certain countries from fishery subsidy prohibitions, the agreement could provide for special and differential treatment by loosening the remedies available against certain developing and LDCs. For example, the agreement could exempt LDCs from exposure to countermeasures in response to a subsidy violation. LDCs, and artisanal and subsistence fishers in developing countries, could also be exempt from the monetary assessment and catch reduction remedies proposed in Section 3.3.3.2 above. Extending special and differential treatment through subsidy prohibition exemptions rather than remedy limitations is a logical approach if the goal is to avoid exposing LDCs, artisanal, and subsistence fishers to fishery subsidy litigation. Nevertheless,

limiting the remedies applicable to these groups is available as an alternative if the NGR is unable to agree on exemptions from the prohibitions themselves.

4. Additional Proposals

Although adjusting the remedies available in the SCM Agreement will address some challenges associated with fisheries subsidies, the NGR should consider other enforcement mechanisms as well. This Part proposes three additional frameworks that could supplement the SCM revisions proposed in the previous Part: 1) an enhanced notification and transparency regime; 2) a law enforcement approach to regulating IUU fishing; and 3) incentivizing collective action in response to fishery subsidy violations.

4.1. Notifications and Transparency

Given the challenges of addressing fisheries subsidies through the WTO's dispute resolution process, making subsidies more transparent to WTO Members could serve as an effective supplement to the remedies discussed above. This section outlines the notification and transparency provisions contained in the SCM and NGR proposals, and it offers two additional proposals for the NGR's consideration.

4.1.1. Existing SCM and NGR Notification Provisions

The SCM Agreement requires WTO Members to notify subsidies within the definition provided under Article 1 that are "specific" as defined under Article 2.¹³⁰ Notifications must be "sufficiently specific to enable other Members to evaluate the trade effects" of the subsidies and to understand how the subsidy programs operate.¹³¹ This information includes the form of the subsidy, the subsidy per unit to which it is afforded, the purpose of the subsidy program, the duration of the subsidy, and statistical data permitting assessment of the subsidy's trade effects.¹³² Notifications must be provided annually unless otherwise specified.¹³³ The WTO Subsidies Committee is required to examine Members' notifications every three years.¹³⁴

¹³⁰ SCM Agreement, art. 25.2.

¹³¹ SCM Agreement art. 25.3.

¹³² SCM Agreement, art. 25.3.

¹³³ SCM Agreement, art. 25.1.

¹³⁴ SCM Agreement, art. 26.1.

Because the SCM only requires notifying subsidies that are specific, which may tend to exclude certain fisheries subsidies, the NGR proposals contain additional provisions related to notifying fisheries subsidies in particular. Five of the NGR proposals specifically adopt the notification requirements in Article 25.3 of the SCM and apply them to the fisheries subsidies regime.¹³⁵ In addition, five of the NGR proposals contain additional fisheries subsidies notification requirements. These proposals vary slightly in the type of information they require to be notified, but the following are types of information that at least one of the proposals requires:¹³⁶

- The name of the program under which the subsidy is granted
- The legal authority for granting the subsidy
- The type of fishery subsidy granted and the level of support provided
- Catch data containing the type of species caught using subsidies and the amount of that species caught using subsidies
- The fleet capacity in the fishery for which the subsidy was provided
- The status of the fish stock in which the subsidized fishing occurred (e.g., overfished, fully fished, under-fished)
- Conservation and management measures in place for the relevant fish stock
- Total imports and exports per species.

In addition, one Member proposed that Members who fail to notify fisheries subsidies within the period required under the SCM Agreement will face penalties for continued non-compliance after a specified period.¹³⁷

4.1.2. *Additional Proposals*

The NGR should consider adopting the following additional proposals related to subsidy notification.

4.1.2.1. Counter Notification

The NGR should consider adopting the counter notification provision in SCM Article 25.10. Under this provision, any WTO Member may bring to the attention of another Member any measure it believes that Member has not notified in accordance

¹³⁵ See Compilation Matrix, *supra* note 17.

¹³⁶ See *id.*

¹³⁷ See JOB/GC/148/Rev.1, JOB/CTG/10/Rev.1, *Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements, Communication from the United States* (12 March 2018), 10. Penalties include disqualification from chairing certain WTO bodies if the Member fails to notify its subsidy one year after the deadline, and designation as an inactive WTO Member for failure to notify two years after the deadline. *Id.*

with SCM Article 25.¹³⁸ If the violating Member does not thereafter notify the subsidy in question, the complaining Member may bring the alleged subsidy to the attention of the WTO Subsidies Committee.¹³⁹ Although five NGR proposals incorporate the notification requirements specified in SCM Article 25.3, only one incorporates Article 25 in its entirety, including Article 25.10. Other negotiation groups should consider incorporating Article 25.10 into their proposals.

The counter notification program could help accelerate subsidy withdrawal by avoiding the dispute resolution process. Bringing to light a Member's failure to adequately notify a subsidy could incentivize that Member to remove its subsidy rather than resort to litigation. Navigating the dispute resolution process is both costly for Members and often delays subsidy withdrawal given that the subsidy typically remains in place through the DSB's withdrawal deadline. Publicly shaming Members who have not properly notified certain subsidies could help avoid this process and the additional environmental harm that results from delayed subsidy withdrawal.

4.1.2.2. Automatic IUU Fishing Notification

The NGR should consider adopting a framework whereby the WTO would automatically receive notification when a Member's vessel or operator engages in IUU fishing using subsidies. The process would work as follows. The new fisheries subsidies framework would require that Members include in their notifications the specific vessels and operators receiving subsidies. Because RFMOs maintain lists of vessels and operators known to engage in IUU fishing, either the RFMO or WTO could crosscheck Members' subsidy notifications against the IUU vessel and operator list. If an IUU-listed vessel or operator receives a subsidy, the WTO could immediately notify the violating Member and request that it withdraw the subsidy. If the Member refuses, the WTO could initiate proceedings against the violating Member in the DSB.

To adopt this framework, the NGR would need to include the following three additional provisions in the new fisheries subsidies agreement. First, the agreement must require that Members notify the specific fishing vessels and operators that receive subsidies as part of the Member's annual subsidy notifications. Second, the agreement

¹³⁸ SCM Agreement, art. 25.10. Failure to notify may entail either omitting a subsidy program entirely or underreporting the level of subsidies granted.

¹³⁹ *Id.*

must provide for a mechanism allowing the WTO to receive notification when a Member's vessel or operator engages in IUU fishing using subsidies. Because RFMOs maintain IUU fishing lists, the agreement could place the burden on RFMOs to crosscheck their IUU lists with Members' subsidy notifications and alert the WTO Subsidies Committee accordingly. Third, the agreement must specify a process whereby the WTO Subsidies Committee may initiate proceedings against a violating Member should it fail to withdraw its unlawful subsidy on request. One approach would be to permit the Committee to bring proceedings itself, but WTO Members may not support creating a new WTO prosecutorial body. Alternatively, the agreement could permit the Committee to invite a Member to bring a case itself, with guaranteed compensation for the cost of litigation.

4.2. Applying a Law Enforcement Approach to IUU Fishing and Fishing in Overfished Stocks

The NGR has thus far focused on IUU fishing as a subsidy problem, but as one commentator notes, this approach largely misses the point.¹⁴⁰ Governments typically do not grant subsidies for IUU fishing directly.¹⁴¹ Rather, they subsidize certain expenditures—such as equipment or fuel—for their entire fishing industry, within which certain operators or vessels may be on an IUU fishing list. Under the new fisheries subsidies agreement, subsidies toward equipment or fuel will already be prohibited. The fact that the subsidy went toward an operator on an IUU fishing list will add little to the operator's liability. Furthermore, IUU fishing is harmful primarily due to the type of fishing it entails—for example, fishing in an unassessed stock—not because it is carried out using subsidies. Thus, it is important to eliminate IUU fishing entirely and not just when it occurs using subsidies.

For this reason, one commentator recommended addressing IUU fishing using a law enforcement rather than subsidy regulation approach. Under this method, Members would further codify prohibitions against IUU fishing in their domestic laws and adopt additional measures designed to regulate IUU fishing.¹⁴² They would also provide

¹⁴⁰ See Jaemin Lee, *Subsidies for Illegal Activities? – Reframing IUU Fishing from the Law Enforcement Perspective*, J. INT'L ECON. L. (Forthcoming 2019).

¹⁴¹ The same issue also applies to fishing in overfished stocks context. This section will use IUU fishing as the example for brevity.

¹⁴² Examples include ensuring the appropriate enforcement of the 2009 FAO Port State Measures Agreement (PSMA) and catch documentation schemes; improving traceability in seafood supply chains;

causes of action against violators and empower domestic regulators to bring enforcement actions. Members would also define penalties for violations, including civil fines and possibly criminal sanctions. Fishers injured by IUU fishing attributed to another Member could then bring suit in the violating Member's domestic courts to enforce the prohibitions. Alternatively, countries' domestic regulators could bring enforcement actions against domestic violators.

This approach is consistent with the TRIPS Agreement. TRIPS requires Members to codify certain rules related to intellectual property (IP) rights in their domestic law.¹⁴³ It also provides enforcement procedures and remedies that each Member must make available.¹⁴⁴ Among the WTO's various agreements, TRIPS is unique in requiring Members to provide both civil and criminal remedies.¹⁴⁵ The main benefit is that individual parties can directly enforce their intellectual property rights in courts where their disputes arise, rather than waiting for the accumulation of enough violations to stimulate action by WTO Members in the DSB.

One drawback of a law enforcement approach is that complainants may have difficulty establishing standing to sue for an IUU fishing violation. For example, it is not clear what harm any particular country or fishing operator experiences due to another operator's unreported fishing or fishing without a proper flag. Including an administrative enforcement provision can help address this problem, as regulators do not face the same standing requirements as private parties. To assist private parties in bringing suit directly, the agreement could also lower the standing requirements for actions against IUU fishing violators, perhaps granting automatic standing to any entity involved in the fishing industry.

TRIPS grants special and differential treatment to developing country and LDC Members by considering their special economic, financial and administrative challenges and the need for flexibility during the process of bringing the domestic law into compliance. Specifically, a development country or LDC Member is allowed to

and adopting technologies and practices that facilitate information-sharing and support the monitoring of WTO disciplines and others. See Sofia Alicia Balino & Alice Tipping, *Tackling harmful fisheries subsidies for a sustainable future*, International Trade Forum (Dec. 12, 2017), <http://www.tradeforum.org/article/Tackling-harmful-fisheries-subsidies-for-a-sustainable-future/>.

¹⁴³ TRIPS, Part III, Enforcement of Intellectual Property Rights.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

delay for a certain period the date of application of the provisions of TRIPS other than those related to non-discrimination.¹⁴⁶ Moreover, TRIPS requires developed country Members to provide technical and financial cooperation to developing and LDC Members.¹⁴⁷ Providing a phase-in period and promoting capacity development for countries with limited regulatory capacity is consistent with the Doha Mandate, which requires taking the needs of developing countries into account when negotiating new rules for fisheries subsidies.¹⁴⁸ TRIPS therefore provides a model on which the new fisheries subsidies agreement can draw in order to comply with the Doha Mandate's directive related to special and differential treatment.

4.3. Incentivizing Collective Action

Individual Members currently lack proper incentives to challenge unlawful subsidies before the DSB. The environmental harm that fish stock depletion causes is distributed globally and the harm any individual Member experiences is comparatively small. The WTO dispute settlement process is expensive, can take years to complete, and may require a Member to expend considerable political capital. The cost of pursuing fisheries subsidies litigation therefore may outweigh any benefit the complaining Member would receive out of a successful challenge. Furthermore, industry and environmental groups that experience the harm fisheries subsidies cause cannot challenge subsidies directly, as only Member countries are eligible to bring dispute settlement cases.

To address these challenges, the new agreement must incentivize collective action among Members. Two possible approaches are (1) allowing for a class-action type challenge at the WTO, and (2) empowering the WTO Subsidies Committee to assist in or initiate investigations. While both approaches represent a departure from current WTO practice, they would allow for more effective enforcement.

Allowing for a class-action type dispute settlement mechanism would help solve the collective action problem that fisheries subsidies pose. The current DSU permits joining multiple complaints and adding third parties.¹⁴⁹ When multiple complainants

¹⁴⁶ TRIPS, arts. 65.2, 66.1.

¹⁴⁷ TRIPS, arts. 67.

¹⁴⁸ See Doha Ministerial Declaration, *supra* note 6, ¶28.

¹⁴⁹ DSU, arts. 9-10.

request a panel on the same matter, the DSU allows them to be consolidated under a single panel, preserving the rights of the parties as if separate panels existed.¹⁵⁰ This allows all of the parties to separately brief the panel and maintain all of their rights, but still results in the duplication of costs among all the parties involved in the dispute.¹⁵¹

Complainants' mutual interest in preventing the destruction of fisheries resources suggests that a joint-suit provision could be an effective mechanism for challenging fishery subsidies. By allowing for a class-action type challenge, Members could aggregate their resources to fund the challenge, their evidence to prove the violation, and their harms to demonstrate that their collective injury warrants significant retaliation if the violating subsidies are not withdrawn. Under one approach, the fisheries subsidies agreement could explain how Members may form a class and bring a challenge, and then rely on the existing DSU process to govern the dispute. Alternatively, the NGR could seek to amend Article 9 of the DSU to include an option to file a single challenge as a class rather than filing multiple consolidated proceedings.

Empowering the WTO Subsidies Committee to initiate investigations or disputes could also help solve the collective action problem. The NGR could create a group within the WTO Subsidies Committee to assist Members, such as LDCs, in conducting investigations into alleged violations of the fisheries agreement and to initiate investigations *sua sponte*. The group could rely on the notification scheme outlined in Section 4.1 and on information Members and RFMOs provide to begin investigations. The group could then initiate a proceeding if it determines that it is likely a Member violated the agreement.

Because Members may be reluctant to create a WTO body with investigative or prosecutorial powers, as an alternative the group could present a report detailing the results of its investigation to those countries potentially harmed, which could then bring a challenge unilaterally, collectively, or as a class-action. The choice to bring a challenge would still lie with the Members rather than the Subsidies Committee, but the existence of a report of likely violations could incentivize Member action that would not otherwise occur. Combining the notification scheme with a duty on the Subsidies Committee to produce a report on all alleged violations would increase the number of

¹⁵⁰ DSU, art. 9.

¹⁵¹ *Id.*

claims investigated, incentivizing action and exposing the most frequent violators. Another option could be empowering the WTO Secretariat to report on fishery subsidization practices (including potential violations) as part of its report on each country's Trade Policy Review.

5. Implementation Mechanism

Two mechanisms to implement fishery subsidy prohibitions and corresponding remedies are available. The first involves creating a standalone Fisheries Subsidies Agreement. Under this approach, the text on which the negotiators agree would form a new Fisheries Subsidies Agreement under the WTO. The agreement would provide that the SCM Agreement and the DSU¹⁵² remain applicable to fisheries subsidies, except where Fisheries Subsidies Agreement provisions explicitly apply, which is similar to the approach taken in the Agreement on Agriculture. For example, the proposed revision to the concept of subsidy withdrawal contained in Section 3 of this memorandum would supplement the withdrawal provision contained under Article 4 of the SCM Agreement. Similarly, the rules governing eligibility as a prohibited subsidy under the Fisheries Subsidies Agreement would supplement analogous rules under the current SCM Agreement.

As an alternative, the NGR could integrate the new fisheries subsidies provisions into the SCM Agreement. This approach would require amending the SCM Agreement in two ways. First, the NGR would need to incorporate all the fisheries subsidies prohibitions contained in the current proposals into Article 3 of the SCM Agreement. Second, the NGR would need to incorporate in Article 4 of the SCM Agreement any additional rules related to withdrawal and countermeasures specific to fisheries subsidies. As an alternative, the NGR could add articles within Part II of the SCM Agreement. One article would contain the specific fishery subsidy prohibitions, and the other would contain remedy rules specific to fisheries subsidies.

Although integrating fishery subsidy prohibitions into the SCM Agreement is feasible, creating a standalone agreement is advisable for the following reasons. First, as this paper illustrates, a comprehensive approach to addressing subsidized fishing will

¹⁵² The WTO would also need to add the new Fisheries Subsidies Agreement as a covered agreement under Appendix 1 of the DSU.

likely require measures that go far beyond what the SCM Agreement contains. Some measures, such as adopting a law enforcement approach to IUU fishing, do not involve subsidies at all. Thus, many fisheries subsidies measures will not fit neatly within the SCM Agreement framework. Second, the SCM Agreement in its current form is industry agnostic. Provisions related to fisheries subsidies would be the only industry-specific measures in the SCM Agreement. Incorporating fisheries subsidies provisions into the SCM Agreement could invite other industry-specific carve outs that begin to dilute the SCM Agreement's regulatory effect. A standalone agreement under which the SCM Agreement governs subsidy disputes in certain contexts but that includes other provisions tailored to the fishing industry would help avoid these problems.

6. Conclusion

The ongoing WTO negotiations on fisheries subsidies are at a pivotal moment. After almost 20 years of negotiations, parties are optimistic that they will reach an agreement. Members have almost unanimously agreed to prohibit subsidized IUU fishing, and a plurality favors prohibiting subsidies for capacity enhancements, operating costs, and fishing in overfished stocks. However, the NGR's proposals do not yet provide an effective remedy framework necessary to members comply with these prohibitions. This memorandum provides negotiators with information and proposals designed to develop a remedies framework as part of the new fisheries agreement. Including an effective remedies framework will be critical to ensuring that this agreement delivers on its promise of making the world's fisheries sustainable for future generations.