



**Sustainable Development of Small-Scale Fisheries and the Need for Strong
Measures to Protect Small-Scale Fisheries in International Trade Law**

by

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DECLARATION

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ABSTRACT

The small-scale fisheries sector makes a valuable contribution to livelihoods and food security, particularly in under-resourced countries. Yet small-scale fishers and fishing communities are often vulnerable and marginalised, and the small-scale sector is largely ignored by governments providing subsidies to their fishing industries. Provisions seeking to ban harmful fisheries subsidies are now the subject of several large international trade agreements and negotiations. While this is a laudable and necessary goal, the binding nature and robust enforcement mechanisms of trade agreements make it imperative that small-scale fisheries are protected and provided for in these agreements in the interests of sustainable development and poverty reduction. The thesis considers how this can be achieved.

In order to determine what would best serve the interests of small-scale fisheries in trade agreements, the thesis creates a framework of development needs, which underpins the analysis in the remainder of the thesis. This analysis revolves around three large trade agreements and negotiations containing provisions on fisheries subsidies – namely the World Trade Organization (WTO) negotiations, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the United States-Mexico-Canada Agreement (USMCA). Drawing on the development framework, the thesis identifies a number of shortcomings in these agreements when it comes to protections for small-scale fisheries, including a lack of provision for important development needs and a failure to achieve an appropriate balance between development and sustainability considerations. The thesis also considers potential problems that could arise in the conclusion and enforcement of trade agreements dealing with fisheries subsidies, particularly as these relate to small-scale fisheries and sustainable development.

Based on this analysis, the thesis makes a number of recommendations to be incorporated in trade agreements going forward that would adequately protect and promote the interests of small-scale fisheries, while not losing sight of sustainability concerns and the practical realities of negotiating complex international trade agreements. These include, *inter alia*, exemptions for important social assistance subsidies, better representation and transparency, and measures to improve equity between the small-scale sector and other fishing sectors.

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It is trite by now to say that a PhD is a mountain. Yet, as someone who has climbed many mountains during the thesis-writing process, I feel that the metaphor is apt and ask forgiveness for adopting such a well-worn phrase in these acknowledgements. Of course, I did not climb the many mountains around Cape Town (with their thesis-inspiring ocean views) alone. Indeed, I spent a lot of those hikes explaining my PhD topic to strangers, which certainly helped to order and condense my own thoughts on the subject. Likewise, in climbing the thesis mountain, I was not alone and there are many people to thank for helping me through this process.

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LIST OF ACRONYMS

ACP – African, Caribbean and Pacific

ACRWC – African Charter on the Rights and Welfare of the Child

AIS – Automatic Identification System

ASCM – Agreement on Subsidies and Countervailing Measures

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women

CITES – Convention on International Trade in Endangered Species

CPTPP – Comprehensive and Progressive Agreement for Trans-Pacific Partnership

CRC – Convention on the Rights of the Child

DSB – Dispute Settlement Body

DSU – Dispute Settlement Understanding

EAF – Ecosystem Approach to Fisheries

EBFM – Ecosystem-Based Fisheries Management

EEZ – Exclusive Economic Zone

EU – European Union

FAO – Food and Agriculture Organization

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ – International Court of Justice

IGO – Intergovernmental Organisation

IPCC – Intergovernmental Panel on Climate Change

IPOA – International Plan of Action

ITQ – Individual Transferable Quota

IUU – Illegal, Unreported and Unregulated

LDCs – Least-Developed Countries

MEA – Multilateral Environmental Agreement

MDGs – Millennium Development Goals

MFN – Most-Favoured Nation

MPA – Marine Protected Area

MPI – Multidimensional Poverty Index

MSC – Marine Stewardship Council

MSY – Maximum Sustainable Yield

NGO – Non-Governmental Organisation

OECD – Organisation for Economic Co-operation and Development

PSMA – Port State Measures Agreement

RFMO – Regional Fisheries Management Organisation

RTA – Regional Trade Agreement

S&DT – Special and Differential Treatment

SDGs – Sustainable Development goals

SPS – Sanitary and Phytosanitary Measures

SSF – Small-Scale Fisheries

SVEs – Small and Vulnerable Economies

TBT – Technical Barriers to Trade

TRIPS – Trade-Related Aspects of Intellectual Property Rights

UDHR – Universal Declaration on Human Rights

UN – United Nations

UNCED – United Nations Conference on Environment and Development

UNCLOS – United Nations Convention on the Law of the Sea

UNCTAD – United Nations Conference on Trade and Development

UNDP – United Nations Development Programme

UNEP – United Nations Environment Programme

UNFSA – United Nations Fish Stocks Agreement

UNODC – United Nations Office on Drugs and Crime

US – United States

USMCA – United States-Mexico-Canada Agreement

WTO – World Trade Organization

WWF – World Wide Fund for Nature

CHAPTER 1 – INTRODUCTION

I. Introduction

The small-scale fisheries sector provides a highly nutritious source of protein to millions of people, livelihoods for those that would otherwise face poverty and destitution, and a safety net during times of economic downturn, war and natural disaster.¹ Yet many small-scale fishers and fishing communities (collectively referred to as small-scale fisheries) are vulnerable and marginalised. They face a number of difficulties, particularly in developing countries, including health issues, hazardous working conditions, forced labour and child labour, lack of education or access to education, little or no access to justice, and social and geographical isolation.² Small-scale fisheries also face the larger threat plaguing all fisheries activities – the rapid rate of stock depletion and degradation of aquatic ecosystems because of human activity, particularly destructive fishing activity.

Small-scale fisheries would, therefore, benefit greatly from assistance from government, both to facilitate their development³ and to manage effectively the stocks on which they rely. Yet very little in the way of support goes to small-scale fisheries. Instead, the majority of support goes to large industrial fleets,⁴ which create far fewer jobs and livelihoods than the small-scale sector. Thus, government support, instead of being used judiciously for development and poverty reduction, inflates and props up a largely unprofitable industry, leading not only to inequitable trading conditions,⁵ but also to stock depletion and ecosystem destruction.⁶

¹ FAO, 'Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication' (2015) (SSF Guidelines) preface (page ix); Béné C, Hersoug B & Allison EH, 'Not by Rent Alone: Analysing the Pro-Poor Functions of Small-Scale Fisheries in Developing Countries' (2010) 28 *Development Policy Review* 3 at 338-339.

² SSF Guidelines *ibid* preface.

³ The concept of development and developmental outcomes, in the thesis, encompasses two related aspects. First, the advancement of small-scale fisheries by, for example, providing opportunities to add value to catches and obtain better access to markets. Secondly, giving small-scale fishers and their communities the ability to take advantage of such opportunities through initiatives such as the provision of education and equal access to resources.

⁴ Schuhbauer A, Chuenpagdee R, Cheung WWL, et al., 'How Subsidies Affect the Economic Viability of Small-Scale Fisheries' (2017) 82 *Marine Policy*

⁵ Narayanan A, 'The WTO as a Forum for Combating Overfishing: Analyzing the Negotiations on Fisheries Subsidies' (2017) 11 *NUALS LJ* at 13-14.

⁶ *Ibid* at 14-15; Schuhbauer, Chuenpagdee, Cheung, et al (2017) *op cit* note 4 at 117; Tickler D, Meeuwig JJ, Palomares M-L, et al., 'Far from Home: Distance Patterns of Global Fishing Fleets' (2018) 4 *Science advances* 8 at 3; Young MA, *Trading Fish, Saving Fish: The Interaction Between Regimes in International Law* (2011) Cambridge Studies in International and Comparative Law no 76 (Cambridge, Cambridge University Press) at

This iniquitous state of affairs has been recognised by many countries, which are increasingly looking to discipline⁷ fisheries subsidies at the international level.⁸ In this regard, two recently-concluded, large regional trade agreements (RTAs) – the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)⁹ and United States-Mexico-Canada Agreement (USMCA)¹⁰ – have included provisions on fisheries subsidies. The World Trade Organization (WTO) has also been in negotiations to create an ambitious fisheries subsidies agreement since the beginning of the Doha Development Round of negotiations in 2001, although members are struggling to reach agreement on many issues.¹¹

Importantly, while wishing to discipline fisheries subsidies effectively, these agreements and negotiations have acknowledged the necessity of protecting and providing for small-scale fisheries.¹² However, these concerns have not manifested themselves in adequate protection thus far. Agreements like the CPTPP and USMCA do not deal adequately with the issue of development and subsidies to small-scale fisheries,¹³ while WTO members are unable to agree even on basic issues, such as an appropriate definition of small-scale fisheries.¹⁴

Many of these problems are related to sustainability, and this is certainly not an inconsequential issue. While the majority of the blame for global stock depletion can be laid

87-89; Sumaila UR, Ebrahim N, Schuhbauer A, et al., 'Updated Estimates and Analysis of Global Fisheries Subsidies' (2019) 109 *Marine Policy* at 1.

⁷ The use of the word 'discipline' throughout this thesis refers to the prohibition, regulation and exemption of fisheries subsidies and is used by the WTO to characterise the agreement and/or provisions it is negotiating (e.g. the fisheries subsidies disciplines).

⁸ The disciplining of fisheries subsidies will likely only happen at an international level in most instances, as states that unilaterally reduce subsidies reduce the competitiveness of their fishing industries – see discussion in Section II below.

⁹ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 'Chapter 20: Environment' (2017), available at <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/20.-Environment-Chapter.pdf>, accessed on 13 August 2020 art 20.16.

¹⁰ Agreement between the United States of America, the United Mexican States, and Canada, 'Chapter 24: Environment' (2019), available at <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/24-Environment.pdf>, accessed on 13 August 2020 art 24.20.

¹¹ These include special and differential treatment (S&DT), provision for small-scale fisheries, the relationship between the WTO's work on fisheries subsidies and other international agreements, and dispute settlement. These issues are fully canvassed in Chapter 5.

¹² See, for example, CPTPP Environment supra note 9 art 20.16.1; USMCA Environment supra note 10 art 24.17, WTO, 'Fisheries Subsidies Working Document: Communication from the Chair, Revision (TN/RL/W/274/Rev.6)' (14 November 2018) art 5.8. Chapter 3 engages in a detailed analysis of provisions and WTO member submissions dealing with the protection of small-scale fisheries.

¹³ These agreements provide little in the way of protection for small-scale fisheries beyond general statements that the sector is important – see Chapter 3 for a detailed analysis in this regard.

¹⁴ For a discussion on definitional issues and other disagreements in the WTO fisheries subsidies negotiations, see Section III below and Chapter 5. Like the CPTPP and USMCA, a comprehensive exposition of the Chair's various texts and WTO member submissions reveals many shortcomings in the protections proposed for small-scale fisheries – see Chapter 3.

at the door of large, industrial fishing fleets, the small-scale sector is not irreproachable in this regard. The high prevalence of small-scale fishing the world over, destructive fishing practices such as dynamite fishing, and technological advancements in equipment used by small-scale fishers, have contributed to stock depletion.¹⁵ Thus, while subsidies can be an important tool in promoting the development of small-scale fisheries, and particularly the most vulnerable and marginalised among them, it is important not to lose sight of the need for sustainable development when it comes to small-scale fisheries.

Sustainable development, in its most basic formulation, requires that economic advancement and social development occur in a manner that avoids environmental degradation or, in the oft-quoted words of the Brundtland Report, that humanity ‘meets the needs of the present without compromising the ability of future generations to meet their own needs.’¹⁶ The application of the concept has been subject to much explication and challenge over the years, particularly in regard to equity considerations,¹⁷ and will certainly look different in different circumstances.¹⁸ However, the basic formulation of the concept is accepted by most¹⁹ and sustainable development is an important concept in international law,²⁰ including trade law.²¹ The development of small-scale fisheries must, therefore, be placed within this wider framework, taking into account the specific circumstances attendant on the sector. These include the need to facilitate development and protect livelihoods while also protecting aquatic ecosystems. Such considerations should be taken into account at both a national level, when constructing appropriate fisheries management plans and

¹⁵ UNEP, *Fisheries Subsidies, Sustainable Development and the WTO* (2011) (London, Washington DC, Earthscan) at 215.

¹⁶ The best known formulation of this principle is found in the Brundtland Report, which provided that sustainable development is ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’ – WCED, *Our Common Future* (1987) WCED, available at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>, accessed on 13 August 2020 ch 2.

¹⁷ See Elliott J, *An Introduction to Sustainable Development* (2013) Routledge Perspectives on Development 4th ed (Oxford, Routledge) ch 1, particularly at 45-53. These issues are discussed further in Chapter 2 section IV(a)(i).

¹⁸ Ibid at 24 - Elliot does note, however, that ‘the challenges of finding more positive alternatives to existing patterns and processes of development are universal and globally linked.’

¹⁹ Ibid at 19.

²⁰ For example, in 2015, the United Nations (UN) adopted the 17 Sustainable Development Goals (SDGs) of its 2030 Sustainable Development Agenda which aim to eradicate poverty, protect the environment and promote equality.

²¹ See, for example Marrakesh Agreement Establishing the World Trade Organization 1994, 1867 UNTS 154 (Marrakesh Agreement) preamble; CPTPP Environment supra note 9 arts 20.2.2 and 20.3.1; USMCA Environment supra note 10 art 24.2.

implementing international law, and at international level, when states enter into international agreements regulating fisheries.

Thus, the purpose of this thesis is to consider how protections and benefits for small-scale fisheries can be provided in trade agreements dealing with fisheries subsidies in a way that is effective and does not compromise sustainability of aquatic ecosystems. In order to do so, Chapter 2 of the thesis identifies the development needs of small-scale fisheries and creates a development framework to inform the remainder of the thesis. The thesis then uses this framework as a basis to interrogate the agreements and negotiations discussed and, ultimately, provide the recommendations in Chapter 6 of the thesis for these types of trade agreements going forward.

The development framework is briefly introduced in Section VII of this chapter, prior to its further exposition in Chapter 2. This chapter also provides the scope and rationale of the research in Section II, important background information on the WTO fisheries negotiations, CPTPP, and USMCA in Section III, the problem statement, research questions and objectives of the thesis in Sections IV, V and VI, and, finally, the methodology and structure of the thesis in Sections VIII and IX.

II. Scope and Rationale of the Research.

As discussed in Section I, small-scale fisheries face many difficulties. One of the principal concerns in this regard is the depletion of the resources on which small-scale fisheries rely, and a large contributing factor to this depletion is the continued provision of harmful fisheries subsidies to large industrial fishing fleets. Thus, there is no question that the destructive impact of harmful fisheries subsidies on fish stocks and aquatic ecosystems, on which so many rely for food and livelihoods, must be curbed through effective disciplines on these subsidies.

In order to obtain widespread bans on fisheries subsidies, negotiations will need to take place at an international level. Although there are some states that have decided unilaterally to reduce harmful subsidies to their fishing fleets, or not to provide these subsidies at all,²² most states are unlikely to do this, given the loss of competitiveness this

²² See Campling L & Havice E, 'Mainstreaming Environment and Development at the World Trade Organization? Fisheries Subsidies, the Politics of Rule-Making, and the Elusive 'Triple Win'' (2013) 45 *Environment and Planning A* 4 at 848-844; UNEP (2011) op cit note 15 ch 3 (Norway case study).

would occasion for their fishing fleets.²³ Effective dispute resolution mechanisms are also a vital aspect of an agreement to curb fisheries subsidies. This is because incentives for non-compliance are high, given the competitive edge that subsidies can give to a nation's fishing fleets. Thus, apart from the fact that subsidies are generally seen as a trade concern and fisheries subsidies are currently being dealt with in trade forums, the strong dispute resolution mechanisms found in many trade agreements are an important consideration when seeking to discipline fisheries subsidies at an international level. These mechanisms often allow for sanctions and the withholding of trade concessions in the event of non-compliance,²⁴ and can help ensure that an agreement on fisheries subsidies is effectively enforced, provided they are properly tailored to the enforcement of provisions dealing with fisheries subsidies.²⁵

Yet, in creating and enforcing trade agreements for the purposes of promoting sustainability of fish stocks, we cannot lose sight of the fact that, from a development perspective, there are costs as well as benefits to banning certain fisheries subsidies. In particular, fisheries subsidies are vital for facilitating the development of small-scale fisheries, and a trade agreement dealing with fisheries subsidies could be beneficial or detrimental in this regard, depending on the way it is structured. This is because most development assistance given to small-scale fisheries by public entities could fall under the definition of a fisheries subsidy and be covered by these agreements.²⁶

Thus, the very thing that makes trade agreements appealing in regard to disciplining fisheries subsidies – their robust enforcement provisions – also means that provisions on fisheries subsidies must contain appropriate and well-structured exemptions for subsidies to

²³ See UNEP (2011) *ibid*, particularly at 138-139 and ch 3 (Ecuador case study); Campling & Havice (2013) *ibid* at 845-848.

²⁴ See, for example, Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 1994, 1869 *UNTS* 401 (DSU) art 22; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 'Chapter 28: Dispute Settlement' (2017), available at <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/28.-Dispute-Settlement-Chapter.pdf>, accessed on 13 August 2020 art 28.20; Agreement between the United States of America, the United Mexican States, and Canada, 'Chapter 31: Dispute Settlement' (2019), available at <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31-Dispute-Settlement.pdf>, accessed on 13 August 2020 art 31.19; Treaty Establishing the Common Market for Eastern and Southern Africa 1993, 41341 *UNTS* 265 (COMESA) arts 34 and 171; Economic Community of West African States (ECOWAS): Revised Treaty 1993, 660 *ILM* 35(3) (ECOWAS) art 77.

²⁵ This issue is discussed further in Chapter 5 section III.

²⁶ Although there is no single definition of a fisheries subsidy in the general literature, Sumaila et al classify fishing community development assistance as 'ambiguous' fisheries subsidies, which means that these subsidies may be harmful to sustainability, depending on how they are structured – see Sumaila, Ebrahim, Schuhbauer, et al. (2019) *op cit* note 6 at 10. In a trade context, subsidies to small-scale fisheries are likely to be considered specific fisheries subsidies and may fall foul of the bans on fisheries subsidies for reasons discussed in Chapter 3 sections I and II(b)(i).

small-scale fisheries. This will ensure not only that small-scale fisheries benefit from these agreements (in terms of conserving resources on which they rely) but also that they are not harmed by them. Naturally, these exemptions must not ignore sustainability concerns, which are also present in small-scale fisheries, albeit to a lesser extent than in industrial fishing. Indeed, this is necessary not only to ensure good sustainable development outcomes but also to improve the likelihood of state parties accepting the inclusion of these subsidy exemptions in their trade agreements.²⁷ However, thorough consideration of subsidies that could go to small-scale fisheries, including a weighing up of their development benefits and sustainability implications, is important to ensure that an appropriate balance is struck in this regard.

There are a number of trade agreements dealing with sustainable development concerns in fisheries. Apart from those already discussed, these include the Treaty establishing the African Economic Community;²⁸ the Treaty for the Establishment of the East African Community;²⁹ the Common Market for Eastern and Southern Africa Treaty;³⁰ the Treaty establishing the Economic Community of Central African States;³¹ the Treaty of the Economic Community of West African States;³² the Protocol on Fisheries to the Treaty for the Southern African Development Community;³³ the Treaty establishing the Caribbean Community and Common Market;³⁴ the EU's Common Fisheries Policy³⁵ and a number of associated regulations,³⁶ as well as several bilateral trade agreements.³⁷ A full analysis of

²⁷ One of the primary purposes of disciplining fisheries subsidies is sustainability, and certain states – such as New Zealand and Iceland – have expressed concern that proposed exemptions for small-scale fisheries may be wide enough to encompass large-scale fishing – see WTO, 'Advancing Fisheries Subsidies Prohibitions on Subsidies Contributing to Overcapacity and Overfishing, New Zealand/Iceland (TN/RL/W/275)' (8 May 2018) at 3.

²⁸ Treaty Establishing the African Economic Community 1991, 55375 *UNTS*

²⁹ Treaty for the Establishment of the East African Community 1999, 37437 *UNTS* 255.

³⁰ COMESA *supra* note 24.

³¹ Treaty Establishing the Economic Community of Central African States 1983, *WIPO TRT/ECCAS/001*.

³² ECOWAS *supra* note 24.

³³ SADC, 'Protocol on Fisheries to the Treaty of the Southern African Development Community' (2001).

³⁴ Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy 2001, 40269 *UNTS* 293.

³⁵ Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy 2013, OJ L 354 *Eur-Lex* 22 (Common Fisheries Policy).

³⁶ See, amongst others, Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing OJ L 286 *EUR-Lex* 1 (IUU Regulation); Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures 2019, OJ L 198 *EUR-Lex* 105. While these regulations do mention fisheries subsidies briefly – see for example, the IUU Regulation art 45(7) and Common Fisheries Policy *ibid* arts 22(6)-(7) – they do not deal with the issue in any substantive way.

³⁷ See, for example, the Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the one part, and the European Union and its Member States, of the other part 2017, OJ L 11 *Eur-Lex* 23; China FTA Network, 'Free Trade Agreement Between the Government of the People's Republic of China and The

every one of these agreements is beyond the scope of this thesis. However, the thesis also restricts its analysis to a discussion of the WTO negotiations, CPTPP and USMCA for two important reasons.

The first is that these agreements are large and influential, encompassing a significant portion of world trade and a mix of countries in different stages of development. The WTO comprises, at time of writing, 164 member countries,³⁸ and almost all world trade. The CPTPP is one of the largest RTAs in the world and has far-reaching consequences for small-scale fisheries in the Asia-Pacific region.³⁹ USMCA regulates trade between the United States (US), Canada and Mexico, all of which are large economic powers and in the top 25 major producing countries for marine fish capture.⁴⁰ Thus, a consideration of these agreements allows for an in-depth analysis of diverse concerns and attitudes towards issues around small-scale fisheries and development in fisheries. This assists in informing robust, effective and practical recommendations on protections for small-scale fisheries in trade agreements.

The second is that these agreements deal comprehensively with issues around fisheries subsidies. The reasons that subsidies are the focus of this thesis have already been discussed and relate to the fact that effectively disciplining fisheries subsidies (with appropriate and well-structured exemptions) is important for the promotion of sustainable development, and particularly the protection of small-scale fisheries and the resources on which they rely for food and livelihood. However, an exposition of what constitutes well-structured subsidy provisions from a sustainable development point of view is also important to explore for pragmatic reasons.

As discussed in Section I, there is a growing interest in disciplining fisheries subsidies at the international level. Although this issue is not a new one in international law – provisions on the reduction of harmful fishing subsidies were included in the Food and Agriculture Organization's (FAO) International Plan of Action for the Management of

Government of the Republic of Korea,' (2015), available at http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf, accessed on 13 August 2020.

³⁸ The most recent WTO member, Afghanistan, joined the WTO on 29 July 2016.

³⁹ As at November 2019, the parties to the CPTPP accounted for 13.3% of world trade and 14% of world fisheries and aquaculture production – see Committee on Fisheries (COFI), *Recent Trade Agreements and Market Access for Fish and Fishery Products (FT/XVII/2019/10)* (2019) FAO, available at <http://www.fao.org/3/nb388en/nb388en.pdf>, accessed on 13 August 2020 at 2.

⁴⁰ FAO, *The State of World Fisheries and Aquaculture: Sustainability in Action* (2020) available at <http://www.fao.org/3/ca9229en/CA9229EN.pdf>, accessed on 13 August 2020 (SOFIA) at 13.

Fishing Capacity (IPOA-Capacity) in 1999,⁴¹ and the WTO has been in negotiations since 2001 – there has been a lot of recent activity in this area. In 2015, Goal 14.6 of the sustainable development goals (SDGs) urged the creation of a comprehensive fisheries subsidies agreement in the WTO by 2020,⁴² and in 2018 and 2020 respectively, the CPTPP and USMCA came into force. This suggests that there will be more RTAs that take up this challenge, especially if WTO members cannot reach an agreement.⁴³ Given the implications for the development of small-scale fisheries of this growing interest, it is particularly important that concerns of small-scale fisheries are taken into account and effectively provided for in these agreements going forward.

This is not to say, however, that other trade agreements containing provisions on fisheries do not deal with important development and sustainability considerations pertinent to small-scale fisheries. These agreements can provide vital protections for small-scale fisheries and help to standardise approaches to protecting small-scale fisheries in a particular area, which is important given the potential for small-scale fisheries to cross boundaries either on inland waters or in the ocean. Thus, they would be an interesting subject of further study in determining what would best serve small-scale fisheries in particular regions, especially as they deal with all types of fisheries while the WTO,⁴⁴ CPTPP⁴⁵ and USMCA⁴⁶ deal specifically with marine capture fisheries. They may also benefit from the analysis conducted in this thesis, which can assist in giving content to and contextualising broad and vague development provisions.

This research also has broader relevance for trade agreements dealing with similar environmental issues like fossil fuel subsidies,⁴⁷ or those that affect small and vulnerable

⁴¹ FAO, 'International Plan of Action for the Management of Fishing Capacity' (1999) (IPOA-Capacity) arts 25-26.

⁴² United Nations, 'Goal 14: Conserve and Sustainably Use the Oceans, Seas and Marine Resources', available at <https://www.un.org/sustainabledevelopment/oceans/>, accessed on 13 August 2020 (SDG Goal 14) art 6.

⁴³ Even if the WTO negotiations are concluded, members may want to include extra protections in their RTAs, through WTO-plus provisions. This would depend on what is ultimately decided in the WTO, as WTO-plus provisions are used to fill gaps or ask members to make further commitments.

⁴⁴ Chair's Working Document (2018) op cit note 12 art 2.4(c).

⁴⁵ CPTPP Environment supra note 9 art 20.16.

⁴⁶ USMCA does not expressly state that its provisions on fisheries subsidies are limited to marine capture fishing, although this seems to be the intention. The word 'marine' is used throughout the various fisheries provisions, and in the clarification on scope, art 24.17 (marine wild capture fisheries) refers to art 24.20 (fisheries subsidies) – see USMCA Environment supra note 10 arts 24.17-24.20. However, it should be borne in mind that this is not entirely clear at present.

⁴⁷ See Young MA, 'Energy Transitions and Trade Law: Lessons from the Reform of Fisheries Subsidies' (2017) 17 *International Environmental Agreements: Politics, Law and Economics* 3.

communities.⁴⁸ Indeed, Charles has suggested that the WTO fisheries negotiations are a ‘test case’ for the negotiation of further environmental agreements.⁴⁹ Naturally, fisheries regulation has particular nuances that may not be applicable to other areas of international environmental law. However, many areas of international law are connected, and the types of trade measures used to curb overfishing, such as import bans, regulation of subsidies and ecolabelling schemes, are also used to regulate other areas of environmental law, such as climate change.⁵⁰

III. Background

(a) *The WTO Fisheries Subsidies Negotiations*

The WTO agreed to begin negotiations on the creation of fisheries subsidies disciplines in 2001, as part of the Doha Development Round. However, the four years prior to the Hong Kong Ministerial Conference in 2005 was primarily a debate on whether fisheries subsidies should be disciplined in the WTO at all. Fisheries subsidies disciplines were originally placed on the Doha Round Agenda after the ‘Friends of Fish’ Group, comprising Australia, Chile, Ecuador, Iceland, New Zealand, Peru, the Philippines and the US, pushed for their inclusion, but there was strong opposition to the negotiations from Japan and Korea. Japan⁵¹ and Korea⁵² argued that proper fisheries management was enough to prevent environmental degradation caused by overfishing and that fisheries subsidies should be dealt with in the course of negotiations on the Agreement on Subsidies and Countervailing Measures (ASCM).⁵³

⁴⁸ For example, there is growing recognition that indigenous communities affected by international negotiations on environmental issues, such as climate change, should be taken into account in such negotiations – see Young MA, ‘Trade Measures to Address Environmental Concerns in Faraway Places: Jurisdictional Issues’ (2014) 23 *Review of European Comparative & International Environmental Law* 3 at 317; United Nations: Meetings Coverage and Press Releases, ‘Indigenous Peoples must be Included in Global Negotiations aimed at Combating Climate Change, Say Speakers in Permanent Forum’ (2008), available at <https://www.un.org/press/en/2008/hr4946.doc.htm>, accessed on 13 August 2020.

⁴⁹ Charles AT, ‘Small-Scale Fisheries: On Rights, Trade and Subsidies’ (2011) 10 *MAST* 2 at 89.

⁵⁰ Young MA, ‘Research Handbook on Climate Change and Trade Law’ in Delimatsis P (ed) *Trade measures to address climate change: territory and extraterritoriality* (2016) at 329.

⁵¹ WTO, ‘Japan’s Basic Position on the Fisheries Subsidies Issue (TN/RL/W/11)’ (2 July 2002)

⁵² WTO, ‘Korea’s Views on the Doha Development Agenda Discussions on Fisheries Subsidies (TN/RL/W/17)’ (2 October 2002).

⁵³ Agreement on Subsidies and Countervailing Measures 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A 1994, 1869 *UNTS* 14 (ASCM).

Some commentators do appear to agree with the position taken by Japan and Korea.⁵⁴ However, the majority of writing and research from both commentators⁵⁵ and international organisations such as the United Nations Conference on Trade and Development (UNCTAD), the FAO, and the United Nations Environment Programme (UNEP),⁵⁶ favour the view that subsidies lead to overfishing (through the provision of fuel subsidies and other operating costs) and overcapacity (through subsidies for the building and modernisation of boats and other fisheries infrastructure). Subsidies leading to overcapacity also have a strong link to illegal, unreported and unregulated (IUU) fishing,⁵⁷ as over-inflated fleets and unemployed fishers continue to operate in the face of fisheries management measures which attempt to curtail overfishing.

Perhaps because of the lack of support for their views, Japan and Korea changed their positions in 2004 and agreed to negotiate,⁵⁸ and WTO Members, in the 2005 Hong Kong Ministerial Declaration, reaffirmed their commitment to the creation of fisheries subsidies disciplines. The Hong Kong Declaration emphasised that the disciplines, apart from ‘enhancing the mutual supportiveness of environment and trade’, should also include a strong development aspect.⁵⁹ In 2007, after what appeared to be the creation of consensus on certain issues, the Chair of the Negotiating Group on Rules (the Chair) created a comprehensive draft text (2007 Draft Text),⁶⁰ which was to serve as the basis for further negotiations and possibly a final text.⁶¹ At that stage, however, it became apparent that there were vast differences of

⁵⁴ Grynberg R & Rochester N, 'The Emerging Architecture of a World Trade Organization Fisheries Subsidies Agreement and the Interests of Developing Coastal States' (2005) 39 *Journal of World Trade* 3 at 504-505.

⁵⁵ Sumaila, Ebrahim, Schuhbauer, et al. (2019) op cit note 6 at 1; Sumaila UR on behalf of the E15 Expert Group on Oceans Fisheries and the Trade System, *Trade Policy Options for Sustainable Oceans and Fisheries* (2016) available at http://e15initiative.org/wp-content/uploads/2015/09/E15_no8_Fisheries_final_REV_x1.pdf, accessed on 19 August 2020 at 6-7; Margaret Young (2011) op cit note 6 at 87-89.

⁵⁶ UNCTAD-FAO-UNEP Joint Statement, 'Regulating Fisheries Subsidies Must Be an Integral Part of the Implementation of the 2030 Sustainable Development Agenda' (2016), available at http://unctad.org/meetings/en/SessionalDocuments/U14ditc_d16_FishSub_Statement_en.pdf, accessed on 13 August 2020 para 2.

⁵⁷ Agnew DJ & Barnes CT, *Economic Aspects and Drivers of IUU Fishing: Building a Framework* (2004) *OECD*, available at <http://www.oecd.org/greengrowth/fisheries/29468002.PDF>, accessed on 13 August 2020 at 20.

⁵⁸ WTO, 'Questions and Comments from Korea on New Zealand's Communication on Fisheries Subsidies (TN/RL/W/154), (TN/RL/W/160)' (8 June 2004), at para 11; WTO, 'Fisheries Subsidies: Proposed Structure of the Discussion, Communication from Japan (TN/RL/W/159)' (7 June 2004).

⁵⁹ WTO, 'Hong Kong Ministerial Declaration, Adopted on 18 December 2005 (WT/MIN(05)/DEC)' (2005) Annex D, para 9.

⁶⁰ WTO, 'Draft Consolidated Chair Texts of the AD and SCM Agreements: Annex VIII - Fisheries Subsidies (TN/RL/W/213)' (30 November 2007).

⁶¹ UNEP (2011) op cit note 15 at 168.

opinion between members, with the most stalwart objectors to the text being large developing countries such as China, India, Indonesia and Brazil.⁶²

Subsidies negotiations have continued since the release of the 2007 Draft Text, despite the stalling of other aspects of the Doha Round, and have recently seen a surge of activity to meet the goal imposed by SDG 14.6 of disciplining harmful fisheries subsidies by 2020. Indeed, despite the COVID-19 pandemic, which has led to the postponement of the WTO's 12th Ministerial Conference (originally set to take place in June 2020), both members and the Chair are hoping to meet this goal by reaching agreement in December 2020.⁶³

While this optimism is encouraging, proposals by WTO Members to the Rules Negotiating Group still show significant disagreement on a number of key issues, from the way the disciplines should be structured and whether external agreements should be relied upon, to what comprises effective special and differential treatment (S&DT) for developing countries and how to differentiate developing countries for S&DT purposes.⁶⁴ Members are also at odds on how small-scale fisheries should be provided for in the text, and particularly which small-scale fisheries should be covered by subsidy exemptions.⁶⁵

Whether these differences will be resolved by the end of 2020 is debatable. The Chair did release a new Draft Text to guide negotiations in June 2020,⁶⁶ which is promising. However, at the time of finalising this thesis, this draft was not publicly available⁶⁷ and those who have seen it note that it does not deal with controversial issues,⁶⁸ nor is it indicative of any agreement on its provisions.⁶⁹ Thus, it remains to be seen whether negotiations will, in fact, conclude in 2020.

⁶² Ibid at 169-173.

⁶³ Parmentier R, Parkes G, Wills S, et al., 'Fisheries Subsidies and SDG14: Is the WTO up to the Task? (Panel Discussion)' (1-5 June 2020), *Virtual Ocean Dialogues* (Cologny, Switzerland).

⁶⁴ These issues are canvassed in detail in Chapter 5.

⁶⁵ The debate has included issues such as whether developed countries should be able to provide subsidies to their small-scale fisheries and how widely small-scale fisheries should be defined – for a full analysis on this point see Chapter 5 section II.

⁶⁶ WTO, 'Negotiating Group on Rules Unofficial Room Document - Fisheries Subsidies Draft Consolidated Text (RD/TN/RL/126)' (2020), available at https://docsonline.wto.org/dol2fe/Pages/FE_Search/FE_S_S006-1.aspx?Id=264595&IsNotification=False, accessed on 13 August 2020.

⁶⁷ As at 28 August 2020.

⁶⁸ Including issues such as dispute settlement, notification and transparency, and a definition of small-scale fisheries.

⁶⁹ See Stewart TP, Update on Fisheries Subsidies Draft Consolidated Text from June 25 (2020) *Current Thoughts on Trade*, available at <https://currentthoughtsontrade.com/page/2/>, accessed on 13 August 2020; Third World Network, 'Rules Chair Issues Draft Consolidated Text on Fisheries Subsidies' (29 June 2020), available at <https://twn.my/title2/wto.info/2020/ti200624.htm>, accessed on 24 August 2020.

(b) The Comprehensive and Progressive Agreement for Trans-Pacific Partnership

The CPTPP was initially concluded as the Trans-Pacific Partnership (TPP), and comprised nearly 40% of world trade, making it the largest RTA ever to be negotiated.⁷⁰ The US withdrew from the TPP in 2017, but the remaining signatories signed the agreement in March 2018, re-naming it the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and suspending those provisions that the US had pushed to be included.⁷¹ At present, the signatories to the CPTPP are New Zealand, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore and Vietnam, representing around 13.3% of world trade.⁷² While this is a significant reduction from 40%, the agreement still represents a large proportion of world trade and trade in the Asia-Pacific region.

The CPTPP parties made great progress in coming to an agreement on measures to improve the sustainability of fisheries, not only relating to the elimination of certain harmful subsidies⁷³ but also on the need for effective fisheries management systems,⁷⁴ the conservation of certain marine creatures and seabirds,⁷⁵ and the implementation of measures to combat IUU fishing.⁷⁶ It is also encouraging that the parties – a mix of developed and developing countries with very different views and policies on fisheries issues⁷⁷ – managed to agree to enforceable provisions on fishing, and particularly on fisheries subsidies.

Yet, despite this progress, the CPTPP deals with small-scale fisheries and important development issues only in broad and vague terms. In this regard, it acknowledges ‘the importance of the marine fisheries sector to their [the CPTPP parties] development and to the livelihoods of their fishing communities, including artisanal or small-scale fisheries’⁷⁸ and provides that parties ‘shall make best efforts to refrain from introducing new, or extending or enhancing existing, subsidies’ which contribute to overfishing and overcapacity, ‘taking into consideration a Party’s social and developmental priorities, including food security

⁷⁰ BBC News ‘TPP: What Is It and Why Does It Matter?’ *BBC News* 23 January 2017, available at <http://www.bbc.com/news/business-32498715>, accessed on 13 August 2020.

⁷¹ These provisions centred around investment, intellectual property and health - see New Zealand Foreign Affairs and Trade, ‘Comprehensive and Progressive Agreement for Trans-Pacific Partnership’, available at <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/cptpp-overview/>, accessed on 13 August 2020.

⁷² COFI (2019) op cit note 39.

⁷³ CPTPP Environment supra note 9 arts 20.16.5-6.

⁷⁴ Ibid art 20.16.3.

⁷⁵ Ibid art 20.16.4.

⁷⁶ Ibid art 20.16.14.

⁷⁷ As noted in Section III(a) above, some of these countries have been at odds in the WTO negotiations.

⁷⁸ CPTPP Environment supra note 9 art 20.16.1.

concerns'.⁷⁹ It also has chapters on development⁸⁰ and governance concerns⁸¹ which could be used to inform and/or supplement these provisions. However, more could certainly have been included to protect and benefit small-scale fisheries in this agreement.

(c) The United States-Mexico-Canada Agreement

USMCA represents a re-negotiation of the North American Free Trade Agreement (NAFTA) between the US, Canada and Mexico. The agreement came into effect on 1 July 2020.

Despite the fact that the US pulled out of the CPTPP, much of USMCA's environment chapter (as well as other chapters) is identical to that of the CPTPP, including the provisions on small-scale fisheries and development. USMCA appears less focused on development concerns than the CPTPP, however, as it does not have specific chapters on development and capacity building like the CPTPP does.⁸² This issue is discussed further in Chapter 3.⁸³

It is clear, then, that the parties to the agreements and negotiations discussed, while acknowledging the need to take the interests of small-scale fisheries into account, have not been able to do so in a manner that provides effective protection for this sector. In the WTO negotiations, there is a lack of agreement on the form that these provisions should take, while the RTAs deal with these concerns cursorily at best. This is problematic, as exemptions from certain subsidy bans for the small-scale sector are vital for protecting food security and livelihoods.

IV. Problem Statement

There is a need to discipline harmful fisheries subsidies at an international level, preferably in trade agreements with strong enforcement provisions, to protect stocks on which small-scale fisheries rely. However, there must also be appropriate exemptions for small-scale fisheries in these agreements in order to protect and promote livelihoods, food security, and poverty

⁷⁹ Ibid art 20.16.7.

⁸⁰ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 'Chapter 23: Development' (2017), available at <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/23.-Development-Chapter.pdf>, accessed on 13 August 2020.

⁸¹ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 'Chapter 26: Transparency and Anti-Corruption' (2017), available at <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/26.-Transparency-and-Anti-Corruption-Chapter.pdf>, accessed on 13 August 2020; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 'Chapter 21: Cooperation and Capacity Building' (2017), available at <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/21.-Cooperation-and-Capacity-Building-Chapter.pdf>, accessed on 13 August 2020.

⁸² For example, unlike the CPTPP, USMCA does not have chapters on development and capacity building.

⁸³ See Chapter 3 sections II(a)(iii) and (v), (b)(i), c(i) and d(iii).

reduction. Practically, too, it is important to deal with this issue, as states are increasingly including provisions on fisheries subsidies in their trade agreements, which will have a profound effect on small-scale fisheries.

States seem willing to include provisions for the protection of small-scale fisheries in these agreements, but thus far this willingness has not manifested in adequate protection for small-scale fisheries. This is deeply concerning, given that small-scale fisheries are an important source of food and income for millions of people. In the WTO negotiations in particular, there is little agreement on the form these provisions should take, which, given the nature of trade negotiations and the compromises that often need to be made, could lead to an agreement that does not include comprehensive, or even adequate, protections for small-scale fisheries. Whether this was the case in the negotiation of the RTAs is unclear, but what is clear is that these agreements do not provide sufficient protection for small-scale fisheries.

It is suggested that the primary reason for this state of affairs is that, despite the fact that fisheries subsidies is a global environmental problem, states negotiating these trade agreements tend to focus mainly on their national political and economic interests.⁸⁴ This is perhaps partly because the experience of trade negotiators is limited when it comes to fisheries issues, an issue acknowledged by both WTO members and the Chair.⁸⁵ Yet this type of negotiation facilitates narrow perspectives and a lack of cohesion, which is problematic when trying to provide comprehensive protections for many different types of small-scale fisheries globally. As discussed in Sections I and II above, a further issue is that there are sustainability concerns relating to the exemption of small-scale fisheries from certain subsidy bans, which cannot be ignored in the creation of these trade agreements.

Thus, a comprehensive analysis of the various sources of international law on this topic, including case law, treaties and soft law, academic research, reports by intergovernmental organisations (IGOs) and non-governmental organisations (NGOs), statements by parties to these agreements, and so on, would help identify the development needs of small-scale fisheries on a broad, global scale, and how these needs could be provided for in a trade agreement, including potential limitations in this regard. This would allow for a better understanding of how small-scale fisheries can best be served in these types

⁸⁴ See Campling & Havice (2013) op cit note 22.

⁸⁵ See, for example, WTO, 'Fisheries Subsidies: New Proposals Regarding the Discipline, Communication from Japan (TN/RL/GEN/171)' (17 January 2011) at 1 and WTO, 'Anti-Dumping, Subsidies and Countervailing Measures and Fisheries Subsidies, Statement by the Chairman (TN/RL/W/247)' (17 May 2010) at 5.

of trade agreements, while also taking into account political and practical hurdles. The challenge is to suggest a set of standard provisions for inclusion in these agreements which are acceptable to states negotiating a trade agreement, while still providing for the needs of small-scale fisheries and sustainable development in an effective manner.

V. Research Questions

The primary research question of the thesis is the following:

What types of provisions could be included in international trade agreements dealing with fisheries subsidies to enable the sustainable development of small-scale fisheries?

In order to answer this question, the thesis considers the following sub-questions:

1. What are the development needs of small-scale fisheries?
2. How are the development needs of small-scale fisheries currently represented in trade agreements dealing with fisheries subsidies?
3. What are the sustainability implications of providing subsidies to small-scale fisheries and how can these be addressed?
4. Are there limitations⁸⁶ on the types of subsidies that can be proposed in an international trade forum?

VI. Objectives

The primary objective of the thesis is to identify a set of standard provisions for the sustainable development of small-scale fisheries that could be included in international trade agreements dealing with fisheries subsidies. The secondary objectives follow the research questions and include: determining the development needs of small-scale fisheries; considering how these development needs are represented in trade agreements dealing with fisheries subsidies; establishing sustainability implications of providing subsidies to small-scale fisheries and addressing these implications; and identifying limitations on the types of development initiatives that can be proposed in an international trade forum.

⁸⁶ For example, whether there are textual limitations imposed by the form of a trade agreement or political and practical difficulties which may require compromise.

VII. Theoretical Framework

The theoretical framework created in this thesis details important development needs relevant to small-scale fisheries. The thesis interrogates international trade agreements comprised of parties from a mix of countries in different stages of development. This requires that the framework of development needs be broad and flexible, to accommodate the disparities between small-scale fisheries in different parts of the world. However, the scope of the framework is influenced and circumscribed by a number of issues. These include the regions where most small-scale fisheries are found, resource constraints in many states in these regions, and the need to take account of sustainability concerns.⁸⁷

The creation of the framework is further influenced by the work of Nienke Van der Burgt.⁸⁸ Van der Burgt created a typology of development indicators for small-scale fisheries – including equity, poverty eradication, and participation⁸⁹ – in order to assess how a number of international fisheries instruments, including the United Nations Fish Stocks Agreement (UNFSA),⁹⁰ the FAO's Code of Conduct for Responsible Fisheries (FAO Code of Conduct)⁹¹ and bilateral access agreements between the European Union (EU) and various African states, contribute to the development of small-scale fisheries. This typology is a useful starting point for the framework as it also deals with international agreements and, thus, takes a global view of the needs of small-scale fisheries. The typology as it stands is not entirely apposite for the purposes of the thesis, chiefly because it takes too narrow a view of the development needs of small-scale fisheries. However, the thesis framework builds upon this typology to create the more extensive framework of development needs set out in Chapter 2.

VIII. Methodology

The thesis concerns the interrogation of international treaties and negotiations dealing with fisheries subsidies, and recommendations for the improvement of such treaties, by considering, broadly, those development issues commonly affecting small-scale fisheries

⁸⁷ See Chapter 2 section II.

⁸⁸ Van der Burgt N, *The Contribution of International Fisheries Law to Human Development* (2013) (Leiden, The Netherlands, Martinus Nijhoff Publishers).

⁸⁹ *Ibid* at 8.

⁹⁰ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995, 2167 *UNTS* 3 (UNFSA).

⁹¹ FAO, 'Code of Conduct for Responsible Fisheries' (1995) (FAO Code of Conduct).

worldwide. The thesis does this almost entirely through desktop study, relying primarily on sources of international law to answer the research questions.

A thesis undertaking a consideration of the sources of international law must take into account that the international legal system is ‘decentralised, consensual, and relatively primitive’⁹² and, therefore, requires a different methodological approach to the study of domestic law.⁹³ According to Hall:

The most effective research in international law is that which pays faithful attention to its rather peculiar system of sources. A mastery of these sources, and an appreciation for the demands which they place upon the researcher, are essential ingredients for the pursuit of an effective and fruitful research programme in international law.⁹⁴

Apart from *jus cogens* norms⁹⁵ and obligations *erga omnes*,⁹⁶ there does not appear to be any hierarchy between international law norms, at least not in the fields of international trade and environmental law.⁹⁷ Likewise, the sources of international law do not have any obvious hierarchy.⁹⁸ However, Article 38(1) of the Statute of the International Court of Justice (ICJ),⁹⁹ which is generally considered to reflect,¹⁰⁰ or at least provide a starting place,¹⁰¹ for the sources of law applicable to international law, does provide a type of structure through which to approach international legal research.¹⁰²

According to Article 38(1)(b), treaties, custom, and ‘the general principles of law recognised by civilised nations’¹⁰³ shall be applied by the court in order to decide disputes.¹⁰⁴ Judicial decisions and the works of publicists (academics) are also applied ‘as subsidiary

⁹² Hall S, 'Researching International Law' in McConville M and Hong Chui W (eds) *Research Methods for Law* (2007) at 182.

⁹³ *Ibid.*

⁹⁴ *Ibid* at 202.

⁹⁵ Peremptory norms from which states may not derogate, such as the prohibition against genocide.

⁹⁶ Obligations that states have towards the international community at large, such as outlawing genocide.

⁹⁷ Margaret Young (2011) *op cit* note 6 at 12.

⁹⁸ Hall (2007) *op cit* note 92 at 182.

⁹⁹ Statute of the International Court of Justice 1946, *UKTS* 67 art 38(1).

¹⁰⁰ Hall S, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 *European journal of international law* 2 at 284; Harris D & Sivakumaran S, *Cases and Materials on International Law* (2015) 8th ed (London, Thomson Reuters (Legal) Limited) at 16; Janis MW, *International Law* (2008) 5th ed (New York, Aspen Publishers) at 44.

¹⁰¹ Williams JW, 'Research Tips in International Law' (1981) 15 *J. Int'l L. & Econ.* 1 at 7.

¹⁰² See Hall (2001) *op cit* note 100 at 298 who states that ‘Article 38 sets out a rational methodology for technical legal reasoning in international law, proceeding from the specific to the general.’

¹⁰³ The general principles are often seen as embodying ‘a naturalist approach’ to international law and are used where there is no treaty or customary law on a particular point – see Williams (1981) *op cit* note 101 at 8. Examples include procedural principles such as the *res judicata* and the principle of *pacta sunt servanda* – see Harris and Sivakumaran (2015) *op cit* note 100 at 36 and 40; Hall (2001) *ibid* at 298.

¹⁰⁴ ICJ Statute *supra* note 99 art 38(1).

means for the determination of rules of law.’¹⁰⁵ These are not the only sources of international law, however, which have, in recent years, come to include declarations of international bodies, such as UN General Assembly resolutions, and soft law.¹⁰⁶ These secondary sources may perform a number of different functions, including providing evidence of emerging customary law, assisting in the interpretation of established international law and acting as a predictor of future development in international law.¹⁰⁷

Harris and Sivakumaran also point out that unilateral acts of states (i.e. pronouncements of government officials) may bind states in certain circumstances, and should, therefore, be considered a further source of international law.¹⁰⁸ In the thesis, such unilateral pronouncements generally take the form of submissions by members to the WTO Rules Group.¹⁰⁹

It could, thus, be said that treaties, customary law and the general principles are the most authoritative or ‘primary’ sources of international law, while judicial decisions, academic writing, declarations, soft law and unilateral acts are ‘secondary’ sources, generally used as interpretative materials or evidence of customary law. However, while international judicial decisions do not follow the *stare decisis* principle, they are highly influential in changing state practice¹¹⁰ and are usually followed by international courts in subsequent cases, particularly those judgments of prominent international tribunals such as the International Court of Justice (ICJ), the WTO’s Appellate Body, and the Permanent Court of Arbitration.¹¹¹ Indeed, the Appellate Body has made it clear on more than one occasion that Panels should follow previous Appellate Body decisions where the issues in contention are

¹⁰⁵ Ibid art 38(1)(d).

¹⁰⁶ See Hall (2007) op cit note 92 at 200-202; Harris and Sivakumaran (2015) op cit note 100 at 50-56; Janis (2008) op cit note 100 at 53-56; Dupuy P-M, 'Soft Law and the International Law of the Environment' (1991) 12 *Michigan Journal of International Law* 2 at 435; see also Simma B & Paulus AL, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View' (2017) 93 *American Journal of International Law* 2 at 308 who suggest that even those adopting a positivistic view of international law must acknowledge the importance of soft law for the purpose of clarifying legal rules and indicating future legal changes.

¹⁰⁷ Hall (2007) ibid at 201-202; Harris and Sivakumaran (2015) ibid at 51-56; Dupuy (1991) ibid at 431-435.

¹⁰⁸ Harris and Sivakumaran (2015) ibid at 44-50.

¹⁰⁹ These submissions are generally made without prejudice to the interest of the state or states submitting them and cannot, therefore, be considered binding. However, they do give an indication of the thinking of WTO members on many important issues and may act as a source of pressure on states to adhere to their positions on certain issues.

¹¹⁰ For a clear example of this, see Auld K, 'Trade Measures to Prevent Illegal Fishing and the WTO: An Analysis of the Settled Faroe Islands Dispute' (2017) 17 *World Trade Review* 4 at 13-14, which details the EU’s attempt to comply with WTO jurisprudence in creating a regulation designed to combat IUU fishing through trade measures.

¹¹¹ Harris and Sivakumaran (2015) op cit note 100 at 41-42; Hall (2007) op cit note 92 at 197-198.

the same,¹¹² and the ICJ relies heavily on its own jurisprudence in deciding cases.¹¹³ This suggests that judicial decisions of international courts are not departed from lightly.

It should also be noted that international environmental law often takes the form of declarations and soft law instruments.¹¹⁴ This is particularly so in the case of fisheries law¹¹⁵ and the various Codes and Guidelines released by the FAO have, over the years, had a definite influence on state practice.¹¹⁶ In utilising the sources of international law, therefore, it is important to pay attention not only to the nature of the source but also the extent to which it has been followed or relied upon, by both states and international judicial bodies, and this is the methodological approach taken in the thesis.

In certain respects, however, the traditional sources of international law are not sufficient to answer, or to fully answer, the research questions of the thesis. This is because the subject matter of the thesis concerns the lives and livelihoods of small-scale fishers and fishing communities, who are not traditional actors in international law and had not, until the release of the SSF Guidelines in 2015, been the subject of international agreements. Thus, the thesis also looks beyond the sources traditionally associated with international law to grey, or non-commercial, literature, in order to answer the research questions.

Grey literature is often used in policy and decision-making,¹¹⁷ which makes it useful for a thesis that aims to present recommendations for law reform. It is also invaluable in supplementing traditional commercial publications, as it often approaches an issue from a

¹¹² WTO, 'US-Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (WT/DS268/AB/R) Report of the Appellate Body adopted on 17 December 2004' (2004) para 188; WTO, 'US-Final Anti-Dumping Measures on Stainless Steel from Mexico (WT/DS344/AB/R) Report of the Appellate Body adopted on 20 May 2008' (2008) paras 161-162.

¹¹³ Harris and Sivakumaran (2015) op cit note 100 at 41-42; Janis (2008) op cit note 100 at 86.

¹¹⁴ Dupuy (1991) op cit note 106; Janis (2008) ibid at 55. Examples include the United Nations Conference on Environment and Development, 'Rio Declaration on Environment and Development (A/CONF.151/26 (Vol. I))' (1992) and the United Nations General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development (A/RES/70/1)' (2015). Note that there is overlap and declarations are often referred to as soft law.

¹¹⁵ Examples include the FAO Code of Conduct supra note 91; SSF Guidelines supra note 1; FAO, 'International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (2001) (IPOA-IUU); IPOA-Capacity supra note 41; and the FAO, 'Voluntary Guidelines for Catch Documentation Schemes' (2017).

¹¹⁶ See Hosch G, *Analysis of the Implementation and Impact of the FAO Code of Conduct for Responsible Fisheries since 1995* (2009) FAO Fisheries and Aquaculture Circular, FAO, available at <http://www.fao.org/tempref/docrep/fao/011/i0604e/i0604e00.pdf>, accessed on 13 August 2020, particularly at 75-77. Note also the widespread adoption of the definition of IUU fishing in the IPOA-IUU by states and RFMOS – see, for example, Unreported and Unregulated Fishing Enforcement Act H.R. 774 of 2015 s303(2); IUU Regulation op cit note 36 art 2.2; North-East Atlantic Fisheries Commission, 'NEAFC Scheme of Control and Enforcement of 2010 (latest version 2020)', available at <https://www.neafc.org/scheme>, accessed on 13 August 2020 art 1(l).

¹¹⁷ Lawrence A, Thomas J, Houghton J, et al., 'Collecting the Evidence: Improving Access to Grey Literature and Data for Public Policy and Practice' (2015) 46 *Australian Academic & Research Libraries* 4 at 229.

unique perspective and, in some cases, may be the most current or only source of information on a topic.¹¹⁸ However, grey literature, while useful, is generally not peer-reviewed in the traditional sense¹¹⁹ and must be approached with a certain amount of caution.

The grey literature used in the thesis consists primarily of reports and guidelines by IGOs, such as the FAO, UNEP and others. The work of the FAO is a particularly important source of information as it deals extensively with issues affecting small-scale fisheries. While such literature is not generally peer-reviewed, publications by IGOs are generally seen as reliable and authoritative.¹²⁰ Where other types of grey literature are used in the thesis, they are scrutinised carefully, in order to determine whether any sort of review process has taken place, the extent to which these ideas have been followed in commercial literature, the bodies or persons releasing the research, and, where applicable, the methods used to conduct the research, in order to assess the credibility of, and the weight to be given to, the research.

Another important consideration in determining the methodological approach adopted by the thesis is the broad nature of the problem being investigated, in the sense that the trade treaties and negotiations with which the thesis deals, involve a great many state parties and sometimes the majority of the world's countries. As a result, time and financial constraints precluded the undertaking of any sort of meaningful empirical study with fishing communities affected by these agreements. Instead the thesis relies on the studies undertaken by others in this regard, to assist in determining the development needs of small-scale fisheries. In doing so the thesis does not lose sight of the fact that these studies are specific to a particular place, but rather looks for consensus in the outcomes to inform the broad recommendations of the thesis. Such studies are primarily utilised in Chapter 2.

It was the author's hope, however, that the thesis could have been augmented by empirical study at the WTO through a doctoral internship. While the writing of the thesis, and particularly Chapter 5, was made possible through a study of the many documents released by the WTO Rules Group as well as commentary on the negotiations, the author felt that it could have benefitted from interaction with WTO officials. However, the COVID-19 pandemic prevented any application being made in this regard. It was fortunate, then, that in

¹¹⁸ Ibid at 236.

¹¹⁹ Adams RJ, Smart P & Huff AS, 'Shades of Grey: Guidelines for Working with the Grey Literature in Systematic Reviews for Management and Organizational Studies' (2017) 19 *International Journal of Management Reviews* at 433-434.

¹²⁰ See, for example, University of British Columbia, 'Government Publications - International Organizations' (2020), available at <https://guides.library.ubc.ca/c.php?g=307170>, accessed on 13 August 2020.

the process of writing the thesis, a number of online conferences and webinars were held with the Chair and several WTO administrators and ambassadors.¹²¹ These conferences were invaluable in providing current information on the state of the WTO negotiations as well as allowing for interaction with the participants through questions and comments.

IX. Structure of the Thesis

The thesis consists of six chapters. Chapter 1 introduced the thesis by highlighting the problems faced by small-scale fisheries and the need to provide for this sector in international trade agreements seeking to discipline fisheries subsidies. It further presented the scope and rationale, problem statement, research questions and objectives, methodology, and a brief overview of the theoretical basis of the thesis.

Chapter 2 creates a framework of development needs of small-scale fisheries, which informs the remainder of the thesis, and particularly the recommendations in Chapter 6. It uses Van der Burgt's work as a starting point and draws on the broader literature on poverty and development, including international human rights law, as well as the literature pertaining specifically to small-scale fisheries. In the beginning, the chapter also considers certain broad approaches to poverty and development in small-scale fisheries, in order to inform both the framework and the overall approach of the thesis. In this regard, it notes the resource constraints prevalent in many countries where small-scale fisheries reside but also the need for some level of management of fish stocks, even where resources to do so are scarce.

Chapter 3 analyses member submissions and working documents of the WTO negotiations, as well as the texts of CPTPP and USMCA, in order to understand how the needs of small-scale fisheries are currently represented in these negotiations and agreements. This overview provides insight into the types of provisions that are currently being included in trade agreements dealing with fisheries, as well as the structure these agreements generally take. This assists in identifying gaps in the agreements as well as the types of provisions that can be included in such agreements, both of which are vital components in structuring the

¹²¹ These include the 12th International Forum on Illegal, Unreported and Unregulated Fishing (18-22 May 2020), organised by Chatham House in London; the Virtual Ocean Dialogues (1-5 June 2020), organised by the World Economic Forum and Friends of Ocean Action in Cologne, Switzerland; and the Friends of Ocean Action's Webinar on Eliminating Harmful Fisheries Subsidies (30 June 2020) in Zurich (held as a follow up to the Virtual Ocean Dialogues session after the release of the Chair's 2020 Draft Negotiating Text to the Rules Group).

final recommendations of the thesis for trade agreements going forward. Chapter 3 considers these issues primarily from a development point of view but does highlight sustainability concerns with some of the subsidies discussed, as a precursor to further discussion in Chapter 4.

Chapter 4 considers the effects of certain beneficial development subsidies identified in Chapter 3 on the sustainability of fish stocks and aquatic ecosystems. This is vital to ensure that a proper balance is struck between development and sustainability in trade agreements. The chapter first examines fisheries management approaches, and particularly the ecosystem approach to fisheries. This analysis, as well as a consideration of the types of safeguard mechanisms (such as notifications) used in international trade agreements, inform the chapter's discussion on the types of safeguards that could be attached to these subsidies, so that they can be provided to small-scale fisheries without compromising sustainability.

Chapter 5 focuses on practical and political hurdles to the inclusion of provisions protecting small-scale fisheries in trade agreements, as well as the conclusion and enforcement of these agreements. Practical and political considerations, while at times nebulous and difficult to analyse, cannot be overlooked when it comes to international trade negotiations, where it is often difficult to obtain consensus. This chapter explores these limitations in order to inform the final recommendations of the thesis, as well as to identify solutions to the most intractable problems faced by these types of negotiations.

Chapter 6 concludes the thesis. It reflects on the research conducted and provides recommendations for states concluding trade agreements dealing with fisheries subsidies, with a focus on the protection and benefit of small-scale fisheries. Taking as their basis the development needs of small-scale fisheries, the recommendations consider what would best serve small-scale fisheries in such agreements with due regard for textual, practical and political limitations, as well as the need to ensure an appropriate balance between sustainability and development. The recommendations, like the rest of the thesis, take account of resource limitations and the different stages of development of states negotiating an agreement.

CHAPTER 2 – DEVELOPMENT NEEDS OF SMALL-SCALE FISHERIES

I. Introduction

Small-scale fisheries take many forms. They comprise women, men and children, who may be engaged in any number of activities, including gleaning,¹²² longlining, purse seine fishing, pearl diving, buying and selling fish, or working as crew members or in processing factories. Small-scale fisheries may be rural or urban, part-time or full-time, coastal or inland, commercial or subsistence or both, chronically poor or vulnerable to poverty or, in a few cases, relatively prosperous. Determining the development needs of this disparate group is, therefore, a complex undertaking and the development framework in this chapter is inevitably a broad framework, which will have different areas of relevance for different countries.

Yet, while the thesis does not lose sight of the fact that all poor small-scale fisheries are worthy of assistance, no matter where in the world they are found, the framework focuses on the problems faced by small-scale fisheries in Asia, Africa and Latin America, as this is where the majority of small-scale fisheries reside. While striving to be as inclusive as possible, the framework necessarily takes cognisance of the fact that many of the states in these regions are under-resourced and are subject to poor governance practices, gender inequities and so on. Thus, it considers what opportunities and advantages¹²³ can, realistically, be provided for small-scale fisheries in the regions in which they primarily reside, taking particular cognisance of resource constraints.

Section II of the chapter considers two opposing theories of development of small-scale fisheries. This discussion assists in explaining the general approach adopted in creating the framework. Thereafter, in Section III, the chapter analyses the development framework created by Van der Burgt, in order to lay the foundation for the framework created in this chapter and explain how it differs from and builds upon that of Van der Burgt. In Section IV the chapter sets out the development framework, which consists of four broad concepts – environmental equity, access to basic necessities, security and good governance. In creating the framework, the chapter first considers the general use of these development concepts in the literature and international agreements, as these pertain to poverty reduction and

¹²² Gleaning is a method of gathering small fish and invertebrates from areas such as intertidal zones, mangrove swamps, and reef flats.

¹²³ As noted in Chapter 1 section I at note 3, this thesis sees development in small-scale fisheries as comprising both the provision of opportunities and the ability to take advantage of those opportunities.

development, in order to unpack the concepts and contextualise the discussion. In considering how the concepts apply to small-scale fisheries, however, the framework is shaped by circumstances prevalent in small-scale fisheries. Thus, each of the concepts explored takes on a particular meaning in the context of small-scale fisheries, and it is this understanding that informs the remainder of the thesis. Section V concludes.

II. The Wealth-Based and Welfare Models

Béné, Hersoug and Allison identify two broad schools of thought when it comes to impoverishment and development in small-scale fisheries.¹²⁴ The first is that small-scale fisheries compete for resources that are fast depleting, leading to greater fishing effort which reduces sustainability and wealth generation and leads to impoverishment.¹²⁵ The second is the view that open access fisheries act as a method of poverty prevention, absorbing surplus rural labour and providing a safety net in times of crisis.¹²⁶

In the former case, the solution is to restrict access to a few, highly efficient, craft, in order to make the small-scale fishing industry profitable for those involved and generate public funds through tax and levies on the sector, which can then be used for social welfare.¹²⁷ Under this type of model, however, excess labour formerly employed in small-scale fishing needs to be absorbed by other industries, particularly if fish stocks need to recover from over-exploitation.¹²⁸ As many small-scale fisheries are rural, there will either have to be increased urban migration, assuming that employment exists in urban centres, or absorption by other rural activities, such as agriculture,¹²⁹ or other fisheries-related industries, such as aquaculture or fish processing.¹³⁰ This would likely also necessitate support of these industries by the state. Béné, Hersoug and Allison term this the ‘wealth-based model’.¹³¹

The second case (the ‘welfare model’) suggests that the solution is to leave fisheries as a common-pool or open-access resource for the poor and vulnerable, to act as a labour

¹²⁴ Béné, Hersoug & Allison (2010) op cit note 1. See also OECD, *Natural Resources and Pro-Poor Growth: The Economics and Politics* (2008) DAC Guidelines and Reference Series, available at https://www.oecd-ilibrary.org/development/natural-resources-and-pro-poor-growth_9789264060258-en, accessed on 13 August 2020 at 89.

¹²⁵ Béné, Hersoug & Allison (2010) *ibid* at 330.

¹²⁶ *Ibid* at 331.

¹²⁷ *Ibid* at 330.

¹²⁸ Wilen JE, 'The Challenges of Pro-Poor Fisheries Reform' (2013) 28 *Marine Resource Economics* 3. See also Béné, Hersoug & Allison (*ibid*) at 335-336.

¹²⁹ Wilen (2013) *ibid*.

¹³⁰ Béné, Hersoug & Allison (2010) op cit note 1 at 336.

¹³¹ *Ibid* at 330.

buffer and social welfare mechanism.¹³² This type of model has been adopted by certain developing countries, such as Mozambique and Indonesia, both because of a lack of alternative work opportunities and because these states do not have the capacity to enforce the types of regulations envisaged by the wealth-based model.¹³³ In this regard, Béné, Hersoug and Allison make the point that the wealth-based model can be deployed in certain developed countries but there are serious difficulties in implementing a wealth-based model in most developing countries, because of poor governance and lack of resources.¹³⁴ They also point out that curtailing small-scale fishing would cause hardship for all those who rely on small-scale fisheries in a secondary capacity, such as those who work in the pre- or post-harvest sectors and the households that rely on incomes from fishing for necessities or to cross-subsidise other livelihood ventures.¹³⁵ Wilen, despite arguing for a wealth-based model, also questions its efficacy in developing countries, again for reasons of poor governance and lack of resources.¹³⁶

It has been estimated that 95% of small-scale fisheries are found in Asia, Africa and Latin America,¹³⁷ regions which have traditionally been characterised by poverty and underdevelopment. Thus, small-scale fisheries are often found in states which lack the resources and institutional structures to reform and control their fishing industry. These conditions are not conducive to approaches which attempt to reform the fisheries industry by drastically reducing fishing effort. Yet, even in wealthier, developed states, such as Canada and Spain, commentators have pointed to the negative impact on both livelihoods and sustainability by applying this type of highly regulated, top-down model to small-scale fisheries.¹³⁸

¹³² Ibid at 331.

¹³³ Ibid at 334-335.

¹³⁴ Ibid at 335-336 and 348.

¹³⁵ Ibid at 342.

¹³⁶ Wilen (2013) op cit note 128 at 205-206 and 215.

¹³⁷ FAO, *Increasing the Contribution of Small-Scale Fisheries to Poverty Alleviation and Food Security* (2005) FAO Technical Guidelines for Responsible Fisheries, FAO, available at <http://www.fao.org/3/a-a0237e.pdf>, accessed on 13 August 2020 at 12.

¹³⁸ see Ostrom E, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990) (USA, Cambridge University Press) at 173-177; Miret-Pastor L, Herrera-Racionero P, Lizcano E, et al., 'The Spanish Mediterranean Fishing Guilds (Cofradías): An Example of Collaborative Management with a Key Role in Sustainable Fisheries' (2019) *Fisheries* January 2019 at 2-4.

However, leaving fisheries completely open-access can lead to overfishing.¹³⁹ This is a significant problem, as overfishing may have catastrophic effects on aquatic ecosystems,¹⁴⁰ which can significantly impact the livelihoods of those who rely on fisheries. In this regard, conserving, and thereby potentially increasing, fish stocks can have benefits for present generations of small-scale fisheries as well as future generations,¹⁴¹ and livelihood opportunities may exist for small-scale fisheries as environmental stewards, given their knowledge of local fisheries and aquatic ecosystems. This suggests that development and conservation of resources cannot be considered as separate issues, but must be dealt with simultaneously, and that conservation is a vital aspect of development, food security and poverty reduction.

Consequently, while access to aquatic resources cannot, and should not, be curtailed for those who need it, development of small-scale fisheries must also be sustainable and there must be some regulation of resources, even if this is only to maintain the viability of fish stocks.¹⁴² Such regulation should be sufficiently flexible to accommodate different situations and local management systems (and, indeed, should encourage the creation of such systems) but leaving fisheries completely open access is likely to lead to overfishing in most cases. Thus, in determining the development needs of small-scale fisheries, the thesis adopts a middle ground in line with considerations of sustainable development. The framework created in this chapter determines the most pressing development needs of small-scale fisheries and suggests ways in which these could be implemented, while not losing sight of sustainability concerns and taking particular cognisance of capacity constraints in the regions where most small-scale fisheries reside. Similarly, the remainder of the thesis looks to strike an appropriate balance between sustainability and development when considering subsidies for small-scale fisheries.

¹³⁹ Béné, Hersoug & Allison (2010) op cit note 1 at 349.

¹⁴⁰ Jackson JBC, Kirby MX, Berger WH, et al., 'Historical Overfishing and the Recent Collapse of Coastal Ecosystems' (2001) 293 *Science* 5530.

¹⁴¹ Hardy P-Y, Béné C, Doyen L, et al., 'Strengthening the Resilience of Small-Scale Fisheries: A Modeling Approach to Explore the Use of In-Shore Pelagic Resources in Melanesia' (2017) 96 *Environmental modelling & software* 1 at 301; Cochrane KL, Andrew NL & Parma AM, 'Primary Fisheries Management: A Minimum Requirement for Provision of Sustainable Human Benefits in Small-Scale Fisheries' (2011) 12 *Fish and Fisheries* 3.

¹⁴² Cochrane, Andrew and Parma take the view that, practically, a viability approach is the route that will have to be taken by most developing countries at present in regard to fisheries management – Cochrane, Andrew & Parma (2011) *ibid* at 279.

III. Van der Burgt's Framework

As discussed in Chapter 1,¹⁴³ the theoretical framework developed in this chapter builds on the work of Van der Burgt, who considers the development of small-scale fisheries in relation to certain international fisheries agreements, as well as bilateral access agreements between the EU and various African, Caribbean and Pacific (ACP)¹⁴⁴ countries. Van der Burgt takes the view that the contribution of these agreements to the development of small-scale fisheries can be determined by focusing on whether equity, poverty eradication and participation initiatives for small-scale fisheries are present in these agreements.

Initially, Van der Burgt treats her three primary indicators as overlapping and mutually-reinforcing principles.¹⁴⁵ Equity is about equal access to fish resources and the opportunity to improve or maintain well-being, the latter of which also requires access to income and opportunities (poverty eradication). Freedom from deprivation can empower people and allow them to participate in decision-making processes that affect them and participation, in turn, facilitates equity and poverty eradication by giving people a voice.¹⁴⁶ When it comes to determining their use in fisheries instruments, however, Van der Burgt takes a different view of these concepts.

In considering equity in fisheries, Van der Burgt focuses on intragenerational equity and optimum utilisation, but not intergenerational equity.¹⁴⁷ As discussed in greater detail in Section IV(a)(i) below, intergenerational equity refers to the need to conserve the earth's resources for future generations while intragenerational equity provides that there should be equitable access to resources for members of the current generation. In focusing on intragenerational equity but not intergenerational equity, Van der Burgt's reasoning appears to be that intragenerational equity is related to sustainable development, while intergenerational equity relates to sustainable use.¹⁴⁸ Yet this overlooks the fact that the creation of sustainable fisheries has the benefit of conserving resources on which small-scale fisheries rely.¹⁴⁹

¹⁴³ Chapter 1 section VII.

¹⁴⁴ A list of ACP countries is provided in Annexure 1.

¹⁴⁵ Van der Burgt (2013) op cit note 88.

¹⁴⁶ Ibid at 9-10.

¹⁴⁷ Ibid at 8-9 and 340-343.

¹⁴⁸ Ibid at 71.

¹⁴⁹ See Chapter 2 generally, and particularly sections II and IV(a)(ii).

Poverty eradication, for Van der Burgt, comprises basic necessities but, like equity, focuses on only two elements – safety at sea and food security. While these are vital issues for small-scale fisheries, there is little analysis of other basic necessities or poverty reduction mechanisms which could be of benefit to small-scale fisheries.¹⁵⁰ Participation is an important element in Van der Burgt's work and encompasses vital governance and equity principles, such as public participation, access to information, capacity building, and gender equity.¹⁵¹ However, other elements of good governance, such as transparency, accountability, cooperation and collaboration between those dealing with fisheries issues, improving resource governance, and combatting corruption barely feature in the discussion.¹⁵² This is problematic, as weak governance can be a source of many ills for the poor, and a lack of proper resource governance is particularly detrimental to the lives of small-scale fisheries.¹⁵³

As a result, Van der Burgt's work, while a good starting point for analysis of the development needs of small-scale fisheries, takes too narrow a view of these needs for the purposes of this thesis. Thus, the framework in this chapter differs from Van der Burgt's theory in two important respects.

To begin with, it creates a framework of development needs rather than indicators. This is not merely an issue of semantics. The purpose of indicators is to measure progress and this is the focus of Van der Burgt's work, which considers how certain agreements are contributing to development by holding them up against the framework of indicators. This thesis does consider, in Chapter 3, how development needs of small-scale fisheries have been represented in trade agreements to date in order to identify gaps in these agreements. However, the overarching purpose of the work is to determine the types of development provisions that could be included in a trade agreement, and the framework will ultimately inform those suggestions. Thus, while the two frameworks address the same basic issue –

¹⁵⁰ Although Van der Burgt initially discusses a variety of different development needs in the context of poverty eradication and refers to the necessity of taking a holistic view of basic human rights, she ultimately focuses only on safety at sea and food security – Van der Burgt (2013) op cit note 88 at 9, 113-116 and 343-344.

¹⁵¹ Ibid at 9-10 and 345-346. There is a particular focus on gender issues in Van der Burgt's work. This is important, given that around half of those involved in the small-scale sector are women – see ibid at 88-89, 102-103, 216-218 and 332-333; Harper S, Zeller D, Hauzer M, et al., 'Women and Fisheries: Contribution to Food Security and Local Economies' (2013) 39 *Marine Policy* 56 at 57; Lentisco A & Lee RU, *A Review of Women's Access to Fish in Small-Scale Fisheries* (2015) FAO Fisheries and Aquaculture Circular, FAO, available at <http://www.fao.org/3/a-i4884e.pdf>, accessed on 13 August 2020 at 4; SSF Guidelines supra note 1 preface ix.

¹⁵² The primary reference to these principles occurs in a footnote, and Van der Burgt notes that good governance is discussed only indirectly in the work – see Van der Burgt (2013) ibid at 68 and fn 105.

¹⁵³ As discussed further in Section IV(d) below.

development of small-scale fisheries – the purposes to which these frameworks are put are different. As a result the term ‘indicators’ is misleading in the context of this thesis.

The other respect in which this framework differs from Van der Burgt’s framework, is that it builds upon and broadens many of the issues addressed therein. First, the framework takes into account both inter- and intragenerational equity, rather than only considering intragenerational equity, as fisheries management measures aim to protect the resource on which small-scale fisheries depend for their livelihood. Naturally, such measures should not shut small-scale fisheries away from this resource, but there must be a balance if small-scale fishing is to continue. Certain management measures can also be beneficial in both an inter- and intragenerational sense, such as co-management and the employment of small-scale fisheries as environmental stewards.

The framework also does not consider optimum utilisation to be a separate equity principle, both because it could be considered part of the principles of intergenerational and intragenerational equity but, more importantly, because it is potentially inconsistent with the advancement of equity in small-scale fisheries. Optimum utilisation envisages that the current generation of a state will exploit fish stocks at optimal levels within that State’s EEZ or, where this is not possible, allow other States to fish for the surplus.¹⁵⁴ This means that, in theory at least, the current generation is maintaining the stock levels for future generations, and giving members of the current generation equitable access to resources. In practice, however, access agreements can create problems for small-scale fisheries. Research has shown that distant water fishing fleets create competition for, and deplete, resources,¹⁵⁵ conflict with local fishers at sea and in markets,¹⁵⁶ engage in IUU fishing,¹⁵⁷ and do not comply with local management rules for fish stocks¹⁵⁸ or even development provisions in

¹⁵⁴ United Nations Convention on the Law of the Sea 1982, 1833 *UNTS* 3 (UNCLOS) art 62.

¹⁵⁵ Ponte S, Raakjær J & Campling L, 'Swimming Upstream: Market Access for African Fish Exports in the Context of WTO and EU Negotiations and Regulation' (2007) 25 *Development Policy Review* 1 at 129; Kaczynski VM & Fluharty DL, 'European Policies in West Africa: Who Benefits from Fisheries Agreements?' (2002) 26 *Marine Policy* 2 at 82 and 90.

¹⁵⁶ Mbithi Mwikya S, *Fisheries Access Agreements: Trade and Development Issues* (2006) Natural Resources, International Trade and Sustainable Development Series, *ICTSD*, available at http://www.ictsd.org/sites/default/files/downloads/2008/04/mbithi_2006.pdf, accessed on 13 August 2020 at 18.

¹⁵⁷ Belhabib D, Sumaila UR, Lam VW, et al., 'Euros vs. Yuan: Comparing European and Chinese Fishing Access in West Africa' (2015) 10 *PLoS One* 3 at 10-11.

¹⁵⁸ Kaczynski & Fluharty op cit note 155 at 87 and 92.

their own access agreements with coastal states.¹⁵⁹ Thus, the promotion of optimum utilisation can be detrimental to intragenerational equity.

Secondly, the framework takes a broader view of poverty eradication than Van der Burgt. It also adopts the term poverty *reduction*, rather than poverty *eradication*. This is because eradicating poverty is problematic once the concept of poverty is expanded beyond the idea of not meeting a certain income level. In this regard, it is very difficult to ‘get to zero’ on a multidimensional poverty scale that considers a number of factors as important in reducing poverty, such as better health care and education.¹⁶⁰

Taking the concept of poverty in this broader sense, there are many different aspects that contribute to poverty reduction. These do include provision of basic necessities but can also include reduction of vulnerability, increased participation and good governance, pro-poor economic growth and equity.¹⁶¹ Many small-scale fisheries are poor, which suggests that development mechanisms for small-scale fisheries share similarities with these general poverty reduction mechanisms. However, there are a number of issues that particularly affect small-scale fisheries, which must be taken into account in creating a framework of development needs aimed at reducing poverty and vulnerability and stimulating development in small-scale fisheries.

Béné and Friend argue that poverty in small-scale fisheries is often caused by issues such as geographical and political isolation.¹⁶² Jentoft et al, similarly, suggest that it is caused by power imbalances and lack of secure access rights to resources and assets.¹⁶³ Béné, Hersoug and Allison also note the importance of access to roads, education, health services and clean water, as well as the need for measures to address vulnerability and improved

¹⁵⁹ Guggisberg S, *Is Europe Ready to Lead on International Fisheries Governance?* (2017) WWF UK, available at <https://www.wwf.org.uk/sites/default/files/2017-06/Is%20Europe%20Ready%20To%20Lead%20On%20International%20Fisheries%20Governance.pdf>, accessed on 13 August 2020 at 13 and 15-16.

¹⁶⁰ Alkire S, *How to Measure the Many Dimensions of Poverty?* (2013) in Development Co-operation Report 2013: Ending Poverty *OECD*, available at <https://www.oecd-ilibrary.org/content/publication/dcr-2013-en>, accessed on 3 December 2018 at 49.

¹⁶¹ Solheim E, *Development Co-operation Report 2013: Ending Poverty* (2013) *OECD*, available at <https://www.oecd-ilibrary.org/content/publication/dcr-2013-en>, accessed on 13 August 2020; UNDP, *Poverty Reduction and Human Rights* (2003) *UNDP*, available at http://content-ext.undp.org/aplaws_publications/1873321/povertyreduction-humanrights0603%5B1%5D.pdf, accessed on 13 August 2020.

¹⁶² Béné C & Friend RM, 'Poverty in Small-Scale Fisheries: Old Issue, New Analysis' (2011) 11 *Progress in Development Studies* 2 at 121.

¹⁶³ Jentoft S, Bavinck M, Alonso-Población E, et al., 'Working Together in Small-Scale Fisheries: Harnessing Collective Action for Poverty Eradication' (2018) 17 *Maritime Studies* 1 at 8.

governance through co-management and decentralisation.¹⁶⁴ In addition, the dangers associated with fishing and threats to coastal communities as a result of climate change are significant security concerns for small-scale fisheries. Thus, while the framework does consider basic necessities (including food security) and safety at sea as important concerns of small-scale fisheries, it further considers issues affecting the security, or vulnerability, of small-scale fisheries, such as tenure and access rights, climate change, and social safety nets. It also considers governance issues beyond those considered by Van der Burgt in the context of participation, including issues such as transparency, accountability, cooperation and collaboration between those dealing with fisheries issues, improving resource governance, and combatting corruption.¹⁶⁵ This is because poor governance can be a source of many ills for the poor, and a lack of proper resource governance is particularly detrimental to the lives of small-scale fisheries.¹⁶⁶

As far as pro-poor economic growth is concerned, it has already been noted that this thesis does not adopt the view that large economic growth programmes are, for the most part, feasible in the small-scale fisheries sector. To the extent that general pro-poor growth measures can be utilised to assist small-scale fisheries, such as the creation of community-based infrastructure projects or employment guarantees, these are mentioned in the course of the chapter. However, it is not clear that all pro-poor growth policies will benefit small-scale fisheries. For example, there is doubt about whether export-led growth, often touted for its success in East Asia,¹⁶⁷ is beneficial for the poor of a state when the exports are natural resources rather than manufactured goods, as exporting natural resources can weaken the

¹⁶⁴ Béné, Hersoug & Allison (2010) op cit note 1 at 335 and 339.

¹⁶⁵ Although Van der Burgt does mention these elements of governance, the primary reference to these principles occurs in a footnote, and Van der Burgt notes that good governance is discussed only indirectly in the work – see Van der Burgt (2013) op cit note 88 at 68 and fn 105.

¹⁶⁶ Chapter 2 section IV(d) provides a detailed discussion on good governance.

¹⁶⁷ Klasen S, *In Search of the Holy Grail: How to Achieve Pro-Poor Growth* (2003) Towards Pro-Poor Policies: Aid, Institutions and Globalization *Annual World Bank Conference on Development Economics—Europe*, available at <http://documents.worldbank.org/curated/en/851501468780335344/pdf/289950PAPER0ABCDE020030Europe.pdf>, accessed on 13 August 2020 at 15 and 19.

manufacturing and agricultural sectors of a state.¹⁶⁸ For small-scale fisheries particularly, there is little evidence that they would benefit from better access to international markets.¹⁶⁹

Thirdly, while the framework of development needs in this chapter considers participation extensively, including equal participation of women, it also deals with a number of other governance concerns that could hamper development of small-scale fisheries. Van der Burgt mentions some of these concerns briefly, including transparency,¹⁷⁰ access to justice,¹⁷¹ participation of civil society¹⁷² and institutional capacity building.¹⁷³ However, the thesis goes into a more in-depth exposition of these issues, as well as dealing with issues such as effectiveness and efficiency, accountability, and the minimisation of corruption, issues which Van der Burgt acknowledges are important aspects of good governance but on which she does not go into detail.¹⁷⁴ It is important to deal with these issues, as a lack of resources (a serious constraint on government effectiveness) and the prevalence of corrupt practices in regions where small-scale fisheries are found¹⁷⁵ make these important issues affecting the development of small-scale fisheries.

To this end, the chapter considers four broad areas of development and discusses how they apply specifically to small-scale fisheries: environmental equity (considering equity in natural resource management), access to basic necessities (such as food, water, education and health), security (social security mechanisms, safety at sea and tenure security) and good governance (transparency, participation and strengthening of institutions).

It should be noted that, throughout the chapter, any initiatives suggested to give effect to the requirements will be actions that can be taken by states. Although the achievement of sustainable development requires the assistance of all levels of society, trade agreements are created by states and, thus, the focus of the thesis must necessarily be what states can do to

¹⁶⁸ Knack S, *Aid Dependence and the Quality of Governance: A Cross-Country Empirical Analysis* (2000) Policy Research Working Paper Series, *The World Bank*, available at <http://documents.worldbank.org/curated/en/200401468741328803/pdf/multi-page.pdf>, accessed on 13 August 2020 at 1.

¹⁶⁹ Béné C, Lawton R & Allison EH, "Trade Matters in the Fight Against Poverty": Narratives, Perceptions, and (Lack of) Evidence in the Case of Fish Trade in Africa' (2010) 38 *World development* 7; Béné, Hersoug & Allison (2010) op cit note 1 at 330; UNEP (2011) op cit note 15 ch 3 (Senegal case study, particularly at 90-92).

¹⁷⁰ Van der Burgt (2013) op cit note 88 at 210 and 331.

¹⁷¹ Ibid at 84.

¹⁷² Ibid at 86 and 331.

¹⁷³ Ibid at 214-215.

¹⁷⁴ Ibid at 68, fn 105.

¹⁷⁵ Kaufmann D, *Rethinking Governance: Empirical Lessons Challenge Orthodoxy* (2003) *The World Bank*, available at file:///C:/Users/LocalAdmin/Downloads/SSRN-id386904..pdf, accessed on 13 August 2020.

contribute to the sustainable development of small-scale fisheries. However, these actions can include the creation of policy space for entities such as local organisations or NGOs to assist small-scale fisheries, as well as direct interventions. It should also be noted that the development areas discussed are interrelated. For example, equity, access to basic necessities and security can all be achieved through improved governance, while access to basic necessities such as education and health care can lead to greater security, as they allow households to engage in a number of different industries and better contribute to household income. These linkages will be identified throughout the chapter, and illustrate the importance of considering the framework of development needs holistically when creating policies aimed at benefitting small-scale fisheries.

IV. Development Needs

(a) Environmental Equity

Equity, at its core, is about promoting fairness. The concept of equity is, therefore, different to the concept of equality. Equality is the idea of equal treatment regardless of circumstances, while equity recognises that certain advantages exist for some and not for others, and strives to correct or compensate for those advantages. The concept is often referred to in ICJ jurisprudence as a general principle of law or custom¹⁷⁶ and is referred to and relied upon in international treaties and UN General Assembly resolutions.¹⁷⁷ It can also be seen in WTO law, in the principle of special and differential treatment.¹⁷⁸ Significantly, equity is an important consideration in a sustainable development context.¹⁷⁹

(i) Inter- and Intragenerational Equity

A comprehensive articulation of the concept of intergenerational equity in the environmental sphere can be found in the 1989 seminal work by Edith Brown Weiss – *In Fairness to Future*

¹⁷⁶ Harris & Sivakumaran (2015) op cit note 100 at 38-39.

¹⁷⁷ Ibid at 39-40.

¹⁷⁸ See, particularly, General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A 1994, 1867 *UNTS* 187 (GATT) read with WTO, 'Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (L/4903)' (1979) (the Enabling Clause).

¹⁷⁹ Brundtland Report op cit note 16 ch 2.1-2.2; Klugman J, *Human Development Report 2011 - Sustainability and Equity: A Better Future for All* (2011) *UNDP*, available at http://hdr.undp.org/sites/default/files/reports/271/hdr_2011_en_complete.pdf, accessed on 13 August 2020 at 1; Elliot (2013) op cit note 17 at 45-53.

Generations.¹⁸⁰ The concept is also included in a number of international environmental and human rights instruments,¹⁸¹ and, in its simplest sense, refers to the idea that the earth is held in trust by the current generation for future generations. This means that, while reasonable access to resources is envisioned for the current generation, the current generation should not deprive future generations of the benefit and use of the earth's resources.¹⁸² Brown Weiss developed her ideas to provide a normative basis for sustainable development,¹⁸³ which 'relies on a commitment to equity with future generations'.¹⁸⁴

Brown Weiss also took the view that intragenerational equity – the idea that there should be equitable access to resources for all members of the current generation¹⁸⁵ – is a necessary accompaniment to the theory of intergenerational equity. This is because, first, the poor and marginalised do not share equitably in the earth's resources at present¹⁸⁶ and, secondly, we cannot expect poor countries and communities to care about environmental problems until they achieve a higher standard of living.¹⁸⁷ Thus, in addition to promoting fairness, Brown Weiss suggests that addressing intragenerational equity could help ensure that intergenerational equity is achieved.¹⁸⁸

Yet criticism has been levelled at Brown Weiss for subsuming the concept of intragenerational equity within her broader theory of intergenerational equity and, thus, ignoring the possibility of conflict between the two concepts.¹⁸⁹ If, for example, development measures are necessary to ensure that intragenerational equity is achieved, this may come at

¹⁸⁰ Brown Weiss E, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (1989) (Tokyo, Japan, United Nations University).

¹⁸¹ See, for example, Convention on International Trade in Endangered Species of Wild Fauna and Flora 1975, 993 *UNTS* 243 preamble (CITES); Convention on Biological Diversity 1992, 1760 *UNTS* 79 preamble; FAO Code of Conduct supra note 91 ss6.2 and 7.1.1 and Annex 2; United Nations, 'Universal Declaration of Human Rights (General Assembly Resolution 217 A (III))' (1948) (UDHR) preamble and art 22.

¹⁸² Brown Weiss (1989) op cit note 180 at 13.

¹⁸³ Brown Weiss E, 'In Fairness to Future Generations and Sustainable Development' (1992) 8 *American University Journal of International Law and Policy* 1 at 23.

¹⁸⁴ *Ibid* at 19. These ideas can also be seen in the Brundtland Report (1987) op cit note 16 ch 2.1-2.2.

¹⁸⁵ Brown Weiss (1989) op cit note 180, particularly at 21.

¹⁸⁶ *Ibid* at 14 and 21.

¹⁸⁷ *Ibid* at 27.

¹⁸⁸ The idea that those living in poverty do not care about the environment is not necessarily true. Those who rely on natural resources for their livelihoods are often concerned with protecting these resources – see Martinez-Alier J, *The Environmentalism of the Poor* (2002) *UNRISD*, available at [http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/5EB03FFBDD19EA90C1257664004831BD/\\$file/MartinezAlier.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/5EB03FFBDD19EA90C1257664004831BD/$file/MartinezAlier.pdf), accessed on 13 August 2020 at 41-42; Ostrom (1990) op cit note 138 at 177-178. However, it cannot be denied that where the choice is between survival and future generations, the preference will be for survival, and providing for the basic needs of the poor can prevent the necessity of such a choice.

¹⁸⁹ Collins LM, 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' (2007) 30 *Dalhousie Law Journal* 1 at 115-116.

the expense of intergenerational equity if resources are overexploited to achieve this outcome. Conversely, current generations, particularly in the developing world, may suffer at the expense of future generations if their access to resources is truncated for conservation purposes. Nevertheless, as Collins points out, the concept of intergenerational equity can assist us in determining what interests we should consider in making policy decisions.¹⁹⁰ She further suggests that if intergenerational equity is ‘interpreted alongside principles such as Environmental Justice...and Common but Differentiated Responsibilities’¹⁹¹ concerns about those suffering disproportionately for environmental protection will largely be addressed.¹⁹²

This is, indeed, an important point. Principles such as environmental justice, common but differentiated responsibilities and gender equity have sprung from movements emphasising issues around intragenerational equity, including poverty and inequality amongst states and peoples, and the failure to take such considerations into account when addressing sustainable development concerns.¹⁹³ These are important considerations when it comes to fisheries, which are relied on by millions for subsistence and livelihoods.

Environmental justice is the idea that there should be fairness in the distribution of environmental burdens and benefits. The concept is generally associated with a movement in the US in response to the fact that environmental hazards were often situated in or near low-income communities of colour. However, it is now seen to have broader application, and can generally be applied to any issue where the poor and marginalised bear the burden of environmental degradation,¹⁹⁴ or are engaged in ecological distribution conflicts.¹⁹⁵ This can also apply between countries, such as the dumping of hazardous waste along the coastlines of poor developing countries¹⁹⁶ or the disproportionate effects of climate change on small island

¹⁹⁰ Ibid at 104.

¹⁹¹ Ibid at 116.

¹⁹² Ibid at 116. It should also be noted that innovative solutions that target both intergenerational and intragenerational equity goals simultaneously do exist. Costa Rica’s Programme for Payment of Environmental Services, for example, compensates farmers and indigenous communities for conserving natural resources – see Rodriguez CM, *Local Solutions for Tackling Poverty in Costa Rica, the Dominican Republic, Sri Lanka, Uganda and Viet Nam: Local Solution 1* (2013) in Development Co-operation Report 2013: Ending Poverty *OECD*, available at <https://www.oecd-ilibrary.org/content/publication/dcr-2013-en>, accessed on 3 December 2018.

¹⁹³ Elliot (2013) op cit note 17 at 47-53.

¹⁹⁴ O’Brien KL & Leichenko RM, ‘Global Environmental Change, Equity, and Human Security’ in Richard MA, Barnett J, McDonald B and O’Brien KL (eds) *Global environmental change and human security* (2010) at 161.

¹⁹⁵ Martinez-Alier (2002) op cit note 188.

¹⁹⁶ Note, for example, allegations of toxic waste dumping along the Somali coast by European and Asian firms – see Hunter Funnell C & Herring E, *Evaluating Claims of Nuclear Waste Dumping in Somalia/Somaliland: Initial Scoping of Open Sources in English* (2016) *Transparency Solutions*, available at <https://transparencysolutions.com/wp-content/uploads/2018/06/Nuclear-Waste-Dumping-Claims.pdf>, accessed

countries like the Maldives.¹⁹⁷ O'Brien and Leichenko also note that environmental justice has both an outcome and a process component.¹⁹⁸ This means that there should be fairness both in where environmental effects are felt, and in the processes to determine how this should occur.

Related to environmental justice is the concept of common but differentiated responsibilities. In the Rio Declaration,¹⁹⁹ common but differentiated responsibilities means that those most responsible for environmental degradation and holding extensive technology and resources should bear the brunt of combatting and reversing environmental degradation and pursuing sustainable development.²⁰⁰ The United Nations Framework Convention on Climate Change²⁰¹ expands the principle, providing for commitments based not only on which states are most responsible for climate change but also on the development priorities and circumstances of states.²⁰² Although this is specific to the climate change context it does provide support for use of special and differential treatment provisions in dealing with other environmental ills, such as overfishing. Cullet expands the principle even further, arguing that it can apply to issues that are of common concern but were not caused by any particular group of states. In such cases, wealthier states have a duty to share technology and resources with under-resourced states in order to combat a problem which will affect all states.²⁰³

Gender equity is also an important aspect of intragenerational equity. Gender equity encompasses a range of issues, including the need to give greater recognition to the roles that women play in harvesting resources (including support roles), the impacts of environmental change on women, and the need to give women a greater role and voice in issues of environmental change that affect them.²⁰⁴ Denton notes that 'rural women in particular play a

on 13 August 2020; Ewing B 'Is Toxic Waste Behind Somali Piracy?' *Digital Journal* 14 October 2008, available at <http://www.digitaljournal.com/article/261147>, accessed on 13 August 2020.

¹⁹⁷ Recent research suggests that the Maldives and other low-lying atolls, such as the Seychelles, Cook Islands, Northwestern Hawaiian Islands and Marshall Islands may become uninhabitable by the middle of the century as rising sea levels will make potable groundwater unavailable – see Storlazzi CD, Gingerich SB, van Dongeren A, et al., 'Most Atolls Will Be Uninhabitable by the Mid-21st Century Because of Sea-Level Rise Exacerbating Wave-Driven Flooding' (2018) 4 *Science advances* 4.

¹⁹⁸ O'Brien & Leichenko (2010) op cit note 194 at 161.

¹⁹⁹ Rio Declaration supra note 114.

²⁰⁰ Ibid principle 7.

²⁰¹ United Nations Framework Convention on Climate Change 1992, 1771 *UNTS* 107.

²⁰² Ibid art 4(1).

²⁰³ Cullet P, 'Common but Differentiated Responsibilities' in Fitzmaurice M, Ong DM and Merkouris P (eds) *Research Handbook on International Environmental Law* (2010) at 173.

²⁰⁴ O'Brien & Leichenko (2010) op cit note 194 at 160; Denton F, 'Climate Change Vulnerability, Impacts, and Adaptation: Why Does Gender Matter?' (2002) 10 *Gender & Development* 2.

key role in environmental and natural resource management'²⁰⁵ and that 'poor women are generally on the receiving end of the effects of increasing environmental degradation and depletion of natural resources, because of their involvement in, and reliance on, livelihoods activities which depend directly on the natural environment.'²⁰⁶

(ii) *Equity for Small-Scale Fisheries*

Intergenerational equity, as it applies to fisheries, deals with the conservation of fish stocks so future generations, and, indeed, current generations, can enjoy use of the resource. There are a number of mechanisms that states may employ to conserve and manage fish stocks, including quota and monitoring systems, restrictions on gear and nets, closed areas or seasons, reducing subsidies, buyback schemes and so on.²⁰⁷ These mechanisms, if effective, will assist both future generations and the current generation of small-scale fishers in the long term by conserving and rehabilitating stocks on which they depend for their livelihood.²⁰⁸

However, in order to also promote intragenerational equity, these regulations should strive for equity between small-scale fisheries and other fishing sectors – such as industrial and recreational fisheries – in the allocation of permits, fishing grounds and support, taking into account important considerations such as food security. Not doing so is problematic for the development of small-scale fisheries if they are cut off from the resources on which they rely, and can lead to resentment and flouting of conservation rules.²⁰⁹ It is also important to provide access to areas encompassing traditional fishing grounds, and communities should be consulted and their interests taken into account in the designation of protected areas,²¹⁰ in order to prevent illegal fishing or complete exclusion from resources on which small-scale

²⁰⁵ Denton (2002) *ibid* at 11.

²⁰⁶ *Ibid* at 12.

²⁰⁷ Fisheries management concerns are dealt with comprehensively in Chapter 4 sections II and III.

²⁰⁸ See, for example, Hauck M, Mbatha P & Raemaekers S, 'Enhancing Benefits to Small-Scale Fishers along the East Coast of South Africa' in Wynberg R and Hauck M (eds) *Sharing Benefits from the Coast: Rights, Resources and Livelihoods* (2014) at 60.

²⁰⁹ Sowman M, Hauck M, van Sittert L, et al., 'Marine Protected Area Management in South Africa: New Policies, Old Paradigms' (2011) 47 *Environmental Management* 4 at 576-579; Young M, 'Achieving Equity in the Fishing Industry: The Fate of Informal Fishers in the Context of the Policy for the Small-Scale Fisheries Sector in South Africa' (2013) 16 *Potchefstroom Electronic Law Journal* 5 at 310-311; Johnstone G & Johnstone R, 'The Impact of Policy and Law on Benefit Sharing: A Case of Mozambique' in Wynberg R and Hauck M (eds) *Sharing Benefits from the Coast: Rights, Resources and Livelihoods* (2014) at 131-132.

²¹⁰ See, for example Wynberg R & Hauck M, 'Sharing Benefits from the Coast' in Wynberg R and Hauck M (eds) *Sharing Benefits from the Coast: Rights, Resources and Livelihoods* (2014a) at 5. This issue, including sustainability concerns, is discussed further in Chapter 4 section III.

fisheries depend. Similarly, fishing communities should not be removed from their traditional land nor should permission be given for such land to be degraded by external activity.²¹¹

The principles of intragenerational equity and common but differentiated responsibilities further require that members of the current generation, particularly those who are primarily responsible for overfishing and degradation of fish stocks, provide assistance to other members of the current generation to conserve fish stocks and help with poverty alleviation. At an international level, this can include technical assistance from larger, more developed countries to improve management and oversight of fisheries and to assist with poverty reduction in small-scale fisheries. At a national level, this can include the provision of basic necessities to small-scale fisheries, such as education, health services, food and water, as well as the creation of alternative livelihood opportunities.²¹²

Optimum utilisation and the concomitant problem of access agreements, is also a concern of intragenerational equity in small-scale fisheries. As discussed in Section III above, while optimum utilisation does, in theory, give effect to the principles of intergenerational and intragenerational equity, in practice the outcome is often very different. The issue of access agreements also raises environmental justice concerns, as poor coastal communities may suffer from depleted stocks taken to meet the growing demand for fish in developed and large developing countries. In addition, the process component of environmental justice requires that small-scale fisheries should have a say in the allocation of access rights. However, there is often a lack of transparency in the negotiation and monitoring of access agreements.²¹³ It is important, therefore, that states wishing to offer access to foreign fleets put safeguards in place, with technical assistance if necessary.²¹⁴ In addition, access payments

²¹¹ A good example is destruction of mangroves in coastal regions for shrimp farming. This practice can cause any number of problems, including destroying ecosystem services (such as the protection provided against natural disasters) and increasing food insecurity and poverty – see Martinez-Alier (2002) op cit note 188 at 25-32.

²¹² Alternative livelihood initiatives can be tailored to local circumstances and resources, and can be anything from tax incentives for local employment to tourism initiatives to direct employment of local fishers to enforce fishing regulations or help create sustainable aquaculture projects. Diversification of livelihoods can also be beneficial to sustainability, and thus intergenerational equity, where this leads to reduced pressure on fish stocks and ecosystems – see for example, Hauck, Mbatha & Raemaekers (2014) op cit note 208 at 59-60; Hardy, Béné, Doyen, et al (2017) op cit note 141 at 292. Education and engagement with fishers on conservation and fisheries regulations can also improve sustainability outcomes – see Hauck, Mbatha & Raemaekers at 59-61; FAO (2005) op cit note 137 at 39. Issues of participation and engagement are dealt with further in Section IV(d)(iv) below.

²¹³ Standing A, *Corruption and Commercial Fisheries in Africa* (2008) U4 Anti-Corruption Resource Centre, *Chr. Michelson Institute*, available at <https://www.cmi.no/publications/file/3189-corruption-and-commercial-fisheries-inafrica.pdf>, accessed on 13 August 2020; Belhabib, Sumaila, Lam, et al (2015) op cit note 157 at 9-10 and 12; Mbithi Mwikya (2006) op cit note 156 at 35; Le Manach F, Andriamahefazafy M, Harper S, et al., 'Who gets what? Developing a more equitable framework for EU fishing agreements' (2013) 38 *Marine Policy* at 258.

²¹⁴ The types of safeguards that could be useful in this regard are discussed fully in Chapter 3 section II(a)(ii).

are usually not commensurate with the value of stocks being taken by distant water fishing fleets.²¹⁵ Thus, better bargaining by governments can increase the amount of access payments which can then be used for social welfare purposes.²¹⁶

It is also very important to pay attention to gender equity in small-scale fisheries. It has been estimated that half of those working in small-scale fisheries are women,²¹⁷ and in the Pacific Islands over half the small-scale *catches* are contributed by women.²¹⁸ Women are often involved with inshore harvesting, pre- and post-harvest production of fish caught offshore and selling and marketing of catches.²¹⁹ They may also be involved in some other industry to help supplement income, such as tourism, or they may be the primary homemakers.²²⁰ However, these roles are often not recognised in policies or legislation dealing with small-scale fisheries, and women may not be given a voice in the creation of policies affecting them. This is particularly so if policies involving fisheries are negotiated with traditional leaders and the society is a patriarchal one, which is often the case in traditional fishing communities.²²¹

The importance of gender equity to development of small-scale fisheries is recognised in the SSF Guidelines, which provide that '[g]ender equality and equity is fundamental to any development. Recognizing the vital role of women in small-scale fisheries, equal rights and opportunities should be promoted.'²²² Harper et al also highlight the contributions women can make to resource sustainability and food security in fisheries, noting that women hold valuable knowledge about nearshore resources that could assist in their conservation,²²³ and that women's roles in the home can provide important information for developing policies on fisheries and food security because of their 'role in assessing supply and demand on a

²¹⁵ OECD (2008) op cit note 124 at 90.

²¹⁶ Issues of social welfare and governance are dealt with in greater detail in Sections IV(c) and (d) below.

²¹⁷ Harper, Zeller, Hauzer, et al (2013) op cit note 151 at 57; Lentisco & Lee (2015) op cit note 151 at 4.

²¹⁸ Harper, Zeller, Hauzer et al (2015) *ibid* at 60.

²¹⁹ *Ibid*; Lentisco & Lee (2015) op cit note 151 at 2-3.

²²⁰ Harper, Zeller, Hauzer et al (2015) *ibid* at 61; Lentisco & Lee (2015) *ibid* at 6.

²²¹ See Hauck M, Mbatha P & Wynberg R, 'Coastal Communities and Livelihoods in South Africa and Mozambique' in Wynberg R and Hauck M (eds) *Sharing Benefits from the Coast: Rights, Resources and Livelihoods* (2014) at 30-31; Béné C & Neiland AE, *From Participation to Governance: A Critical Review of the Concepts of Governance, Co-management and Participation, and their Implementation in Small-scale Inland Fisheries in Developing Countries* (2006) World Fish Center Studies and Reviews, *World Fish Centre*, available at http://pubs.iclarm.net/resource_centre/GovernancePaper.pdf, accessed on 13 August 2020 at 36 and 44.

²²² SSF Guidelines *supra* note 1 s3(4).

²²³ Harper, Zeller, Hauzer, et al (2013) op cit note 151 at 60; see also Denton (2002) op cit note 204 at 13. Brown Weiss takes the view that conservation of cultural resources, such as knowledge of ecosystems and local conservation methods, is also an important aspect of intergenerational equity – see Brown Weiss (1989) op cit note 180 at 8.

household level'.²²⁴ Moreover, women play an important role in providing food for the household through marketing fish, agriculture and other activities.²²⁵

The conservation of natural resources is also important for gender equity because so many rural women depend on natural resources for their livelihoods.²²⁶ In a fisheries context this applies particularly to inshore and intertidal resources such as mussels,²²⁷ but can also include other fish species²²⁸ as well as resources along the shoreline or surrounding areas, such as wood for cooking.²²⁹ In addition, the particular challenges faced by women, especially those living in poverty, such as lack of access to pregnancy or child care,²³⁰ violence and abuse, and diseases and other health problems due to the nature of their work²³¹ are also important elements to be considered in the pursuit of gender equity.

It is imperative, therefore, that policies addressing equity in small-scale fisheries take into account the important role women play in the business of fishing and in fishing communities. Initiatives to recognise this role, and to give women the opportunity to be involved in formulating policy and monitoring resources, must be created. In addition to those already mentioned, such as conserving resources and utilizing women's knowledge of stocks and food supply, this can include training and education, the creation of markets for fish or other local products, care facilities for children and pregnant women, provision of water pumps or standpipes, training on gender mainstreaming, and the creation of processing facilities to add value to catches.²³² It is also necessary to give women a voice in issues that affect them and prevent elite capture in participatory mechanisms, an issue that will be discussed further in Section IV(d) of this chapter.

²²⁴ Harper, Zeller, Hauzer et al (2015) *ibid* at at 61.

²²⁵ *Ibid* at 61.

²²⁶ See Section IV(a)(i) above.

²²⁷ Lentisco & Lee (2015) *op cit* note 151 at 14; Harper, Zeller, Hauzer, et al (2013) *op cit* note 151 at 56.

²²⁸ Especially as women are often secondary or tertiary users of fish – Lentisco & Lee (2015) *ibid* at 15-16.

²²⁹ Denton (2002) *op cit* note 204 at 15.

²³⁰ *Ibid* at 15.

²³¹ Denton notes that environmental change may increase the distances that women have to walk to find water and firewood, and that women face particular health risks caused by their traditional role as water collectors (e.g. malaria) and cooks (e.g. respiratory problems) – *Ibid* at 12 and 15. Ben-Yami also notes that women working in small-scale fisheries may suffer from eye disease or blindness from working in smoky environments – Ben-Yami M, *Risks and Dangers in Small-Scale Fisheries: An Overview* (2000) ILO Working Paper: Sectoral Activities Program, *International Labour Office*, available at http://www.ilo.org/public/libdoc/ilo/2000/100B09_208_engl.pdf, accessed on 13 August 2020 at 2.

²³² Women play an important role in post-harvest processing of fish – Lentisco & Lee (2015) *op cit* note 151 at 6.

Finally, and related to gender equity, marginalisation and exclusion have been identified as problems particularly affecting women and the poorest fishers.²³³ This can relate to geographical isolation as well as power imbalances. Power imbalances can occur at all levels. They can be between community members, and can lead to exclusion of migrant fishers from communities and land²³⁴ or of women fish traders who are seen to engage in immoral practices to obtain fish.²³⁵ They can also occur between industrial and small-scale fishers, where the former have greater political influence in decision-making processes, or between small-scale fisheries and other sectors of the economy that may be considered more valuable.²³⁶ As there are a multiplicity of issues here, states will have to adopt a number of different approaches to deal with them, which will largely be dealt with later in the chapter. These include better transport infrastructure to enhance the development of rural communities, collaboration and cooperation between public entities, and greater participation of fishers, particularly women and migrant fishers, at all levels of government and in community organisations.

(b) Access to Basic Necessities²³⁷

Twenty years ago, when the UN's Millennium Development Goals (MDGs) were released, the focus of poverty reduction initiatives was primarily on economic growth and increases in income.²³⁸ However, it has become increasingly clear that a rise in income alone does not necessarily allow people to better themselves and permanently escape poverty, or prevent them falling back into poverty because they lack resilience to changing circumstances.²³⁹

²³³ Béné & Friend op cit note 162 at 130.

²³⁴ Ibid at 136; Allison E & Ellis F, 'The Livelihoods Approach and Management of Small-Scale Fisheries' (2001) 25 *Marine Policy* at 385-386.

²³⁵ Sex for fish is a common practice in certain areas and may attract condemnation from the community – see Béné & Friend (2011) *ibid* at 128; Lentisco & Lee (2015) op cit note 151 at 16.

²³⁶ Béné & Friend (2011) *ibid* at 135-136.

²³⁷ The thesis uses the term 'basic necessities', rather than 'basic needs' in order to differentiate its approach (which considers issues from the perspective of equity, the creation of opportunities, human rights, and holistic and sustainable development) from the narrower basic needs approach to poverty reduction, which has now largely been replaced with the human development framing of freedoms and capabilities – see Klugman (2011) op cit note 179 at 1-2 and 17.

²³⁸ The MDGs had a target of halving extreme poverty by 2015 by halving the number of people living on less than 1.25 US dollars per day, as well as a target of full employment by 2015. However, issues such as education and health were not explicitly tied to poverty reduction, nor did equity considerations feature in the MDG poverty targets – see United Nations, 'Goal 1: Eradicate Extreme Poverty & Hunger' (2015), available at <http://www.un.org/millenniumgoals/poverty.shtml>, accessed on 13 August 2020. This has changed in the SDGs – see United Nations, 'Goal 1: End poverty in All Its Forms Everywhere', available at <https://www.un.org/sustainabledevelopment/poverty/>, accessed on 13 August 2020.

²³⁹ Shepherd A, *How Do We Get to Zero on Poverty - And Stay There?* (2013) in Development Co-operation Report 2013: Ending Poverty *OECD*, available at <https://www.oecd-ilibrary.org/content/publication/dcr-2013-en>, accessed on 3 December 2018; Toye J, 'Poverty Reduction' (2007) 17 *Development in Practice* 4/5.

Economic growth, too, is often ineffective at reducing poverty without improvements in equity and the ability to take advantage of opportunities.²⁴⁰ As a result, poverty in the development literature is now generally seen as multidimensional and related to issues such as lack of health, work, clean water, education, security, and voice.²⁴¹

This broader view of poverty necessarily requires a consideration of many different issues that can contribute to poverty reduction. It has already been noted, in Section III above, that poverty reduction can encompass different aspects, including improved governance, security and equity. However, because these issues are dealt with in other parts of the chapter, this section focuses specifically on access to the basic necessities of life, which is a vital component in reducing poverty.

Thus, the first part of this section looks at what constitutes basic necessities in a general development context before applying this analysis to the specific case of small-scale fisheries. In the first part the thesis draws on human rights instruments, both international and regional.²⁴² Human rights instruments are important guides in this regard, as they often have as their stated goal to improve standards of living.²⁴³ A rights-based approach to poverty has, moreover, been adopted by the United Nations Development Programme (UNDP), which takes the view that the reduction of multidimensional poverty should be facilitated by the promotion and protection of human rights.²⁴⁴

The thesis also finds it helpful, in framing the discussion, to draw on the multidimensional poverty index (MPI), created by UNDP, the Human Development Report Office, and the Oxford Poverty and Human Development Initiative. This index is an important guide when it comes to determining basic necessities as it sets out a number of indicators for measuring poverty, including nutrition, child mortality, years of schooling, school attendance, cooking fuel, sanitation, drinking water, electricity, housing and assets

²⁴⁰ See Jones H, *Equity in Development - Why It Is Important and How to Achieve It* (2009) *Overseas Development Institute*, available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4577.pdf>, accessed on 13 August 2020, particularly at 19-24; Brundtland Report op cit note 16 ch 2.1(6).

²⁴¹ Alkire (2013) op cit note 160 at 44. See also Toye (2007) op cit note 239 at 506; FAO (2005) op cit note 137 at 5.

²⁴² In its consideration of regional human rights instruments, the thesis focuses on those regions where most small-scale fisheries reside – namely Africa, Asia and Latin America.

²⁴³ See, for example, UDHR supra note 181 preamble; International Covenant on Economic, Social and Cultural Rights 1966, 993 *UNTS* 3 (ICESCR) preamble; Convention on the Rights of the Child 1989, 1577 *UNTS* 3 (CRC) preamble.

²⁴⁴ UNDP (2003) op cit note 161 at 2.

(grouped into health, education and standard of living).²⁴⁵ In particular, the three general categories of the MPI – health, education and standard of living – provide a useful structure for the discussion on basic necessities, and are used in this manner in conducting the analysis in part (i) of this section.

(i) Basic Necessities in Human Rights Instruments

The first part of the MPI deals with health concerns, particularly nutrition and child mortality. Health concerns are also dealt with extensively in international human rights instruments, including the Universal Declaration on Human Rights (UDHR),²⁴⁶ the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁴⁷ the Convention on the Rights of the Child (CRC),²⁴⁸ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),²⁴⁹ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Convention).²⁵⁰ These instruments take a more comprehensive view of health care than the MPI indicators and include provisions on access to medical care,²⁵¹ health of children,²⁵² prevention, treatment and control of disease,²⁵³ access to food and clean drinking water,²⁵⁴ safe working conditions,²⁵⁵ equality in access to health care,²⁵⁶ and education on matters related to health care – particularly in regard to family planning and child health.²⁵⁷

²⁴⁵ UNDP, 'The 2019 Global Multidimensional Poverty Index (MPI)' (2019), available at <http://hdr.undp.org/en/2018-MPI>, accessed on 13 August 2020.

²⁴⁶ UDHR supra note 181.

²⁴⁷ ICESCR supra note 243.

²⁴⁸ CRC supra note 243.

²⁴⁹ Convention on the Elimination of All Forms of Discrimination against Women 1980, 1249 *UNTS* 13 (CEDAW).

²⁵⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, 2220 *UNTS* 3 (Migrant Convention).

²⁵¹ UDHR supra note 181 art 25(1); ICESCR supra note 243 art 12(2)(d); CRC supra note 243 art 24(b); CEDAW supra note 249 art 14(2)(b); Migrant Convention ibid art 28.

²⁵² UDHR ibid art 25(2); ICESCR ibid art 12(2)(a); CRC ibid art 24.

²⁵³ ICESCR ibid art 12(2)(c); CRC ibid art 24(c).

²⁵⁴ CRC ibid art 24(c); UDHR supra note 181 art 25(1); ICESCR ibid art 11.

²⁵⁵ Migrant Convention supra note 250 arts 25(1)(a) and 70; CEDAW supra note 249 art 11(1)(f); ICESCR ibid arts 7(ii)(b) and 12(2)(b).

²⁵⁶ CEDAW ibid art 12(1); Migrant Convention ibid art 28; ICESCR ibid art 12(2)(d).

²⁵⁷ CRC supra note 243 arts 24(e)-(f); CEDAW ibid art 10(h).

Regional human rights instruments, such as the Banjul Charter,²⁵⁸ the Protocol of San Salvador,²⁵⁹ the Maputo Protocol,²⁶⁰ and the African Charter on the Rights and Welfare of the Child (ACRWC)²⁶¹ contain similar provisions on health and nutrition,²⁶² and emphasise education and awareness of health issues,²⁶³ women's health rights²⁶⁴ and protection from infectious diseases, including HIV/AIDS.²⁶⁵ These instruments are particularly important as they emphasise the problems present in those regions where small-scale fisheries primarily reside. Also important in the case of small-scale fisheries is the Declaration on the Rights of Indigenous Peoples, which provides that all indigenous peoples have the right to access all health services, and to 'the enjoyment of the highest attainable standard of physical and mental health'.²⁶⁶

The second part of the MPI is concerned with education, namely years of schooling and school attendance. Education concerns in human rights instruments are, again, broader than the MPI. The UDHR,²⁶⁷ ICESCR,²⁶⁸ Protocol of San Salvador,²⁶⁹ CRC,²⁷⁰ and ACRWC²⁷¹ all emphasise the right to free and compulsory primary education as well as the availability of secondary and higher education on the basis of ability. CEDAW²⁷² and the Maputo Protocol²⁷³ both provide for the right of women to all types of education, including skills training, and to equality and non-discrimination in education, while both the Migrant Convention²⁷⁴ and the Indigenous Peoples Declaration²⁷⁵ provide for education and skills training to be provided without discrimination. Thus, human rights instruments consider not

²⁵⁸ African Charter on Human and People's Rights 1981, 1520 *UNTS* 217 (Banjul Charter).

²⁵⁹ Organization of American States, 'Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights' (1999), available at <http://www.oas.org/juridico/english/treaties/a-52.html>, accessed on 13 August 2020 (Protocol of San Salvador).

²⁶⁰ African Union, 'Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' (2003) (Maputo Protocol).

²⁶¹ African Charter on the Rights and Welfare of the Child 1990, *OAU CAB/LEG/24.9/49* (ACRWC).

²⁶² Banjul Charter *supra* note 258 art 16; Protocol of San Salvador *supra* note 259 arts 10 and 12; ACRWC *ibid* art 14; Maputo Protocol *supra* note 260 arts 14 and 15.

²⁶³ ACRWC *ibid* arts 14(2)(f) and (h); Protocol of San Salvador *ibid* art 10(2)(e); Maputo Protocol *ibid* arts 14(1)(g) and (2)(a).

²⁶⁴ Maputo Protocol *ibid* art 14.

²⁶⁵ *Ibid* arts 14(1)(d) and (e); Protocol of San Salvador *supra* note 259 arts 10(2)(c) and (d).

²⁶⁶ United Nations General Assembly, 'United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295)' (2007) (Indigenous Peoples Declaration) arts 24(1) and (2).

²⁶⁷ UDHR *supra* note 181 art 26(1).

²⁶⁸ ICESCR *supra* note 243 art 13(2).

²⁶⁹ Protocol of San Salvador *supra* note 259 art 13(3).

²⁷⁰ CRC *supra* note 243 art 28.

²⁷¹ ACRWC *supra* note 261 art 11.

²⁷² CEDAW *supra* note 249 arts 10(a) and (e) and 14(2)(d).

²⁷³ Maputo Protocol *supra* note 260 art 12.

²⁷⁴ Migrant Convention *supra* note 250 arts 43(1)(a) and (c), and 45(1)(a) and (b).

²⁷⁵ Indigenous Peoples Declaration *supra* note 266 arts 43(1)(a) and (c) and 45(1)(a) and (b).

only formal education, but also skills training, and emphasise equality and the importance of education for everyone, including women, migrants and indigenous people.

The final aspect of the MPI deals with standard of living, specifically access to cooking fuel, sanitation, drinking water, electricity, housing and assets. Human rights instruments also emphasise the importance of an adequate standard of living and acceptable living conditions²⁷⁶ and, like the MPI, highlight specific concerns in this regard. These include the right to food,²⁷⁷ clothing,²⁷⁸ housing,²⁷⁹ and water.²⁸⁰ CEDAW draws particular attention to the plight of women in rural communities, and stresses the need for sanitation, water supply, electricity, transport, and communications to improve the lives of these women.²⁸¹ It also, along with the Maputo Protocol²⁸² and the Migrant Convention,²⁸³ underscores the right to housing, while the Indigenous Peoples Declaration stresses the right to traditional lands, territories and resources.²⁸⁴ These provisions are a clear attempt to deal with discrimination against marginalised groups in regard to tenure issues.

The foregoing analysis has provided a useful overview of the types of basic necessities that, if provided, will help to reduce poverty. Many of these necessities are universal. In the specific case of small-scale fisheries, however, issues around geographical and social isolation shape the discussion on basic necessities, as do concerns around fishing and resource competition.

(ii) Basic Necessities for Small-Scale Fisheries

The SSF Guidelines set out a number of problems prevalent in poor fishing communities, including geographical isolation (leading to limited access to markets and health, education and other social services) lack of access to alternative livelihoods, youth unemployment,

²⁷⁶ UDHR supra note 181 art 25(1); ICESCR supra note 243 art 11(1); CRC supra note 243 art 27(1); CEDAW supra note 249 art 14(2)(h); Maputo Protocol supra note 260 art 16; Indigenous People's Declaration ibid art 21(1).

²⁷⁷ UDHR ibid art 25(1); ICESCR ibid art 11(1); CRC ibid art 24(1)(c). The Indigenous Peoples Declaration also provides for indigenous peoples to be 'secure in the enjoyment of their own means of subsistence' - Indigenous People's Declaration ibid art 20(1).

²⁷⁸ UDHR ibid art 25(1); ICESCR ibid art 11(1)

²⁷⁹ UDHR ibid art 25(1); ICESCR ibid art 11(1); CEDAW supra note 249 art 14(2)(h); Maputo Protocol supra note 260 art 16; Migrant Convention supra note 250 art 43(1)(d); Indigenous Peoples Declaration supra note 266 art 21(1).

²⁸⁰ CEDAW ibid art 14(2)(h); CRC supra note 243 art 24(2)(c).

²⁸¹ CEDAW ibid art 14(2)(h).

²⁸² Maputo Protocol supra note 260 art 16.

²⁸³ Migrant Convention supra note 250 art 43(1)(d).

²⁸⁴ Indigenous Peoples Declaration supra note 266 art 26(1).

unhealthy and unsafe working conditions, ill health (particularly high incidences of HIV/AIDS), forced labour and child labour.²⁸⁵ It is clear that these issues cover both lack of basic necessities, such as health care, and lack of access to basic necessities because of issues like geographical isolation. It is necessary to address both these aspects in order to reduce poverty in small-scale fisheries.

As noted in Section II above, the majority of small-scale fishers and fish farmers are situated in Asia, Africa and Latin America. Given that these areas comprise a large amount of low-lying tropical terrain, mosquito-borne diseases such as malaria and yellow fever are particularly prevalent.²⁸⁶ In addition, the nature of the work done by small-scale fishers and the lack of running water and sanitation services in many rural communities increases the likelihood of contracting water-borne diseases such as cholera,²⁸⁷ schistosomiasis,²⁸⁸ and other diseases contracted by drinking and standing or swimming in unclean water.²⁸⁹ In Sub-Saharan Africa, HIV/AIDS also presents a considerable problem for small-scale fishers, who often do not have easy access to medication or contraception.²⁹⁰ In this regard, practices such as exchanging sexual favours for fish lead to the spread of HIV and other sexually transmitted diseases amongst both fishing communities and migrant fishers.²⁹¹ Thus, it is clear that addressing the spread, and treatment of, disease, is an important aspect of fulfilling basic health needs in small-scale fisheries.

This can be done through better provision of health services, as well as clean and safe water and sanitation, something which the SSF Guidelines also stress as an important aspect of reducing poverty in small-scale fisheries.²⁹² Women would especially benefit from these services, as women are particularly susceptible to water-borne diseases because of the nature

²⁸⁵ SSF Guidelines supra note 1 preface xi.

²⁸⁶ WHO, 'Malaria' (2020), available at <https://www.who.int/news-room/fact-sheets/detail/malaria>, accessed on 13 August 2020; WHO, 'Yellow Fever' (2019), available at <https://www.who.int/news-room/fact-sheets/detail/yellow-fever>, accessed on 13 August 2020. See also Béné & Friend op cit note 162 at 132; FAO Committee on Fisheries, *Social Issues in Small Scale Fisheries (COFI/2007/6)* (2007) available at <http://www.fao.org/tempref/docrep/fao/meeting/011/j8992e.pdf>, accessed on 19 August 2020 at 3.

²⁸⁷ Cholera is a bacterial infection associated with lack of access to clean water and basic sanitation facilities – see WHO, 'Cholera' (2019), available at <https://www.who.int/news-room/fact-sheets/detail/cholera>, accessed on 13 August 2020.

²⁸⁸ Schistosomiasis is a disease caused by parasitic worms and those fishing in infested waters are particularly vulnerable - WHO, 'Schistosomiasis' (2020), available at <https://www.who.int/news-room/fact-sheets/detail/schistosomiasis>, accessed on 13 August 2020.

²⁸⁹ Béné & Friend (2011) op cit note 162 at 132; Denton (2002) op cit note 204 at 15; COFI (2007) op cit note 286 at 3.

²⁹⁰ Béné C & Merten S, 'Women and Fish-for-Sex: Transactional Sex, HIV/AIDS and Gender in African Fisheries' (2008) 36 *World development* 5 at 879-881; Bene and Friend (2011) *ibid* at 132.

²⁹¹ Lentisco & Lee (2015) op cit note 151 at 16-17; Béné & Merten (2008) *ibid*.

²⁹² SSF Guidelines supra note 1 art 6.2.

of their work, which often involves collecting and cooking with water.²⁹³ In addition, small-scale fisheries, particularly rural ones, often do not have access to electricity.²⁹⁴ Women in these communities are, thus, also at greater risk of contracting respiratory diseases because of their reliance on traditional cooking fuels, such as wood and dung.²⁹⁵ This is problematic, both from a gender equity point of view and because of the important role women play in managing the household and contributing to food security and poverty reduction in fishing communities.²⁹⁶ Thus, it is imperative that safe water, sanitation services and electricity be provided to fishing communities.

Food security is also an important basic necessity in small-scale fisheries and the SSF Guidelines have this, along with poverty eradication, as an overarching aim.²⁹⁷ As fish has high nutritional value, fishers that fish partially for subsistence purposes are getting access to nutritious food, as well as income to purchase food and other necessities. However, this is dependent on the level of access that fishers have to these resources. It is clear that small-scale fishers should not lose access to the resources on which they rely. Thus, states should provide security of tenure for fishing communities (which can also improve food security by encouraging the planting of crops or other livelihood diversification activities),²⁹⁸ including allowing small-scale fishers access to beaches, landing sites, and fishing grounds wherever possible.

Access to technology and other types of fishing inputs can also afford greater access to fish. Better fishing gear, for example, can make a significant difference in the lives of small-scale fishers, particularly the poorest among them, who are often excluded from accessing this type of technology.²⁹⁹ Improved access to cold storage on boats and at landing sites can also assist in promoting food security by ensuring that catch is not lost unnecessarily.³⁰⁰ Such programmes should, however, be aimed at improving efficiency and preventing loss, rather than raising very poor small-scale fishers to the level of industrial or

²⁹³ Denton (2002) op cit note 204 at 15; WHO Schistosomiasis (2020) op cit note 288.

²⁹⁴ See, for example, Hauck, Mbatha & Wynberg (2014) op cit note 221 at 27.

²⁹⁵ Denton (2002) op cit note 204 at 15.

²⁹⁶ Lentisco & Lee (2015) op cit note 151 at 2-3.

²⁹⁷ SSF Guidelines supra note 1.

²⁹⁸ Tenure security is discussed in greater detail in Sections IV(c)(ii) and (iv) below.

²⁹⁹ Béné & Friend op cit note 162 at 135.

³⁰⁰ OECD (2008) op cit note 124 at 91.

commercial fishers through large modernisation programmes, which can increase unsustainable fishing and place small-scale fishers in debt.³⁰¹

Education and skills training is another important component of poverty reduction in small-scale fisheries. The SSF Guidelines emphasise that states should provide education and skills training to reduce poverty in small-scale fisheries³⁰² and note that formal education is often low in fishing communities.³⁰³ This can lead to low income levels³⁰⁴ and little livelihood diversification in households. However, a lack of education is often a physical access problem in small-scale fisheries.³⁰⁵ The isolated nature of many fishing communities means that, even where the state is willing and able to provide education to its citizens, it is difficult to find good teachers who are willing to work in such isolated areas, and teaching supplies and equipment are likely to be inadequate.³⁰⁶

Geographical isolation can also limit access to other important services and opportunities for fishing communities, such as health care, markets, credit facilities,³⁰⁷ and work opportunities.³⁰⁸ As a result, an important part of facilitating access to basic necessities for small-scale fisheries is providing transport and telecommunications infrastructure. Transport infrastructure includes building and repairing roads and public transport, as well as provision of transport assets, such as boats and land-based vehicles.³⁰⁹ This can assist isolated fishing communities to improve their standard of living through better access to work, markets and education, and to access essential services, such as health care. Telecommunications infrastructure, and particularly access to internet services, can also be an invaluable resource to isolated fishing communities, as it can increase access to education and

³⁰¹ Allison & Ellis (2001) op cit note 234 at 382-383.

³⁰² SSF Guidelines supra note 1 art 6.2.

³⁰³ Ibid preface xi. See also Hauck, Mbatha & Wynberg (2014) op cit note 221 at 26-27.

³⁰⁴ Hauck, Mbatha & Wynberg (2014) ibid at 27.

³⁰⁵ SSF Guidelines supra note 1 preface xi.

³⁰⁶ Béné & Friend op cit note 162 at 134.

³⁰⁷ Lack of access to credit facilities in turn limits access to education, alternative livelihoods and so on. This can force fishers to turn to local financing mechanisms which are likely to be usurious, creating debt traps and preventing development – see FAO (2005) op cit note 137 at 60-61; Béné & Friend op cit note 162 at 134.

³⁰⁸ Béné & Friend (2011) ibid at 133-134; FAO (2005) ibid at 34.

³⁰⁹ FAO (2005) ibid at 59; Béné & Friend (2011) ibid at 134; OECD (2008) op cit note 124 at 91.

information, facilitate marketing of fish,³¹⁰ assist in the creation of co-ops and other collaborative organisations,³¹¹ and even improve fisheries management.³¹²

Small-scale fisheries also experience other types of isolation that have an impact on development. In particular, a lack of political influence³¹³ and social capital³¹⁴ are important contributors to poverty in small-scale fisheries. As discussed in Section IV(a)(ii), power imbalances of all kinds are prevalent in the sector and contribute to marginalisation of migrant fishers, women and, sometimes, entire fishing communities.³¹⁵ In this regard, human rights instruments such as CEDAW, the Maputo Protocol, the Migrant Convention and the Indigenous Peoples Declaration, with their emphasis on equitable access to benefits such as education, health, and land are important for states to consider when creating policies and initiatives aimed at reducing poverty and improving access to basic necessities in small-scale fisheries.

(c) Security

Security, as it applies to development, is essentially the idea of being free from threat. This is often the threat of falling into poverty or into deeper poverty because of an unexpected shock, and is, therefore, closely related to the idea of vulnerability. Security concerns that can affect the poor and vulnerable include threats to personal safety as well as threats to income, assets and other livelihood concerns. This can occur for many reasons – lack of tenure or income security, exposure to increasingly catastrophic climate change events, and unsafe working conditions. Lack of personal security is also a concern in areas which are prone to crime and

³¹⁰ For example, real-time data on catches and landings can be used to facilitate direct sales to consumers and improve traceability for ecolabelling initiatives – see McClenachan L, Neal BP, Al-Abdulrazzak D, et al., 'Do Community Supported Fisheries (CSFs) Improve Sustainability?' (2014) 157 *Fisheries Research* at 68; Bradley D, Merrifield M, Miller KM, et al., 'Opportunities to Improve Fisheries Management Through Innovative Technology and Advanced Data Systems' (2019) 20 *Fish and Fisheries* 3 at 570.

³¹¹ For example, the African Women Fish Processors and Traders Network, which aims to empower women fish processors in African countries through capacity-building, protecting women's rights, raising awareness, and improving access to fish, has created networks of women fishers for collaboration purposes through platforms such as Whatsapp and Facebook – see Schuttenberg H, Harper S, Swaffield-Bray E, et al., 'Gender and IUU Fishing (Panel Discussion)' (18-22 May 2020), *12th International Forum on Illegal, Unreported and Unregulated Fishing* (London).

³¹² See Morgera E & Ntona M, 'Linking Small-Scale Fisheries to International Obligations on Marine Technology Transfer' (2018) 93 *Marine Policy* at 296-298; Bradley, Merrifield, Miller, et al (2019) op cit note 310 at 570. This issue is discussed further in Chapter 4 section III.

³¹³ Political influence in this context refers to influence over any power structure, whether this be formal government, local organisations, or traditional leaders.

³¹⁴ Social capital refers to 'the links, shared values and understandings in society that enable individuals and groups to trust each other and so work together.' – see Keeley B, *Human Capital* (2007) OECD Insights, *OECD*, available at https://www.oecd-ilibrary.org/education/human-capital_9789264029095-en, accessed on 13 August 2020 at 102.

³¹⁵ Béné & Friend op cit note 162 at 134-136.

do not have adequate policing and security, or where there is ongoing conflict. Thus, measures such as the provision of social security and secure land tenure, improvements in policing and safety at work, and building capacity to cope with climate change events are all means of improving security of the poor and vulnerable. Some of these measures can also assist the poor to move out of poverty, and are, therefore, an important aspect of poverty reduction and development. These measures are discussed in parts (i), (ii), and (iii) below. Thereafter their application to small-scale fisheries is explored.

(i) *Social Security*

One way to reduce many of the insecurities faced by the poor and vulnerable is the provision of social security. Social security is seen as a means to protect the vulnerable from shocks like loss of work or disability,³¹⁶ as well as assisting the poor with access to basic necessities.³¹⁷ Social security has two primary components – social insurance and tax-financed social benefits,³¹⁸ also referred to as social welfare programs³¹⁹ or social safety nets.³²⁰ Social insurance relates to contributions made to insurance schemes, such as health and disability insurance, while social safety nets encompass regular income provided by the state to those in need, such as old-age pensions, child support, unemployment insurance or basic income support.³²¹

Economic theory often takes the view that there must be a trade-off between economic growth and equity, and that social safety nets trap people in cycles of poverty as they provide no incentive to work.³²² However, there is increasing empirical evidence suggesting that social safety nets can, in fact, lead to development through expansion and diversification of livelihoods and greater investment in education, not to mention the

³¹⁶ Devereux S, 'Can Social Safety Nets Reduce Chronic Poverty?' (2002) 20 *Development Policy Review* 5 at 659-660; Samson M, *How Are Countries Using Social Protection to Benefit the Poor?* (2013) in *Development Co-operation Report 2013: Ending Poverty OECD*, available at <https://www.oecd-ilibrary.org/content/publication/dcr-2013-en>, accessed on 3 December 2018 at 72.

³¹⁷ Van Ginneken W, *Extending Social Security: Policies for Developing Countries* (2003) *International Labour Review, ILO*, available at https://www.researchgate.net/publication/228311538_Extending_Social_Security_Policies_for_Developing_Countries, accessed on 13 August 2020 at 12-13; Samson (2013) *ibid* at 72.

³¹⁸ Van Ginneken (2003) *ibid* at 11.

³¹⁹ Kenworthy L, *Do Social-Welfare Policies Reduce Poverty? A Cross-National Assessment* (1999) LIS Working Paper Series, No. 188, *Luxembourg Income Study (LIS)*, available at <https://www.econstor.eu/bitstream/10419/160860/1/lis-wps-188.pdf>, accessed on 13 August 2020.

³²⁰ Devereux (2002) *op cit* note 316.

³²¹ Van Ginneken (2003) *op cit* note 317 at 11.

³²² Devereux (2002) *op cit* note 316 at 657-658; Samson (2013) *op cit* note 316 at 78 read with fn 12; Kenworthy (1999) *op cit* note 319 at 1.

increased ability to work when a person receives adequate nutrition, safe water and medical care.³²³ Statistical evidence, too, shows that increases in welfare payments lead to decreases in poverty.³²⁴

Among those that argue for the value of social safety nets, there are debates as to whether or not these should be targeted.³²⁵ Targeting occurs when social safety payments are made dependent on an external metric, such as age, disability, gender or income level, or through ‘self-targeting’³²⁶ mechanisms, such as the creation of labour-based, government-funded infrastructure projects which can be used both as an employment mechanism, a source of continuous income flow (if timed correctly),³²⁷ and to improve infrastructure in poor communities.³²⁸ This debate is essentially moot when it comes to low-income countries, however, and even large developing and emerging economies often cannot afford universal basic income and have to provide targeted support.

Social insurance programmes, unlike social safety nets, require contributions from beneficiaries. Social insurance can cover a number of different risks and eventualities, including health and/or disability, loss of assets, unemployment and retirement. This type of insurance is often associated with formal employment and excludes many of the poor or vulnerable, who often work in the informal sector.³²⁹ Although some countries have attempted to implement statutory health and pension schemes, this has mostly occurred in developed and middle-income developing countries, and is often not feasible for low-income developing countries.³³⁰ In response to this problem, there has been an increase in the creation of community-based schemes or ‘micro-insurance’, run and administered by communities,³³¹ as a way to provide greater coverage to the informal sector.³³² Van Ginneken sees potential for expansion of such schemes, provided that government assists with training,

³²³ Samson (2013) *ibid* at 77-78; Devereux (2002) *ibid*.

³²⁴ Kenworthy (1999) *op cit* note 319.

³²⁵ See, in regard to opposing views on conditions, Van Ginneken (2003) *op cit* note 317 at 56 and 62 and Devereux (2002) *op cit* note 316 at 672.

³²⁶ Such mechanisms use specific cost/benefit ratios to discourage those who are not poor from applying (e.g. a programme requires a beneficiary to work and provides lower than average wages) – see Van Ginneken (2003) *ibid* at 56.

³²⁷ For example, to coincide with the dry season for farmers or a closed season for fishers – see Devereux (2002) *op cit* note 316 at 664; Van Ginneken (2003) *ibid* at 48.

³²⁸ See Van Ginneken (2003) *ibid* at 48-51; Devereux (2002) *ibid* at 664-665.

³²⁹ Van Ginneken (2003) *ibid* at 7.

³³⁰ *Ibid* at 31-33 and 42-43.

³³¹ These communities need not be geographically-based, but can also be based on religion, culture, gender or some other affiliation.

³³² Van Ginneken (2003) *op cit* note 317 at 9 and 26-27. Devereux also suggests that these schemes were a response to disillusionment with social safety nets – Devereux (2002) *op cit* note 316 at 661.

co-financing, monitoring and technical assistance³³³ and it is in the interests of government to support these schemes, as the greater the social security coverage of its citizens, the less it has to provide in the way of social safety nets.

Thus, while there is evidence of the advantages of social security, different circumstances prevailing in different countries, including population demographics, availability of natural and monetary resources and availability of work, will determine the types of actions that states can and should take to help the poor and vulnerable and stimulate growth and development. In this regard, Kenworthy points to the importance of effective social welfare policy design in reducing poverty,³³⁴ while Van Ginneken stresses the need for international assistance³³⁵ and for building strong and competent institutions to administer these policies.³³⁶

(ii) Tenure Security

As discussed in Sections IV(a) and (b) of this chapter, provision of land and assets, as well as guaranteeing continued access to areas abundant in natural resources, are important aspects of promoting equity and poverty reduction. This raises the issue of tenure security, which can also be a vital component in preventing conflict and degradation of the environment.³³⁷

Tenure security is often seen as an individual obtaining a title or long lease to a registered plot of land although it does, in fact, take many forms,³³⁸ including traditional communities or extended family groups holding land as co-owners or rights in traditional hunting, grazing or fishing areas,³³⁹ which may include conservation areas.³⁴⁰ Affording poor and vulnerable individuals, families and communities recognition of their lands and rights can be very beneficial, as this can provide a strong position from which to negotiate deals

³³³ Van Ginneken (2003) *ibid* at 29-31.

³³⁴ Kenworthy (1999) *op cit* note 319 at 20.

³³⁵ Van Ginneken (2003) *op cit* note 317 at 33, 53, 63, 71 and 75.

³³⁶ *Ibid* at 21, 24, 26, 29, 31, 33, 42 and 51.

³³⁷ FAO, 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' (2012) (Tenure Guidelines) preface v; For a comprehensive enumeration of the reasons for this see FAO, *Land Tenure and Rural Development* (2002) FAO, available at <http://www.fao.org/3/y4307e/y4307e00.htm#Contents>, accessed on 13 August 2020 s4.

³³⁸ Holden ST & Ghebru H, 'Land Tenure Reforms, Tenure Security and Food Security in Poor Agrarian Economies: Causal Linkages and Research Gaps' (2016) 10 *Global Food Security* at 21; Simbizi MCD, Bennett RM & Zevenbergen J, 'Land Tenure Security: Revisiting and Refining the Concept for Sub-Saharan Africa's Rural Poor' (2014) 36 *Land Use Policy* at 231-232.

³³⁹ See Norfolk S & Tanner C, *Improving Tenure Security for the Rural Poor: Mozambique - Country Case Study* (2007) LEP Working Paper # 5, FAO, available at <http://www.fao.org/3/a-k0786e.pdf>, accessed on 13 August 2020, particularly the case studies at 16-21; Simbizi, Bennett & Zevenbergen (2014) *ibid* at 231-232.

³⁴⁰ Norfolk & Tanner (2007) *ibid* at 20.

with potential investors that benefit all parties.³⁴¹ It can further encourage people to conserve and make beneficial improvements to the land, plant crops, or develop the land in some other way, such as for tourism purposes.³⁴² Recognising community land rights is also in line with international human rights law,³⁴³ and the FAO's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO Tenure Guidelines).³⁴⁴

Taking cognisance of difficulties around registration of rights, certain under-resourced countries have created progressive land laws that recognise title and rights in land without these being registered³⁴⁵ or aim to register all land rights held by the poor.³⁴⁶ However, while it is important to implement legislation that recognises community and occupation rights, even if these have not been registered, this is often not enough to provide secure tenure. Access to additional inputs, such as labour and access to credit, may also be necessary for investment in, and conservation of, land.³⁴⁷ In addition, poor governance, including corruption, inefficiency, lack of access to information and justice, lack of institutional trust, the high costs of land registration, and lack of education and training, can prevent people asserting their rights, and thus have a detrimental impact on development and livelihood diversification.³⁴⁸ In this regard, Cotula et al note that, even if countries have progressive laws on paper, there are 'big gaps between theory and practice, between statute books and reality on the ground.'³⁴⁹

In addition, mechanisms to improve tenure security often do not take account of the inequalities that exist within communities and households. Women frequently face obstacles in securing land tenure and generally have weaker land rights than men,³⁵⁰ and other minority

³⁴¹ See, for example, the Canhane community case study undertaken in Mozambique – *ibid* at 16-18.

³⁴² *Ibid* at 16-18; Holden & Ghebru (2016) *op cit* note 338 at 25.

³⁴³ International Covenant on Civil and Political Rights 1966, 999 *UNTS* 171; Indigenous Peoples Declaration *supra* note 266 art 26.

³⁴⁴ Tenure Guidelines *supra* note 337 art 3.1.1.

³⁴⁵ Norfolk & Tanner (2007) *op cit* note 339 at 1.

³⁴⁶ Focus on Land in Africa, 'Land Rights and Development in Rwanda', available at <http://www.focusonland.com/countries/rwanda/>, accessed on 13 August 2020.

³⁴⁷ Holden & Ghebru (2016) *op cit* note 338 at 23 and 25.

³⁴⁸ *Ibid*; Simbizi, Bennett & Zevenbergen (2014) *op cit* note 338 at 235-237; Norfolk & Tanner (2007) *op cit* note 339 at 28-33.

³⁴⁹ Cotula L, Vermeulen S, Leonard R, et al., *Land Grab or Development Opportunity* (2009) Agricultural investment and international land deals in Africa, *IIED/FAO/IFAD*, available at https://www.alimenterre.org/system/files/ressources/pdf/land_grab_fao.pdf, accessed on 13 August 2020 at 7.

³⁵⁰ Holden & Ghebru (2016) *op cit* note 338 at 24; Tenure Guidelines *supra* note 337 art 5.4; Simbizi, Bennett & Zevenbergen (2014) *op cit* note 338 at 235.

groups may also be excluded for purposes of land or resource distribution.³⁵¹ Some states have sought to rectify this by, for example, joint land titling for women and men,³⁵² or allowing persons or households to register land titles separately so as not to fall under the control of the community.³⁵³ The FAO Tenure Guidelines also provide that responsible governance of tenure of land, fisheries and forests requires, *inter alia*, equal tenure rights for women and men as well as for other vulnerable and marginalised people.³⁵⁴ Empowerment is an important aspect of this process, however, as social norms may prevent women and other vulnerable groups from asserting their rights.³⁵⁵ Thus, inclusive participatory processes, access to information and accessible judicial services,³⁵⁶ are also essential aspects in ensuring that tenure security is afforded to everyone.³⁵⁷

(iii) Personal Security

Personal security is a critical element in poverty reduction and development. Personal security can take the form of safety at work, freedom from violence, and prevention of loss of life and assets caused by climate change events.

Safety at work is closely related to health issues. This is particularly important in the case of the poor. Devereaux puts the point well when he states that

(T)he poor tend to : (a) have the lowest food intakes; (b) present the highest rates of undernutrition; (c) be most exposed and susceptible to debilitating diseases; and (d) expend most physical energy on work (e.g. farming and casual labouring).³⁵⁸

This is certainly true for farmers and fishermen, who undertake hard physical labour and, in the case of fishermen, are exposed to a large number of risks and dangers. These problems are often exacerbated by the fact that many of these injuries occur in remote places, which makes it difficult to access medical care timeously or at all.

³⁵¹ Holden & Ghebru (2016) *ibid* at 24; Simbizi, Bennett & Zevenbergen (2014) *ibid* at 235.

³⁵² Holden & Ghebru (2016) *ibid* at 24. See further Simbizi, Bennett & Zevenbergen (2014) *ibid* at 235.

³⁵³ Norfolk & Tanner (2007) *op cit* note 339 at vii-viii.

³⁵⁴ Tenure Guidelines *supra* note 337 art 3B.

³⁵⁵ Norfolk & Tanner (2007) *op cit* note 339 at 16; Simbizi, Bennett & Zevenbergen (2014) *op cit* note 338 at 235-236.

³⁵⁶ Accessible judicial services can include community paralegals, alternative dispute resolution mechanisms or mobile services.

³⁵⁷ Tenure Guidelines *supra* note 337, particularly arts 3B, 6.6, 8.6-8.7 and 8.9; FAO (2002) *op cit* note 337 ss4.22-4.23.

³⁵⁸ Devereux (2002) *op cit* note 316 at 663.

Remoteness of location can also have an effect on personal safety from violence, as there may not be adequate police presence in the area to prevent crime and inadequate facilities to prosecute offenders even if they are apprehended. The vulnerability of women and children make them susceptible to violence, which is especially problematic in traditional, patriarchal communities, where women are not given support or encouraged to report crimes such as rape or abuse. Conflict can also have a particularly detrimental effect on the poor and vulnerable, who may lose their livelihoods or leave everything behind and become refugees. This can severely hamper poverty reduction and development.³⁵⁹

Climate change, too, is an increasing source of risk for people all over the world. Storms, cyclones, droughts and rising sea levels can have catastrophic effects on livelihoods. Those living on low-lying atolls face the risk of floods as well as increasingly high levels of non-potable water from rising sea levels,³⁶⁰ while those living near the coast in areas prone to cyclones may lose their homes, livestock, assets, or even their lives in storm surges.³⁶¹ Droughts are increasing and becoming more severe³⁶² and are particularly difficult for farmers and farming communities, especially those who are already vulnerable.³⁶³ Many of these effects are felt disproportionately by the poor and vulnerable, and those who are vulnerable may fall into poverty as a result of shocks caused by climate change.³⁶⁴

It is clear, therefore, that security can take many forms, including personal security, income security, land or asset security, and insurance against shocks. A lack of these types of security can cause people to fall into poverty or deeper into poverty in the wake of a shock and can also prevent people accessing credit, taking moderate risks, or planning for the future. In order to promote development and reduce poverty, therefore, it is vitally important that these issues be addressed. The remainder of this section considers how these security considerations apply to small-scale fisheries.

³⁵⁹ Nsiah-Gyabaah K, 'Human Security as a Prerequisite for Development' in Matthew RA, Barnett J, McDonald B and O'Brien KL (eds) *Global environmental change and human security* (2010) at 244-246.

³⁶⁰ Storlazzi, Gingerich & van Dongeren (2018) op cit note 197.

³⁶¹ For an example of the devastating effects of storm surges see the case study on the East Godavari River Delta in Ben-Yami (2000) op cit note 231 at 15-16.

³⁶² Cook BI, Mankin JS & Anchukaitis KJ, 'Climate Change and Drought: From Past to Future' (2018) 4 *Current Climate Change Reports* 2 at 168-170 and 173.

³⁶³ See, for example, Udmale PD, Ichikawa Y, Manandhar S, et al., 'How Did the 2012 Drought Affect Rural Livelihoods in Vulnerable Areas? Empirical Evidence from India' (2015) 13 *International Journal of Disaster Risk Reduction* .

³⁶⁴ O'Brien & Leichenko (2010) op cit note 194 at 165-170. For an example of how environmental disasters can affect the poor and vulnerable even in wealthy developed countries see Basolo V, 'Environmental Change, Disasters, and Vulnerability: The Case of Hurricane Katrina and New Orleans' in Matthew RA, Barnett J, McDonald B and O'Brien KL (eds) *Global environmental change and human security* (2010).

(iv) Security for Small-Scale Fisheries

One of the most pressing security issues facing small-scale fisheries is the danger that accompanies fishing. The dangers that small-scale fishers face are numerous and varied, and are exacerbated by a lack of safety equipment, communication devices, training, and adequate safety and rescue operations. This includes not only dangers from fishing, such as capsizing, collisions and injuries from use of equipment or animals, but also poor working conditions on board ‘mother ships’ which hire local fishers.³⁶⁵ Climate change events can also have a profound effect on coastal communities, which may be badly affected by storms³⁶⁶ and, because many fishers may also be farmers, or farm for subsistence purposes, droughts can severely affect fishing communities.

It is important that these issues be addressed as improved safety allows fishers to continue to sustain their livelihood³⁶⁷ and support their families. In this regard, single women, including widowed and divorced women, are often amongst the poorest members of fishing communities.³⁶⁸ In addition, important livelihood assets, such as boats and fishing equipment, may be lost in fishing accidents even if the fishers themselves survive, and a boat that capsizes can lose a day or multiple day’s catch. This often happens in the surf zone as fishers try to beach their boats after a fishing trip.³⁶⁹

The IMO, ILO and FAO have developed the Recommendations for Decked Fishing Vessels of Less than 12 Metres in Length and Undecked Fishing Vessels.³⁷⁰ These, as well as the Code of Safety for Fishermen and Fishing Vessels³⁷¹ and the FAO/ILO/IMO Voluntary Guidelines for the Design, Construction and Equipment of Small Fishing Vessels³⁷² are referred to in the SSF Guidelines as important instruments for states enacting regulations dealing with safety for small-scale fisheries.³⁷³ Thus, these guidelines should be implemented

³⁶⁵ Ben-Yami (2000) op cit note 231.

³⁶⁶ Ibid at 15-16 and 39.

³⁶⁷ Van der Burgt (2013) op cit note 88 at 200.

³⁶⁸ Béné & Merten (2008) op cit note 290 at 883.

³⁶⁹ Ben-Yami (2000) op cit note 231 at 14.

³⁷⁰ FAO/ILO/IMO, 'Safety Recommendations for Decked Fishing Vessels of Less Than 12 metres in Length and Undecked Fishing Vessels' (2012).

³⁷¹ IMO, *Code of Safety for Fishermen and Fishing Vessels 2005* (2006) 2nd ed (United Kingdom, IMO Publishing).

³⁷² IMO, *Voluntary Guidelines for the Design, Construction, and Equipment of Small Fishing Vessels 2005* (2006) 2nd ed (United Kingdom, IMO Publishing).

³⁷³ SSF Guidelines supra note 1 art 6.16 read with fn 3.

by states, along with effective and clear labour laws designed to prevent human rights abuses on fishing vessels, including small fishing vessels.³⁷⁴

Even where these types of laws and guidelines are put in place, however, enforcement may be a problem, given resource constraints and the reality that there may be vast numbers of small-scale fishers fishing along the coast and in inland waters who do not land in ports or at designated landing sites.³⁷⁵ As a result, the FAO is of the view that safety at sea is partly a top-down and partly a bottom-up initiative.³⁷⁶ This suggests that safety measures can be undertaken by government or at grassroots level, or both. Ben-Yami notes that a number of search and rescue services are largely civilian operations, created and run by NGOs, volunteers and fisheries organisations, with some government support.³⁷⁷ NGOs, fisheries organisations and other members of civil society can also play an important role in combatting human rights abuses on fishing vessels, by providing information, calling attention to these abuses, and putting pressure on governments and private companies to change their regulations and policies.³⁷⁸

Education and access to technology are also vital aspects of improving safety and minimising threats to small-scale fisheries. This can include training in first aid and proper use of equipment, and the provision of communication devices, life jackets, compasses, and so on.³⁷⁹ Modifications to, and building of, ports and designated landing sites to accommodate small-scale fishers can also prevent loss of life, catch and fishing equipment.³⁸⁰ While many of these expenses would fall to the state, the creation of insurance schemes like the community-funded schemes discussed³⁸¹ or funding of insurance by fishers organisations could be a way to finance some of these expenses at a community level. In this regard,

³⁷⁴ This may include ratifying the Work in Fishing Convention which sets out acceptable working conditions for fishers and seeks to prevent human rights abuses on fishing vessels. However, more is needed for the protection of small-scale fisheries as this convention applies only to vessels over 24 metres in length – see Convention (No. 188) Concerning Work in the Fishing Sector 2007, 54755 *UNTS* 1.

³⁷⁵ See FAO (2005) op cit note 137 at 65 and the case study on Lake Victoria by Ponte, Raakjær & Campling (2007) op cit note 155 at 132-133.

³⁷⁶ FAO, 'Safety for Fishermen: Holistic Approach' (2016), available at <http://www.fao.org/fishery/safety-for-fishermen/57259/en/>, accessed on 13 August 2020.

³⁷⁷ Ben-Yami (2000) op cit note 231 at 31.

³⁷⁸ See, ILO, *Caught at Sea - Forced Labour and Trafficking in Fisheries* (2013) ILO, available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_214472.pdf, accessed on 13 August 2020, particularly at 43-45 and 53.

³⁷⁹ Ben-Yami (2000) op cit note 231 at 33-42; FAO/ILO/IMO Safety Recommendations (2012) op cit note 370.

³⁸⁰ Ben-Yami (2000) *ibid* at 14. Note that modification of landing sites can also improve access to fish by small-scale traders and processors and help reduce loss of catch by providing cold storage – see OECD (2008) op cit note 124 at 91 and FAO (2005) op cit note 137 at 58-59.

³⁸¹ See Section IV(c)(i) above.

insurance could be made dependent on the obtaining and use of safety equipment, such as lifejackets, and regular inspections to ensure the soundness of a vessel.³⁸²

This raises the issue of social security and social safety nets for small-scale fisheries, which the FAO believes ‘warrant special mention because they are of vital importance in minimizing the vulnerability of the poor to sudden changes in income.’³⁸³ Small-scale fisheries are particularly vulnerable because of the dangers of fishing, the fact that many small-scale fishers operate in the informal sector and do not receive social insurance benefits like disability cover, susceptibility to climate change events, and the fact that overfishing and the concomitant need to conserve resources can have a detrimental effect on small-scale fishers’ livelihoods.

The sections on equity and basic necessities suggested ways to reduce poverty and vulnerability, including training and education, improved transport infrastructure, better access to health care and the creation of alternative livelihoods. These benefits can be obtained through social safety net mechanisms. Jentoft et al also note that social policies such as unemployment insurance can help small-scale fisheries whose access to fish resources has been curtailed by management measures.³⁸⁴ These types of benefits can also be obtained through community insurance schemes, which can be used to increase health and disability cover, or provide unemployment or life insurance. In addition, because many fishing communities are geographically isolated, a good form of social security for small-scale fisheries would be the creation of infrastructure projects that employ local fishers to improve local transport and telecommunications infrastructure.

It is also important to consider security of land and resources, particularly for fisher-farmers, but also for fishing communities in areas in which there is a high demand for coastal resources and land.³⁸⁵ The SSF Guidelines emphasise that ‘[t]enure rights to land in the coastal/waterfront area are critical for ensuring and facilitating access to the fishery, for accessory activities (including processing and marketing), and for housing and other livelihood support.’³⁸⁶ Initiatives to promote tenure security for small-scale fisheries may be

³⁸² Ben-Yami (2000) op cit note 231 at 33 and 42-43.

³⁸³ FAO (2005) op cit note 137 at 63.

³⁸⁴ Jentoft, Bavinck, Alonso-Población, et al (2018) op cit note 163 at 5.

³⁸⁵ Wynberg & Hauck (2014a) op cit note 210 at 5-6; Norfolk and Tanner (2007) op cit note 339 at 29.

³⁸⁶ SSF Guidelines supra note 1 preface x.

facilitated by NGOs, as well as through private and government partnerships.³⁸⁷ Government can also create an enabling environment for greater tenure security and benefit sharing to occur, by recognising occupation and community rights in land, setting aside funds to assist communities to register their rights, and ensuring that its employees are properly trained in surveying and registering land rights.³⁸⁸ Providing access to the coast, lakes or other water bodies is also an important security mechanism, if we consider that fishing itself is a form of social security for many vulnerable people.³⁸⁹

However, it is important to recognise that the benefits of tenure security are unlikely to be distributed equally in fishing communities and families. In such cases the marginalised in fishing communities may be excluded from distribution and consultation processes. Thus, conducting participatory and inclusive tenure processes at all levels of government, providing equal tenure rights such as joint titling, and empowering vulnerable groups to assert their rights through provision of information, training and judicial services,³⁹⁰ are all important aspects of ensuring that tenure security is afforded to those who are most vulnerable.

(d) Good Governance

Governance, at least as it pertains to public administration, can cover many different types and levels of administration and decision-making, at local, regional, national or international level. Different states have different governance challenges and governance is not always an easy concept to define.³⁹¹ However, the literature does show consensus on certain issues. First, good governance is an important precursor to development and poverty reduction.³⁹² Secondly, there are common elements that characterise or facilitate good governance. These include accountability, institutional competence (including effectiveness, efficiency and responsiveness), transparency, access to information, low levels of corruption, proper rule of

³⁸⁷ Wynberg R & Hauck M, 'People, Power and the Coast: Towards an Integrated, Just and Holistic Approach' in Wynberg R and Hauck M (eds) *Sharing Benefits from the Coast: Rights, Resources and Livelihoods* (2014b) at 144-145.

³⁸⁸ Norfolk and Tanner (2007) op cit note 339 at 15, 32 and 35-36; Tenure Guidelines supra 337 art 8.10.

³⁸⁹ FAO (2005) op cit note 137 at 13.

³⁹⁰ These types of governance issues are addressed in Section IV(d) below.

³⁹¹ Kim PS, Halligan J, Cho N, et al., 'Toward Participatory and Transparent Governance: Report on the Sixth Global Forum on Reinventing Government' (2005) 65 *Public Administration Review* 6 at 648; Landell-Mills P, 'Coming to Grips with Governance: The Lessons of Experience' (2003) 12 *Journal of Contemporary China* 35 at 361-362.

³⁹² Kim, Halligan, Cho, et al (2005) *ibid* at 647 and 650-651; Landell-Mills (2003) *ibid* at 358-359; Kaufmann (2003) op cit note 175 at 16-17; Knack (2000) op cit note 168 at 2.

law, access to justice and participation.³⁹³ A strong and active media, legislature and civil society, as well as ethical corporate governance, are also emphasised in the literature as important in ensuring good governance in a state.³⁹⁴

The discussion in this section does not go into all of these issues in detail but rather focuses on those governance concerns that particularly affect the poor and marginalised. For the sake of simplicity, the chapter considers these issues under the headings of transparency, participation and strengthening of institutions, which are discussed in parts (i), (ii) and (iii). Part (iv) deals with their application to small-scale fisheries.

(i) Transparency

Transparency is a vital aspect of good governance. This is because transparency is an important precursor to accountability and the assertion of rights.³⁹⁵ Conversely, a lack of transparency and accountability can increase the potential for mismanagement and corruption. Greater transparency and accountability can be achieved through, amongst other mechanisms, reporting and independent auditing requirements,³⁹⁶ the creation of robust and transparent public procurement,³⁹⁷ and, as noted in the introduction, a free and active media, civil society and legislature.

Access to information is also an essential aspect of increasing transparency and accountability and is crucial in assisting the poor to assert their rights.³⁹⁸ Kaufmann takes the view that in order for information to be effective, not only access, but also ‘timeliness; relevance; and quality of economic, social, and political information...accessible to all relevant stakeholders’³⁹⁹ is necessary. Initiatives of government or civil society organisations, such as education programmes or awareness campaigns, can assist with getting this

³⁹³ Landell-Mills (2003) *ibid* at 361-366 and 369; Kim, Halligan, Cho, et al (2005) *ibid* at 648-650; Kaufmann (2003) *ibid* at 5 and 18-21. These elements also form part of SDG 16 - United Nations, 'Goal 16: Promote Just, Peaceful and Inclusive Societies', available at <https://www.un.org/sustainabledevelopment/peace-justice/>, accessed on 13 August 2020.

³⁹⁴ Kaufmann (2003) *ibid* at 19-20; Landell-Mills (2003) *ibid* at 366; Kim, Halligan, Cho, et al (2005) *ibid* at 650 and 652.

³⁹⁵ Kaufmann (2003) *ibid* at 22; Landell-Mills (2003) *ibid* at 371; Kim, Halligan, Cho, et al (2005) *ibid* at 649-650.

³⁹⁶ Landell-Mills (2003) *ibid* at 366; Kaufmann (2003) *ibid* at 20.

³⁹⁷ Landell-Mills (2003) *ibid* at 366.

³⁹⁸ For example, Landell-Mills notes that in Uganda, a study set up to trace service delivery allocations led to increased pressure on local officials to account for lost funds – *ibid* at 366.

³⁹⁹ Kaufmann (2003) *op cit* note 175 at 20.

information to communities.⁴⁰⁰ Technology can also be used to great effect in providing timely and accurate information, but this will require access to telecommunications networks, which may be lacking in rural or isolated communities. This reaffirms the need for such networks to be put in place.

(ii) Participation

In the development literature, participation is often touted as a panacea for all ills.⁴⁰¹ This is clearly not the case, as participatory processes may be ineffective for many different reasons, as discussed further below. Nonetheless, participatory processes can be an important element in improving representation and outcomes for those that are marginalised and lack political and social capital, provided these processes are accessible, inclusive and tailored to the situation at hand.

One of the ways in which citizens can participate in government is through petitions, letters and other approaches to government which can be used to bring up problems that may be unknown or overlooked by those in power. However, research shows that the poor are unlikely to use these mechanisms when they have had frustrating and humiliating experiences with local government institutions such as welfare offices.⁴⁰² This is problematic, as Razzaque notes that, in general, traditional administrative systems are ‘ineffective, insensitive, inefficient, and often hostile of people whom they claim to serve’,⁴⁰³ which is undoubtedly decreasing engagement of the poor with government. It is important, therefore, to ensure that those working in these positions receive sensitivity training and are subject to greater scrutiny and accountability, in order to improve trust in, and engagement with, government institutions by the poor.

Participation can also be facilitated directly by government or private investors through formal processes, whereby communities are consulted on issues that affect them. Related to this is the issue of decentralisation, whereby central government devolves certain functions to local structures or communities in order to increase efficiency and promote

⁴⁰⁰ Norfolk and Tanner (2007) op cit note 339 at 30.

⁴⁰¹ See discussion in Béné and Neiland (2006) op cit note 221 at 24-35.

⁴⁰² Lawless JL & Fox RL, 'Political Participation of the Urban Poor' (2001) 48 *Social Problems* 3 at 374-376 and 379-380.

⁴⁰³ Razzaque F, *Citizen's Charter and Its Effectiveness: A Case Study of Department of Immigration and Passports of Bangladesh* (2012) IGS Working Paper Series, *Institute of Governance Studies: BRAC University*, available at https://www.academia.edu/35812223/Citizens_Charter_and_Its_Effectiveness_A_Case_Study_of_Department_of_Immigration_and_Passports_of_Bangladesh, accessed on 13 August 2020 at 1.

participation and empowerment.⁴⁰⁴ Participatory and decentralisation processes are often controversial, however, and may be subject to elite capture,⁴⁰⁵ conducted in a cursory manner in order to pay lip service to laws or policies governing the project,⁴⁰⁶ or, conversely, may devolve too much power to communities who are not equipped to effectively manage projects put under their control.⁴⁰⁷ Nevertheless, Béné and Neiland are of the view that these processes, while not the solution to all development ills, can be effective, provided that certain conditions exist:

[P]articipatory processes will only be effective where state agencies are well-managed by professional public servants who have appropriate incentives, are allowed to exercise professional autonomy, and who have adequate authority to perform their roles. Furthermore – and perhaps more importantly – participatory processes and decentralization reforms will not provide end-users with reliable, high-quality and cost-effective services unless the end-users can exercise effective leverage through strong democratic institutions, market competition, civil society organizations, and above all, downward accountability mechanisms.⁴⁰⁸

A further criticism that can be levelled at formal participatory processes is that they exclude the marginalised. These are often women, but Cornwall argues that treating women as a homogenous group in participatory processes, or assuming that women are always more marginalised than men, is dangerous, as it risks excluding those who are truly marginalised in a community.⁴⁰⁹ Thus, it is necessary to determine the situation on the ground when determining how to bring all voices into the process. There may also be a need for further measures such as skills training and conflict resolution, as well as advocacy work on the right to participation for everybody in the community, in order for participatory processes to truly be inclusive.⁴¹⁰

(iii) Strengthening of Institutions

It is no secret that the poor rely more on the state for basic necessities and social security, as well as on common pool resources, than their wealthier counterparts. Thus, inefficient institutions and poor natural resource governance impact disproportionately on the poor, who

⁴⁰⁴ Béné and Neiland (2006) op cit note 221 at 16-17.

⁴⁰⁵ Ibid at 22-23.

⁴⁰⁶ Ibid at 31-32; van Donk M, 'Tackling the 'Governance Deficit' to Reinvigorate Participatory Local Governance' in van Donk M (ed) *Putting Participation at the Heart of Development/Putting Development at the Heart of Participation: A Civil Society Perspective on Local Governance in South Africa* (2012) at 12-13.

⁴⁰⁷ Béné and Neiland (2006) ibid at 30-31.

⁴⁰⁸ Ibid at 35.

⁴⁰⁹ Cornwall A, 'Whose Voices? Whose Choices? Reflections on Gender and Participatory Development' (2003) 31 *World development* 8 at 1330 and 1337.

⁴¹⁰ Ibid at 1333-1334.

also lack the social and political capital to speak out against injustices. Indeed, Landell-Mills takes the view that inefficiency in public institutions ‘can obstruct development and poverty reduction even more than corruption’, although these issues are intertwined.⁴¹¹

Institutional inefficiency can occur for a number of reasons, including corrupt practices such as nepotism, a lack of resources to attract, retain and upskill good employees,⁴¹² lack of communication and cooperation between entities that may be working at cross-purposes in dealing with sustainability and development issues,⁴¹³ and the inability of the poor and marginalised to assert their rights because of inefficient or inaccessible justice processes.⁴¹⁴ These concerns must be addressed if other aspects of poverty reduction, such as access to basic necessities, are to be achieved.

Mechanisms to improve transparency and accountability are needed to combat corruption, as has already been discussed. However, resources are needed for the conducting of audits, provision of good salaries, and other mechanisms which can assist in this regard. Similarly, improving efficiency and accessibility in judicial processes will require resources – for training of judges, legal aid, providing local tribunals, and so on – as will the creation of coordinated processes across public entities. Thus, lack of resources is a source of many ills when it comes to good governance.

In this regard, aid and technical assistance are important to enable under-resourced states to undertake governance reforms. In addressing resource shortages, however, it is important not to raise further governance problems, particularly the facilitation of corruption. In this regard, the provision of aid can often promote poor governance, as it may make a government more accountable to the donor than to its people and encourage rent-seeking and destabilisation of government (as aid can make control of government lucrative).⁴¹⁵ Thus, aid

⁴¹¹ Landell-Mills (2003) op cit note 391 at 361-362. See also Kaufmann (2003) op cit note 175 at 3.

⁴¹² Lack of resources can also facilitate bribery and impinge on other aspects of good governance (e.g. a lack of resources for training judges and police offices can impede access to justice) – see Knack (2000) op cit note 168 at 2.

⁴¹³ Andrews and Entwistle show that cross-sectoral partnerships between public entities improve effectiveness of the public service and note that communication and collaboration is particularly crucial when it comes to cross-cutting and pressing social issues – see Andrews R & Entwistle T, 'Does Cross-Sectoral Partnership Deliver? An Empirical Exploration of Public Service Effectiveness, Efficiency, and Equity' (2010) 20 *Journal of Public Administration Research and Theory* 3 at 681-682 and 693.

⁴¹⁴ Issues such as a lack of training for judges, slow processes, inadequate enforcement of judgements, geographical isolation, lack of information around rights and judicial processes, and mistrust of the judicial system can all contribute to making judicial processes inefficient and inaccessible to the poor, and particularly the rural poor – see Landell-Mills (2003) op cit note 391 at 364-365; Norfolk & Tanner (2007) op cit note 339 at 31-32.

⁴¹⁵ Knack (2000) op cit note 168 at 1-5.

that is allocated directly to strengthening institutions and improving governance or directly strengthening citizen participation is likely to be more effective at promoting governance reform than other, more general, forms of aid.⁴¹⁶ Strengthening governance in this manner is also an important precursor to the funding of other types of government development projects,⁴¹⁷ otherwise this funding is unlikely to reach those it is meant to support.

Resource shortages, as well as improved cooperation and collaboration for the benefit of the poor, can also be addressed by recognising, and working with, the multiplicity of informal institutions relied on by the poor to resolve problems, assert their rights, and manage common pool resources. Many of these institutions, including NGOs and other civil society organisations, traditional leaders, community paralegals, and local cooperatives help address shortcomings in governance in poor areas. Thus, partnerships between these institutions and government can allow for the pooling of resources, greater oversight of all parties and improved participation for the poor. As with participatory processes, however, it is important to address discrimination and marginalisation in these institutions when entering into partnerships, and ensure that they are not subject to elite capture or dominated by certain groups or ideologies.

(iv) Governance Issues Affecting Small-Scale Fisheries

Small-scale fisheries face many problems when it comes to transparency, access to information, and asserting their rights. One of the primary concerns in this regard is fishing quota and rights applications. In states where small-scale fisheries must apply for subsistence and small commercial permits or community rights, it is important that the process is a simplified one, as complicated bureaucratic processes can lead to unsuccessful applications.⁴¹⁸ Transparency is a vital element in ensuring fairness in allocation processes, particularly because small-scale fisheries often do not have the political clout to influence the allocation process.

As discussed in the context of equity, another area where transparency is lacking in the governance of small-scale fisheries is in access agreements. This has been touched on by

⁴¹⁶ Ibid at 22-23. See also Landell-Mills (2003) op cit note 391 at 370.

⁴¹⁷ Although donors can create their own development projects, it is generally more beneficial and less administratively burdensome for governments if donors support government programmes directly – see Knack (2000) ibid at 23; Fleshman M, *Africa Pushes for Better Aid Quality* (2004) *Africa Renewal*, available at <https://www.un.org/africarenewal/magazine/january-2004/africa-pushes-better-aid-quality>, accessed on 13 August 2020.

⁴¹⁸ See, for example, Micha Young (2013) op cit note 209 at 295.

Van der Burgt in her analysis of access agreements between the EU and ACP countries. Her work shows that, although the intent of the EU is to be, at least, procedurally transparent,⁴¹⁹ in practice this frequently does not occur.⁴²⁰ Nevertheless, the text of these agreements is at least available for perusal. Access agreements between ACP countries and Asian countries, on the other hand, are notoriously secret, often known only to those who negotiated and signed them.⁴²¹ Given that access agreements often lead to conflict and can harm small-scale fisheries, the text of these agreements should, at least, be made available for public perusal, especially because lack of transparency and accountability in fisheries can easily lead to corrupt practices.⁴²²

Issues of transparency, access to information, access to justice, and strengthening of civil society also arise because action by individual states to address concerns of small-scale fisheries has often been lacking in the past.⁴²³ Although the creation of the SSF Guidelines is spurring change in this regard,⁴²⁴ the importance of civil society and mechanisms promoting access to justice and access to information cannot be overstated, given that the poor, marginalised and isolated character of many small-scale fisheries often makes it difficult for them to assert their rights. Indeed, these mechanisms have been used by small-scale fisheries in the past to access justice and improve transparency in government decisions affecting them.⁴²⁵ This type of action also helps to minimise corruption, as will be discussed further

⁴¹⁹ This refers to transparency in establishing the agreements – i.e. between various EU entities.

⁴²⁰ Van der Burgt (2013) op cit note 88 at 331-332.

⁴²¹ Standing (2008) op cit note 213 at 2.

⁴²² Ibid at 2; Standing A, *Corruption and State-Corporate Crime in Fisheries* (2015) U4 Anti-Corruption Resource Centre, *Chr. Michelson Institute*, available at <https://assets.publishing.service.gov.uk/media/57a08995ed915d622c0002bd/U4-Issue-2015-15-web.pdf>, accessed on 13 August 2020 at 8.

⁴²³ Chuenpagdee R & Jentoft S, 'Transforming the Governance of Small-Scale Fisheries' (2018) 17 *Maritime Studies* at 106.

⁴²⁴ The FAO is assisting states to implement its SSF Guidelines in various ways – see FAO, 'SSF Guidelines Update: February 2019' (2019), available at <https://mailchi.mp/a5c088354858/ssf-guidelines-update-february-2019>, accessed on 13 August 2020. This work was also mentioned by the Director of the Fisheries and Aquaculture Policy and Resources Division of the FAO at the Virtual Ocean Dialogues in June 2020 – Allison E, Lukanga E, Barange M, et al., 'Sustaining the Global Ocean Economy through Resilient Small-Scale Fisheries and Supply Chains (Panel Discussion)' (1-5 June 2020), *Virtual Ocean Dialogues* (Cologne, Switzerland).

⁴²⁵ For example, activism by small-scale fishers in South Africa, aided by civil society organisations and a progressive Bill of Rights, led to legislative and policy reform around fishing rights – see Isaacs M & Hara M, *Backing Small-Scale Fishers: Opportunities and Challenges in Transforming the Fish Sector* (2015) Rural Status Report 2, *Institute for Poverty, Land and Agrarian Studies, University of the Western Cape*, available at https://cer.org.za/wp-content/uploads/2016/08/Backing-Small-scale-Fishers_PLAAS.pdf, accessed on 13 August 2020 at 11-12. See, further, Sowman, Hauck, van Sittert, et al (2011) op cit note 209 at 577-578 and Standing (2015) op cit note 422 at 5, who detail similar stories of activism to challenge a lack of transparency in government decisions on fishing grounds and access agreements. However, Standing does make the important point that this type of action is not always available in countries where democratic freedoms are absent – at 21.

below, and allows for small-scale fisheries to better participate in shaping new laws and policies that affect them.

Another way in which governments can facilitate participation by small-scale fisheries in decisions that affect them is through formal participatory processes. These may relate to many different concerns affecting small-scale fisheries, and certainly small-scale fisheries should be consulted on all issues that affect them. However, one of the most important concerns for small-scale fisheries is effective and equitable management of the resources on which they rely. Participation of some sort is especially important in this regard as fisheries management has often been overly focused on ecological concerns,⁴²⁶ or has prioritised the interests of industrial fisheries above those of small-scale fisheries, as discussed in Chapter 1.⁴²⁷

Participation in such circumstances often takes the form of co-management of resources. Co-management arrangements are useful from both a development and a sustainability point of view. They allow for use of both scientific data and local, traditional knowledge in fisheries management,⁴²⁸ and assist governments, and particularly under-resourced governments, to better manage fisheries.⁴²⁹ Co-management can further obviate problems associated with legal pluralism, including confusion⁴³⁰ and contradictory approaches to fisheries management by government and small-scale fishers,⁴³¹ which can lead to sub-optimal fisheries management and discontent amongst fishers.⁴³²

However, co-management, like other participatory processes, must be structured carefully to be effective. The way power is shared with a community will be different in every case. It is important to guard against the ever-present danger of elite capture and the devolution of power to fisheries communities reinforcing traditional power structures and control of resources.⁴³³ A similar danger is the assumption that there is a cohesive community

⁴²⁶ For a full discussion on this point see Chapter 4 section II.

⁴²⁷ Chapter 1 section I.

⁴²⁸ Cochrane, Andrew and Parma suggest that relying on a combination of scientific and traditional knowledge is the most effective way to manage fisheries – Cochrane, Andrew & Parma (2011) op cit note 141 at 279. See also Miret-Pastor, Herrera-Racionero, Lizcano, et al (2019) op cit note 138 at 16.

⁴²⁹ Rohe JR, Govan H, Schlüter A, et al., 'A Legal Pluralism Perspective on Coastal Fisheries Governance in Two Pacific Island Countries' (2019) 100 *Marine Policy* at 96; Cochrane, Andrew & Parma (2011) ibid at 280.

⁴³⁰ Rohe, Givan, Schlüter, et al (2019) ibid at 92.

⁴³¹ Ibid at 90; Miret-Pastor, Herrera-Racionero, Lizcano, et al (2019) op cit note 138 at 14 and 18.

⁴³² Miret-Pastor, Herrera-Racionero, Lizcano, et al (2019) ibid at 14-19.

⁴³³ Béné and Neiland (2006) op cit note 221 at 43. See also Isaacs & Hara (2015) op cit note 425 at 9, who discuss elite capture of the Fishers' Community Trusts in South Africa. These trusts were not even run by

structure to which power can be devolved. Where there is wide diversity in a ‘community’ – for example, it is made up of different and potentially conflicting ethnic and religious groups – co-management can be unworkable.

It is also important to recognise that co-management, while a useful and effective tool in many instances, is not the answer to every fisheries management problem. For example, highly migratory and straddling⁴³⁴ stocks may be better managed by regional or international bodies while other, more sedentary species, may be better managed by communities, or a combination of government bodies and community structures. In situations where co-management is not possible or practical, however, it is important to improve accountability of fisheries managers⁴³⁵ and provide strong government support for small-scale fisheries through, for example, effective regulation and enforcement of small-scale fishing rights and areas.⁴³⁶

Small-scale fisheries could also benefit from other mechanisms to address government inefficiency and mismanagement, as this can be harmful to small-scale fisheries in many ways. In the first place, dysfunction in government has led to a lack of engagement of small-scale fisheries with governance processes in the past.⁴³⁷ Secondly, effective governance of aquatic ecosystems, which face so many pressures⁴³⁸ and yet are relied upon by so many for food and livelihoods, clearly requires cooperation and collaboration.⁴³⁹ Thirdly, small-scale fisheries are primarily found in regions that suffer disproportionately from corrupt practices. In the specific case of fisheries, corruption is particularly rife⁴⁴⁰ and can lead to severe human rights abuses.⁴⁴¹ Finally, many states where small-scale fisheries

fishing communities, but rather by farmers, teachers and other professionals, who mismanaged the funds and enriched themselves at the expense of poor fishers.

⁴³⁴ Fish stocks that move between water of countries with adjacent EEZs.

⁴³⁵ Béné and Neiland (2006) op cit note 221 at 35.

⁴³⁶ Chuenpagdee & Jentoft (2018) op cit note 423 at 105.

⁴³⁷ Ibid at 105.

⁴³⁸ These pressures include overfishing, climate change, agriculture, aquaculture installations, manufacturing etc. – see Chapter 4 sections II and III for a full discussion on this issue.

⁴³⁹ See SSF Guidelines supra note 1 art 10.

⁴⁴⁰ Standing (2008) op cit note 213 at 1; United Nations Office on Drugs and Crime, 'UNODC to Take On Corruption Enabling Forced Labour in the Fishing Industry' (2017), available at <https://www.unodc.org/southeastasiaandpacific/en/what-we-do/anti-corruption/topics/08-forced-labour-in-the-fishing-industry.html>, accessed on 13 August 2020; Begossi A, 'Small-Scale Fisheries in Latin America: Management Models and Challenges' (2010) 9 *MAST* 2 at 15.

⁴⁴¹ UNODC (2017) *ibid*; ILO (2013) op cit note 378.

are found lack resources and, thus, rely on foreign aid,⁴⁴² which can be detrimental to good governance.

Thus, it is clear that, in order to strengthen institutions dealing with issues affecting small-scale fisheries, there are a number of concerns that must be addressed. In order to combat dysfunction and corruption, it is important to improve transparency and accountability, especially in fisheries regulation, and provide mechanisms and support for aggrieved parties to challenge governance failures. Cooperation and collaboration between many different entities, including at the international level, is also highly important to ensure that all relevant issues, and especially the often-ignored human element of fisheries, are taken into account in decisions affecting fisheries and resource management. Finally, in order to be effective in facilitating the development of small-scale fisheries, aid and technical assistance should, in addition to being used to support development projects, be targeted at governance reforms, particularly improved resource governance.

V. Conclusion

The creation of a framework of development needs for small-scale fisheries is a complex undertaking. The many difficulties that small-scale fisheries face, including poverty and vulnerability, poor governance (of both fisheries and generally), access constraints, reliance on a dwindling resource, and the ever-present threat of climate change, require that a multifaceted approach to poverty reduction and development is required. However, it is also important to recognise that, because the majority of small-scale fisheries are found in under-resourced countries, there are limitations on what many states can do for their small-scale fisheries. Nevertheless, there are a number of steps that these states can take, including in their role as members of the international community, to facilitate development of small-scale fisheries.

The framework established that to improve development outcomes and reduce poverty in small-scale fisheries, states must address a number of issues. First, equity requires that states give small-scale fisheries access to fishing grounds, ensure that other fisheries sectors are not favoured over small-scale fisheries, take measures to curb the destructive

⁴⁴² The World Bank, 'Net Official Development Assistance and Official Aid Received (Current US\$)' (2020), available at <https://data.worldbank.org/indicator/dt.oda.alld.cd>, accessed on 13 August 2020.

impact of distant water fishing fleets on small-scale fisheries, and address gender equity and other problems of marginalisation in fishing communities. Secondly, it is vital that small-scale fisheries have access to the resources on which they depend as well as other basic necessities, such as healthcare, education and training, credit facilities, markets and alternative livelihood opportunities. Thirdly, improving health and safety while fishing, ensuring that catch is not lost and that equipment is insured, and recognising rights to resources and land are further means of facilitating security and, consequently, development. Finally, good governance, both generally and in relation to fisheries issues, is vital for the development of small-scale fisheries, and can improve management of resources on which small-scale fisheries rely, ensure small-scale fisheries have a voice in issues that affect them, facilitate better delivery of development projects to fishing communities, and promote greater equity in fishing. In particular, it is important to improve transparency, accountability, access to justice, and participation in the governance of fisheries and to facilitate greater collaboration and cooperation between entities dealing with fisheries issues, at both the national and international level.

The remainder of the thesis considers how provisions to give effect to these development needs can be incorporated in international and regional trade agreements dealing with fisheries subsidies. Chapter 3 looks at the extent to which the development needs in the framework are currently represented in trade agreements and trade negotiations. This assists in identifying gaps in these agreements and considering limitations (from a textual point of view) on what can be included in these types of agreements. Thereafter the thesis considers other practicalities of including the development needs in a trade agreement, including whether such provisions can be adequately enforced, compromises that may need to be made, and potential clashes between sustainability and development provisions.

CHAPTER 3 – PROTECTIONS FOR SMALL-SCALE FISHERIES IN TRADE AGREEMENTS

I. Introduction

As has been made clear in Chapter 2, the needs of small-scale fisheries are many and varied, and will differ from place to place. However, there are certain general observations that have been made in this regard. Chief amongst these is that states must address poverty, vulnerability and underdevelopment in their small-scale fisheries and ensure equitable treatment for all those working in fishing. The fulfilment of many of these needs will require some sort of assistance by the state, which may take the form of a fishing subsidy.

Not every type of payment made to fishers and fishing communities will be a fishing subsidy, at least not in a trade context. The definition of a subsidy currently being used in the WTO negotiations,⁴⁴³ CPTPP⁴⁴⁴ and USMCA,⁴⁴⁵ is that found in Articles 1.1 and 2 of the ASCM. The ASCM requires that a public contribution benefit a specific industry, sector or region.⁴⁴⁶ Thus, social security payments applying on a general, nationwide basis, such as state pensions, disability, child care, or basic income grants are unlikely to be considered specific subsidies to fishing communities. However, subsidies that aim to uplift fishing communities through, for example, the building of necessary social infrastructure or granting of social security specifically targeted at fishers and fishing communities could fall under this definition.⁴⁴⁷ Certainly, inputs into the fishing industry, aiming to assist small-scale fishers to become more efficient and effective, would be considered fisheries subsidies under this definition.

The extent to which subsidies to small-scale fisheries would contravene a ban on the use of fishing subsidies in a trade agreement will depend, first, on the type of subsidy in issue, secondly, whether fishers are contravening one of the bans on fishing subsidies in these agreements and, thirdly, what sort of exemptions from these bans are provided to small-scale fisheries. This chapter deals with all of these issues in its analysis. At this stage, however, it is important to acknowledge that vague and ineffective treatment of small-scale fisheries in a

⁴⁴³ Chair's Working Document (2018) op cit note 12 arts 2.1-2.2.

⁴⁴⁴ CPTPP Environment supra note 9 art 20.16.5.

⁴⁴⁵ USMCA Environment supra note 10 art 24.20.1.

⁴⁴⁶ ASCM supra note 53 arts 1.1 and 2.

⁴⁴⁷ The reasons for this are discussed further in Section II(b) below.

trade agreement dealing with fisheries subsidies is likely to be harmful, and certainly will not create any benefit for this sector, as this may lead to the prohibition of important development assistance being provided to small-scale fisheries. At best it will facilitate an out-of-sight, out-of-mind approach when it comes to important development and poverty reduction initiatives for small-scale fisheries. This is problematic as moral obligation is often born of precise and unambiguous language, even where provisions are not mandatory. Jentoft encapsulates this idea well when he states that '[n]eutralizing or removing controversial concepts watered down the [SSF Guidelines] text and made it more 'voluntary' as it were, whereas explicit and precise definitions have the opposite effect.'⁴⁴⁸ This is all the more important for small-scale fisheries, which have often been ignored and overlooked in subsidy allocations in favour of industrial fisheries.⁴⁴⁹

The purpose of this chapter is, therefore, to determine the types of provisions that could be included to protect and benefit small-scale fisheries in a trade agreement dealing with fisheries subsidies. In order to do so, the chapter analyses provisions dealing with small-scale fisheries that have been, or are proposed to be, included in the trade agreements and negotiations under discussion. This is important for two reasons. First, it assists in identifying how small-scale fisheries are typically provided for in such agreements and the gaps in this regard. Secondly, it highlights textual limitations in the agreements – namely, what can and cannot be included in such agreements based on the wording and structure these agreements typically take. Both of these objectives assist in informing and shaping the final recommendations of the thesis.

II. Trade Provisions Benefitting Small-Scale Fisheries

This chapter follows the framework created in Chapter 2, which considered how best the needs of small-scale fisheries could be served in places where they are found, taking into account resource constraints and social difficulties present in many of these countries, as well as the types of problems faced by small-scale fisheries. These include, *inter alia*, geographical, political and social isolation, health and safety concerns, gender inequity and inequities between different fishing sectors, and poor resource governance. The chapter, therefore, utilises the framework headings of equity, access to basic necessities, security and

⁴⁴⁸ Jentoft S, 'Walking the Talk: Implementing the International Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries' (2014) 13 *Maritime Studies* 1 at 8.

⁴⁴⁹ Schuhbauer, Chuenpagdee, Cheung, et al (2017) op cit note 4.

good governance to discuss trade provisions that could benefit small-scale fisheries, drawing on the WTO negotiations, CPTPP and USMCA.

As noted in Chapter 1, many provisions in USMCA are identical to those in the CPTPP.⁴⁵⁰ Thus, for ease of reference and to prevent repetition, USMCA will only be mentioned where it differs from the CPTPP in the chapter analysis. In all other instances, analysis of the CPTPP can also be taken to be analysis of USMCA. In analysing the WTO negotiations, the chapter relies on the submissions of WTO members as well as working documents and draft texts by the Chair, which generally summarise member submissions as a basis for further negotiations. The latest of the Chair's publicly available documents⁴⁵¹ is the Chair's 2018 Working Document.⁴⁵² This document is relied on extensively as it provides a composite summary of recent member positions. However, it must be kept in mind that nothing is currently agreed upon in this document and there are also alternative positions presented, such as those on fuel subsidies. These issues are discussed further in the analysis.

(a) Equity

In Chapter 2, the equity component of development was seen to encompass a number of issues affecting small-scale fisheries. These include equity between small-scale and other fishing sectors, equity in the allocation of permits and fishing grounds, provision of technical assistance to under-resourced countries, poverty alleviation measures by government, stricter controls on access agreements and distant water fishing fleets, and gender equity and marginalisation. A number of these issues have been considered and/or included in the trade agreements and negotiations under discussion.

(i) Equity Between Small-Scale and Other Fishing Sectors

The WTO fisheries subsidies negotiations seek to discipline fisheries subsidies that contribute to overcapacity and overfishing, target overfished stocks, and are provided to those involved

⁴⁵⁰ See Chapter 1 section III(c).

⁴⁵¹ As at 28 August 2020 – the Chair has noted, however, that there are no surprises in the currently unreleased consolidated Draft Text of 25 June 2020 and, at least for the purposes of the analysis in this thesis, commentary on the text by the IISD suggests that this is, indeed, the case – see Parmentier R, Thomson P, Wills S, et al., 'Eliminating Harmful Fisheries Subsidies in 2020' (30 June 2020), *Webinar (Zurich)* and Tipping A & Irschlinger T, *WTO Negotiations on Fisheries Subsidies: What's the State of Play?* (2020) Global Subsidies Initiative Policy Brief, *IISD*, available at <https://www.iisd.org/sites/default/files/2020-07/wto-negotiations-fisheries-state-play.pdf>, accessed on 24 August 2020, respectively.

⁴⁵² Chair's Working Document (2018) op cit note 12.

in IUU fishing.⁴⁵³ The CPTPP has actually put some of these restrictions in place, providing that state parties shall not grant ‘subsidies for fishing that negatively affect fish stocks that are in an overfished condition’ or subsidies to fishing vessels which appear on the IUU fishing list of the flag state⁴⁵⁴ or of a relevant regional fisheries management organisation (RFMO).⁴⁵⁵ The WTO negotiations also recognise the importance of fishing for poverty reduction, livelihoods and food security, particularly in developing countries.⁴⁵⁶ Most members, therefore, seek exemptions for the protection of small-scale fisheries. Although the exact nature of these exemptions differs in each submission, they generally take the form of some sort of subsidy allowance for small-scale fisheries, which may either be a general allowance⁴⁵⁷ or a specific allowance (such as infrastructure for fishing communities).⁴⁵⁸ This goes beyond the CPTPP which makes only broad and general statements around the importance of providing for small-scale fisheries.⁴⁵⁹

An analysis of global fisheries subsidies by Schuhbauer et al shows that, in 2009, approximately 15% of all government subsidies went to the small-scale fisheries sector⁴⁶⁰ and an estimated 90% of capacity-enhancing subsidies (those for boat building and modernisation, access agreements, development programs and port development, market and storage infrastructure, and tax exemptions⁴⁶¹) went to large-scale fishing.⁴⁶² In addition, only 6% of fuel subsidies, which form the majority of the subsidies provided to the fishing sector, went to small-scale fisheries in 2009.⁴⁶³ This shows that small-scale fisheries are benefitting very little from fisheries subsidies, particularly capacity-enhancing subsidies, and reducing these subsidies for large-scale fisheries (especially if certain subsidies are still allowed for

⁴⁵³ Ibid preamble and art 3.

⁴⁵⁴ The state in which a vessel is registered or licensed.

⁴⁵⁵ CPTPP Environment supra note 9 art 20.16.5. USMCA further includes an IUU list of the subsidising party – USMCA Environment supra note 10 art 24.20.1(a).

⁴⁵⁶ See Chair’s Working Document (2018) op cit note 12 at 2.

⁴⁵⁷ See, e.g. ibid arts 2.8 and 5.8; WTO, 'Proposed Disciplines on Prohibitions and Special and Differential Treatments for Fisheries Subsidies, Proposal from Indonesia, Revision (TN/RL/GEN/189/Rev.1)' (13 July 2017) at 2-3; WTO, 'LDC Group Fisheries Subsidies Text Proposal, Submission by Cambodia on Behalf of the LDC Group (TN/RL/GEN/193)' (17 July 2017) at 2; WTO, 'Proposal for Disciplines on Fisheries Subsidies: Communication from Argentina, Colombia, Costa Rica, Panama, Peru, and Uruguay, Revision (TN/RL/GEN/187/Rev.2)' (25 July 2017) at 3; WTO, 'Advancing Toward a Multilateral Outcome on Fisheries Subsidies in the WTO, European Union, Revision (TN/RL/GEN/181/Rev.1)' (6 July 2017) at 2, amongst many others.

⁴⁵⁸ Specific subsidy proposals in the WTO negotiations are discussed throughout the chapter.

⁴⁵⁹ As discussed in Chapter 1 section III(b).

⁴⁶⁰ The definition of small-scale fisheries used in this paper is in accordance with national definitions, where available – Schuhbauer, Chuenpagdee, Cheung, et al (2017) op cit note 4 Supplementary Information A.

⁴⁶¹ Ibid at 115.

⁴⁶² Ibid at 117.

⁴⁶³ Ibid at 117.

small-scale fisheries) would go some way to improving equity by reducing the unfair competitive advantage given to large-scale fisheries over small-scale fisheries. This would also help to conserve fish stocks, as capacity-enhancing subsidies make otherwise unprofitable ventures, such as fishing on the high seas and in the waters of distant countries, profitable.⁴⁶⁴

The CPTPP bans only subsidies to IUU fishing and fishing that negatively impacts overfished stocks.⁴⁶⁵ Thus, it does not specifically ban capacity-enhancing subsidies, although it does provide a notification requirement for non-prohibited subsidies, particularly fuel subsidies.⁴⁶⁶ WTO members recognise the need to discipline most capacity-enhancing subsidies but fuel subsidies are a different matter. The 2018 Working Document simultaneously excludes fuel subsidies from the disciplines and includes fuel subsidies benefitting the fishing sector on its list of prohibited capacity-enhancing subsidies,⁴⁶⁷ which suggests members are at odds on the issue.

Even if fuel subsidies are banned, however, this may not be enough to ban them in actuality, unless the disciplines are carefully worded.⁴⁶⁸ This is because many fuel subsidies are provided by way of tax exemptions which could be considered non-specific subsidies under the ASCM while, in reality, these tax exemptions do subsidise the fisheries industry.⁴⁶⁹ In this regard, the 2018 Working Document has a third provision on fuel which attempts to address this issue – a notification requirement for ‘non-specific subsidies for the provision or use of fuel or for schemes that can reasonably be expected to result in the provision or use of fuel, which benefit the fisheries sector.’⁴⁷⁰ Nonetheless, a notification requirement for ‘non-specific’ fuel subsidies is unlikely to address the very real concerns around the ongoing provision of these subsidies to large-scale fishing fleets for both development and sustainability.

The 2018 Working Document also provides for developing and least-developed countries to use capacity-enhancing subsidies, subject to certain conditions.⁴⁷¹ Although it

⁴⁶⁴ Ibid at 117; Tickler, Meeuwig, Palomares, et al (2018) op cit note 6 at 3.

⁴⁶⁵ CPTPP Environment supra note 9 art 20.16.5

⁴⁶⁶ Ibid art 20.16.11.

⁴⁶⁷ Chair’s Working Document (2018) op cit note 12 arts 2.4(b) and 3.7(e).

⁴⁶⁸ Harper S, Bevacqua D, Chudnow R, et al., ‘Fuelling the Fisheries Subsidy Debate: Agreements, Loopholes and Implications’ (2012) 113 *Fisheries Research* 1.

⁴⁶⁹ Ibid. See also He J, ‘Chinese Public Policy on Fisheries Subsidies: Reconciling Trade, Environmental and Food Security Stakes’ (2015) 56 *Marine Policy* at 109 and 111-112.

⁴⁷⁰ Chair’s Working Document (2018) op cit note 12 art 6.2.

⁴⁷¹ Ibid arts 5.7-5.14.

states that ‘[d]eveloping countries ranking among the world's [X] biggest in terms of marine capture production as determined by the FAO shall endeavour to refrain from making use of the flexibilities’,⁴⁷² this is not an outright prohibition on members such as China, Peru and Indonesia, which have the highest marine capture in the world.⁴⁷³ Thus, the provisions on capacity-enhancing subsidies in both the WTO negotiations and the CPTPP are currently inadequate for the enhancement of equity between small-scale and industrial fisheries.

Although not on the same scale, there may also be conflicts and inequities that arise between small-scale and recreational fisheries (as well as between recreational and industrial fisheries). Recreational fishing may have problematic ecological impacts,⁴⁷⁴ directly compete for resources with industrial and small-scale fisheries⁴⁷⁵ and even be prioritised over the needs of small-scale fisheries.⁴⁷⁶ Recreational fishing is usually more prevalent in developed countries and large developing countries,⁴⁷⁷ although there may be some recreational fishing, including for tourism purposes, in other developing countries.⁴⁷⁸ Thus, conflicts and inequities between recreational and small-scale fishers can arise all over the world. It is clear that, in such cases, the interests of poverty alleviation and food security must be paramount, which suggests that small-scale fisheries should be favoured – a view also taken by the FAO.⁴⁷⁹ On the other hand, recreational fishing can bring in revenue for coastal communities, through tourism, sourcing of bait, accommodation, guides and so on.⁴⁸⁰ These factors must be taken into account by fisheries managers attempting to create equity between industrial, recreational and small-scale fisheries.

Recreational fishing is privately funded and is not subsidised by governments. However, attracting recreational fishers through setting up of tourism initiatives or building infrastructure conducive to recreational fishing⁴⁸¹ could be seen as fisheries subsidies that

⁴⁷² Ibid art 5.12.

⁴⁷³ SOFIA (2020) op cit note 40 at 13.

⁴⁷⁴ FAO, *Recreational Fisheries* (2012) FAO Technical Guidelines for Responsible Fisheries FAO, available at <http://www.fao.org/3/i2708e/i2708e00.pdf>, accessed on 13 August 2020 at 1-2 and 9; Fisheries Centre, *Fisheries Catch Reconstructions in the Western Indian Ocean 1950-2010* (2015) Fisheries Centre Research Reports, *University of British Columbia*, available at <http://www.seararoundus.org/doc/publications/books-and-reports/2015/Le-Manach-and-Pauly-Western-Indian-Ocean.pdf>, accessed on 13 August 2020 at 131 and 143.

⁴⁷⁵ See FAO (2012) *ibid* at 2, 10 and 16; Fisheries Centre (2015) *ibid* at 91, 133 and 141-143.

⁴⁷⁶ See, for example, Johnstone & Johnstone (2014) op cit note 209 at 131-132; Fisheries Centre (2015) *ibid* at 143.

⁴⁷⁷ These include China, Brazil, Argentina and India – see FAO (2012) op cit note 474 at 1.

⁴⁷⁸ Ibid at 111.

⁴⁷⁹ Ibid at 113.

⁴⁸⁰ Ibid at 111 and 113-114. See also Fisheries Centre (2015) op cit note 474 at 37 and 54.

⁴⁸¹ This can include boat ramps, access roads, fish-cleaning stations etc. – see FAO (2012) *ibid* at 72.

have problematic ecological impacts. Despite this, recreational fishing is expressly not dealt with in the WTO negotiations.⁴⁸² The CPTPP, on the other hand, does not specifically exclude recreational fisheries, which means that subsidies to recreational fisheries may be prohibited if they lead to IUU fishing or targeting of overfished stocks. However, because a lot of recreational fishing takes place in inland waters⁴⁸³ not all recreational fishing will be dealt with in the CPTPP.⁴⁸⁴

The potentially beneficial effects of recreational fishing for fishing communities, as well as certain ecological benefits that may arise from recreational fishing,⁴⁸⁵ suggests that subsidies to this sector should not be banned outright. While food security and poverty alleviation concerns must be paramount, there is a place for certain subsidisation of recreational fishing activities to benefit development. However, it is important to recognise that potential conflicts and synergies do exist, and to deal with recreational fishing explicitly in a future trade agreement containing provisions on fisheries subsidies.

Finally, as discussed in Chapter 1, subsidies for inland fisheries, where the majority of small-scale fisheries are found,⁴⁸⁶ have been excluded from the agreements under discussion.⁴⁸⁷ Subsidies for aquaculture, which can improve food security, reduce pressure on resources,⁴⁸⁸ and provide alternative livelihood opportunities for small-scale fisheries,⁴⁸⁹ are also excluded.⁴⁹⁰ While these exclusions are beneficial in the sense that there are no limits on what small-scale fisheries may receive as subsidies, on balance this is likely to hurt small-scale fisheries, for two reasons. First, because small-scale fisheries receive very little in the way of subsidies, this is likely to promote an out-of-sight, out-of-mind approach. Secondly, not disciplining these subsidies will simply perpetuate the inequitable status quo, and

⁴⁸² Chair's Working Document (2018) op cit note 12 art 2.4(d).

⁴⁸³ FAO (2012) op cit note 474 at 4.

⁴⁸⁴ As noted in Chapter 1 section II, the agreements and negotiations under discussion do not deal with inland fishing.

⁴⁸⁵ Recreational fishers are often ecological advocates or incentivise conservation and it has been estimated that 60% of recreational angling is catch-and-release, which lessens the ecological impact of the fishery. Charter fishing, accommodation and guiding for tourists also offer alternative sources of employment to commercial fishers and may lessen the impact of fishing, as fishing tourism is about the experience, rather than meeting catch targets – FAO (2012) op cit note 474 at 7-8; 113-114; Fisheries Centre (2015) op cit note 474 at 54 and 134.

⁴⁸⁶ Béné & Friend op cit note 162 at 119.

⁴⁸⁷ Chapter 1 section II.

⁴⁸⁸ This will only occur when aquaculture is sustainable, however.

⁴⁸⁹ See, for example, Lentisco & Lee (2015) op cit note 151 at 20.

⁴⁹⁰ Chair's Working Document (2018) op cit note 12 art 2.4(a); CPTPP Environment supra note 9 art 20.16, fn 10; USMCA Environment supra note 10 art 24.17, fn 11. However, the 2018 Working Document does qualify this by stating that this exclusion only applies to practices where capture fisheries are not used to feed farmed fish – art 1.

potentially lead to resource depletion.⁴⁹¹ It is suggested then, that, as with subsidies to recreational fishing, excluding these subsidies is a significant gap in the disciplines when it comes to protections for small-scale fisheries.

(ii) Access Agreements

Distant water fishing fleets cause multiple problems for sustainability of local fish stocks and small-scale fisheries. These include resource depletion, an increase in IUU fishing, and increased conflict between large and small-scale fisheries for space, resources and markets.⁴⁹² This is compounded by the fact that the small developing countries which allow access to distant water fishing fleets often do not have the resources to properly monitor these fleets⁴⁹³ and there is little transparency or participation in the negotiation of many access agreements.⁴⁹⁴ While these agreements may create some employment opportunities in developing countries,⁴⁹⁵ this is likely not enough to offset the deleterious developmental effects of resource depletion and conflict.⁴⁹⁶ In addition, the socio-economic opportunities are greater if countries are able to develop their domestic fishing industries, including value-added processing, and export the products of their EEZs.⁴⁹⁷

Access payments are generally between governments, although there may be private to government agreements too. In the latter case, a subsidy does not arise, but to the extent that a government is not reimbursed or fully reimbursed for the costs of obtaining access rights, a subsidy may arise (access subsidy). Capacity-enhancing subsidies, such as those for infrastructure, boat-building, equipment and operating costs, are a large part of what makes access to the waters of other countries possible. However, most distant water fishing nations have already built up their fisheries sectors and do not need subsidies for boat-building or infrastructure anymore.⁴⁹⁸ Thus, it is primarily the disciplining of ongoing capacity-

⁴⁹¹ This can also occur with aquaculture, which may use wild capture stocks to feed and stock farms and harm fish stocks and ecosystems through pollution – see the discussion in Chapter 4 section III.

⁴⁹² As discussed in Chapter 2 section III.

⁴⁹³ Mbithi Mwikya (2006) op cit note 156 at 9; Nyman E, 'Techno-Optimism and Ocean Governance: New Trends in Maritime Monitoring' (2019) 99 *Marine Policy* at 31.

⁴⁹⁴ See Chapter 2 section IV(a)(ii).

⁴⁹⁵ Mbithi Mwikya (2006) op cit note 156 at 31. Opportunities for employment and value-added activities are also dependent on the necessary infrastructure being in place for landings by foreign fleets and processing catches, which is often not the case – at 9 and 16-17.

⁴⁹⁶ According to Tickler et al, the continual degradation of fish stocks by distant water fishing fleets threatens food and economic security for billions of people and increases the risk of conflict. They also note that there is often little benefit for developing countries in hosting foreign fishing fleets as many of these fleets tranship fish at sea and do not land their catches in local ports – Tickler, Meeuwig, Palomares, et al (2018) op cit note 6 at 4.

⁴⁹⁷ Mbithi Mwikya (2006) op cit note 156 at 33-34.

⁴⁹⁸ *Ibid* at 23-24.

enhancing subsidies, such as operating subsidies (e.g. fuel subsidies), financial subsidies (e.g. lower interest rates), modernisation/repair subsidies, and access subsidies that will help to improve equity between small-scale fisheries and large foreign fleets.

Disciplines on access subsidies would not entail banning access agreements themselves, which would, indeed, be a contravention of the United Nations Convention on the Law of the Sea (UNCLOS).⁴⁹⁹ However, stock depletion and consequent increasing costs of distant-water fishing may mean that foreign fleets find it unprofitable to fish in foreign waters without capacity-enhancing subsidies.⁵⁰⁰ This will have an effect on small developing countries that rely on this revenue⁵⁰¹ as well as on certain employment and value-added activities (although these benefits are generally far greater in the distant water fishing nation than in the host country).⁵⁰² Nevertheless, the continued rate of stock depletion makes it clear that these conditions cannot continue indefinitely, and the negative effects on both development and sustainability suggest that a trade-off is necessary to protect the livelihoods of millions of small-scale fishers and coastal communities.

It was noted in the previous section that certain capacity-enhancing subsidies that make distant water fishing possible are proposed to be banned in the 2018 Working Document. However, it is unclear whether fuel subsidies will, in fact, be banned. Access subsidies, too, are excluded from the disciplines in the 2018 Working Document,⁵⁰³ and the ongoing confusion over whether these are subsidies at all is also problematic. In the academic literature Sumaila et al class these payments as capacity-enhancing subsidies based on economic theory and academic writing.⁵⁰⁴ However, Grynberg is not convinced that the forgoing of access revenue constitutes a subsidy under the ASCM.⁵⁰⁵

Similarly, many WTO members assume that the onward transfer of access rights are subsidies under WTO law and suggest that they be disciplined⁵⁰⁶ while others question this

⁴⁹⁹ UNCLOS supra note 154 arts 61 and 62.

⁵⁰⁰ Tickler, Meeuwig, Palomares, et al (2018) op cit note 6 at 3.

⁵⁰¹ See Grynberg R, 'WTO Fisheries Subsidies Negotiations: Implications for Fisheries Access Arrangements and Sustainable Management' (2003) 27 *Marine Policy* 6.

⁵⁰² See Mbithi Mwikya (2006) op cit note 156 at 16-18; Le Manach; Andriamahefazafy; Harper (2013) op cit note 213 at 261.

⁵⁰³ The 2018 Working Document exempts 'subsidies directly resulting from agreements between WTO Members in which one party grants access to its exclusive economic zone to fishing vessels of another party' - Chair's Working Document (2018) op cit note 12 art 2.4(h).

⁵⁰⁴ Sumaila, Ebrahim, Schuhbauer, et al. (2019) op cit note 6 at 1-2 and 10.

⁵⁰⁵ Grynberg (2003) op cit note 501 at 501. Grynberg does note, however, that there is no precedent for the view that development assistance cannot be considered a subsidy – at 501, fn 14.

⁵⁰⁶ See WTO, 'Fisheries Subsidies: Special and Differential Treatment: Paper from Argentina, Revision (TN/RL/GEN/138/Rev.1)' (26 January 2007) at 3; WTO, 'Possible Disciplines on Fisheries Subsidies: Paper

assumption.⁵⁰⁷ There has also been a lot of pushback against disciplining access subsidies, particularly from developing countries. The ACP Group⁵⁰⁸ and Small and Vulnerable Economies (SVE) Group⁵⁰⁹ have been particularly vocal about the need to retain them, while large developing countries, including China, India, Brazil and Mexico, have suggested disciplining access subsidies only for developed countries.⁵¹⁰ This is unlikely to significantly reduce distant water fishing, however, as China has the largest distant water fishing fleet in the world.

According to Article 1.1 of the ASCM, a subsidy is deemed to exist where ‘there is a financial contribution by a government or any public body within the territory of a Member’ or ‘there is any form of income or price support in the sense of Article XVI⁵¹¹ of GATT 1994’ and ‘a benefit is thereby conferred’.⁵¹² As noted in Section I above, these subsidies must also be specific to a particular industry or area. However, the proposed Article 2.2 of the 2018 Working Document also provides that the fisheries subsidies disciplines go beyond the scope of this article and cover ‘other nature of subsidies or incentives benefiting fishing activities’.⁵¹³

When it comes to access subsidies, the ACP Group has raised the issue of whether there is an appropriate market benchmark against which to measure the existence of a benefit,⁵¹⁴ given that fisheries access negotiations are bilateral agreements and may include a

from Brazil, Revision (TN/RL/GEN/79/Rev.4)' (13 March 2007) at 2; WTO, 'Framework of the Disciplines on Fisheries Subsidies, Communication from the Republic of Korea (TN/RL/W/245)' (24 November 2009) at 4; Japan (2011) op cit note 85 at 8.

⁵⁰⁷ WTO, 'Access Fees in Fisheries Subsidies Negotiations: Communication from the ACP Group (TN/RL/W/209)' (5 June 2007) at 3; WTO, 'Development and Sustainability in the WTO Fishery Subsidies Negotiations: Issues and Alternatives, Communication from New Zealand (TN/RL/W/206)' (31 May 2006) at 4.

⁵⁰⁸ See e.g. ACP Group (2007) *ibid*; WTO, 'Principles and Elements for Concluding Negotiations on Fisheries Subsidies Rules in the WTO Submission by Guyana on behalf of the ACP Group, Revision (TN/RL/GEN/182/Rev.1)' (20 June 2017) at 2.

⁵⁰⁹ See e.g. WTO, 'Fisheries Subsidies, Communication from Antigua and Barbuda, Belize, Fiji Islands, Guyana, the Maldives, Papua New Guinea, Solomon Islands, St Kitts and Nevis (TN/RL/W/136)' (14 July 2003) (SVE Group) at 2; WTO, 'WTO Fisheries Subsidies Disciplines, Architecture on Fisheries Subsidies Disciplines, Paper from Fiji; Jamaica; Papua New Guinea; and the Solomon Islands, Revision (TN/RL/GEN/57/Rev.1)' (4 August 2005) at 4. A list of SVE countries is provided in Annexure 1.

⁵¹⁰ See, e.g. WTO, 'Further Contribution to the Discussion on the Framework for Disciplines on Fisheries Subsidies: Paper from Brazil (TN/RL/GEN/79)' (16 November 2005) at 12; WTO, 'Fisheries Subsidies: Special and Differential Treatment, Communication from Brazil, China, India and Mexico (TN/RL/GEN/163)' (11 February 2010) at 4.

⁵¹¹ Article XVI deals specifically with export subsidies which are not at issue in the fisheries subsidies negotiations – see GATT *supra* note 178.

⁵¹² ASCM *supra* note 53 art 1.1.

⁵¹³ Chair's Working Document (2018) op cit note 12 art 2.2.

⁵¹⁴ In WTO jurisprudence, a benefit is seen as an advantage to the recipient which can be determined by reference to the relevant market in which the recipient competes – see WTO, 'Canada - Certain Measures Affecting the Renewable Energy Generation Sector (WT/DS412/AB/R; WT/DS426/AB/R) Report of the

development assistance component.⁵¹⁵ This seems to suggest that access rights should not be valued at their commercial value, but rather at the amount paid for the access by a particular country. This debate occurred early in the WTO negotiations but was never resolved.⁵¹⁶

If the market benchmark is, indeed, the amount paid for access by a particular country, this would be difficult to quantify. Access payments may be made through the provision of infrastructure, military aid and other projects⁵¹⁷ and even when payments are made in cash they are often tied up with development aid.⁵¹⁸ The use of re-flagged vessels by distant water fishing nations⁵¹⁹ can also obscure the amounts being paid for access.⁵²⁰ However, academic writing suggests that access rights should be based on the commercial value of the stocks. A number of authors have argued that development assistance payments should be decoupled from payments for access to stocks, which are used to reduce the value of the access payments to less than their commercial value.⁵²¹ Apart from issues of equity,⁵²² this reduction in fees is seen as a beneficial subsidy to distant water fleets.⁵²³

Thus, these writings provide support for the argument that the existence of a beneficial access subsidy should be determined through consideration of an objective commercial value for access rights. As such a value is quantifiable,⁵²⁴ it can provide a market benchmark for the determination of a subsidy under the fisheries subsidies disciplines. Even if this is not the case, however, it is arguable that this is no longer an issue in view of the

Appellate Body adopted on 24 May 2013 ' (2013) paras 5.164-5.169; WTO, 'United States - Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (WT/DS353/AB/R) Report of the Appellate Body adopted on 23 March 2012' (2012) at 635-636.

⁵¹⁵ ACP Group (2007) op cit note 507 at 3.

⁵¹⁶ New Zealand (2006) op cit note 507 at 4.

⁵¹⁷ Belhabib, Sumaila, Lam, et al (2015) op cit note 157 at 14.

⁵¹⁸ Mbithi Mwikya (2006) op cit note 156 at 12 and 22; Le Manach; Andriamahefazafy; Harper (2013) op cit note 213 at 258.

⁵¹⁹ Reflagging foreign vessels so they are technically considered part of the local fleet.

⁵²⁰ Belhabib, Sumaila, Lam, et al (2015) op cit note 157.

⁵²¹ Le Manach, Andriamahefazafy, Harper, et al (2013) op cit note 213 at 263; Mbithi Mwikya (2006) op cit note 156 at 30 and 34; Grynberg (2003) op cit note 501 at 510.

⁵²² Clearly development aid, which by its nature is assistance and not a payment in a commercial transaction, should not reduce the value of access rights, which are a tradeable commodity belonging to the host country.

⁵²³ Le Manach, Andriamahefazafy, Harper, et al (2013) op cit note 213 at 263; Mbithi Mwikya (2006) op cit note 156 at 11 and 21. See also Grynberg (2003) op cit note 501 at 510 – although Grynberg does not take the view that development aid is a subsidy under the ASCM, he suggests decoupling this aid from fisheries access payments because it could be considered a subsidy under the expanded fisheries subsidies disciplines – at 501.

⁵²⁴ Determining the commercial value may be difficult, but not impossible. Le Manach et al make the case that this could be determined through reference to the ex-vessel price of the fish, for example, and emphasise that better stock assessment, monitoring and so on could give a better idea of the actual benefits of access - Le Manach, Andriamahefazafy, Harper, et al (2013) *ibid* at 262-263. Mbithi Mkiya makes a similar point that improved stock assessment would assist in determining the true value of the catch – Mbithi Mwikya (2006) *ibid* at 34.

expanded definition of a subsidy under the 2018 Working Document to encompass subsidies or incentives benefiting fishing activities beyond those subsidies falling under the ASCM.

It does seem, then, that the WTO negotiations should deal with access subsidies in some form. Even if these subsidies are ultimately exempted from the disciplines because of concerns from developing countries, an agreement should at least require that certain caveats be attached to access agreements to improve sustainable development outcomes. These could include transparency and participation in the negotiation of agreements, as well as proper monitoring of distant water fishing fleets and fish stocks through tracking and observation technology, patrolling of waters, stock and ecosystem monitoring and port inspections. As many of these measures are difficult for developing countries to implement, technical assistance provisions could be included in the disciplines, requiring the distant water fishing nation to assist with monitoring and assessment. These sorts of mechanisms were, in fact, suggested by the ACP Group in a 2011 submission.⁵²⁵ However, the ACP Group now seems to take the view that these agreements should be entirely outside the ambit of the WTO negotiations.⁵²⁶ This is unfortunate, as the implementation of these suggestions would have provided some safeguards against the problems foreign fleets can cause to small-scale fisheries and to sustainability, even if access subsidies are ultimately allowed under the WTO disciplines.

Unlike the WTO negotiations, the CPTPP makes no specific mention of access agreements, access subsidies, or distant water fishing. Thus, subsidies for access and distant water fishing could, potentially, be disciplined under the CPTPP if they can be shown to lead to IUU fishing or negatively affect overfished stocks. This would have to be done on a case-by-case basis, however, and does not take into account the need for transparency and participation in the creation of access agreements. Furthermore, it would be difficult to prove IUU fishing and overfishing in distant water fishing fleets as those under-resourced developing countries where the majority of distant water fishing occurs struggle to enforce fisheries management laws and it is often unclear whether stocks in these waters are overfished or not.⁵²⁷ Thus, in order for the CPTPP to discipline distant water fishing, even in a limited case-by-case way, it would need strong technical assistance provisions that aim to

⁵²⁵ WTO, 'Fisheries Subsidies: Articles III and V: Communication from Kenya on behalf of the ACP Group (TN/RL/GEN/176)' (1 March 2011) at 4.

⁵²⁶ ACP Group (June 2017) *op cit* note 508 at 2.

⁵²⁷ This issue is dealt with comprehensively in Chapter 4 section II.

assist under-resourced countries with fisheries management. At present these do not exist, as discussed in Section II(a)(iii) below.

It is clear, then, that the lack of effective disciplines on access subsidies and distant water fishing is something of a trend and a significant gap in current trade agreements dealing with fisheries subsidies. Although there may be some developmental benefits to allowing access to foreign fleets, these appear to be far outweighed by the depletion of fish stocks, illegal fishing, conflict with local fishers and unfair competition with domestic fisheries, and it is imperative that a better balance be struck in this regard.

(iii) Technical Assistance and Cooperation

Technical assistance has been an important part of the WTO negotiations and certain developing country groupings have demanded strong provisions,⁵²⁸ rather than the often ineffectual, non-binding provisions that currently exist in WTO law.⁵²⁹ Suggested provisions on technical assistance and capacity-building have centred on implementing the subsidies disciplines, creating and enforcing fisheries management systems, and research and development.⁵³⁰ These provisions are, thus, primarily aimed at sustainability and implementing the subsidy prohibitions. Nevertheless, strong technical assistance provisions targeted at improving fisheries management and implementing the subsidies disciplines can have benefits for small-scale fisheries. The benefits to small-scale fisheries of disciplining subsidies to large-scale fishing and monitoring the activities of large-scale fleets have already been discussed, but it is also important to note that improvements in monitoring of fish stocks fished by small-scale fisheries can lead to an increase in quotas for those fish stocks (where applicable).⁵³¹

⁵²⁸ WTO, 'Proposal on Technical Assistance for Meeting Future WTO Fisheries Subsidies Obligations, Communication from Ecuador and Egypt (TN/RL/GEN/179)' (28 March 2011).

⁵²⁹ See, for example, GATT *supra* note 178 read with the Enabling Clause *supra* note 178. See also Olarreaga M & Ng F, 'Tariff Peaks and Preferences' in Hoekman BM, Mattoo A and English P (eds) *Development, Trade and the WTO: A Handbook* (2002) at 109-112 for an overview of why preferential schemes for developing countries are often ineffective.

⁵³⁰ See, e.g. Chair's Working Document (2018) *op cit* note 12 arts 5.15-5.16; Ecuador and Egypt (2011) *op cit* note 528; WTO, 'ACP Group Text Proposal, Fisheries Subsidies Disciplines: Submission by Guyana on behalf of the ACP Group (TN/RL/GEN/192)' (14 July 2017) at 3; LDC Group (2017) *op cit* note 457 at 2; WTO, 'Proposed Disciplines on Prohibitions and Special and Differential Treatment for Fisheries Subsidies, Proposal from Indonesia (TN/RL/GEN/189)' (6 June 2017) at 5. Research and development (or R&D) refers, in this context, to technological innovation in fisheries, such as the creation of more efficient aquaculture or processing methods.

⁵³¹ Cochrane, Andrew and Parma note that there is often a lack of information on stocks fished by small-scale fisheries and, thus, greater need for a precautionary approach to be adopted in regard to these stocks – Cochrane, Andrew & Parma (2011) *op cit* note 141 at 278-279.

Technical assistance to improve infrastructure, education or safety for fishers, for which there is a certain amount of consensus that subsidy exemptions should be provided under the disciplines,⁵³² is not present in the technical assistance provisions of the 2018 Working Document. The inclusion of such provisions would assist under-resourced developing countries to implement these exemptions and, thus, give effect to one of the oft-quoted aims of the negotiations: appropriate S&DT in light of the importance of the fisheries sector to poverty reduction, livelihoods and food security.⁵³³ However, assistance with fisheries management is an important step in this regard as improvements in fisheries management may be a pre-requisite to the granting of certain subsidies to small-scale fisheries in the disciplines.⁵³⁴

The CPTPP's environment chapter provides for cooperation and technical assistance to implement the chapter.⁵³⁵ However, the parties need only cooperate 'when there is mutual benefit from that cooperation.'⁵³⁶ Although mutual benefit could arise from conservation of fish stocks, this is a somewhat vague and unhelpful provision, and certainly does not appear applicable to poverty reduction projects of another party.

The CPTPP's chapter on cooperation and capacity-building also uses voluntary language in regard to technical assistance to implement the chapter.⁵³⁷ However, it has a stronger focus on development and economic growth than the environment chapter and specifies some areas for cooperation and capacity building, such as education, gender equity and disaster management.⁵³⁸ These provisions may have some benefits for small-scale fisheries, although the lack of exemptions for development needs of small-scale fisheries in the fisheries subsidies provisions could be problematic, as discussed in Sections II(a)(iv) and (b)(i) below. USMCA's cooperation provisions differ from the CPTPP in this regard, including only vague pronouncements on the importance of cooperation for implementing the environment chapter and a commitment to expand cooperative relationships in environmental

⁵³² WTO member submissions on this point are discussed throughout the chapter, particularly in Sections II(b)-(c).

⁵³³ For a recent iteration see Chair's Working Document (2018) op cit note 12 preamble.

⁵³⁴ See, for example, *ibid* art 2.8. A requirement for improved fisheries management as a precursor to the provision of certain subsidies is also the position taken by this thesis and is expounded upon in Chapter 4 section IV.

⁵³⁵ CPTPP Environment *supra* note 9 art 20.12.

⁵³⁶ *Ibid* art 20.12.2.

⁵³⁷ CPTPP Cooperation *supra* note 81 art 21.5 provides that 'the Parties shall work to provide the appropriate financial or in-kind resources for cooperation and capacity building activities conducted under this Chapter, subject to the availability of resources and the comparative capabilities that different Parties possess to achieve the goals of this Chapter.'

⁵³⁸ *Ibid* arts 21.1-21.2.

matters.⁵³⁹ These are unlikely to do much good for small-scale fisheries or sustainability in general, particularly given the history of fishing disputes between the US and Mexico.⁵⁴⁰

Technical assistance for dispute settlement is also a potentially important issue to address in these agreements as dispute settlement is costly and time-consuming and, thus, often out of reach for small developing countries.⁵⁴¹ At this stage, however, technical assistance of this nature has not been included in any of the agreements or negotiations under discussion. This issue is examined further in Section III(b) of Chapter 5.

(iv) Alleviating Poverty of Small-Scale Fisheries

In 2005 the Ministerial Council of the WTO proclaimed that one of the integral parts of the fisheries subsidies negotiations was ‘appropriate and effective special and differential treatment for developing and least-developed Members...taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns’.⁵⁴² Since then, members have made a number of similar proclamations relating directly to the development of fishing communities, suggesting exemptions to the subsidies disciplines for, *inter alia*, ‘the development of local communities and poverty reduction’,⁵⁴³ ‘problems affecting small-scale fisheries, for the benefit of coastal communities and with a view to improving quality of life’,⁵⁴⁴ and ‘fishing activities related to the subsistence and livelihood of the fishermen and their families’.⁵⁴⁵

Although these provisions are light on specifics, they do show concern for small-scale fisheries and alleviating the poverty in which many fishing communities live, which are important aspects of intragenerational equity. However, general provisions like this provide less of a moral imperative to act and even less direction on how to take action. While some specifics around community infrastructure, education and provision of gear and other fishing inputs for small-scale fisheries have found their way into the negotiations and are discussed

⁵³⁹ USMCA Environment *supra* note 10 art 24.25.

⁵⁴⁰ The US and Mexico have, to date, been involved in three WTO disputes over dolphin bycatch in tuna fisheries, the latest of which was concluded in January 2019.

⁵⁴¹ This issue is fully canvassed in Chapter 5 section III.

⁵⁴² Hong Kong Ministerial Declaration *supra* note 59 at D-2.

⁵⁴³ WTO, ‘Proposal on Fisheries Subsidies Special and Differential Treatment, Artisanal Fisheries - Article III.2(A): Communication from Ecuador and Peru (TN/RL/GEN/172)’ (19 January 2011) at 4.

⁵⁴⁴ WTO, ‘Possible Approaches to Improved Disciplines on Fisheries Subsidies: Communication from Chile (TN/RL/W/115)’ (10 June 2003) at 3.

⁵⁴⁵ Brazil (2007) *op cit* note 506 at 4.

in Section II(b) below, the 2018 Working Document does not go into specific exemptions for the most part. Instead, it includes two general exemptions for small-scale fisheries.

The first is broad but vague, providing that, within the EEZ, the disciplines should not prevent members assisting their small-scale fishers to access marine resources and markets, subject to a fisheries management system being in place.⁵⁴⁶ The second applies only to the provisions on capacity-enhancing subsidies (rather than those on IUU fishing and overfishing).⁵⁴⁷ This exception is also limited to developing countries⁵⁴⁸ which seems unjust. Although generally more ubiquitous and severe in developing countries, poverty and need amongst small-scale fisheries can also be seen in developed countries⁵⁴⁹ and the ability to address the development needs of all small-scale fisheries should not be excluded from the final agreement. The distinction between developing and developed countries at the WTO is also somewhat arbitrary. The WTO lets countries 'self-declare' their status, which has led to a number of countries that may generally be regarded as developed, including Singapore, South Korea, Hong Kong and the United Arab Emirates, to self-declare as developing. At present, however, the broader provision around marine resources and markets would appear to undermine these limitations in the EEZ anyway, as capacity-enhancing subsidies could be a way of facilitating access to marine resources.

These conflicting provisions suggest that members have not reached any sort of agreement on how to deal with small-scale fisheries in the disciplines. Further evidence of this can be found in the lack of consensus on how small-scale fisheries should be defined,⁵⁵⁰ with certain members suggesting that the concept of small-scale fisheries should be defined narrowly.⁵⁵¹ While these submissions aim to prevent loopholes in the disciplines, as well as to ensure that small-scale fishing is not contributing to overfishing, an overly narrow definition of small-scale fisheries could impede development and poverty alleviation in small-scale fisheries. This issue is addressed further in Chapter 5.⁵⁵² However, it is important to note right

⁵⁴⁶ Chair's Working Document (2018) op cit note 12 art 2.8.

⁵⁴⁷ Ibid arts 5.8(a)-(d).

⁵⁴⁸ Ibid arts 5.8(a)-(d).

⁵⁴⁹ See, for example, Marciniak B, 'Vanished Prosperity: Poverty and Marginalization in a Small Polish Fishing Community' in Jentoft S and Eide A (eds) *Poverty Mosaics: Realities and Prospects in Small-Scale Fisheries* (2011).

⁵⁵⁰ See, for example, Chair's Working Document (2018) op cit note 12 art 1, which contains four different definitions of small-scale fisheries.

⁵⁵¹ See, e.g. EU (2017) op cit note 457 at 2; WTO, 'Fisheries Subsidies, Exhaustive List of Non-Prohibited Fisheries Subsidies: Paper from New Zealand (TN/RL/GEN/141)' (6 June 2006) at 4.

⁵⁵² At Chapter 5 section II(b).

at the outset that the potential for a narrow definition and issues around coverage of subsidies exemptions must be addressed to ensure that many poor and vulnerable small-scale fisheries are not excluded from accessing potentially beneficial fisheries subsidies under the disciplines.

As discussed in Chapter 1,⁵⁵³ the CPTPP recognises the importance of the marine fisheries sector to the livelihoods of small-scale fisheries and further refers to social and developmental priorities in its provisions on fisheries subsidies.⁵⁵⁴ Although these provisions appear to leave room for parties to subsidise their small-scale fishing, any allowance that can be read into these provisions is subject to the provisions banning subsidies for overfishing and IUU fishing.⁵⁵⁵ Thus, if subsidies to small-scale fisheries contravene these provisions, they will not be allowed under the CPTPP.⁵⁵⁶ The IUU fishing provisions, although potentially problematic given that so much small-scale fishing is unregulated and/or unreported, refer specifically to the IUU lists maintained by states and RFMOs. This narrows the scope of the prohibition, especially as these lists are generally more focused on illegal industrial fishing than unregulated and unreported small-scale fishing (although this cannot be completely ruled out). However, the provisions on overfished stocks, which may include unassessed stocks,⁵⁵⁷ are more problematic.⁵⁵⁸ These provisions also suffer from the same problems noted above with regard to broad and general statements that offer no guidance or imperative to act.

(v) Gender Equity and Marginalisation

Chapter 2 considered a large range of issues to be important in the pursuit of gender equity in small-scale fisheries.⁵⁵⁹ As was the case in that chapter, many of these issues, including greater participation and representation, better access to health care, child care and education, and improving tenure rights, will be dealt with during the course of the chapter. However, it is important to note at this stage that the WTO negotiations make almost no mention of

⁵⁵³ Chapter 1 section III(b).

⁵⁵⁴ CPTPP Environment supra note 9 arts 20.16.1 and 20.16.7.

⁵⁵⁵ Ibid arts 20.16.5 and 7.

⁵⁵⁶ Although it is certainly arguable that small-scale fisheries should not be engaging in IUU fishing or targeting overfished stocks, this is sometimes unavoidable, as discussed in Section II(b) below.

⁵⁵⁷ Many stocks fished by small-scale fisheries are unassessed – Cochrane, Andrew & Parma (2011) op cit note 141 at 279. For further discussion on this issue see Section II(b)(i) below.

⁵⁵⁸ Specific problems that could arise in this regard include prohibition of subsidies for important social assistance projects – this is discussed fully in Section II(b)(i) below.

⁵⁵⁹ See, particularly, Chapter 2 section IV(a)(ii).

women, gender equity or the marginalisation of fishing communities or subsets of those communities. Within the WTO negotiations, the SVE Group mentions in 2003 that ‘in many coastal developing states, women disproportionately dominate or play an increasingly important role in the artisanal sector.’⁵⁶⁰ However, nothing is heard about this or gender equity thereafter, despite the fact that hundreds of submissions have been made to the Rules Group during the nearly twenty years since the negotiations began.

This disregard of an important problem in small-scale fisheries likely reflects the fact that, as Lentisco and Lee note, ‘[f]emale stakeholders in the fisheries sector were, until recently, invisible in the statistics collected and provided to fisheries managers and policy-makers.’⁵⁶¹ However, with the increase in literature on women’s roles in small-scale fisheries, much of which is reflected in the highly publicised SSF Guidelines,⁵⁶² there is no reason that issues around gender equity should not be afforded at least some attention in the WTO negotiations, particularly given the number of women involved in the small-scale fisheries sector. Marginalisation of small-scale fishers, fishing communities, or subsets of these groups, and the effect this can have on the most vulnerable, is also not mentioned, despite the fact that this can increase poverty and impede development.

The CPTPP, too, does not consider issues of gender equity and marginalisation in the context of fisheries. It does, however, have a development chapter which deals more generally with enhancing opportunities for women. This includes cooperation in order to improve training and skills development, enhance access to markets, technology and financing, develop women’s leadership networks, and identify workplace flexibility initiatives.⁵⁶³ It also notes the importance of policies ‘related to the promotion of market-based approaches aimed at improving trading conditions and access to finance for vulnerable areas or populations’.⁵⁶⁴ Gender equality is also one of the areas singled out for cooperation and capacity building initiatives in the CPTPP’s cooperation chapter.⁵⁶⁵ This could be beneficial to small-scale fisheries, although the provisions are non-binding and general. However, this is still better than USMCA which, like the WTO, does not deal with the issue at all.

⁵⁶⁰ SVE Group (2003) op cit note 509 at 3.

⁵⁶¹ Lentisco & Lee (2015) op cit note 151 at 2.

⁵⁶² SSF Guidelines supra note 1.

⁵⁶³ CPTPP Development supra note 80 art 23.4.2.

⁵⁶⁴ Ibid art 23.3.4.

⁵⁶⁵ CPTPP Cooperation supra note 81 art 21.2.2(b).

(b) Access to Basic Necessities

As discussed in Chapter 2, basic necessities, as they apply to small-scale fisheries, comprise health, education, food security, rural development infrastructure, and equity (in the form of political and social capital). This section will focus on the first four considerations, as general equity issues have already been canvassed in Section II(a) above.

(i) Health

There are a number of health concerns that affect small-scale fisheries, many of which affect women and other marginalised groups (such as migrant fishers) disproportionately. These include water-borne and respiratory diseases, often brought about because of the nature of the work of small-scale fishers and a lack of basic infrastructure in isolated fishing communities, as well as the spread of HIV/AIDs.⁵⁶⁶ Development projects in fishing communities, and particularly rural communities, can assist in combatting these problems, by providing running water, sanitation, electricity, and health services.

Several prominent commentators and IGOs see development support for fishing communities as fisheries subsidies.⁵⁶⁷ In addition, and despite the fact that general infrastructure is not considered a subsidy under the ASCM,⁵⁶⁸ a number of WTO members have proposed specific exemptions to the subsidies prohibitions for social infrastructure provided to fishing communities.⁵⁶⁹ This suggests that, to the extent that development support is given to fisheries communities, this could be considered a specific fisheries subsidy in a trade agreement. This is particularly so in the WTO negotiations, which have adopted a wider definition of a fisheries subsidy.⁵⁷⁰ However, the language of the ASCM, which states that it covers financial contributions benefitting a specific industry or region,⁵⁷¹ also provides support for this idea. Thus, apart from the inherent value in specifying the types of subsidy

⁵⁶⁶ As discussed in Chapter 2 section IV(b)(ii).

⁵⁶⁷ See, for example, Sumaila, Ebrahim, Schuhbauer, et al. (2019) op cit note 6 at 10; OECD.Stat, *Fisheries Support Estimate (2020) OECD*, available at https://stats.oecd.org/Index.aspx?DataSetCode=FISH_FSE, accessed on 13 August 2020.

⁵⁶⁸ ASCM supra note 53 art 1.1(a)(1)(iii).

⁵⁶⁹ See, for example, New Zealand (2006) op cit note 551 at 3; WTO, 'Fisheries Subsidies: Proposed New Disciplines, Proposal from the United States (TN/RL/GEN/145)' (22 March 2007) at 5; WTO, 'Fisheries Subsidies: Proposed New Disciplines, Revised Proposal from the Republic of Indonesia (TN/RL/GEN/150/Rev.2)' (9 October 2007) at 6; WTO, 'Fisheries Subsidies: Framework for Disciplines, Communication from Japan; the Republic of Korea; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (TN/RL/GEN/114/Rev.2)' (5 June 2007) at 7. Specific aspects of these submissions are discussed below.

⁵⁷⁰ Chair's Working Document (2018) op cit note 12 art 2.2. Also see discussion in Section II(a)(ii) above.

⁵⁷¹ ASCM supra note 53 arts 1.1 and 2.

exemptions that should be available to fishing communities in these agreements,⁵⁷² it is also important to do so because of the danger that these projects could contravene the bans on fisheries subsidies in these agreements.

In the WTO negotiations, the legality of subsidies for development support would depend on whether they are provided to those engaged in IUU fishing or fishing that affects overfished stocks.⁵⁷³ As with the CPTPP, the 2018 Working Document defines IUU fishing primarily in relation to vessel lists,⁵⁷⁴ which narrows the scope of this prohibition. It also provides flexibilities for states struggling to control unregulated and unreported fishing in their small-scale fisheries.⁵⁷⁵ However, the ban on subsidies that affect overfished stocks is more problematic, as this explicitly includes unassessed stocks⁵⁷⁶ and many fish stocks targeted by small-scale fisheries are unassessed.⁵⁷⁷ Although it is important to include this prohibition for the sake of sustainability, it may cause problems when it comes to provision of social support to fishing communities that are targeting such stocks.⁵⁷⁸

The 2018 Working Document does include an exemption from the ban on overfished stocks.⁵⁷⁹ However, this is not specific to small-scale fisheries, applies only to least-developed countries (LDCs)⁵⁸⁰ and developing countries, and there is also no consensus on whether it will apply to the EEZs of members or only their territorial waters.⁵⁸¹ Thus, it is non-specific, unclear and ignores the needs of small-scale fisheries in developed countries, who may also require social assistance. Area limitations are also not particularly useful in this regard, as small-scale fishers are known to fish beyond their own EEZs.⁵⁸² Indeed, this is not

⁵⁷² As discussed in Section I above, these include greater moral obligation and the need to bring these issues to the fore.

⁵⁷³ Chair's Working Document (2018) op cit note 12 arts 3.2 and 3.3. These types of subsidies would not contravene the provisions on capacity-enhancing subsidies, which provides a specific list of banned subsidies – art 3.7.

⁵⁷⁴ Ibid art 3.2.

⁵⁷⁵ Ibid art 5.5.

⁵⁷⁶ Ibid art 3.3.2.

⁵⁷⁷ Cochrane, Andrew & Parma (2011) op cit note 141 at 279.

⁵⁷⁸ It is not difficult to draw links between social support to fishing communities and the actual practice of fishing – improved health means more strength and time to fish, provision of water and electricity can increase the time that women can spend fishing and enables the creation of ice for longer fishing trips, upskilling and education can be used to earn more money for fishing, and so on.

⁵⁷⁹ Chair's Working Document (2018) op cit note 12 art 5.6.

⁵⁸⁰ A list of LDC countries is provided in Annexure 1.

⁵⁸¹ Chair's Working Document (2018) op cit note 12 art 5.6.

⁵⁸² See Masifundise Development Trust, *Assessment Report on Small-Scale Fisheries in Africa* (2012) *Inter African Bureau for Animal Resources*, available at http://masifundise.org/wp-content/uploads/2013/01/AU-Report_Africa.pdf, accessed on 13 August 2020 at 3; Brochier T, Auger P, Thiao D, et al., 'Can Overexploited Fisheries Recover by Self-Organization? Reallocation of Fishing Effort as an Emergent Form of Governance' (2018) 95 *Marine Policy*.

difficult when a community lives close to a border between states, the EEZ is small, undetermined or not yet declared, or the fishermen are migrant fishers. The general exemptions for small-scale fishers are also fairly unhelpful in this regard, as they apply only to fishers and fishing-related activities, such as accessing marine resources. Thus, even if these exemptions were not vague and contradictory, many types of social infrastructure in fishing communities would not fall under these provisions.

In contrast, and as noted above, many WTO member submissions include specific exemptions for social infrastructure in fishing communities. These include construction of water and sanitary waste systems for fishing communities.⁵⁸³ Exemptions for the building of health clinics and electricity infrastructure could also be useful additions to these submissions that would help to improve health and facilitate poverty reduction in fishing communities. Unfortunately, member suggestions of this nature are not reflected in the 2018 Working Document. The 2018 Working Document simply provides that ‘subsidies that improve hygiene, health, safety and working conditions for fishers’ are not presumed to lead to overfishing.⁵⁸⁴ This is a good start but deals only with the health and working conditions of fishers, rather than fishing communities. Thus, there is a need for greater clarity in regard to health considerations in the WTO negotiations. It is vital that this issue be dealt with properly to ensure that small-scale fisheries receive the care they need, especially in countries where dangerous communicable diseases are widespread and potentially devastating.

Health considerations play even less of a role in the CPTPP than in the WTO disciplines. The CPTPP’s development chapter does recognise the importance of investing in public infrastructure and health systems in order to generate and sustain broad-based economic growth,⁵⁸⁵ which would presumably apply to fishing communities. However, there is no mention of the health problems facing small-scale fishers and fishing communities in the environment chapter or of exemptions from the fisheries subsidies provisions for health infrastructure. Even these general provisions are an improvement on USMCA, however, which does not have a development chapter and does not deal with issues such as health, education, community infrastructure or other basic services at all.

⁵⁸³ See New Zealand (2006) op cit note 551 at 3; US (2007) op cit note 569 at 5; Indonesia (2007) op cit note 569 at 6; Japan, Korea & Chinese Taipei (2007) op cit note 569 at 7.

⁵⁸⁴ Chair’s Working Document (2018) op cit note 12 art 3.6(b).

⁵⁸⁵ CPTPP Development supra note 80 art 23.3.3.

Unlike the WTO negotiations, however, the CPTPP's ban on subsidies to overfished stocks does not specifically refer to unassessed stocks, but simply provides that the negative effect of subsidies and evidence of overfishing must be determined with reference to scientific evidence.⁵⁸⁶ Thus, it is unclear whether subsidies are banned when scientific evidence is not available, which could potentially obviate some of the problems in the WTO negotiations in regard to the creation of social infrastructure in fishing communities. Yet this would present a significant loophole, which was likely not the intention of the parties and may cause problems for sustainability. This, again, suggests the need for greater certainty on what can and cannot be provided to small-scale fisheries to ensure that important development issues are not ignored and small-scale fisheries are not harmed by bans on fisheries subsidies in trade agreements.

(ii) Education

Exemptions to the fisheries subsidies disciplines for education and skills training for fishers have been proposed by many WTO members.⁵⁸⁷ These suggestions have generally been coupled with early retirement schemes and alternative employment assistance, and are aimed at all fishers, not just small-scale fishers. However, while these submissions did find their way into the 2007 Draft Text,⁵⁸⁸ they are absent in the 2018 Working Document. In addition, these submissions focus on re-education and skills training for fishers, rather than the broader idea of education for fishing communities. Skills training and re-education can be important aspects of development in small-scale fisheries as they allow for livelihood diversification or movement into a livelihood that is safer and less volatile than fishing, but a broader view of education and skills training in fishing communities, particularly for women and children, is also an important aspect of development in fishing communities.

Clearly, schemes for the re-education and re-training of fishers are specific to the fishing industry, whereas broader education initiatives may be considered more of a general service. As discussed in the context of health infrastructure, however, these broader social programmes could be considered specific fisheries subsidies if implemented in specific fishing communities and regions, and could contravene a ban if fishers in these places are

⁵⁸⁶ CPTPP Environment *supra* note 9 art 20.16.5(a).

⁵⁸⁷ See, e.g. US (2007) *op cit* note 569 at 5; Indonesia (2007) *op cit* note 569 at 6; Brazil (2007) *op cit* note 506 at 3; and New Zealand (2006) *op cit* note 551 at 4; WTO, 'Fisheries Subsidies, Framework for Disciplines: Communication from Japan; the Republic of Korea; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (TN/RL/GEN/114)' (21 April 2006) at 3.

⁵⁸⁸ Chair's Draft Text (2007) *op cit* note 60 art II(c).

targeting overfished stocks. Thus, apart from the fact that there is inherent value in specificity, the importance of education and training to poverty reduction and development suggests that, if there is any chance of these types of programmes falling foul of a subsidies ban, they should be dealt with in the general exemptions for small-scale fisheries.

Broader education and skills training provisions do appear in the CPTPP (although not in USMCA, as noted above). As with health issues, these are dealt with only in the context of general development and cooperation. The provisions on education are more extensive than those on health, however, and recognise the importance of investment in education systems for purposes of economic growth, improving competitiveness, creating jobs and expanding trade and investment,⁵⁸⁹ as well as the value in building the skills of women.⁵⁹⁰ Education is also one of the areas singled out for cooperation and capacity building initiatives in the CPTPP.⁵⁹¹ Nevertheless, these are still fairly vague pronouncements and are not specifically applicable to small-scale fisheries. This diminishes their usefulness for development of small-scale fisheries, especially if subsidies for education and skills training in fishing communities fall foul of the fisheries subsidies bans.

(iii) Food Security

Food security in small-scale fisheries is, as noted in Chapter 2, related to issues of access – both to aquatic resources and to land.⁵⁹² This encompasses concerns such as tenure security and access to technology and other fishing inputs, including improved fishing gear and cold storage.

Tenure security issues are dealt with in Section II(c)(ii) below. However, it is important to note at this stage that access to fishing grounds, which was dealt with as an aspect of tenure security in Chapter 2, has two components. The first is physical access to beaches, landing sites and so on, which can be said to be an aspect of tenure security. The second is the right to fish in these grounds, which may include protected areas. This latter aspect of access deals with quotas and right allocations and is, therefore, more of a concern of fisheries management, rather than a subsidy issue. Thus, it is not dealt with further in this

⁵⁸⁹ CPTPP Development *supra* note 80 arts 23.5.1 and 23.3.3.

⁵⁹⁰ *Ibid* art 23.4.2(a).

⁵⁹¹ CPTPP Cooperation *supra* note 81 art 21.2.2(b).

⁵⁹² Chapter 2 section IV(b)(ii).

chapter, except to note that this is a limitation on the protections that can be provided to small-scale fisheries in a trade agreement dealing with fisheries subsidies.

In regard to technology and other fishing inputs, there have been a number of submissions from WTO members suggesting exemptions from the disciplines for subsidies for fuel, fishing gear and cold storage (ice, cool boxes etc.) either for small-scale fisheries specifically⁵⁹³ or for developing countries.⁵⁹⁴ These types of capacity-enhancing subsidies have been prohibited in the 2018 Working Document⁵⁹⁵ but this prohibition does not apply to the LDCs⁵⁹⁶ or SVEs.⁵⁹⁷ These subsidies would also, presumably, be allowed under one or both of the small-scale exemptions although, as discussed, there is little clarity on this and these exemptions may exclude a number of poor and vulnerable small-scale fishers from their ambit if small-scale fisheries are narrowly defined.⁵⁹⁸

The CPTPP, while not including any specific exemptions for small-scale fisheries, does make passing reference to food security in its fisheries subsidies provisions, in regard to the introduction of new subsidy programmes. As noted in Chapter 1,⁵⁹⁹ under this provision, parties ‘shall make best efforts to refrain from introducing new, or extending or enhancing existing, subsidies’ which contribute to overfishing and overcapacity, ‘taking into consideration a Party’s social and developmental priorities, including food security concerns’.⁶⁰⁰ This suggests that parties could, potentially, create new subsidy programmes in the interests of food security, including subsidies for fishing inputs to small-scale fisheries. However, the lack of data on stocks fished by small-scale fisheries again raises the problem of subsidies for these inputs contravening the ban on subsidies to overfished stocks.

All of this is not to say, of course, that fishing inputs to small-scale fisheries should not be disciplined in some manner. Unlike subsidies for the improvement of health and education in fishing communities, the provision of fishing inputs can have significant impacts on sustainability of aquatic ecosystems. However, these concerns only heighten the need for these subsidies to be dealt with explicitly in a trade agreement, in order that a better balance

⁵⁹³ See, e.g. Indonesia (2017) op cit note 530 at 4; SVE Group (2003) op cit note 509 at 3.

⁵⁹⁴ See, e.g. Brazil (2007) op cit note 506 at 4; Argentina (2007) op cit note 506 at 4.

⁵⁹⁵ Chair’s Working Document (2018) op cit note 12 arts 3.7(b) and (f).

⁵⁹⁶ Ibid art 5.4.

⁵⁹⁷ Ibid art 5.14.

⁵⁹⁸ See Section II(a)(iv) above.

⁵⁹⁹ Chapter 1 section III(b).

⁶⁰⁰ CPTPP Environment supra note 9 art 20.16.7.

between sustainability and development might be achieved. This issue is dealt with further in Chapter 4.⁶⁰¹

(iv) Transport and Telecommunications Infrastructure

As discussed, a number of WTO members have made submissions to the effect that government expenditure for social infrastructure in fishing communities should not be prohibited under the disciplines. Many of these submissions specifically mention transport infrastructure or roadways.⁶⁰² Yet, despite the importance of such infrastructure for many fishing communities, these provisions were not reflected in the 2018 Working Document and, like other forms of fisheries infrastructure, may fall foul of a ban on fisheries subsidies.

Another means of facilitating transport is the provision of vehicles, including boats, which may be necessary for transportation, particularly for remote or island fishing communities. These subsidies are banned under the prohibitions on capacity-enhancing subsidies in the 2018 Working Document,⁶⁰³ although the exemptions for capacity-enhancing subsidies for developing countries and small-scale fisheries may allow boat-building subsidies to be provided to certain small-scale fishers.

The CPTPP does not ban capacity-enhancing subsidies, but simply asks members to refrain from introducing new programmes.⁶⁰⁴ Thus, it does not specifically ban subsidies to boat-building and modernisation unless these target IUU fishing or overfished stocks. However, many subsidies to small-scale fisheries could be caught under the overfished stocks provisions, as discussed previously.⁶⁰⁵ The CPTPP also notes the importance of investing in public infrastructure for economic growth,⁶⁰⁶ although greater specificity, particularly in relation to small-scale fisheries, would better facilitate the implementation of transport and communications projects in fishing communities.

Unlike subsidies for other types of social infrastructure, however, blanket exemptions are unwise in the case of transport and telecommunications infrastructure. Such infrastructure may have a significant impact on sustainability of aquatic ecosystems as it can facilitate the

⁶⁰¹ See Chapter 4 section IV(c).

⁶⁰² New Zealand (2006) op cit note 551 at 3; The US (2007) op cit note 569 at 9; Indonesia (2007) op cit note 569 at 6; Japan, Korea and Chinese Taipei (2007) op cit note 569 at 7.

⁶⁰³ For a recent version of this prohibition see Chair's Working Document (2018) op cit note 12 art 3.7(c).

⁶⁰⁴ As discussed in Chapter 1 section III(b) and Section II(b)(iii) above.

⁶⁰⁵ See Section II(b)(i) above.

⁶⁰⁶ CPTPP Development supra note 80 art 23.3.3.

greater commercialisation of small-scale fisheries.⁶⁰⁷ Boat-building and modernisation subsidies are even more problematic as these are patently capacity-enhancing. They are also potentially detrimental to development, if small-scale fisheries are unable to diversify their livelihoods because of debt.⁶⁰⁸ Thus, as with fishing inputs, it is vital that these issues be dealt with effectively in trade agreements dealing with fisheries subsidies, and that a balance is struck between sustainability and development concerns. This is explored further in Chapter 4.⁶⁰⁹

(c) Security

Security for small-scale fisheries can take a number of forms. Chapter 2 considered that these fall into roughly three groups. The first is personal security, which means improved safety at sea (or on inland waters) and protection from natural disasters, such as droughts or hurricanes, which are increasingly being exacerbated by climate change. The second is social security, such as the provision of social safety nets, creation of community or fisher organisation insurance schemes, and transport infrastructure projects. The third is tenure security, which encompasses access to fishing grounds and tenure rights to traditional community land, particularly in coastal areas which are in high demand. Improving tenure security also requires recognition of inequities in distribution of tenure security, in order to protect women and other marginalised groups.

(i) Safety Initiatives and Disaster Relief

Both safety and disaster relief are issues which have been canvassed extensively in the WTO negotiations. There appears to be broad agreement that subsidies for the safety of vessels and crew,⁶¹⁰ as well as subsidies for disaster management⁶¹¹ should not be prohibited under the disciplines. The 2018 Working Document contains exemptions for the acquisition and

⁶⁰⁷ For a full discussion on this point see Chapter 4 section IV(b).

⁶⁰⁸ As discussed in Chapter 2 section IV(b)(ii) – see in this regard Allison & Ellis (2001) op cit note 234 at 382-383.

⁶⁰⁹ At Chapter 4 section IV(b).

⁶¹⁰ See, e.g. The US (2007) op cit note 569 at 5; Indonesia (2007) op cit note 569 at 17; WTO, 'Fisheries Subsidies – Articles I, II AND IV: Communication from the Republic of Korea (TN/RL/GEN/168)' (24 September 2010) at 5 and 11; Brazil (2007) op cit note 506 at 3; New Zealand (2006) op cit note 551 at 4.

⁶¹¹ See e.g. US (2007) ibid at 5; Indonesia (2007) ibid at 7; Korea (2010) ibid at 6 and 12; WTO, 'Contribution to the Discussion on the Framework for the Disciplines on the Fisheries Subsidies: Communication from Japan; the Republic of Korea; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (TN/RL/W/172)' (22 February 2005) at 3; Japan (2011) op cit note 85 at 11 and 16; Brazil (2007) ibid at 4; New Zealand (2006) ibid at 4; Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay (2017) op cit note 457 at 2.

installation of safety equipment,⁶¹² disaster relief,⁶¹³ safety and working conditions for fishers,⁶¹⁴ and resilience and adaptation to climate change.⁶¹⁵ Although these subsidies are aimed at fishermen and vessels generally, it is suggested that these provisions are sufficient to cover the types of safety problems faced by small-scale fisheries. However, it may be prudent to set out specific protections for small-scale fisheries in a trade agreement, given the particularly vulnerable nature of this group and the lack of attention paid to small-scale fisheries in regard to subsidy allocations.

It would also be beneficial if the provisions on disaster relief covered economic disasters, particularly given the hardships imposed on many small-scale fisheries by the current economic crisis.⁶¹⁶ An interpretation of this nature was, indeed, proposed by Japan⁶¹⁷ in 2011. The 2018 Working Document provides for ‘subsidies for [natural] disaster relief’⁶¹⁸ which suggests that this issue is still undecided. However, given the economic devastation caused to the fishing industry by the COVID-19 pandemic – through interruptions in trade and global supply chains, closures in the food service industry, and restrictions on movement⁶¹⁹ – WTO members will almost certainly want to include subsidies for economic disaster relief to assist in the recovery of their fishing industries.

Another important aspect of safety for small-scale fishers is the construction and improvement of landing sites and similar infrastructure. This infrastructure can also facilitate better access to markets for small-scale fisheries if it provides processing, cold storage, and handling facilities.⁶²⁰ A number of submissions in the WTO negotiations, from both developed and developing countries, have suggested that subsidies to build wharves, fishing

⁶¹² Chair’s Working Document (2018) op cit note 12 arts 2.4(f) and (g).

⁶¹³ Ibid art 2.4(e) – the exception for disaster relief comes with certain caveats, however, including time limitations and the fact that the fleet or area can only be restored to its pre-disaster state. This is important as disaster relief subsidies can include harmful prohibited subsidies, such as boat-building subsidies.

⁶¹⁴ Ibid art 3.6(b).

⁶¹⁵ Ibid art 2.4(f).

⁶¹⁶ These include a drop in demand, falling fish prices, lack of access to markets, the imposition of new sanitary measures, lack of mobility, and lack of storage and processing – see FAO, ‘Q&A: COVID-19 Pandemic - Impact on Fisheries and Aquaculture’ (2020), available at <http://www.fao.org/2019-ncov/q-and-a/impact-on-fisheries-and-aquaculture/en/>, accessed on 13 August 2020.

⁶¹⁷ Japan (2011) op cit note 85 at 11 and 16.

⁶¹⁸ Chair’s Working Document (2018) op cit note 12 art 2.4(e).

⁶¹⁹ FAO (2020) op cit note 616.

⁶²⁰ Ports provide improved infrastructure to access markets, such as roads, cold storage, processing facilities and so on – see Sciortino JA, *Fishing Harbour Planning, Construction and Management* (2010) FAO Fisheries and Aquaculture Technical Paper, FAO, available at <http://www.fao.org/3/i1883e/i1883e.pdf>, accessed on 13 August 2020 at 13. They can also be helpful in improving food safety and traceability, although this is generally only applicable to exports to countries like the EU which have stringent standards in this regard – see Ponte, Raakjær & Campling (2007) op cit note 155 at 133.

ports, and harbours, particularly those serving fishing communities and disadvantaged areas, should not be prohibited under the disciplines.⁶²¹ Certain states also maintain that the use of these subsidies should be confined to developing countries⁶²² but, to the extent that these types of installations are designed to benefit small-scale fishers, it seems unjust and arbitrary to differentiate between developed and developing countries.

The Chair's 2007 Draft Text banned port infrastructure 'exclusively or predominantly for activities related to marine wild capture fishing'⁶²³ while the 2018 Working Document does not include anything on ports and fisheries infrastructure. Neither of these approaches is without its problems. The banning of port infrastructure specifically related to fishing could, perversely, prohibit this infrastructure for fishing communities but not for infrastructure which services large industrial fleets, as large ports or waterfront areas are more likely to have a number of different uses.⁶²⁴ Not dealing with the issue at all, however, has a similar effect, as the creation of small ports and harbours for use in fishing communities specifically targets the fishing industry and/or certain regions, and could thus contravene a different subsidy ban, such as that on overfished stocks.

In addition, while the creation of large ports and fishing harbours is often a public good and can have many uses besides providing a place to land fish catches, it can have substantial impacts on the sustainability of aquatic ecosystems. These impacts arise not only from increased fishing but also from the generation of large amounts of pollution.⁶²⁵ Given these concerns, and the fact that the building of large ports provides a substantial benefit to the fishing industry, it is necessary that trade agreements dealing with fisheries subsidies do not entirely exempt the creation of large ports from regulation simply because this infrastructure has other uses. Instead, they should attempt to strike an appropriate balance between the sustainability and developmental aspects of problematic fisheries infrastructure, particularly when it comes to infrastructure servicing small-scale fisheries. This issue is discussed further in Chapter 4.⁶²⁶

⁶²¹ See, e.g. New Zealand (2006) op cit note 551 at 3; Indonesia (2007) op cit note 569 at 6; WTO, 'Fisheries Subsidies: Proposed Structure of the Discussion, Communication from Japan (TN/RL/W/159)' (7 June 2004) at 7; WTO, 'Possible Disciplines on Fisheries Subsidies: Paper from Brazil, Revision (TN/RL/GEN/79/Rev.1)' (21 February 2006) at 3; Japan, Korea and Chinese Taipei (2007) op cit note 569 at 7.

⁶²² WTO, 'Fisheries Subsidies: Special and Differential Treatment: Communication from Argentina, Chile, Costa Rica, Egypt and Uruguay, Revision (TN/RL/GEN/173/Rev.2)' (4 March 2011) at 2 and 5.

⁶²³ Chair's Draft Text (2007) op cit note 60 art I.1(d).

⁶²⁴ See Cho Y, 'Revisiting WTO Fisheries Subsidies Negotiations' (2015) 6 *Beijing Law Review* at 12.

⁶²⁵ See Chapter 4 section IV(a) for a discussion of these impacts.

⁶²⁶ Ibid.

In regard to safety initiatives in the RTAs, the CPTPP has one provision on cooperation and capacity building activities for disaster management in its general cooperation chapter.⁶²⁷ However, the general nature of this provision means that it has limited use for small-scale fisheries, and the CPTPP certainly does not deal with a situation where subsidies for safety initiatives and fisheries infrastructure could contravene its provisions on fisheries subsidies. Indeed, the CPTPP has hardly anything in the way of security provisions as they apply to small-scale fisheries, primarily because, as noted throughout this chapter, its environment chapter barely deals with development concerns. USMCA, similarly, contains nothing in regard to these types of security concerns. Thus, the RTAs are mentioned very little in this section.

(ii) Social Security

Chapter 2 noted that social security is an important means of accessing basic necessities. In regard to small-scale fisheries, it maintained that the types of social security mechanisms that could be of most benefit include the provision of social safety nets, creation of community insurance schemes, and infrastructure projects.⁶²⁸

The creation of infrastructure that could serve fishing communities has already been discussed under the sections on transport and communications infrastructure and safety initiatives and disaster relief.⁶²⁹ The social security aspect of infrastructure has a slightly different focus – namely the use of these projects to create jobs and, in some places, provide employment guarantees. To the extent that these projects provide employment for fishing communities, this could be seen as a fishing subsidy. However, these payments would likely only be seen as specific subsidies when this involved projects specific to a fishing community or area. Other major infrastructure projects would be seen as general infrastructure projects and draw labourers from many different sectors. As a result, employment costs for infrastructure projects benefitting the fisheries sector would not need to be dealt with as a separate subsidy in a trade agreement, as these would form part of the costs of creating such infrastructure. Thus, the focus of this part will be on the provision of social safety nets and insurance schemes.

⁶²⁷ CPTPP Cooperation supra note 81 art 21.2.2(c).

⁶²⁸ See Chapter 2 section IV(c)(iv).

⁶²⁹ At Sections II(b)(iv) and (c)(i) above.

Several submissions in the WTO negotiations, primarily from developed and large developing countries, have focused on the need to provide fishermen with social safety net benefits such as unemployment relief, early retirement, life insurance and insurance for injury or damage to boats and gear, support for fishworkers during temporary or permanent suspension of fishing activities (to build up stocks), income for social welfare, livelihood support for impoverished fishworkers, alternative employment assistance, and payments for natural disaster relief or other environmental and economic changes.⁶³⁰ With the exception of subsidies for the permanent cessation of fishing activities and disaster relief, however, these suggestions have not been included in the 2018 Working Document and, indeed, insurance, income support and social charges for fishing vessels and fishing-related activities are listed as prohibited capacity-enhancing subsidies.⁶³¹

These types of exemptions have mostly been proposed by developed countries and certain large developing countries, which are more likely to have resources to provide social benefits of this nature. Particularly in small developing countries, social safety nets and insurance may need to function at the community level, with some government support. Although the WTO negotiations do not deal specifically with this issue, the prohibition on insurance and income support subsidies may also be problematic in this regard, as government support for these schemes would essentially be support for fishers' insurance and social benefits. This situation is less than ideal.

There are a number of proposed exemptions to these prohibitions, including for LDCs, SVEs, certain fishing areas, and small-scale fishing.⁶³² Yet many of these exemptions suffer from the same shortcomings that have been discussed in other parts of this chapter,⁶³³ including vagueness, inconsistency, and the exclusion of certain types of poor and vulnerable fishers from important social benefits. In addition, the issue of operating inputs to fishers, even small-scale fishers, is a complicated one, as it does raise sustainability concerns. Thus, as with other fishing inputs, such as ice and gear, this issue should be further considered through a sustainable development lens. This analysis is conducted in Chapter 4.⁶³⁴

⁶³⁰ See The US (2007) op cit note 569 at 5; Indonesia (2007) op cit note 569 at 6-7; Korea (2010) op cit note 610 at 11-12; WTO, 'Fisheries Subsidies for Social Security and Welfare: Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (TN/RL/W/202)' (6 March 2006); Japan, Korea and Chinese Taipei (2007) op cit note 569 at 7; Brazil (2007) op cit note 506 at 3-4.

⁶³¹ Chair's Working Document (2018) op cit note 12 art 3.7(f).

⁶³² Ibid arts 3.7, 5.4 and 5.7-5.14.

⁶³³ See Sections II(a)(iv) and II(b)(iii) above.

⁶³⁴ Chapter 4 section IV(c).

(iii) Tenure Rights

Not all tenure security initiatives can be considered subsidies to fishing communities. These may be broad national processes, or may simply recognise long-held rights with no transfer of land or other financial contribution. Yet, to the extent that other, more lucrative, investments are foregone to provide tenure security to small-scale fisheries, or if a government makes payments to assist fishing communities to register tenure rights, there could be a specific financial contribution to the fisheries sector, and a subsidy may arise. Thus, tenure security initiatives, despite their importance in promoting food security and development, could contravene a subsidy ban if they do not fall under an exemption.⁶³⁵ Yet, they are not dealt with in any form in the trade agreements and negotiations under discussion.

It is, of course, arguable that providing access to the sea and inland water bodies through tenure security initiatives could have sustainability impacts because this allows for fishing to take place. Generally, however, tenure rights for small-scale fisheries will simply provide greater security of access, and legitimise rights that already existed. They can also lead to reduced dependence on wild capture fish if land is developed for activities such as farming or tourism. Thus, the provision of tenure security for small-scale fishers and fishing communities should have, at worst, minor sustainability impacts that are far outweighed by the development benefits of assisting small-scale fisheries in this manner.

Providing tenure security for small-scale fisheries will also go some way towards protecting the tenure rights of marginalised groups, particularly those who are full-time fishers and need access to fishing grounds to sustain their livelihoods. Still, the inequities that often exist within fishing communities will likely require more to ensure that women and other marginalised groups are not excluded from land tenure processes. As discussed in Section II(a)(v), however, there is currently very little in trade agreements on protections for marginalised groups, which is a significant gap in these agreements.

(d) Good Governance

Chapter 2 contended that there are a number of areas where governance could be improved to facilitate the development of small-scale fisheries. These include transparent quota and rights allocation processes, transparency in the creation of access agreements; facilitation of

⁶³⁵ As discussed in Section II(a)(iv) above, these exemptions, where they exist, are generally unsatisfactory for development and poverty reduction in small-scale fisheries.

participation; control of corruption and mismanagement, especially in the fisheries industry; improved cooperation and collaboration between those dealing with fisheries issues; and other general improvements to governance, such as strengthening civil society and improving access to justice and access to information.⁶³⁶ Although there is a great deal of overlap between these issues, the section follows Chapter 2 and structures the discussion under the headings of transparency, participation and strengthening institutions.

(i) Transparency

General transparency concerns in the WTO negotiations relate to an important reporting issue – notification of subsidies. Member submissions have focused primarily on notification of fishing subsidies covered by the disciplines, but some submissions also emphasise that vessel capacity, fishery production and subsidies not covered by the disciplines, such as fuel subsidies, should be notified to the WTO.⁶³⁷ In the 2018 Working Document members must provide information related to prohibited subsidy programmes as well as how they are implementing the prohibitions on certain subsidies, information on non-prohibited subsidies (including fuel and aquaculture subsidies), and lists of vessels engaging in IUU fishing, including circulars from RFMOs.⁶³⁸ These requirements do not apply to LDCs, however.⁶³⁹

The CPTPP, too, requires that parties provide information on subsidies prohibited under the agreement, as well as subsidies not covered by the agreement, including fuel subsidies.⁶⁴⁰ Whether these notification requirements will be of assistance in curbing the use of non-prohibited subsidies is debatable. However, if reporting requirements are adhered to, these provisions will be helpful in holding members to their commitments on prohibited subsidies, as notifications provide information that can lead to challenges to subsidy programmes from other parties to the agreement or civil society.⁶⁴¹ On balance, this is likely to be a beneficial outcome for small-scale fisheries, given that the majority of harmful

⁶³⁶ See Chapter 2 section IV(d)(iv).

⁶³⁷ Japan, Korea and Chinese Taipei (2007) op cit note 569 at 4; Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay (2017) op cit note 457 at 4; WTO, 'Proposed MC11 Fisheries Subsidies Disciplines: Implementing SDG Target 14.6: Communication from Iceland, New Zealand, and Pakistan (TN/RL/GEN/186)' (27 April 2017) at 7.

⁶³⁸ Chair's Working Document (2018) op cit note 12 art 6.

⁶³⁹ Ibid art 5.20.

⁶⁴⁰ CPTPP Environment supra note 9 arts 20.16.9-20.16.11.

⁶⁴¹ For example, the 2018 Working Document provides for the Committee on Subsidies and Countervailing Measures (SCM Committee) to hold a biennial review on the implementation of the agreement and members' subsidy programmes, based partly on members' subsidy notifications – Chair's Working Document (2018) op cit note 12 art 8.1.

subsidies currently go to industrial fishing, although the onerous nature of notification may be a deterrent to smaller developing countries providing subsidies to their fishers, most of which are small-scale.

Other transparency issues identified in Chapter 2 include greater transparency in access agreements and quota allocations. As noted in Section II(a)(ii) above, proposals in the WTO negotiations to make access agreements transparent do not appear in the 2018 Working Document, which is highly problematic. Greater transparency in quota and right allocations is also not dealt with specifically in the WTO negotiations or the CPTPP. This is more understandable as quota allocations are a fisheries management, rather than a subsidy, issue. However, management measures for fish stocks for which subsidies are provided must be notified under the 2018 Working Document⁶⁴² as well as the CPTPP.⁶⁴³ Thus, elements of transparency in fisheries management can be found in these agreements.

The CPTPP also has a number of general transparency provisions in its environment chapter, relating to awareness and enforcement of its provisions, the creation of fair, equitable and transparent judicial or administrative proceedings for the enforcement of parties' environmental laws, and the publication of written submissions and responses regarding the implementation of the environment chapter.⁶⁴⁴ A specific chapter on transparency and corruption also includes general transparency measures applicable to the whole agreement.⁶⁴⁵ Because of the lack of detail in the CPTPP on most development issues affecting small-scale fisheries, these provisions do not directly assist small-scale fisheries. However, they can be used to ensure that the prohibitions on fisheries subsidies are complied with which, like the WTO negotiations, would improve equity between large- and small-scale fishers.

(ii) Participation

Chapter 2 identified a number of important issues relating to participation of small-scale fisheries in issues that affect them. These include strengthening processes that allow for informal participation (which will largely be dealt with in the section on strengthening

⁶⁴² Ibid art 6.1(i).

⁶⁴³ CPTPP Environment supra note 9 art 20.16.10(f).

⁶⁴⁴ Ibid arts 20.7 and 20.9.

⁶⁴⁵ CPTPP Transparency supra note 81 arts 26.2-26.5. Note that USMCA does not have a similar chapter, but does include transparency provisions very similar to those in the CPTPP's environment chapter – see USMCA Environment supra note 10 arts 24.5-24.6.

institutions), formal participatory processes such as co-management (where feasible), and greater participation of women and other marginalised groups.⁶⁴⁶

The need for co-management is mentioned only once in the WTO negotiations in a submission by Ecuador and Egypt, which proposes that technical assistance be provided to develop ‘strong fisheries collectives to join in "co-management" activities alongside government authorities’ where appropriate.⁶⁴⁷ Other suggestions to involve small-scale fisheries in management usually refer to use of traditional fisheries knowledge and institutions. These types of proposals have been included in a number of submissions in the WTO negotiations, usually from developing countries.⁶⁴⁸

The 2018 Working Document does not mention co-management or any other involvement of small-scale fisheries in fisheries management. However, it does provide for technical assistance for fisheries management and further exempts subsidies for the promotion of sustainable fisheries⁶⁴⁹ and the adoption of techniques or technology aimed at...improving compliance with fisheries management regimes’.⁶⁵⁰ These provisions would cover government support for involvement of small-scale fisheries in management, which seems to be endorsed by many WTO members as an important conservation tool. Use of co-management organisations and traditional ecological knowledge are also important facets of an ecosystem approach to fisheries management the use of which, as will be discussed further in Chapter 4, should form an important caveat to the use of certain subsidies.

There has been very little else around participation of small-scale fisheries in the WTO negotiations. A lone submission from Japan, Korea and Chinese Taipei in 2007 suggested that in the case of WTO disputes involving small-scale fisheries in developing country members ‘representative(s) from local stakeholder groups, such as community fishery management groups’ could be invited to participate in the dispute by giving expert advice on the matter to a WTO panel.⁶⁵¹ Whether this idea will be included in the final

⁶⁴⁶ Chapter 2 section IV(d)(iv).

⁶⁴⁷ Ecuador and Egypt (2011) op cit note 528 at 3.

⁶⁴⁸ See Ecuador and Peru (2011) op cit note 543 at 4; Brazil, China, India and Mexico (2010) op cit note 510 at 3; WTO, 'Fisheries Subsidies: Articles I, III, IV, V AND VI: Communication from Morocco (TN/RL/GEN/170)' (14 December 2010) at 4; WTO, 'Need for Effective Special & Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies Text, Submission by India, Indonesia and China, Revision (TN/RL/GEN/155/Rev.1)' (19 May 2008) at 12.

⁶⁴⁹ Chair's Working Document (2018) op cit note 12 arts 2.4(f) and 3.6(a).

⁶⁵⁰ Ibid art 2.4(f).

⁶⁵¹ Japan, Korea and Chinese Taipei (2007) op cit note 569 at 8-9.

agreement is unclear at present, as very little has been discussed in regard to dispute settlement. In general, however, there has been a lack of attention paid to participation issues in the negotiations. This is a significant gap, as there are aspects of a future agreement which could include provisions for the participation of small-scale fisheries, including dispute settlement and the creation of an appropriate definition of small-scale fisheries.⁶⁵² Although not relevant for the actual provisions of the agreement, WTO members could also do more to include these voices in the negotiating process, such as conducting national participatory processes with fishers to inform their submissions to the Rules Group.

The CPTPP does not have anything specific on involving small-scale fisheries in resource management. In the context of biodiversity it does provide that '[t]he Parties recognise the importance of respecting, preserving and maintaining knowledge and practices of indigenous and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity.'⁶⁵³ However, this provision is focused on the preservation of knowledge and practices of communities, not the involvement of such communities in management of resources. Interestingly, USMCA goes beyond the CPTPP in this regard, and acknowledges the importance of involving indigenous and local communities in long-term environmental conservation.⁶⁵⁴ Still, this provision is fairly general and applies only in the context of conservation, not managing fish stocks for food security and other important development purposes.

The CPTPP also has provisions on public participation and public submissions in its environment chapter. These provisions deal with requests for information and the creation of consultative mechanisms on the implementation of the chapter,⁶⁵⁵ as well as requiring each party to set up mechanisms for 'the receipt and consideration of written submissions from persons of that Party regarding its implementation of this Chapter.'⁶⁵⁶ As noted in Chapter 2, the ability to petition government is one aspect of participation in government processes, although these types of processes often do not assist the poor.⁶⁵⁷ In the case of small-scale fisheries, particularly those in rural areas with little access to telecommunications or

⁶⁵² One of the options in the current negotiations is for each state to decide on its own definition of small-scale fisheries. A comprehensive discussion on this issue can be found at Chapter 5 section II(b).

⁶⁵³ CPTPP Environment *supra* note 9 art 20.13.3.

⁶⁵⁴ USMCA Environment *supra* note 10 art 24.2.4.

⁶⁵⁵ CPTPP Environment *supra* note 9 art 20.8.

⁶⁵⁶ *Ibid* art 20.9.1. USMCA has similar provisions, although its provisions on written submissions are not as detailed as those in the CPTPP – USMCA Environment *supra* note 10 art 24.5.

⁶⁵⁷ Chapter 2 section IV(d)(ii).

education, the efficacy of these types of provisions for improving participation is dubious.⁶⁵⁸ Thus, while they could assist civil society organisations working with small-scale fisheries, in many cases these provisions would need to be coupled with provisions on access to education and the creation of other social infrastructure to be effective in improving participation of small-scale fisheries.

(iii) Strengthening of Institutions

During the course of the WTO negotiations, four notable aspects that could assist in strengthening institutions have arisen. The first is the provision of technical assistance for the purpose of improving fisheries management and assisting fisheries management bodies.⁶⁵⁹ This can help small-scale fisheries by improving stock levels and providing better monitoring, particularly of distant water fishing fleets. This may also minimise opportunities for corruption in the fishing sector, as partnerships between fisheries management bodies would increase oversight of the activities of these bodies. The second is the inclusion of provisions for cooperation and partnerships. In the 2018 Working Document, partnerships are to be maintained at an international level, with the Committee on Subsidies and Countervailing Measures (SCM Committee) required to maintain close contact with the FAO and relevant RFMOs.⁶⁶⁰ It further provides that direct communication and cooperation agreements between WTO members should be encouraged to combat IUU fishing.⁶⁶¹ The third is notification requirements relating to subsidy programmes and IUU fishing vessels, as discussed. More transparency in the fishing industry can assist in minimising corruption and improve the ability of civil society organisations and small-scale fisheries to challenge government policy. The fourth is the focus on co-management arrangements and use of traditional knowledge by many members, which can strengthen fisheries management bodies by supplementing data on fish stocks and ensuring greater oversight of fishing, particularly in remote areas.⁶⁶²

Considering the limited scope of the WTO negotiations, which focus purely on fisheries subsidies rather than a wider range of environmental matters, it is submitted that

⁶⁵⁸ The efficacy of these provisions for the enforcement of fisheries subsidies violations is also debatable, given that submissions may have to explain how the issue affects trade or investment between the parties and fisheries subsidies are often difficult to link to trade effects – CPTPP Environment supra note 9 art 20.9.2(d). Problems with linking fisheries subsidies to trade effects are discussed further in Chapter 5 section III(a).

⁶⁵⁹ As discussed in Section II(a)(iii) above.

⁶⁶⁰ Chair's Working Document (2018) op cit note 12 art 8.5.

⁶⁶¹ Ibid art 8.9.

⁶⁶² See Chapter 2 section IV(d)(iv).

WTO members have done a relatively good job in providing measures to strengthen institutions, at both the local and international level. More could certainly be done to facilitate access to justice for small developing countries and small-scale fisheries, but as very little has been discussed in regard to dispute settlement as yet, provisions of this nature may still be forthcoming. This issue is explored further in Chapter 5.⁶⁶³

The CPTPP, as discussed in the context of transparency and participation, has provisions on procedural matters (such as requests for information) and public submissions in its environment chapter.⁶⁶⁴ Although these provisions may not always be effective in improving the participation of under-developed small-scale fisheries, they can be beneficial in strengthening institutions, by increasing government accountability and providing information and procedures through which environmental rights, including in fisheries, can be asserted. The CPTPP's technical assistance provisions could also assist in improving fisheries governance, although these provisions are not specifically aimed at fisheries management. In regard to notifications of fisheries subsidies, it is not clear whether these will be made public, as is generally the case in the WTO. However, this information could possibly be obtained through a request for information.⁶⁶⁵

Other measures for improving governance can also be found in the environment, development and anti-corruption chapters of the CPTPP. Article 20.11 of the Environment Chapter provides that '[t]he Parties recognise that flexible, voluntary mechanisms, for example, voluntary auditing and reporting, market-based incentives, voluntary sharing of information and expertise, and public-private partnerships, can contribute to the achievement and maintenance of high levels of environmental protection and complement domestic regulatory measures.'⁶⁶⁶ Auditing, particularly of government finances is, as discussed in Chapter 2, a vital aspect of transparency and the prevention of corruption.⁶⁶⁷ In a broader sense, auditing could also include review of parties' subsidy programmes, which forms a component of both the CPTPP⁶⁶⁸ and WTO negotiations.⁶⁶⁹

⁶⁶³ Chapter 5 section III(b).

⁶⁶⁴ CPTPP Environment supra note 9 arts 20.7-20.9.

⁶⁶⁵ Ibid art 20.8.

⁶⁶⁶ Ibid art 20.11.1.

⁶⁶⁷ Chapter 2 section IV(d)(i).

⁶⁶⁸ CPTPP Environment supra note 9 art 20.16.8.

⁶⁶⁹ Chair's Working Document (2018) op cit note 12 art 8.1.

Prevention of corruption is dealt with in the CPTPP's transparency and anti-corruption chapter, which is specifically made applicable to the entire CPTPP agreement.⁶⁷⁰ This chapter uses mandatory language and deals with issues such as bribery, the importance of auditing, transparency, proper hiring processes, conflicts of interest, whistleblowing, disciplinary measures, prevention of corruption in the judiciary, and strengthening of civil society in the fight against corruption.⁶⁷¹ These are important provisions, given the problems around corruption in fisheries management.

Finally, the development chapter of the CPTPP has a number of provisions noting the importance of issues such as transparency, good governance, accountability,⁶⁷² strengthening of public institutions⁶⁷³ and partnerships between public entities, as well as with the private sector and NGOs⁶⁷⁴ in order to better facilitate development. As has been noted previously, USMCA differs from the CPTPP in this regard as it does not have a development chapter.

Thus, the CPTPP has a broad range of provisions that could be of assistance in improving governance in the fisheries industry. Indeed, the CPTPP does a good job of providing for measures that will assist in strengthening institutions if they are implemented, although it is unfortunate that there is no specific mention of the need to strengthen fisheries management institutions. USMCA also has good provisions in this regard, although the absence of any sort of development focus does weaken its protections for small-scale fisheries to a certain extent.

III. Conclusion

It is clear that small-scale fisheries face many challenges. Many are poor, vulnerable and marginalised and the sector faces numerous threats, including resource depletion, unsafe working conditions, and climate change. The needs of small-sale fisheries should, thus, be of paramount concern when considering the allocation and prohibition of support for the fisheries sector. However, while steps are being taken to include the needs of small-scale fisheries in trade agreements, there is, at present, not enough being done.

⁶⁷⁰ CPTPP Transparency supra note 81 art 26.6.2.

⁶⁷¹ Ibid arts 26.7-26.10.

⁶⁷² CPTPP Development supra note 80 art 23.2.3.

⁶⁷³ Ibid art 23.3.3.

⁶⁷⁴ Ibid art 23.6.

The trade treaties and negotiations canvassed in this chapter do contain some provisions that could assist with poverty reduction and development in small-scale fisheries. Some of these provisions are indirectly beneficial, while others provide direct benefits. They do so in differing degrees and with different focuses. Nevertheless, there is certainly room for improvement in all the development areas proposed. The CPTPP and USMCA, while reflecting a concern for small-scale fisheries, in the main assist only indirectly, by placing stricter controls on large-scale fleets and promoting improved governance in environmental matters. The WTO negotiations, too, provide indirect benefits and also reflect a general concern for small-scale fisheries but, while many member submissions make detailed proposals for the assistance of small-scale fisheries, the 2018 Working Document contains few specifics and shows no consensus on these issues.

The analysis has, thus, revealed some significant gaps in these agreements and negotiations. First, exemptions for subsidies to small-scale fisheries are either non-existent or unclear, which can stifle development and further marginalise vulnerable fishers. Secondly, the WTO negotiations show ongoing problems around defining small-scale fisheries, which could derail the proposed general exemptions for subsidies to small-scale fisheries. Thirdly, issues such as access subsidies and fuel subsidies, which have significant negative impacts on development and sustainability, are not dealt with clearly or at all. Finally, there is a lack of specificity in these agreements, creating the perception that the needs of small-scale fishers are not important enough to deal with in any comprehensive manner, and potentially leading to the prohibition of certain beneficial subsidies, such as community infrastructure or tenure security. There is also little to no mention of participation of fishing communities in issues that affect them and the problems faced by women and other marginalised groups in fishing communities are generally ignored or provided for only in a general way, which can have significant effects on poverty and development.

Greater specificity is also important in the case of subsidies that may be beneficial to small-scale fisheries but have significant sustainability impacts. As noted in the chapter, these include subsidies for port and related infrastructure, transport and telecommunications infrastructure, boats and vehicles for transport, and operating inputs, such as fuel, ice, insurance and income support. It is important to deal with these subsidies in a trade agreement in order to strike the best possible balance between sustainability and development in each case. In this regard, Chapter 4 explores the issue of fisheries sustainability in greater detail and draws on this analysis to suggest ways to strike this balance more effectively.

CHAPTER 4 – SUSTAINABILITY IMPLICATIONS OF SUBSIDIES FOR SMALL-SCALE FISHERIES

I. Introduction

Sustainable development is an important issue when it comes to small-scale fisheries and is a central concept of this thesis. Thus far, the thesis has dealt primarily with development issues, considering how the needs of small-scale fisheries can best be met by states, including through the judicious exemption of social assistance subsidies in international trade agreements. However, it is also important to take into account sustainability concerns when providing subsidies to small-scale fisheries.⁶⁷⁵ In this regard, Chapter 3 found that certain fisheries subsidies that could be used for the development of small-scale fisheries could cause problems for the sustainability of aquatic ecosystems. These include subsidies for fisheries infrastructure, transport and telecommunications, and operating inputs such as fuel, gear, cold storage, insurance and income support. This chapter addresses these concerns.

Chapter 3 argued that it would benefit small-scale fisheries to have greater specificity in the negotiations and agreements discussed, rather than vague general exemptions. Although a general (catch-all) exemption can be useful to ensure that nothing is overlooked, specificity can create greater moral obligation, highlight the types of initiatives that can assist small-scale fisheries, and, for the purposes of this chapter, allow for different types of provisions to be treated differently in order to obtain a better balance between sustainability and development concerns. Thus, specificity allows for safeguards or conditionalities to be placed on the provision of subsidies where necessary, to prevent overfishing and ecosystem degradation. Where such conditionalities are not necessary, however, assistance can be provided to small-scale fisheries without the types of onerous requirements attached which could deter government assistance in under-resourced countries.

To this end, the purpose of the chapter is to analyse those subsidies that may lead to degradation of aquatic environments, and offer possible safeguards to ensure that sustainable development is achieved when it comes to subsidisation of small-scale fisheries. There are a number of important reasons to undertake such an analysis. First, sustainability is a key purpose of disciplining fisheries subsidies in trade agreements. Without sufficient attention

⁶⁷⁵ As discussed in Chapter 1 section I, sustainability concerns are not absent in small-scale fisheries, even if they are generally not as severe as those accompanying large-scale fishing.

paid to the sustainability implications of social assistance subsidies, therefore, important development provisions are unlikely to be included in these agreements. Secondly, sustainability is important for small-scale fisheries, as depletion of fish stocks can be highly detrimental to livelihoods. Thirdly, this approach puts greater emphasis on the *type* of exemption provided than *to whom* the exemption is provided. As will be discussed in Chapter 5, this is a beneficial approach when we consider the problems around defining small-scale fisheries that have arisen in the negotiations.⁶⁷⁶

Before undertaking this analysis, however, it is important to understand the state of world fisheries and how sustainability in this sphere can be enhanced through proper fisheries management. This informs the discussion on why certain subsidies are potentially harmful to sustainability, as well as the type of safeguards that can prevent such harm. Indeed, while fisheries management alone is not enough to prevent overfishing and curtail the detrimental effects of harmful subsidies,⁶⁷⁷ the sustainability implications of subsidies are inextricably linked to fisheries management. Subsidies can be beneficial (if they assist in improving fisheries management) or detrimental to management efforts (if they lead to overcapacity), and the harmful effects of certain subsidies can also be lessened or exacerbated by the management approach adopted.⁶⁷⁸

Thus, Sections II and III of this chapter examine the history of, and consider what constitutes, good fisheries management, looking particularly at approaches that take into account development concerns and incorporate these types of considerations into the management approach. This will ensure that, where trade agreements cannot or do not pay sufficient attention to development initiatives such as co-management, they can still be incorporated in any fisheries management component of the agreement. In this regard, the CPTPP, USMCA and WTO negotiations all incorporate provisions on fisheries management, either as standalone provisions⁶⁷⁹ or components of exemptions.⁶⁸⁰

⁶⁷⁶ Chapter 5 section II(b).

⁶⁷⁷ See discussion in Chapter 1 section III(a).

⁶⁷⁸ According to UNEP, effective management can reduce harmful subsidy effects, while poor management can exacerbate these effects – see UNEP (2011) op cit note 15 ch 2.

⁶⁷⁹ USMCA Environment supra note 10 art 24.18; CPTPP Environment supra note 9 art 20.16.3.

⁶⁸⁰ For example, the 2018 Working Document includes exemptions for subsidies that benefit fisheries management, as well as requiring a fisheries management plan in order to utilise certain exemptions, such as those provided to developing countries – Chair's Working Document (2018) op cit note 12 arts 2.4(f), 3.6(a) and 5.9-10.

Section IV discusses in greater detail the subsidies that may cause environmental degradation if they are allowed for small-scale fisheries in trade agreements, either because of the potential for countries to circumvent the disciplines and apply these subsidies to their industrial fishing⁶⁸¹ or because such subsidies could increase fishing or other problematic behaviour (e.g. habitat destruction). Based on the discussion on the elements of good fisheries management in Section III of the chapter as well as particular considerations pertinent to each type of subsidy, the chapter suggests possible safeguards or conditions that could be attached to these subsidies to ensure that they strike an appropriate balance between sustainability and development.

II. Sustainability and the Evolution of Fisheries Management

Despite the fact that the prevailing belief until as late as the 19th century was that, in the marine environment at least, resources were inexhaustible,⁶⁸² there is evidence to suggest that human activity has always had a detrimental effect on fish populations and aquatic ecosystems.⁶⁸³ With the rise of technology, however, the ability of humans to access aquatic resources, even in remote locations and the depths of the ocean, has increased significantly. Coupled with a lack of enforcement capacity and, often, a lack of will from both governments and fishers to conserve fish stocks, a systematic decimation of aquatic resources and ecosystems has occurred, including several prominent stock collapses with global effects.⁶⁸⁴ Certain government policies, including the provision of capacity-building subsidies, have further increased the potential for overfishing.⁶⁸⁵

It is also true that, while overfishing should take a large portion of the blame for destruction of aquatic ecosystems, there are other contributing factors in this regard. These include destructive fishing methods, pollution (including through dumping of bycatch and

⁶⁸¹ Whether this issue arises depends on how small-scale fisheries are defined, a problem which is discussed further in Chapter 5 section II(b). Assuming, however, that we want to protect the majority of small-scale fisheries, the definition of small-scale fisheries could be wide enough to allow countries to subsidise some aspects of their industrial fishing and thus circumvent the disciplines.

⁶⁸² Sumaila UR, Khan A, Watson R, et al., 'The World Trade Organization and global fisheries sustainability' (2007) 88 *Fisheries Research* at 1; Jackson, Kirby, Berger, et al (2001) op cit note 140 at 35.

⁶⁸³ Pauly D, Christensen V, Guénette S, et al., 'Towards Sustainability in World Fisheries' (2002) 418 *Nature* 6898 at 689. See also Jackson, Kirby, Berger, et al (2001) *ibid*, who document many historic instances of overfishing by humans and its ramifications.

⁶⁸⁴ Pauly, Christensen, Guénette, et al (2002) *ibid* at 690; Garcia SM, Zerbi A, Aliaume C, et al., *The Ecosystem Approach to Fisheries: Issues, Terminology, Principles, Institutional Foundations, Implementation and Outlook* (2003) FAO Fisheries Technical Paper, FAO, available at <http://www.fao.org/3/a-y4773e.pdf>, accessed on 13 August 2020 at 5.

⁶⁸⁵ Margaret Young (2011) op cit note 6 at 87-88.

loss of gear), and land-based activities that affect water sources, such as agriculture, manufacturing and coastal development.⁶⁸⁶ The growing threat of climate change also has significant effects on aquatic ecosystems. A recent report by the Intergovernmental Panel on Climate Change (IPCC) details these effects on the ocean, including the shrinking of the cryosphere (ice sheets, glaciers, snow cover etc.), rising sea levels, an increase in extreme sea level events, rapidly warming oceans, greater incidence of marine heatwaves, ocean acidification and oxygen loss.⁶⁸⁷ These events have varying, but generally negative, consequences for marine and coastal ecosystems,⁶⁸⁸ ecosystem services, and people – particularly indigenous peoples and local fishing communities.⁶⁸⁹ The impact of climate change on inland water sources was not dealt with in the IPCC report but there are significant effects on these water sources too, whether it be through severe droughts and floods, rising sea levels rendering water non-potable, or any number of catastrophic events that are exacerbated by climate change and affect these water bodies and the life within and around them. There is, therefore, a clear need for fisheries management which takes into account all these pressures on aquatic ecosystems.

The idea of single-species management of fish stocks appeared in the early 1950s as a result of observations that heavily exploited fish stocks recovered almost completely when left alone during the two world wars.⁶⁹⁰ Single-species management or managing at maximum sustainable yield (MSY)⁶⁹¹ concentrates on managing the specific stocks being targeted, by determining how much of the stock can be removed while still maintaining optimum levels of that stock for fishing purposes. This concept was later enshrined in UNCLOS which further provides that, to the extent that a state is not able to harvest the MSY of fish in its waters, it should provide access to other states to do so.⁶⁹² UNCLOS also created the EEZ, which gives states exclusive use rights to resources over an area two hundred

⁶⁸⁶ FAO, *Fisheries Management 2. The Ecosystem Approach to Fisheries* (2003) FAO Technical Guidelines for Responsible Fisheries FAO, available at <http://www.fao.org/3/a-y4470e.pdf>, accessed on 13 August 2020 at 19-20.

⁶⁸⁷ IPCC, *The Ocean and Cryosphere in a Changing Climate: Summary for Policymakers* (2019) IPCC, available at https://report.ipcc.ch/srocc/pdf/SROCC_SPM_Approved.pdf, accessed on 13 August 2020 at 8-11.

⁶⁸⁸ *Ibid* at 11-14.

⁶⁸⁹ *Ibid* at 16-19.

⁶⁹⁰ Pauly, Christensen, Guénette, et al (2002) *op cit* note 683 at 689.

⁶⁹¹ Maximum sustainable yield (MSY) is 'the highest possible annual catch that can be sustained over time, by keeping the stock at the level producing maximum sustainable growth' – WWF, 'Common Fisheries Policy Reform: Getting MSY Right' (2011), available at

http://awsassets.panda.org/downloads/wwf_msy_oct2011_final.pdf, accessed on 13 August 2020.

⁶⁹² UNCLOS *supra* note 154 arts 61-62.

nautical miles from its coastline⁶⁹³ as well as an obligation to conserve resources in this area.⁶⁹⁴ Prior to this, the majority of the ocean was unregulated and fishing continued with impunity on the high seas, including in the waters that now form the EEZs of developing countries.

It is questionable whether the creation of EEZs has improved sustainability of aquatic ecosystems, however, as poor developing states have little in the way of capacity or resources to enforce conservation rules and gather the data needed for effective management in the large EEZs they now control. A lack of resources to build up their own fleets has also meant that these states are not able to use their EEZs to full advantage.⁶⁹⁵ This is problematic as the decline in fish stocks in other parts of the world has led wealthy states to turn towards the resources of small developing countries. These fleets pay a fraction of what the fish is worth⁶⁹⁶ and deplete the waters of these states at the expense of sustainability and development. Giving access to distant water fleets on the basis that stocks in the EEZ are underutilised is also, in many cases, disingenuous. It is often impossible to tell if this is true or not, because of inadequate data, or support for those that could interpret the data, on the stocks being targeted.⁶⁹⁷ As a result, many developing country fisheries are overexploited.⁶⁹⁸

Yet small developing countries are not the only ones struggling to manage their aquatic resources. Implementation of management approaches in aquatic environments is challenging for any state,⁶⁹⁹ especially given increasing recognition that single-species (conventional) management is inadequate for protection of aquatic ecosystems. In this regard, more holistic ecosystem approaches to fisheries management (ecosystem management), which require that the effects of fishing on aquatic ecosystems – rather than just the targeted stock – be taken into account, are starting to become the accepted model for fisheries

⁶⁹³ This area is measured from the same baseline established to determine the territorial sea – *ibid* art 57 read with Part II, s2.

⁶⁹⁴ *Ibid* arts 55-57 and 61.

⁶⁹⁵ Mbithi Mwikya (2006) *op cit* note 156 at 33.

⁶⁹⁶ Belhabib, Sumaila, Lam, et al (2015) *op cit* note 157 at 4 – the authors note that amounts paid for access are less than they appear at face value because a large proportion of the catch of distant water fishing fleets is not recorded or reported in official catch statistics.

⁶⁹⁷ *Ibid* at 2.

⁶⁹⁸ See, for example, Gorris P, 'Mind the Gap Between Aspiration and Practice in Co-Managing Marine Protected Areas: A Case Study from Negros Occidental, Philippines' (2019) 105 *Marine Policy* at 14; Belhabib D, Sumaila UR & Le Billon P, 'The Fisheries of Africa: Exploitation, Policy, and Maritime Security Trends' (2019) 101 *Marine Policy* at 80-86; UNEP (2011) *op cit* note 15 at 69-70.

⁶⁹⁹ See UNEP (2011) *ibid* at 30-31.

management.⁷⁰⁰ Given its wider scope, ecosystem management requires more data and resources than conventional management,⁷⁰¹ and aquatic ecosystems, particularly marine ecosystems and those that cross jurisdictional boundaries, are often difficult to map⁷⁰² and monitor.⁷⁰³

Principles that underpin ecosystem management are, moreover, not consistent in the literature. In a review of the literature on marine planning, Kirkfeldt notes that the three most popular ecosystem perspectives (excluding specific sectoral approaches such as ecosystem-based fisheries management) are ecosystem-based management, the ecosystem-based approach, and the ecosystem approach. These approaches have different focuses on paper, although their application and outcomes are very similar in practice.⁷⁰⁴ Nevertheless, practitioners and researchers interviewed for the Kirkfeldt review showed wide-ranging and diverging opinions on what should be included in these approaches.⁷⁰⁵ The FAO has also observed that more holistic ecosystem approaches, such as those canvassed in the Kirkfeldt review, tend to have a greater ecological focus than sectoral ecosystem approaches to fisheries management.⁷⁰⁶

The sectoral concept of ecosystem-based fisheries management (EBFM) is often discussed in papers dealing with ecological approaches to fisheries and the marine environment.⁷⁰⁷ However, while certain common principles can be extrapolated from this

⁷⁰⁰ See FAO, *Fisheries Management 2. The Ecosystem Approach to Fisheries 2.2 The Human Dimensions of the Ecosystem Approach to Fisheries* (2009) FAO Technical Guidelines for Responsible Fisheries, FAO, available at <http://www.fao.org/3/a-i1146e.pdf>, accessed on 13 August 2020 at 1; Kirkfeldt TS, 'An Ocean of Concepts: Why Choosing Between Ecosystem-Based Management, Ecosystem-Based Approach and Ecosystem Approach Makes a Difference' (2019) 106 *Marine Policy* at 1; Gelcich S, Reyes-Mendy F, Arriagada R, et al., 'Assessing the Implementation of Marine Ecosystem Based Management into National Policies: Insights from Agenda Setting and Policy Responses' (2018) 92 *Marine Policy* at 40-41. The need for an ecosystem approach in managing aquatic ecosystems is also recognised in a number of international instruments, including UNCED, 'Agenda 21 (UN Doc A/Conf.151/26)' (1992) chs 17 and 18; UNFSA supra note 90 arts 5 and 6; FAO Code of Conduct supra note 91; Convention on Biological Diversity, 'Aichi Biodiversity Targets' (2010), available at <https://www.cbd.int/sp/targets/>, accessed on 13 August 2020 Targets 6 and 11 (amongst others); SDG Goal 14 op cit note 42; SSF Guidelines supra note 1, particularly arts 3.11, 6.1, 7.5, 10.4, 10.5 and 10.9.

⁷⁰¹ For a full discussion on data needs under an ecosystem approach see Section III below.

⁷⁰² Spatial mapping of an ecosystem is a vital first step in ecosystem management but may be a complicated process involving input by many different stakeholders - FAO (2003) op cit note 686 at 19 and 46.

⁷⁰³ FAO (2009) op cit note 700 at 75. See also Botsford LW, Castilla JC & Peterson CH, 'The Management of Fisheries and Marine Ecosystems' (1997) 277 *Science* 5325 at 513, who note that ecosystem management of marine ecosystems 'lags significantly behind management of terrestrial and freshwater systems due to undersampling of the oceans, their three-dimensional nature, and the difficulty in replicating and controlling experiments.'

⁷⁰⁴ Kirkfeldt (2009) op cit note 700 at 6.

⁷⁰⁵ Ibid at 6.

⁷⁰⁶ FAO (2009) op cit note 700 at 4-5.

⁷⁰⁷ Trochta JT, Pons M, Rudd MB, et al., 'Ecosystem-Based Fisheries Management: Perception on Definitions, Implementations, and Aspirations' (2018) 13 *PLoS One* 1.

research, there is, like the broader ecosystem approaches, little in the way of common consensus on the elements of EBFM.⁷⁰⁸ Garcia et al also suggest that EBFM, although taking into account some human elements, is still skewed towards the ecological, rather than attempting to balance social and ecological concerns.⁷⁰⁹ This is supported by a consideration of the most frequently cited principles of EBFM identified in the literature, which have a distinctly ecological leaning.⁷¹⁰

In response to these challenges, the FAO has developed an approach – the ecosystem approach to fisheries (EAF) – which attempts to balance ecological and human considerations in fisheries management and promote an incremental approach to the adoption of ecosystem principles. The EAF has undergone extensive development in a number of FAO Technical Papers in an attempt to give states comprehensive guidance on the implementation of this approach in their national fisheries management systems.⁷¹¹ Different countries and regions have developed different ecosystem approaches to dealing with fisheries.⁷¹² However, it is safe to assume that EAF objectives are being adopted by many states,⁷¹³ given the wide reach of the FAO, the fact that the EAF is based on fisheries literature and relevant international instruments⁷¹⁴ (particularly the FAO Code of Conduct⁷¹⁵ which is used extensively as the blueprint for good fisheries management around the world⁷¹⁶), and the release by the FAO of a number of detailed technical papers giving practical instructions on implementing the EAF.

In addition, both the FAO and several commentators take the view that striving for a fair balance of ecological and human concerns in resource management is the approach most likely to be successful in achieving sustainability in complex socio-ecological systems like

⁷⁰⁸ Ibid at 2 and 5.

⁷⁰⁹ The authors note that this term was rejected at the FAO's 2001 Reykjavik Conference because it 'may have been interpreted as giving to environmental considerations pre-eminence over socio-economic and cultural ones, raising concern about equity, political as well as socio-economic costs and feasibility' – Garcia, Zerbi, Aliaume, et al (2003) op cit note 684 at 6.

⁷¹⁰ These include 'consideration of ecosystem connections, use of scientific knowledge, stakeholder involvement, maintenance of biodiversity and acknowledgment of uncertainty' – see Trochta, Pons, Rudd, et al (2018) op cit note 707 at 2.

⁷¹¹ See, for example, FAO (2003) op cit note 686; FAO (2009) op cit note 700; FAO, *Fisheries Management 2. The Ecosystem Approach to Fisheries 2.1 Best Practices in Ecosystem Modelling for Informing an Ecosystem Approach to Fisheries* (2008) FAO Technical Guidelines for Responsible Fisheries, FAO, available at <http://www.fao.org/3/I0151E/i0151e.pdf>, accessed on 13 August 2020.

⁷¹² FAO (2009) ibid at 3-4.

⁷¹³ Note, for example, the adoption of EAF principles into fisheries management in a number of Latin American countries – Gianelli I, Horta S, Martínez G, et al., 'Operationalizing an Ecosystem Approach to Small-Scale Fisheries in Developing Countries: The Case of Uruguay' (2018) 95 *Marine Policy* at 1.

⁷¹⁴ FAO (2003) op cit note 686, particularly at 3-4 and 83.

⁷¹⁵ Ibid at 5.

⁷¹⁶ Hosch (2009) op cit note 116.

fisheries.⁷¹⁷ The EAF also does not attempt to overhaul conventional management systems, but rather suggests building on these systems by incorporating ecosystem principles pertinent to a particular area or fishery.⁷¹⁸ This makes the task of adopting an ecosystem approach less daunting and spreads the costs over a longer time period.

Furthermore, its focus on the human elements of fisheries means that the EAF is likely to be more beneficial for small-scale fisheries than ecosystem approaches focused on ecological, rather than social, considerations.⁷¹⁹ Small-scale fisheries can also benefit from the EAF's departure from the top-down and non-inclusive approaches that have often been adopted in conventional fisheries management,⁷²⁰ as governance in EAF aims to be participative and incorporate a wider range of stakeholders and knowledge systems than conventional management.⁷²¹

Thus, the chapter uses the EAF as a basis for its discussion in Section III on what constitutes effective fisheries management and important principles in this regard. In developing the EAF, the FAO reports focus on the management of marine capture fisheries, which accords with the analysis of the WTO negotiations, CPTPP and USMCA. However, the discussion in Section III takes a broader view, drawing on a variety of sources apart from the FAO reports and discussing ecosystem management of inland fisheries where appropriate. Furthermore, because every situation and ecosystem is different, not every consideration raised here will be applicable to every situation. The section merely seeks to outline the types of considerations that arise when applying ecosystem approaches to fisheries, in order to inform the discussion in Section IV and, particularly, any suggestions to utilise such an approach as a safeguard in a trade agreement.

III. Application of an Ecosystem Approach to Fisheries

The EAF 'strives to balance diverse societal objectives, by taking account of the knowledge and uncertainties of biotic, abiotic and human components of ecosystems and their

⁷¹⁷ See FAO (2009) op cit note 700 at 2; Kittinger JN, Finkbeiner EM, Ban NC, et al., 'Emerging Frontiers in Social-Ecological Systems Research for Sustainability of Small-Scale Fisheries' (2013) 5 *Current Opinion in Environmental Sustainability* 3 at 354; Bavinck M, Jentoft S & Scholtens J, 'Fisheries as Social Struggle: A Reinvigorated Social Science Research Agenda' (2018) 94 *Marine Policy* at 47.

⁷¹⁸ FAO (2003) op cit note 686 at 14.

⁷¹⁹ Indeed, Garcia et al, in discussing the EAF, note that many small-scale fisheries 'should be particularly adapted and receptive to an ecosystem approach to their livelihood.' – Garcia, Zerbi, Aliaume, et al (2003) op cit note 684 at 46.

⁷²⁰ Ibid at 4.

⁷²¹ Ibid, particularly at 25-26 and 39-40. These elements of the EAF approach are discussed further in Section III below.

interactions and applying an integrated approach to fisheries within ecologically meaningful boundaries.⁷²² Principles of this approach include the following:

[F]isheries should be managed to limit their impact on the ecosystem to the extent possible; ecological relationships between harvested, dependent and associated species should be maintained; management measures should be compatible across the entire distribution of the resource (across jurisdictions and management plans); the precautionary approach should be applied because the knowledge on ecosystems is incomplete; and governance should ensure both human and ecosystem well-being and equity.⁷²³

These principles are broad, but the various FAO technical papers as well as the literature on ecosystem approaches to fisheries offers further guidance and practical approaches for improved management of fisheries and aquatic ecosystems.⁷²⁴

In the first place, management of aquatic ecosystems also requires consideration of influences outside the water source. Climate change represents a huge threat to aquatic ecosystems, as discussed, while agriculture and manufacturing are large polluters of water sources and, in certain cases, may contribute more to the collapse of a fish stock and/or ecosystem than overfishing.⁷²⁵ Other important, and sometimes overlooked, components of fisheries management, are the competition for fish represented by other aquatic creatures, such as birds and large mammals,⁷²⁶ and the potential problems to ecosystems caused by activities like deep sea mining.⁷²⁷ Thus, a holistic cross-sectoral approach must be taken when managing aquatic ecosystems, including effective spatial planning.⁷²⁸ This requires legislative and policy coherence across sectors⁷²⁹ as well as cross-cutting collaboration within

⁷²² FAO (2003) op cit note 686 at 6.

⁷²³ Ibid at 14-15.

⁷²⁴ Note that, because issues such as equity and governance have been dealt with in Chapter 2, this chapter will not go into detail on these types of development issues. However, it is important to reiterate that development of small-scale fishers and fishing communities is an important aspect of improving fisheries sustainability, as it can reduce dependence on the resource, improve education and attitudes on environmental stewardship, and create perceptions of fairness that may prevent illegal activity.

⁷²⁵ This is most likely to happen in inland water bodies and sensitive coastal areas – See Garcia, Zerbi, Aliaume, et al (2003) op cit note 684 at 12-15.

⁷²⁶ Daw T & Gray T, 'Fisheries Science and Sustainability in International Policy: A Study of Failure in the European Union's Common Fisheries Policy' (2005) 29 *Marine Policy* 3 at 194; Garcia, Zerbi, Aliaume, et al (2003) ibid at 14.

⁷²⁷ Garcia, Zerbi, Aliaume, et al (2003) ibid at 13.

⁷²⁸ See van Hoof L, Fabi G, Johansen V, et al., 'Food from the Ocean; Towards a Research Agenda for Sustainable Use of Our Oceans' Natural Resources' (2019) 105 *Marine Policy* at 49; FAO, *The State of World Fisheries and Aquaculture 2018: Meeting the Sustainable Development Goals* (2018) available at <http://www.fao.org/3/i9540en/i9540en.pdf>, accessed on 13 August 2020 (SOFIA) at 104.

⁷²⁹ Garcia, Zerbi, Aliaume, et al (2003) op cit note 684 at 37.

the fisheries arena⁷³⁰ and with those working in related fields, such as environment, agriculture, and infrastructure, within the state as well as regionally and internationally.

Cooperation outside the bounds of the state is particularly important with management of the marine environment and large lakes and rivers, which often span territories.⁷³¹ In a marine context, this is currently occurring to a certain extent with the management of straddling and highly migratory stocks by RFMOs. However, many of these organisations are concerned only with managing fish stocks and not the ecosystem itself, which may have different spatial boundaries.⁷³² Another initiative taking place in this regard is the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction, which aims to create an agreement governing the conservation and sustainable use of marine biodiversity in areas not within the jurisdiction of any state.⁷³³

Secondly, the role of traditional ecological and local knowledge, participation, decentralisation and co-management all assume greater importance under the EAF. This means that local communities and other stakeholders should be involved in the management of fish resources, where appropriate. Part of this may include improved communication,⁷³⁴ skills training⁷³⁵ and capacity-building for local fishers, who may not be able to adequately communicate their knowledge, even if given the opportunity.⁷³⁶ Equally critical is the role of science, including social science,⁷³⁷ which is often watered-down and sometimes completely

⁷³⁰ Including scientific collaboration – at present there tend to be regional clusters of collaboration amongst fisheries scientists and the science with the most impact is generally from western countries. This means that fisheries science has a distinctly western flavour with less focus on the social aspects of fisheries. Thus, improved collaboration between scientists from developing and developed countries with different views and outlooks, as well as collaboration between scientists from developing countries, would assist in improving fisheries management – see Syed S, Aodha Ln, Scougal C, et al., 'Mapping the Global Network of Fisheries Science Collaboration' (2019) 20 *Fish and Fisheries* 5.

⁷³¹ FAO (2003) op cit note 686; Tuda AO, Kark S & Newton A, 'Exploring the Prospects for Adaptive Governance in Marine Transboundary Conservation in East Africa' (2019) 104 *Marine Policy*.

⁷³² Garcia, Zerbi, Aliaume, et al (2003) op cit note 684 at 39. One exception is the Convention on the Conservation of Antarctic Living Marine Resources 1980, 1329 *UNTS* 47 which adopts an ecosystem approach and has generally been more successful than other RFMOs at conserving the resources and ecosystem under its jurisdiction - Cullis-Suzuki S & Pauly D, 'Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations' (2010) 34 *Marine Policy* 5 at 1041.

⁷³³ United Nations, 'Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction' (2020), available at <https://www.un.org/bbnj/>, accessed on 13 August 2020.

⁷³⁴ FAO (2009) op cit note 700 at 29-30.

⁷³⁵ For example, Cornwall notes the importance of certain skills, such as conflict resolution and assertiveness training, in ensuring that marginalised voices are heard in participatory processes – Cornwall (2003) op cit note 409 at 1337-1338.

⁷³⁶ See FAO (2009) op cit note 700 at 28 and 61; Gorris (2019) op cit note 698 at 15 and 17.

⁷³⁷ Social science can be an invaluable tool in promoting the uptake and success of fisheries management. For example, case studies provide information on important social issues that may affect the implementation of management approaches, including conflicts, cultural practices and beliefs, and attitudes towards technology, science and authority – see Bavinck, Jentoft & Scholtens (2018) op cit note 717; Daw and Gray (2005) op cit

ignored in fisheries policy and, hence, management.⁷³⁸ Given these important considerations, it will be necessary to reduce the hold of economic interests in the management process, particularly lobbying efforts of large-scale, industrial fisheries which tend to be focused on short-term gains.⁷³⁹ It is also vital to include a wide range of different stakeholders in fisheries management and policy-making processes (including academics, fisher organisations, government and NGOs) to improve the possibility of important data being integrated into policy and management decisions.⁷⁴⁰ This will require the strengthening of institutions and governance regimes and addressing the potential problems that arise with co-management initiatives.⁷⁴¹ The institutional set-up should also be such that fisheries managers are given the freedom to adapt where changes in the ecosystem occur or in response to learning or improved data, and to impose penalties and take legal action where appropriate, otherwise management will likely be ineffective.⁷⁴²

Thirdly, to be effective, the EAF requires a wider range of data than conventional fisheries management. In conventional fisheries management, the collection of data revolves around the health of targeted fish stocks. Thus, this approach requires information on issues such as the area of operation of a fishery, inputs into the fishery (e.g. gear used), history of the fishery, stakeholders in the fishery, and the effects of the fishery on the targeted species.⁷⁴³ This information is used to set stock reference points and quotas, impose gear restrictions and so on. Under the EAF, further information is needed to determine issues such as the scale of the ecosystem(s) and ecosystem boundaries, interactions between species, vulnerable or important species and habitats, and other uses of, or pressures on, the ecosystem.⁷⁴⁴ Data collection is also important in relation to the human element of the

note 726 at 194-195; Hall SJ & Mainprize BM, 'Managing By-Catch and Discards: How Much Progress Are We Making and How Can We Do Better?' (2005) 6 *Fish and Fisheries* 2 at 147-149.

⁷³⁸ Daw and Gray (2005) *ibid*; Botsford, Castilla & Peterson (1997) *op cit* note 703 at 512; Pauly, Christensen, Guénette, et al (2002) *op cit* note 683 at 690; Trochta, Pons, Rudd, et al (2018) *op cit* note 707 at 5.

⁷³⁹ Botsford, Castilla & Peterson (1997) *ibid* at 513. Incorporating science into policy may also require capacity-building and improved funding for scientists, fisheries managers and policy makers, as well as effective communication between these groups in order to translate scientific findings into clear policy and management measures – see Dale P, Sporne I, Knight J, et al., 'A Conceptual Model to Improve Links Between Science, Policy and Practice in Coastal Management' (2019) 103 *Marine Policy* at 44-45; FAO (2003) *op cit* note 686 at 21-22.

⁷⁴⁰ Botsford, Castilla & Peterson (1997) *ibid* at 513; Gorris (2019) *op cit* note 698 at 12-13 and 14-15; Dale, Sporne, Knight, et al (2019) *ibid* at 45.

⁷⁴¹ As noted in Chapter 2 section IV(d)(iv), effective governance, including dealing with power asymmetries and other potential pitfalls of co-management arrangements, is an important aspect of ensuring that co-management functions effectively and equitably. See also FAO (2009) *op cit* note 700 at 42; Botsford, Castilla & Peterson (1997) *ibid* at 513; Gorris (2019) *ibid* at 15-17.

⁷⁴² See Garcia, Zerbi, Aliaume, et al (2003) *op cit* note 684 at 37; FAO (2009) *ibid* at 51-52.

⁷⁴³ See FAO (2003) *op cit* note 686 at 26.

⁷⁴⁴ *Ibid*, particularly at 27.

fisheries ecosystem,⁷⁴⁵ including information on societal inequities;⁷⁴⁶ economic considerations such as employment patterns, trade issues, and prices of fish;⁷⁴⁷ and cultural, religious, and social practices of local and indigenous communities.⁷⁴⁸

Although this places a higher burden on fisheries managers, and the full data requirements for an ecosystem approach are unlikely to be met in complex aquatic ecosystems,⁷⁴⁹ it is vital that this information is obtained as far as possible in order to protect the intricate socio-ecological systems which characterise so many fisheries. As there is often a shortage of resources to collect adequate data, particularly in poor developing countries, the EAF will certainly require use of the precautionary approach⁷⁵⁰ and the greater the uncertainty, the more stringent the precautionary measures will need to be. However, data collection can be improved by involving scientists, fishers, other government departments with related areas of competence, and civil society (including through citizen science initiatives⁷⁵¹) in the process of data collection and interpretation.

Particularly in data-poor fisheries with few resources, traditional ecological knowledge and local knowledge can be important sources of information.⁷⁵² In this regard, the FAO takes the view that ‘[i]nadequacy of scientific data should not, in principle, hinder the application of EAF provided the precautionary approach is applied appropriately’ and that ‘the “best available [scientific] information” could in some cases be confined to traditional knowledge and basic fishery assessments.’⁷⁵³ Technology is also becoming an increasingly important means of data collection, and is accessible even to poor fishers and developing

⁷⁴⁵ The FAO notes that a failure to deal with these issues will compromise the effectiveness of fisheries management – FAO (2009) op cit note 700 at 21-25 and 61-62.

⁷⁴⁶ As noted in Chapter 2 section IV(a)(i), poverty and inequity affect resource dependence and the ability of people to undertake measures to conserve these resources. See also *ibid* at 23-25.

⁷⁴⁷ FAO (2009) *ibid* at 22-23; Garcia, Zerbi, Aliaume, et al (2003) op cit note 684 at 41.

⁷⁴⁸ Local cultural and religious beliefs play a large part in the behaviour and practices of small-scale fishers in many parts of the world, and affect whether or not they are willing to comply and assist with management measures for fisheries - Lowe BS, Jacobson SK, Anold H, et al., 'The Neglected Role of Religion in Fisheries Management' (2019) 20 *Fish and Fisheries* 5; Naranjo-Madrigal H & van Putten I, 'The Link Between Risk Taking, Fish Catches, and Social Standing: Untangling a Complex Cultural Landscape' (2019) 100 *Marine Policy* ; Steenbergen DJ, Fabinyi M, Barclay K, et al., 'Governance Interactions in Small-Scale Fisheries Market Chains: Examples from the Asia-Pacific' (2019) 20 *Fish and Fisheries* 4 at 701.

⁷⁴⁹ FAO (2003) op cit note 686 at 28.

⁷⁵⁰ The FAO notes that, under the EAF, a precautionary approach should be applied to potentially deleterious social or economic outcomes as well as ecological outcomes - FAO (2009) op cit note 700 at 41.

⁷⁵¹ See, for example, Jarvis RM, Bollard Breen B, Krägeloh CU, et al., 'Citizen Science and the Power of Public Participation in Marine Spatial Planning' (2015) 57 *Marine Policy* 1, who note that data collected through citizen science initiatives – where the public is asked to provide certain information to bolster scientific data collection – can be highly valuable in marine spatial planning.

⁷⁵² *Ibid* at 279; FAO (2009) op cit note 700 at 27.

⁷⁵³ FAO (2009) *ibid* at 26.

countries through, for example, open source software or public-private partnerships.⁷⁵⁴ This includes software applications that can log data on fish stocks gathered at sea⁷⁵⁵ or improve traceability for purposes of ecolabelling,⁷⁵⁶ and electronic monitoring systems that can replace expensive observer-at-sea programs.⁷⁵⁷ Automatic Identification Systems (AIS)⁷⁵⁸ have also been trialled as a relatively inexpensive way to monitor fishing activity, even in small-scale fisheries.⁷⁵⁹

There are also simple methods that can be used to control fishing effort that do not require comprehensive data, such as data-less management (which uses measures like closed seasons and net sizes to reduce fishing effort⁷⁶⁰) and capacity reduction.⁷⁶¹ Nevertheless, Dowling et al warn against overly simplistic solutions when fisheries are data-poor, and suggest that there is no substitute for good data.⁷⁶² Although the authors do take the view that the risks of using generic methods lessen when these techniques are tailored to specific fisheries,⁷⁶³ this is not always effective. For example, improving size selectivity by changing mesh sizes is only effective in a single-species fishery. As small-scale fisheries often target multiple types of stocks using different gears, this method would be unlikely to work in many small-scale fisheries around the world. Reducing fleet capacity, while an important management measure, can also run into difficulty as the sole solution for improving

⁷⁵⁴ See James M, Mendo T, Jones EL, et al., 'AIS Data to Inform Small Scale Fisheries Management and Marine Spatial Planning' (2018) 91 *Marine Policy* at 117; Morgera & Ntona (2018) op cit note 312 at 302. The point that technology is becoming more affordable and that small-scale fisheries can assist with data collection and monitoring was also made by Ecuador and Egypt in a 2011 submission to the WTO Rules Group in the context of technical assistance demands – Ecuador and Egypt (2011) op cit note 528 at 3.

⁷⁵⁵ Morgera & Ntona (2018) *ibid* at 296-298; Bradley, Merrifield, Miller, et al (2019) op cit note 310 at 570.

⁷⁵⁶ Bradley, Merrifield, Miller, et al (2019) *ibid* at 570.

⁷⁵⁷ *Ibid* at 567-569; Emery TJ, Noriega R, Williams AJ, et al., 'Changes in Logbook Reporting by Commercial Fishers Following the Implementation of Electronic Monitoring in Australian Commonwealth Fisheries' (2019) 104 *Marine Policy*.

⁷⁵⁸ AIS systems were originally used to prevent collisions and, thus, cannot be turned off in the event of illegal activity – see Nyman (2019) op cit note 493 at 32.

⁷⁵⁹ James, Mendo, Jones, et al (2018) op cit note 754; Gianelli, Horta, Martínez, et al (2018) op cit note 713 at 183-184.

⁷⁶⁰ See Johannes RE, 'The Case for Data-Less Marine Resource Management: Examples from Tropical Nearshore Finfisheries' (1998) 13 *Trends in Ecology & Evolution* 6; FAO (2003) op cit note 686 at 38; Prince J & Hordyk A, 'What to Do When You Have Almost Nothing: A Simple Quantitative Prescription for Managing Extremely Data-Poor Fisheries' (2019) 20 *Fish and Fisheries* 2.

⁷⁶¹ Capacity reduction, like closed seasons or gear restrictions, can be used to reduce fishing mortality by restricting fishing inputs – see FAO (2003) *ibid* at 33.

⁷⁶² Dowling NA, Smith ADM, Smith DC, et al., 'Generic Solutions for Data-Limited Fishery Assessments Are Not So Simple' (2019) 20 *Fish and Fisheries* 1 at 182.

⁷⁶³ *Ibid* at 182.

sustainability where advances in technology make gear more efficient (effort creep).⁷⁶⁴ Thus, these types of solutions to a lack of data should be approached with caution.

Fourthly, in addition to managing fish stocks at sustainable levels, the protection and rebuilding of biodiversity, ecosystem functioning and structure, and certain habitats (particularly sensitive ones such as coral reefs) are important mechanisms to ensure that aquatic ecosystems thrive. There are many ways that this can be achieved, and this will depend on the situation in the ecosystem in question. The regulation of fishing pressure through conventional methods restricting or capping fishing effort and catch, such as quotas and gear restrictions, is, of course, highly important, but under an ecosystem approach management measures must be broadened to encompass the ecosystem or ecosystems with which the target species interacts.⁷⁶⁵

A popular way to reduce fishing pressure and protect ecosystems and sensitive habitats, particularly in data-poor or multispecies fisheries,⁷⁶⁶ is the creation of protected areas, particularly MPAs.⁷⁶⁷ Protected areas usually aim to protect the functioning of ecosystems and biodiversity (among other uses) by prohibiting certain activities within these areas, or allowing only limited activity. Different protected areas, or zones within these areas, will often be designated different levels of protection (e.g. no take versus limited fishing zones).⁷⁶⁸ In accordance with an ecosystem approach that takes into account local and indigenous communities, there should be participation in the creation and management of such areas which can, in many cases, provide better socio-ecological outcomes and is likely necessary for the protections to be effective.⁷⁶⁹ As protected areas can increase fish abundance in the surrounding areas⁷⁷⁰ and can create jobs for local people in eco-tourism or stewardship of the area, they also have potentially beneficial developmental effects, provided

⁷⁶⁴ FAO (2003) op cit note 686 at 33.

⁷⁶⁵ Ibid at 7.

⁷⁶⁶ FAO, *Fisheries Management 4. Marine Protected Areas and Fisheries* (2011) FAO Technical Guidelines for Responsible Fisheries FAO, available at <http://www.fao.org/3/a-i2090e.pdf>, accessed on 13 August 2020 at 32-33.

⁷⁶⁷ SOFIA (2018) op cit note 728 at 102-103.

⁷⁶⁸ FAO (2011) op cit note 766 at 9-16.

⁷⁶⁹ Ibid at 15-16 and 52; Pauly, Christensen, Guénette, et al (2002) op cit note 683 at 694.

⁷⁷⁰ FAO (2011) ibid at 45-47. Note, however, that this is not true for all MPAs – see FAO (2003) op cit note 686 at 31.

they are properly created, designed and managed holistically with the input of all relevant stakeholders.⁷⁷¹

Other methods that can be used to protect and rebuild ecosystems and habitats include regulation or prohibition of gear or fishing methods that damage sensitive habitats, such as bottom trawling or dynamite fishing;⁷⁷² regulating the introduction of alien species that occurs through practices like dumping of ballast water and fouling of boat hulls;⁷⁷³ maintaining migration paths or access to spawning grounds;⁷⁷⁴ restoring habitats where possible through, for example, planting of seagrasses or mangroves;⁷⁷⁵ restocking and culling where necessary;⁷⁷⁶ and creating artificial habitats that encourage fish production and biodiversity.⁷⁷⁷ However, it is important that the potential effects of these measures are determined afresh in each case, as it cannot necessarily be assumed that what has worked in one ecosystem can be readily transplanted into another ecosystem.⁷⁷⁸

Fifthly, there needs to be a focus on the reduction of bycatch and discards. This is important in order to protect ecosystem functioning,⁷⁷⁹ reduce overfishing,⁷⁸⁰ protect endangered species, and reduce pollution.⁷⁸¹ One of the best ways to do this is through modification of gear and fishing methods that allow bycatch or juveniles to escape nets and reduce the mortality of seabirds, marine mammals, sharks and other potential bycatch.⁷⁸² Protected areas or seasonal closures in places or at times that bycatch are more likely to be

⁷⁷¹ FAO (2011) *ibid* at 51-57; Gorris (2019) *op cit* note 698 at 12; Feris L, 'A Customary Right to Fish When Fish are Sparse: Managing Conflicting Claims Between Customary Rights and Environmental Rights' (2013) 16 *Potchefstroom Electronic Law Journal* 5 at 572-573.

⁷⁷² FAO (2003) *op cit* note 686 at 34-35; Botsford, Castilla & Peterson (1997) *op cit* note 703 at 510; Pauly, Christensen, Guénette, et al (2002) *op cit* note 683 at 691-692; Garcia, Zerbi, Aliaume, et al (2003) *op cit* note 684 at 11 and 33.

⁷⁷³ Garcia, Zerbi, Aliaume, et al (2003) *ibid* at 32.

⁷⁷⁴ *Ibid* at 33.

⁷⁷⁵ FAO (2003) *op cit* note 686 at 35-36.

⁷⁷⁶ *Ibid* at 19; Clavelle T, Lester SE, Gentry R, et al., 'Interactions and Management for the Future of Marine Aquaculture and Capture Fisheries' (2019) 20 *Fish and Fisheries* 2 at 374-375.

⁷⁷⁷ Garcia, Zerbi, Aliaume, et al (2003) *op cit* note 684 at 34; FAO (2003) *ibid* at 35.

⁷⁷⁸ For example, while there are success stories, methods such as culling and restocking and creation of artificial habitats are not always effective and can be both risky and expensive – see Clavelle, Lester, Gentry, et al (2019) *op cit* note 776 at 374-375; FAO (2003) *ibid* at 34-37.

⁷⁷⁹ Not only can catching non-target species contribute to depletion of certain fish stocks and endanger other aquatic life, such as dolphins, discarding these species can attract scavengers which can upset ecosystem functioning – Garcia, Zerbi, Aliaume, et al (2003) *op cit* note 684 at 12.

⁷⁸⁰ Where catches are recorded as landed catch and discards are not reported, there will be excess fishing mortality not accounted for in quotas and official estimates, which can endanger stocks.

⁷⁸¹ Discards account for a great deal of organic pollution in certain areas which can lead to oxygen depletion of the waters and seabed – Garcia, Zerbi, Aliaume, et al (2003) *op cit* note 684 at 12.

⁷⁸² Hall & Mainprize (2005) *op cit* note 737 at 136-138; FAO (2003) *op cit* note 686 at 19 and 29-31.

caught can also be beneficial, as can real-time data sharing on high bycatch areas.⁷⁸³ Creating new markets for bycatch species can assist in ensuring that bycatch is not wasted⁷⁸⁴ while discard and bycatch bans may be used in certain places and fisheries.⁷⁸⁵ Technological monitoring at sea can help ensure that fishers adhere to rules against discarding and bycatch limits.⁷⁸⁶

Finally, because ecosystem management is more complex and wide-ranging than conventional management approaches, there is a need for greater enforcement under an ecosystem approach. Some of this can be achieved through decentralisation of management. Another way is by providing incentives to improve compliance with regulations.⁷⁸⁷ Incentives should continue to include punitive legal incentives such as fees, fines and other disciplinary measures, particularly for practices such as IUU fishing, but these should be complemented by other types of incentives which can improve regulatory compliance with fewer resources needed for monitoring and enforcement. One example is the giving of use rights – e.g. individual transferable quotas (ITQs)⁷⁸⁸ or exclusive fishing zones for small-scale fisheries or a particular community, preferably with legally-protected rights.⁷⁸⁹ This can incentivise better conservation habits, as opposed to open access systems where resources belong to no one⁷⁹⁰ or systems that attempt to curb fishing effort through catch controls alone.⁷⁹¹ Indeed, the FAO

⁷⁸³ See Hall & Mainprize (2005) *ibid* at 139-140; Bradley, Merrifield, Miller, et al (2019) *op cit* note 310 at 570.

⁷⁸⁴ McClenachan; Neal; Al-Abdulrazzak, et al (2014) *op cit* note 310 at 66-67; Garcia, Zerbi, Aliaume, et al (2003) *op cit* note 684 at 36.

⁷⁸⁵ Hall & Mainprize (2005) *op cit* note 737 at 142-143; Garcia, Zerbi, Aliaume, et al (2003) *ibid* at 36. It should be noted, however, that the creation of new markets as well as requirements for mandatory landings of discards and bycatch (which can also create new markets) can result in active fishing of unregulated species or juveniles where effective management measures are not in place. This would also not be appropriate for certain fisheries, such as small-scale fisheries, which generally target mixed fisheries and use everything they catch – see Hall & Mainprize at 142-143 and 151.

⁷⁸⁶ Bradley, Merrifield, Miller, et al (2019) *op cit* note 310 at 567-569. These systems can (and have been) implemented in different types of fisheries, including small-scale fisheries, and are cheaper than onboard observer programmes – at 569.

⁷⁸⁷ FAO (2009) *op cit* note 700 at 46-49.

⁷⁸⁸ See UNEP (2011) *op cit* note 15 at 27.

⁷⁸⁹ *Ibid* at 27; FAO (2009) *op cit* note 700 at 45; FAO (2003) *op cit* note 686 at 37-39.

⁷⁹⁰ Although there is the possibility that self-organisation can occur amongst fishing communities this is unlikely to happen in the majority of cases, given the unpredictability of fisheries and aquatic ecosystems and the many pressures on these resources. Even Ostrom, who argued that natural resources could be managed without state intervention, took the view that fisheries are more difficult to manage than other common-pool resources and that '[s]ome fishery systems approach mathematical chaos and are particularly challenging for users or government officials.' – Ostrom E, 'General Framework for Analyzing Sustainability of Social-Ecological Systems' (2009) 325 *Science* 5939 at 421. Thus, use rights are a more predictable way to improve management of the fishery, although even then more will likely be needed – in particular an understanding of the socio-ecological system in question and proper monitoring and enforcement – Ostrom at 421-422.

⁷⁹¹ Including closed seasons, creation of total allowable catch etc. UNEP notes that this can promote a 'race for fish', whereas those operating under a system with ITQs or community-based management have greater economic incentives and/or social pressures to conserve resources – see UNEP (2011) *op cit* note 15 ch 2.

notes that legally-protected and exclusive use rights may be essential to successfully implement the EAF, particularly in the context of co-management.⁷⁹²

Market-based incentives can also be useful in improving sustainability of certain fisheries. Ecolabelling, for example, is an important market-based incentive, as the benefits of certification include higher prices, price stability and access to new markets.⁷⁹³ Although these are often (although not always) private initiatives, government, as an important stakeholder in fisheries management processes, should encourage the implementation of programmes to achieve certification and work with local fishers in this regard for development and sustainability purposes. Tax programmes, such as taxes on bycatch, pollution and carbon emissions, or tax breaks for capacity reduction or use of environmentally-friendly gear and practices, can be further drivers of improved compliance, and accord with important environmental principles, such as the polluter pays and user pays principles.⁷⁹⁴ Other incentives, such as the formation of transparent and participatory institutions, and creation of social pressures (e.g. through more transparent reporting) can also play a role in compliance with fisheries management regulations.⁷⁹⁵

Apart from improved management of wild capture fisheries, states can reduce pressure on these fisheries while continuing to meet the growing demand for fish through aquaculture, including marine aquaculture (mariculture). However, these practices come with their own sustainability concerns. Some of the general concerns around aquaculture include the practice of ranching (catching wild juveniles and raising them in farms) and feeding farmed fish with wild capture fish.⁷⁹⁶ Further concerns arise with aquaculture which involves interaction with the ocean or inland water sources. These concerns include pollution,⁷⁹⁷

⁷⁹² FAO (2009) op cit note 700 at 45.

⁷⁹³ Thomas Travaille KL, Crowder LB, Kendrick GA, et al., 'Key Attributes Related to Fishery Improvement Project (FIP) Effectiveness in Promoting Improvements Towards Sustainability' (2019) 20 *Fish and Fisheries* 3 at 452; Hall & Mainprize (2005) op cit note 737 at 145-146. There has been some criticism around the difficulties that certain developing country fisheries have in meeting the requisite criteria for certification – Bavinck, Jentoft & Scholtens (2018) op cit note 717 at 48. However, Thomas Travaille et al do not find that fishery improvement projects, which are widely used as a means to achieve certification, are underperforming in developing countries. They also note that the MSC has created a number of tools to assist developing countries in this regard – at 461-462.

⁷⁹⁴ See FAO (2003) op cit note 686 at 39; Garcia, Zerbi, Aliaume, et al (2003) op cit note 684 at 25.

⁷⁹⁵ FAO (2009) op cit note 700 at 49.

⁷⁹⁶ Clavelle, Lester, Gentry, et al (2019) op cit note 776 at 373-374; SOFIA (2018) op cit note 728 at 146.

⁷⁹⁷ Pollution can occur from inputting of organic matter, such as excess feed, which can negatively affect water quality and habitats – Clavelle, Lester, Gentry, et al (2019) *ibid* at 372-373.

escapes,⁷⁹⁸ interference with habitats,⁷⁹⁹ conflicts, particularly with fishers and local communities,⁸⁰⁰ and disease transmission.⁸⁰¹

Nevertheless, there are ways to make aquaculture more sustainable – feed can be provided from land-based sources, agreements and partnerships can be made with coastal communities, disease control strategies can be implemented, breeding programs can be instituted (thereby reducing the practice of ranching), filter feeders can be farmed together with other species to improve water quality, and so on.⁸⁰² Aquaculture can also have positive sustainability benefits if it is used as a means of rebuilding ecosystems. Re-stocking programmes, if they operate in a sustainable manner, can be an option to assist in the regeneration of wild fish populations.⁸⁰³

The above exposition has shown that if fisheries are to be managed sustainably, a multifaceted approach is necessary. States must attempt to manage fishing effort, integrate ecosystem-based principles into fisheries management, promote sustainable aquaculture to replace wild capture fishing, curb fleet capacity, and reduce IUU fishing. Although this is not an easy task, it is a necessary one, and the use of local knowledge, co-management arrangements, use rights, and increasingly affordable and distributable technology can be of great assistance in this regard. Section IV draws on this exposition in its discussion of problematic subsidies. In particular, it considers why certain of the potential subsidy allowances for small-scale fisheries discussed in Chapter 3 may create sustainability problems, and suggests environmental safeguards to prevent these concerns from manifesting.

⁷⁹⁸ Escapes are problematic because farmed fish are often bred to have certain characteristics, such as faster growth, or they may be genetically modified. Thus, interbreeding with local fish populations can reduce diversity amongst wild populations. The escape of alien species can also have undesirable effects on local ecosystems – *ibid* at 375-376.

⁷⁹⁹ If, for example, farms are placed on or above sensitive habitats this can be detrimental to those habitats, a problem that often affects coastal fisheries disproportionately – *ibid* at 370-371; Pauly, Christensen, Guénette, et al (2002) *op cit* note 683 at 693.

⁸⁰⁰ Clavelle, Lester, Gentry, et al (2019) *ibid* at 376; SOFIA (2018) *op cit* note 728 at 145; Martinez-Alier (2002) *op cit* note 188 at 25-32.

⁸⁰¹ Disease is often a problem in fish farms because of interbreeding and the close quarters in which the fish live, and can decimate these farms. Diseases can be transmitted from wild populations to farmed fish and vice versa, which is particularly problematic when non-native fish are farmed – Clavelle, Lester, Gentry, et al (2019) *ibid* at 376; SOFIA (2018) *ibid* at 147; Pauly, Christensen, Guénette, et al (2002) *op cit* note 683 at 693.

⁸⁰² See Clavelle, Lester, Gentry, et al (2019) *ibid* and SOFIA (2018) *ibid* at 144-148 for a more comprehensive overview of the types of actions that can be taken to improve the sustainability of aquaculture and mariculture.

⁸⁰³ These programmes must be approached with caution, however – see Clavelle, Lester, Gentry, et al (2019) *ibid* at 374-375; FAO (2003) *op cit* note 686 at 34-37.

IV. Potentially Problematic Provisions and Safeguards

Chapter 3 identified a number of potentially problematic subsidies that could benefit small-scale fisheries, including subsidies for fisheries infrastructure, improved transport and telecommunications infrastructure for fishing communities, and operating costs of fishing. These types of subsidies have been represented to varying degrees in the negotiations and agreements under discussion and will likely be a concern in future trade agreements. To date, however, the handling of these subsidies has generally been less than satisfactory, particularly when it comes to appropriate and effective balancing of development and sustainability concerns. This section of the chapter will, therefore, consider each of these problematic subsidies in turn, elaborating on potential sustainability concerns and suggesting conditions that could be attached to these provisions to prevent environmental degradation.

It should be noted at the outset that some of these conditions may be onerous for small developing countries, which could hamper development of small-scale fisheries. This problem will be dealt with further in the analysis. However, provisions for special and differential treatment in the 2018 Working Document do, at present, allow for exclusions from compliance with certain provisions for the LDCs⁸⁰⁴ and SVEs.⁸⁰⁵ Appropriate exclusions can also be made for these types of groups from the safeguards suggested below, and these issues will be discussed where relevant.

(a) Fisheries Infrastructure

Fisheries infrastructure that is beneficial for the development of small-scale fisheries can encompass many different types of infrastructure, including social infrastructure for fishing communities, as discussed in Chapter 3. However, this section focuses on fisheries infrastructure that, while potentially beneficial, may also be harmful to sustainability (hereafter called fisheries infrastructure). This includes ports, fishing harbours, landing areas, processing plants, and aquaculture installations.

The building of ports and fishing harbours can attract fishing vessels to an area and facilitate the creation of markets for fish (potentially for overseas distribution).⁸⁰⁶ They also

⁸⁰⁴ See Chair's Working Document (2018) op cit note 12, *inter alia*, arts 5.2, 5.4, 5.5 and 5.20.

⁸⁰⁵ Ibid art 5.14.

⁸⁰⁶ Sciortino (2010) op cit note 620 at 13.

generate large amounts of pollution.⁸⁰⁷ Yet there is a need to differentiate between the creation of large fishing ports and small landing sites in remote locations. These small sites can assist in promoting the safety of small-scale fishers as well as reducing waste and improving sales, as catch is not lost on landing or spoiled before it can get to market. Remote, rural areas are not immune to overfishing problems, particularly as operations may be set up to transport fish from rural areas to large trading hubs, or even for export.⁸⁰⁸ However, these types of operations are usually run by urban middlemen that source the fish from these areas, and not as a result of increased fishing effort driven by better landing facilities. Thus, it seems unlikely that the creation of small fishing harbours or landing facilities situated in remote areas will lead to a large increase in fishing effort and pollution.

The creation of processing plants and similar facilities can help to add value to catches, provide a steady source of income for fishers and provide employment for fishing communities.⁸⁰⁹ Yet they can also lead to an increase in fishing effort, as there will be a demand for fish to supply the plant. This increased demand can lead to overfishing, particularly where enforcement is poor and data on the ecosystem is lacking. Aquaculture and mariculture infrastructure, while a growing source of fish production and livelihoods in many countries,⁸¹⁰ can also have deleterious effects on sustainability. These installations can take up valuable space,⁸¹¹ and in the absence of effective management, can have harmful effects on local fish populations as well as leading to the displacement of small-scale fishers and local fishing communities.⁸¹²

Fisheries infrastructure can, however, have environmental benefits. Inspections at ports, for example, may reduce the incidence of IUU fishing in an area, particularly where all ports in the area have similar procedures, as fresh fish is not an easily preserved commodity.⁸¹³ As IUU fishing is estimated to account for between 13% and 30% of catches

⁸⁰⁷ Chen C-L, Chuang Y-C, Lee T-C, et al., 'Not Out of Sight but Out of Mind: Developing a Multi-Criteria Evaluation Structure for Green Fishery Harbors' (2019) 100 *Marine Policy* at 324.

⁸⁰⁸ See, for example, Steenbergen, Fabinyi, Barclay, et al (2019) op cit note 748 at 704-707.

⁸⁰⁹ In particular, these processing plants often provide employment for women – Lentisco & Lee (2015) op cit note 151 at 6.

⁸¹⁰ Particularly in large developing countries like China, India, and Indonesia – see SOFIA (2020) op cit note 40 at 27, 33 and 36.

⁸¹¹ Coastal areas and inland water bodies are often in demand for a variety of activities, including fishing, tourism, renewable energy infrastructure, dams, farms, and so on, and also house diverse and delicate ecosystems which need to be protected.

⁸¹² See Section III above; Clavelle, Lester, Gentry, et al (2019) op cit note 776 at 369-376.

⁸¹³ This is, indeed, the purpose of the Port State Measures Agreement – see FAO, 'Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (2009) (PSMA).

worldwide,⁸¹⁴ curbing it is an important mechanism in preventing overfishing and improving sustainability. Processing plants can also be beneficial as they can increase revenue without increasing fishing pressure if they are built to process a sustainable level of catch and there are increased revenue flows to the fishers themselves.⁸¹⁵ Aquaculture, too, can be a good way to improve the supply of fish for consumption and restock wild populations if it is properly managed and wild capture fish are not used to stock farms or feed farmed fish. The creation of markets for fish can also have sustainability benefits, where associated market-related incentives to be sustainable, like ecolabelling, are present.

These considerations, both negative and positive, suggest a number of important safeguards that could be attached to the subsidisation of certain fisheries infrastructure by a state. However, there should be a differentiation between the creation of small landing areas built to serve rural and remote fishing communities and ports and harbours that can serve larger boats, processing plants and other infrastructure, to avoid including important social infrastructure within the restrictions. Thus, the former type of infrastructure should not be considered to form part of the discussion below.

First, the building of fisheries infrastructure should be contingent on the adoption of an EAF approach, in line with the FAO Code of Conduct, and designed to cover not only management of fish stocks but also management of the infrastructure itself. Particularly important in this situation is the use of technology, some form of co-management (including using fisher, NGO and citizen science data to get an accurate picture of stock levels), use of the precautionary principle, and cooperation with neighbouring countries in order to improve oversight and enforcement, pool resources and prevent duplication of effort. Collaboration between government, academic institutions, NGOs and fishers can also improve awareness and adoption of the latest science and technology, including cost-effective models for better collecting and interpreting data. In regard to proper management of ports, fishing harbours and aquaculture installations, collaboration with fishers can help mitigate problems around tenure rights and improve management, including monitoring and reporting of problems such as escapes from fish farms.⁸¹⁶

⁸¹⁴ Agnew DJ, Pearce J, Pramod G, et al., 'Estimating the Worldwide Extent of Illegal Fishing' (2009) 4 *PLoS One* 2 at 2.

⁸¹⁵ This will depend on the power dynamics at play and again highlights the need to address these concerns in small-scale fishing. In regard to improving bargaining power, supporting the creation of fisher organisations such as co-ops can be of assistance – see, for example, Lentisco & Lee (2015) op cit note 151 at 19.

⁸¹⁶ See Clavelle, Lester, Gentry, et al (2019) op cit note 776 at 375 and 378-380; Chen, Chuang, Lee, et al (2019) op cit note 807 at 328.

Small developing countries like the LDCs and SVEs are unlikely to have the resources to build large fisheries infrastructure.⁸¹⁷ However, to the extent that they receive help to do so,⁸¹⁸ the requirement to adopt an EAF approach may be problematic, given lack of resources. Indeed, a requirement in the 2007 Draft Text that the use of certain subsidies by developing countries be made contingent on a comprehensive management plan,⁸¹⁹ has already been watered-down considerably in the 2018 Working Document⁸²⁰ because of protests from developing countries.⁸²¹

Nevertheless, this is an area in which sustainability considerations must be paramount. A general requirement for technical assistance for fisheries management, as discussed in Chapter 3,⁸²² will be helpful in this regard. However, it may also be prudent to specify that if wealthier countries are going to assist in building infrastructure, they need to assist with fisheries and ecosystem management. In addition, the management plan proposed in the 2007 Draft Text was inflexible, and required the use of observers and other expensive strategies out of reach for many developing countries.⁸²³ A flexible management plan that draws on an ecosystem approach to fisheries is likely to be more acceptable and appropriate.⁸²⁴ This would require the need for a strong precautionary approach where data is unavailable, which will likely incentivise improved scientific and cross-sectoral collaboration and collection of data, particularly if the country providing technical assistance wants fishing rights in return for such assistance.⁸²⁵

⁸¹⁷ Note, for example, the position taken by the SVEs in the WTO fisheries subsidies negotiations - WTO, 'Small, Vulnerable Economies (SVEs) - Statement on Key Aspects of Article III of the Fisheries Subsidies Annex, Communication from Barbados, Cuba, Dominica, Dominican Republic, El Salvador, Fiji, Honduras, Jamaica, Mauritius, Nicaragua, Papua New Guinea, St. Lucia, St. Vincent & the Grenadines, and Tonga, Revision (TN/RL/W/226/Rev.5)' (22 September 2008) at 2.

⁸¹⁸ For example, China's belt and road initiative has led to the creation of such infrastructure in a number of countries, including poor developing countries – see Hielscher L & Ibold S, 'BRI Projects', available at <https://www.beltroad-initiative.com/projects/>, accessed on 13 August 2020; Kyngé J, 'A Tale of Two Harbours Tells Best and Worst of China's 'Belt and Road'' *Financial Times* (25 September 2018), available at <https://www.ft.com/content/7699d13a-806a-11e8-af48-190d103e32a4>, accessed on 13 August 2020.

⁸¹⁹ Chair's Draft Text (2007) op cit note 60 art V.

⁸²⁰ See Chair's Working Document (2018) op cit note 12 arts 5.9-5.10.

⁸²¹ See, for example, Brazil, China, India and Mexico (2010) op cit note 510 at 2 and 6; Morocco (2010) op cit note 648 at 7. For a full discussion on this issue see Chapter 5 section II.

⁸²² Chapter 3 section IV(a)(iii).

⁸²³ Chair's Draft Text (2007) op cit note 60.

⁸²⁴ This also appears to be the direction in which the WTO negotiations are going in regard to small-scale fisheries – see Chair's Working Document (2018) op cit note 12 art 2.8.

⁸²⁵ For example, China often provides infrastructure, including ports, in return for fishing rights – Belhabib, Sumaila, Lam, et al (2015) op cit note 157 at 9 and 14.

Secondly, the creation of port infrastructure should be contingent on the ratification of the Port State Measures Agreement (PSMA),⁸²⁶ and the creation of inspection points to prevent IUU fishing. A requirement to join relevant RFMOs may also be useful in helping to protect straddling and migratory stocks in the region. Although the efficacy of certain of these organisations is debatable,⁸²⁷ they do at least provide some form of management of areas and stocks that would otherwise be unregulated. They also publish lists of vessels engaged in IUU fishing,⁸²⁸ which are important tools in combatting IUU fishing, and are currently relied upon in the provisions banning subsidies to IUU fishing in the trade agreements under discussion.⁸²⁹ A provision which requires enforcement of export restrictions on endangered aquatic species at ports (for example those listed in Appendices to the Convention on International Trade in Endangered Species (CITES)⁸³⁰) could further assist in promoting sustainability where the building of ports facilitates the creation of export markets.⁸³¹

Thirdly, notification requirements should attach to the building of fisheries infrastructure, including steps taken to mitigate potential environmental degradation and overfishing. This will help improve transparency and oversight, and better incentivise compliance. As with fisheries management requirements, notification requirements can be onerous and difficult for small developing countries to fulfil, but if these countries receive aid to build infrastructure, they are necessary. In such cases the providing country or agency should, as with the requirement to adopt an ecosystem approach, assist in meeting notification standards.

These types of additional obligations may, of course, deter potential investors. However, it is not always clear that the building of massive fisheries infrastructure is beneficial for the development of poor, under-resourced countries, let alone the sustainability of aquatic resources. These types of initiatives often come with high costs for the countries and communities they are meant to benefit, including rights to fish that may already be

⁸²⁶ PSMA *supra* note 813.

⁸²⁷ Cullis-Suzuki & Pauly (2010) *op cit* note 732.

⁸²⁸ There are currently 12 RFMOs that maintain lists of vessels that engage in or support IUU fishing – see TMT, 'Combined IUU Vessel List' (2020), available at <https://www.iuu-vessels.org/>, accessed on 13 August 2020; NPAFC, 'Regional Fisheries Management Organizations' Illegal, Unreported and Unregulated (IUU) Vessel Lists' (2019), available at <https://npafc.org/iuu-vessel-lists/>, accessed on 13 August 2020.

⁸²⁹ See Chair's Working Document (2018) *op cit* note 12 art 3.2(d); CPTPP Environment *supra* note 9 art 20.16.5(b); USMCA Environment *supra* note 10 art 24.20.1(a).

⁸³⁰ CITES *supra* note 181.

⁸³¹ See Steenbergen, Fabinyi, Barclay, et al (2019) *op cit* note 748 at 708; SOFIA (2018) *op cit* note 728 at 105-106.

overexploited⁸³² and erosion of government independence.⁸³³ Thus, it may be more beneficial for countries not to receive this sort of aid at all, particularly if the provisioning country is not willing to assist in ensuring that sustainability is not compromised.

(b) Transport and Telecommunications

Transport infrastructure detrimental to fisheries sustainability often takes the form of transport to and from ports and fishing harbours. However, this type of transport infrastructure is an integral part of the port infrastructure, with all its attendant risks to sustainability. As a result, the building of such infrastructure should be subject to the safeguards discussed for the building of large ports and harbours. Where transport infrastructure is built to service rural fishing areas, however, the danger lies in the commercialisation of small-scale fisheries, where fish are transported from rural areas to large urban hubs for processing, retail or export. The creation of telecommunications infrastructure can also assist in the creation of these types of networks, as communication is an integral aspect of trading fish in this manner.⁸³⁴ While potentially beneficial to the development of small-scale fisheries, this can increase fishing effort as well as discards, as rural fishers may begin targeting particular, lucrative fisheries.⁸³⁵

Providing mechanisms of transport, such as boats and land-based vehicles, as well as modernisation of fishing vessels, can also increase fishing pressure. This is especially true in cases where boats or upgrades have been provided under loan schemes, as this can increase the incentive to fish to pay back these loans. This can also be detrimental to livelihoods as it prevents fishers from diversifying income streams when fish are scarce.⁸³⁶ However, in certain regions, such as remote fishing villages or islands, boats may be necessary for transportation, in order to get to work, schools, clinics and so on.⁸³⁷ Land-based vehicles,

⁸³² Kyngé (2018) op cit note 818; Belhabib, Sumaila, Lam, et al (2015) op cit note 696 at 2 and 9.

⁸³³ Standing notes that the capacity for access agreements to limit government independence is 'exacerbated where access agreements are linked to further loans and aid projects.' – Standing (2008) op cit note 213 at 2.

⁸³⁴ See Steenbergen, Fabinyi, Barclay, et al (2019) op cit note 748 at 704.

⁸³⁵ Ibid at 698.

⁸³⁶ Allison & Ellis (2001) op cit note 234 at 382-383. Other potentially detrimental effects of these subsidies can be seen in a UNEP study conducted in Senegal where modernisation subsidies led to both overexploitation of fish stocks and food insecurity for coastal communities when small-scale fishers turned to targeting lucrative export stocks which locals could not afford – UNEP (2011) op cit note 15 at 67-94.

⁸³⁷ Béné & Friend op cit note 162 at 134; Thompson S, Rony M, Temmer J, et al., 'Pulling in the Indigenous Fishery Cooperative Net: Fishing for Sustainable Livelihoods and Food Security in Garden Hill First Nation, Manitoba, Canada' (2014) 4 *Journal of Agriculture, Food Systems, and Community Development* 3 at 179-182 and 184-185.

while potentially less problematic than water-based ones, can still increase fishing effort, by providing greater carrying capacity for fish catches, as well as access to large urban markets.

As with fisheries infrastructure, however, there are two sides to the sustainability coin. Improved telecommunications and transport infrastructure can assist in the creation of alternative livelihoods, including better access to work, which may reduce fishing pressure. In addition, provision of telecommunications can improve management of fisheries if it allows fishers to log data on fish stocks or improve traceability of catches.⁸³⁸ Improvements in mobility can also lead to better education, which enhances work prospects and conservation literacy. Telecommunications can similarly improve knowledge and understanding through better access to information. Thus, there are many reasons to subsidise transport and telecommunications for remote fishing communities from both a development and sustainability point of view, provided appropriate safeguards are put in place.

The need for co-management and community stewardship, as well as incentives for compliance, becomes particularly pertinent in cases where fisheries are remote and difficult to oversee, which will often be the case in places where transport infrastructure and telecommunications networks are needed. Alternatively, where co-management is inappropriate or difficult to implement, technology may offer another type of monitoring solution, particularly as it is becoming more affordable and accessible. AIS tracking and data logging schemes have been implemented in some developing countries to improve data on fish stocks, meet Marine Stewardship Council (MSC) certification standards and prevent IUU fishing.⁸³⁹ While these solutions are unlikely to be affordable for small developing countries on a wide scale, they may be applied to a particular area or fishery, especially with improved cooperation with, and assistance from, other countries.

Although detailed prescriptions on what should be included in the fisheries management plans of particular countries is inappropriate in a large international trade agreement covering a number of diverse and disparate countries and regions, a requirement to adopt an EAF approach would encompass these types of co-management and monitoring initiatives. Thus, it is suggested that subsidies for transport and telecommunications infrastructure designed to benefit rural communities should be contingent on the adoption of such an approach, tailored to local circumstances and based on the FAO Code of Conduct.

⁸³⁸ See Section III above.

⁸³⁹ Bradley, Merrifield, Miller, et al (2019) op cit note 310 at 570; Gianelli, Horta, Martínez, et al (2018) op cit note 713 at 183-184.

Notification of these subsidies would also be necessary. However, the creation of transport and telecommunications infrastructure in rural areas can have important development and sustainability benefits and the potentially detrimental sustainability impacts are not as severe as those accompanying the creation of the fisheries infrastructure discussed previously. Thus, the notification requirements could be simpler than those attendant upon the building of infrastructure such as ports and harbours, and exemptions or reduced notification requirements could be provided for groups like the LDCs and SVEs.

Loan schemes for the purchase and upgrade of boats are a different matter, however, as these schemes can be detrimental to both development and sustainability. At the same time, subsidies that take the form of outright gifting of boats can also be highly problematic for sustainability, and will likely be inequitable, as these cannot be provided to every small-scale fisher, particularly not in under-resourced countries. Thus, it is suggested that subsidies for boats and modernisation should be allowed only in the form of public transportation, aimed particularly at those remote and rural communities that require these forms of transport to reach important amenities. This could include barges or ferries. This is an important distinction that will assist remote fishing communities while ensuring that sustainability, and indeed development, are not compromised. Subsidies for personal land-based vehicles, as noted, are less problematic than those for boats and can be beneficial for development. Thus, subsidies for such vehicles for small-scale fisheries could, potentially, be allowed under a trade agreement, subject to safeguards such as those detailed in the context of roads and telecommunications subsidies.

(c) Operating Inputs

Provision of operating inputs to fishers, such as fuel, gear, ice, bait, insurance, income support, price support and so on can, in general, increase fishing effort by making it less expensive and more profitable to fish, allowing longer fishing time, and discouraging disinvestment from the fishing industry. Thus, these types of inputs can be problematic for sustainability, particularly if a trade agreement adopts a wide definition of small-scale fisheries that states could exploit to subsidise successful commercial enterprises or components of industrial fisheries. Despite this general concern, however, the provision of certain inputs can actually increase sustainability, particularly in small-scale fisheries.

Many small-scale fishers, particularly the poorest amongst them, still use destructive fishing methods, including widely outlawed methods such as dynamite fishing, electrocution

and poison,⁸⁴⁰ and may not be able to afford less destructive gear which complies with management regulations.⁸⁴¹ The provision of environmentally-friendly gear to small-scale fisheries can, therefore, increase sustainability of fish stocks and other aquatic life and habitats. Gear that is more energy efficient can also reduce use of fuel, which can indirectly damage aquatic ecosystems by contributing to climate change.⁸⁴²

Another important issue is the increase in mobility that many of these inputs allow. The provision of subsidies for inputs like fuel, ice and cold storage can lead to longer, more wide-ranging fishing trips. This can increase fishing pressure but Tilley et al also note that mobility allows small-scale fisheries to better adapt to management changes,⁸⁴³ which could actually *improve* sustainability.⁸⁴⁴ Research by Brochier et al also suggests that the ability of small-scale fisheries to move to new fishing areas in response to overfishing may improve sustainability outcomes. The authors do note that subsidising transport costs for fishing may disrupt their findings, which depart from the assumption that fishers will fish only where and when it is profitable to do so.⁸⁴⁵ However, the basic premise of this study – that allowing small-scale fishers access to a wider range of fishing grounds can improve sustainability – could potentially be factored into management policy, including use of subsidies, as a tool to improve the sustainability of near-shore stocks. Certainly, research by Hardy et al seems to support this supposition.⁸⁴⁶ The use of ice also means that less of the catch will spoil, which can reduce the number of fishing trips taken by small-scale fisheries.

Income support can also be a particularly important tool for sustainability, provided these programmes are properly structured and enforced.⁸⁴⁷ For one thing, it can be made contingent on reducing fishing effort during closed seasons or to protect closed fisheries. For

⁸⁴⁰ Garcia, Zerbi, Aliaume, et al (2003) op cit note 684 at 11; WTO, 'The WTO Fishery Subsidies Negotiations: Update and Introductory Briefing for New Delegates (TN/RL/W/237)' (12 May 2009) at 6; Kittinger, Finkbeiner, Ban, et al (2013) op cit note 717 at 354; He (2015) op cit note 469 at 112.

⁸⁴¹ See Kittinger, Finkbeiner, Ban, et al (2013) *ibid* at 354.

⁸⁴² FAO (2003) op cit note 686 at 32-33.

⁸⁴³ Tilley A, Herrón P, Espinosa S, et al., 'Predicting Vulnerability to Management Changes in Data-Limited, Small-Scale Fisheries' (2018) 94 *Marine Policy* at 43.

⁸⁴⁴ It is clear, however, that assisting fishers' mobility could not extend to the provision of new boats and engines, as the benefits gained from increased mobility would be outweighed by the sustainability costs of increased fishing capacity. Thus, assistance would have to be limited to inputs such as fuel and ice.

⁸⁴⁵ Brochier T, Auger P, Thiao D, et al., 'Can Overexploited Fisheries Recover by Self-Organization? Reallocation of Fishing Effort as an Emergent Form of Governance' (2018) 95 *Marine Policy*

⁸⁴⁶ Hardy, Béné, Doyen, et al (2017) op cit note 141 – in this study the authors found that the relatively high cost of fuel in certain Solomon Islands fisheries led to overexploitation of reef stocks, while provision of fish aggregating devices to attract pelagic species inshore and the resulting decrease in pressure on reef stocks, increased the resilience of the socio-ecological system.

⁸⁴⁷ UNEP (2011) op cit note 15 at 52-56.

another, certain forms of income support, such as payments to support re-training or assist those who wish to retire from fishing, can further reduce pressure on the fishery. As noted in Chapter 3, certain of these considerations were raised by Members in the WTO negotiations, who stated that subsidies for early retirement and re-education of fishers should not be prohibited because of their beneficial effects.⁸⁴⁸

In general, therefore, it is difficult to know whether the provision of certain fishing inputs to small-scale fishers will be helpful or harmful to sustainability. To the extent that these are provided to poor, small-scale fishers, it seems that the benefits of development outweigh the sustainability impacts, which are likely to be small in comparison to those perpetuated by large, industrial fleets. However, to the extent that larger commercial operations fall within the definition of small-scale fisheries, the sustainability impacts may become more pronounced. Because of this dichotomy, however, it is necessary to come up with solutions that will strike an appropriate balance between sustainability of fish stocks and development of small-scale fisheries.

One way to do so is to allow subsidies only for environmentally-friendly gear, as this can benefit sustainability in all fisheries. What is considered environmentally-friendly is different in every fishery and local socio-ecological context will need to be considered. Thus, cooperation between fisheries managers, scientists, fishers and other stakeholders will be needed to improve knowledge on what types of gear are appropriate for different fisheries.⁸⁴⁹

Another is to include contingencies for certain inputs – i.e. income support for fishers only for purposes of reducing fishing effort, or support for community insurance schemes rather than direct insurance to fishers.⁸⁵⁰ Similarly, ice or cold storage could be provided specifically to rural or remote fishing communities, to allow them to reach markets and cut down on wastage.⁸⁵¹ Alternatively, the provision of these inputs would have to be accompanied by an EAF-based management plan and notification requirements. Giving

⁸⁴⁸ See Chapter 3 section II(b)(ii).

⁸⁴⁹ Certain fisheries may be associated with certain types of bycatch or large amounts of bycatch. For example, shrimp fisheries take a great deal of bycatch, particularly turtles, and are often required to use turtle excluder or bycatch reduction devices – see Hall & Mainprize (2005) op cit note 737 at 137. Other ways that gear restrictions can be modified for local circumstances is to take account of fishing practices of local communities. Small-scale fishers generally target a mix of fish stocks, use everything they catch and may switch to targeting different stocks based on external changes, such as climate events or market fluctuations. In such cases, gear restrictions should be in place to prevent destructive practices but should not necessarily be tailored to one stock or be overly restrictive – see Kittinger, Finkbeiner, Ban, et al (2013) op cit note 717 at 353-354.

⁸⁵⁰ This is not a perfect solution as not all fishers are part of a fishing community. However, it may be the best way of striking an appropriate balance between social and ecological considerations in some circumstances.

⁸⁵¹ This may need to be coupled with water and electrification programmes for rural areas.

options in this regard may be the best way for states to tailor the agreement to their own circumstances and capabilities. In addition, countries which are known to have limited resources and little in the way of industrial or commercial fishing, such as the LDCs and SVEs, could be exempt from these contingencies.

(d) Catch-All Provision

Provided that exemptions for subsidies to small-scale fisheries are comprehensive and specific in a trade agreement dealing with fisheries, there should be very little that falls under the rubric of a general, catch-all provision. However, because each country is different and each small-scale fishery has different concerns and structures, there may be additional development issues that need to be addressed through subsidisation of fishing communities and small-scale fishing activities. Furthermore, given that large trade agreements often require compromises and trade-offs for their successful conclusion, there is likely to be something that is omitted or glossed over for lack of agreement. Thus, the adoption of an EAF approach and mandatory notification of subsidies given under a catch-all provision will be necessary contingencies, particularly if a wide definition of small-scale fisheries is adopted in a trade agreement.

Nevertheless, it must be conceded that some of the subsidies that could fall under this catch-all may have little effect on sustainability of fish stocks and have important development impacts, which could be hampered if the initiative is prevented by onerous management and notification requirements. Within the WTO, a possible solution could be the creation of a group of fisheries experts, under the auspices of the Committee on Subsidies and Countervailing Measures (SCM Committee), to deal with requests to implement subsidies without stringent conditions attached. Indeed, the setting up of an ad hoc expert group on fisheries was suggested in a WTO submission by Japan, Korea and Chinese Taipei in 2011, in order to peer review notifications and provide technical assistance to developing countries to fulfil the notification requirements of the new agreement.⁸⁵²

The SCM Committee already has a Permanent Group of Experts advising the Committee on subsidies.⁸⁵³ However, the complicated nature of fisheries subsidies, which directly affect production of a finite resource, may require the creation of an expert group on

⁸⁵² Japan, Korea and Chinese Taipei (2007) op cit note 569 at 8.

⁸⁵³ See WTO, 'Report (2018) of the Committee on Subsidies and Countervailing Measures (Adopted 23 October 2018) (G/L/1272; G/SCM/152) ' (29 October 2018) at 1.

fisheries, preferably a permanent one. In the context of subsidies to small-scale fisheries, such a group could advise both the SCM Committee and WTO Members on these subsidies, including whether proposed subsidy programmes would have adverse effects on sustainability. An expert group could also provide beneficial advice or other technical assistance, particularly to small developing countries, on issues such as notification and proper fisheries management, thereby assisting these countries to fulfil the various safeguard requirements that have been discussed throughout this section.

In this regard, an expert group would function in a similar manner to the compliance committees often created under the auspices of multilateral environmental agreements (MEAs),⁸⁵⁴ which assist state parties to implement and comply with these agreements. In a trade context, an expert group would have a narrower focus than a compliance committee under an MEA, as it would be concerned primarily with assisting certain parties to implement the agreement, rather than providing an alternative to dispute settlement procedures – which are often fairly weak in MEAs.⁸⁵⁵ However, as part of this mandate, it could also help to resolve certain sensitive non-compliance issues that may not be entirely appropriate for formal dispute resolution, as discussed further in Chapters 5⁸⁵⁶ and 6.⁸⁵⁷

Alternatively, and to the extent that resources are not available for the creation of such a body, appropriate relationships could be formed with the FAO, Organisation for Economic Co-operation and Development (OECD) and other international bodies with expertise on fisheries matters to evaluate subsidies on an ad hoc basis and provide assistance.⁸⁵⁸ RTAs dealing with fisheries subsidies could, equally, form relationships with these bodies as well as the WTO, in order to deal with issues around the implementation of fisheries subsidies provisions.

⁸⁵⁴ For a full discussion on the mandate and functions of these committees in the context of various MEAs see Rose G & Kurukulasuriya L, *Compliance Mechanisms Under Selected Multilateral Environmental Agreements* (2007) UNEP, available at <https://www.unenvironment.org/resources/report/compliance-mechanisms-under-selected-multilateral-environmental-agreements>, accessed on 28 September 2020 ch 2.

⁸⁵⁵ *Ibid* at 119.

⁸⁵⁶ Chapter 5 section IV(b).

⁸⁵⁷ Chapter 6 section III(a)(iii).

⁸⁵⁸ Although this would likely be the more cost-effective solution, there has been a lot of pushback from WTO members on allowing the FAO a peer review function. This is dealt with further in Chapter 5 section IV.

V. Conclusion

Resource depletion has long been a destructive corollary of human activity in aquatic environments, and this has become infinitely worse as technology has advanced. The state of aquatic resources is dire all over the world and this is problematic both for sustainability and development of small-scale fisheries, which rely on these stocks for their sustenance and livelihood. The disciplining of harmful subsidies is vital, as they encourage fishing even when the natural warning signals of fish stock decline are evident. At the same time, we should not deny subsidies, even when these are potentially harmful to sustainability, to those fishers and fishing communities that are poor and underserved, as these may be vital to assist in poverty reduction and development. Small-scale fisheries are not the primary cause of the steady fish stock decline we are witnessing but they are also not entirely blameless in this regard, particularly with the increased mechanisation many small-scale fisheries are experiencing. Thus, while certain subsidies should be provided to small-scale fisheries, it is necessary to think critically about which of these subsidies truly serve development needs, which subsidies may be problematic for sustainability, and how potentially detrimental impacts of subsidies can be mitigated in the pursuit of sustainable development.

This chapter considered that the adoption and enforcement of a sound and inclusive fisheries management system, taking into account both the management of fish stocks and social systems, is important to ensure that any potential harm caused by subsidies benefitting small-scale fisheries is mitigated. Thus, the chapter provided an exposition of the ways in which fisheries and aquatic ecosystems (including their human elements) can best be managed and, thereafter, drew on this discussion to consider the potential sustainability impacts of certain beneficial development subsidies and ways in which to reduce these impacts. It found that these subsidies have varied impacts on sustainability, both positive and negative. Thus, it sought to provide guidance that could minimise the unsustainable impacts and optimise the promotion of sustainable practices.

Initiatives to promote sustainability need to be tailored to the situation at hand and, at times, the ability of the state granting the subsidy. In this regard, the chapter aimed for a certain level of generality as well as sensitivity to the needs and different stages of development of states, particularly the poorest among them. Where possible, it suggested exemptions and alternatives for under-resourced countries, such as the LDCs and SVEs, to the extent that they are able to provide these types of subsidies. However, it is necessary that

a balance be struck between the competing interests of development and sustainability, and it is not possible or advisable to allow for rampant development without some attention to the environmental consequences. This is so even in states that do not contribute greatly to the overfishing problem, as there may be partnerships with, or technical assistance from, wealthier countries which will allow fisheries infrastructure to be built, boats to be provided, and so on.

These suggestions, as well as those in previous chapters, are aspirational and aim to find a solution to the problem of sustainable development in the context of protections for small-scale fisheries in trade agreements dealing with fisheries subsidies. However, trade agreements, and certainly ones with many parties, usually require some level of compromise. While aiming for the optimum solution, therefore, this thesis does not lose sight of the fact that there are sticking points in any trade negotiation, and particularly in an organisation as large as the WTO. Thus, Chapter 5 considers contentious issues that have arisen to date in trade agreements and negotiations dealing with fisheries subsidies and which may affect their conclusion or enforcement.

The analysis in Chapter 5 provides greater context for the discussion so far and sheds light on whether or not the proposals made in the thesis are likely to find acceptance or be capable of enforcement. It further assists in informing the final recommendations of the thesis as to how small-scale fisheries can be better represented in such agreements. While the issues will not be the same in every trade negotiation, current trade agreements and negotiations, especially the WTO negotiations, provide a good blueprint for future trade negotiations, as they give insight into the motivations of many of the world's countries as well as the types of problems that can arise in trade negotiations on fisheries subsidies.

CHAPTER 5 – CONTENTIOUS ISSUES IN THE CREATION OF TRADE AGREEMENTS DEALING WITH FISHERIES SUBSIDIES

I. Introduction

Parties to agreements like the CPTPP and USMCA, even though they constitute a mix of developing and developed nations and those seemingly at odds on fisheries issues, have managed to reach consensus on fisheries subsidies. By contrast, the WTO fisheries subsidies negotiations have dragged on for many years with no resolution in sight. There are many possible reasons for this dichotomy, including the fact that the WTO has many more members and that the single undertaking principle may cause states to withhold or grant concessions in one area as leverage to obtain concessions in another area. Nevertheless, there did appear to be a certain level of consensus in the negotiations in 2007, leading to the creation of the 2007 Draft Text.⁸⁵⁹ Yet the reaction to that text exposed substantive flaws which prevented a conclusion to the negotiations.

These problems, including the S&DT provisions and use of external standards in the fisheries management provisions of the text, were either not dealt with in the CPTPP and USMCA (in the case of S&DT) or were embedded in non-mandatory provisions (in the case of external standards⁸⁶⁰). Thus, the conclusion of these agreements was likely also made possible by the skirting of contentious issues, many of which are important in improving the lives of small-scale fisheries.⁸⁶¹ It now appears that certain WTO members also wish to avoid these issues and have proposed the use of subsidy caps.⁸⁶² Under a subsidy cap approach, each WTO member would be provided with a set subsidy amount which it can give to its fishing fleets, with greater amounts for certain countries, such as the LDCs. However, monetary caps are problematic as they do not take into account the state of fish stocks⁸⁶³ and

⁸⁵⁹ Chair's Draft Text (2007) op cit note 60.

⁸⁶⁰ CPTPP Environment supra note 9 art 20.16.3; USMCA Environment supra note 10 art 24.18.

⁸⁶¹ This relates not only to the creation of robust and enforceable provisions for small-scale fisheries, incorporating an inclusive definition, but also the effective disciplining of subsidies provided by large developing countries. Involving organisations with expertise in fisheries issues, and particularly small-scale fisheries, will also help ensure that the interests of small-scale fisheries are accounted for in fisheries management.

⁸⁶² WTO, 'A Cap-Based Approach to Address Certain Fisheries Subsidies That Contribute to Overcapacity and Overfishing, Communication from China (TN/RL/GEN/199)' (4 June 2019); WTO, 'A Cap-Based Approach to Addressing Certain Fisheries Subsidies, Submission of Australia and the United States, Revision (TN/RL/GEN/197/Rev.1)' (6 May 2019).

⁸⁶³ UNEP (2011) op cit note 15 at 205.

are also unlikely to benefit small-scale fisheries, who receive very little in the way of subsidy allocations.⁸⁶⁴

Another challenging issue, to which neither the WTO negotiations nor RTAs like the CPTPP and USMCA have paid much attention, is enforcement of the provisions on fisheries subsidies through trade dispute mechanisms. Chapter 1 noted that the enforcement of these agreements is vital, and robust dispute settlement mechanisms are often the appeal of negotiating environmental agreements in trade forums.⁸⁶⁵ However, as discussed in greater detail in Section III below, these mechanisms are not currently suited to the enforcement of environmental provisions, as they focus on the trade effects of a measure, rather than environmental harm.⁸⁶⁶ Thus, it is crucial that dispute settlement mechanisms for fisheries subsidies provisions take account of their environmental context, otherwise these provisions are likely to meet with mixed results at best.

The thesis, thus far, has considered issues affecting small-scale fisheries, including how small-scale fisheries can be properly represented in trade agreements, with a specific focus on fisheries subsidies. Although this analysis has been grounded in the texts of the agreements and negotiations under discussion, it has offered only a partial view of the context in which these issues must be considered. Yet context is important, as is the resolution of problems that affect not only small-scale fisheries but also the conclusion and enforcement of the agreements themselves.

The objective of this chapter is, then, twofold. First, it aims to situate the analysis to date in its proper context – namely considering the circumstances in which the agreements and drafts discussed in Chapter 3 have been negotiated and created. This helps to highlight the political and practical limitations that shape the recommendations made in the final chapter of the thesis. Secondly, it suggests solutions to certain difficult problems that are holding up the WTO negotiations and which could arise in both future agreements and in the enforcement of existing agreements such as the CPTPP and USMCA. In considering the practical realities of the situation and envisioning a solution, these suggestions look for ways

⁸⁶⁴ Even if a separate cap for small-scale fishing is provided through this approach (and there is no indication at present that this is intended) this still does not allow for appropriate differentiation of needs, and may be used by states to increase the power and capacity of their small-scale fleets with little attention paid to the likely ramifications on sustainability and food security.

⁸⁶⁵ Chapter 1 section II.

⁸⁶⁶ This revolves around issues such as lack of trade effects from environmental harm, the structure of retaliation mechanisms and the inability to collectively enforce judgments, as discussed in Section III below.

to alleviate the concerns of members while still ensuring that sustainability and development are kept at the forefront of the negotiations. This is to ensure that fisheries subsidies agreements, with all their potential benefits for small-scale fisheries, do come into being, but come into being in such a way that the foundational principles of sustainability and development are not lost.

The chapter, thus, provides alternative solutions to quantitative caps and the glossing over that happened in the RTAs. It considers each of the identified issues – development carve-outs, dispute resolution and regime interaction – in turn, although there is likely to be a certain amount of overlap between them. In doing so, the chapter does not attempt to cover every possible problem that could arise in trade negotiations incorporating fisheries subsidies provisions. Instead, it considers what appear to be the most glaring and intractable of these problems, as determined through an extensive canvassing of trade agreements, submissions in the WTO negotiations and academic literature.

The focus is, in the main, on the WTO negotiations. There are many reasons for this, including the wealth of WTO case law, decisions, agreements and submissions to draw on for analysis; the reality that many RTA disputes are brought to the WTO; and the fact that the WTO negotiations, whether or not they are concluded, will affect future trade negotiations dealing with fisheries subsidies. However, the suggestions made in this chapter are, for the most part, applicable to any trade agreement dealing with fisheries subsidies. In addition, parts of the analysis deal with important considerations for other types of environmental provisions embedded in trade agreements, particularly those related to harmful subsidies, such as fossil fuel subsidies.

II. Development Carve-Outs

In trade agreements, development carve-outs generally take the form of S&DT for developing countries, and particularly small developing countries such as the LDCs. In the context of fisheries subsidies, however, such carve-outs are applicable not only to developing countries but also to small-scale fisheries. This certainly makes the issue more complex, as small-scale fisheries are not found solely in developing countries, nor is there any universal definition for what constitutes small-scale fisheries. These issues, coupled with sustainability concerns, has meant that the extent of carve-outs for developing countries and small-scale fisheries has been fiercely debated in the WTO fisheries subsidies negotiations. Indeed, it is

primarily developing countries that took issue with the 2007 Draft Text, which was intended to form the basis for the final disciplines in those negotiations.⁸⁶⁷

While the thesis does not agree with every concern raised about this text, its implications for small-scale fisheries were troubling. The original text confined subsidies for both subsistence and artisanal fisheries⁸⁶⁸ to developing countries, and used characteristics (fishing close to shore, non-mechanised net retrieval, no employer-employee relationship),⁸⁶⁹ and boat size⁸⁷⁰ respectively as qualifiers. Boat size as a factor is largely ineffective, as mechanisation of boats can lead to effort creep,⁸⁷¹ while use of specific characteristics threatens to exclude many poor fishers and is, in the case of confining small-scale fishers to artificial boundaries like the territorial sea, difficult to enforce.

These provisions were also subject to the implementation of a highly complex and expensive fisheries management system,⁸⁷² out of reach for many developing countries and primarily based on western conceptions of fisheries management.⁸⁷³ These provisions did not apply to LDCs⁸⁷⁴ but, given that there are a large number of small and poor economies besides the LDCs (such as the SVEs) and the fact that the provisions were so complicated and costly to implement, it is clear that these provisions would have been detrimental to small developing countries (and even large developing countries) and their small-scale fisheries. There was, therefore, a great deal of pushback from developing countries on the fisheries management provisions⁸⁷⁵ as well as the provisions on small-scale fisheries, including much

⁸⁶⁷ See UNEP (2011) op cit note 15 at 168.

⁸⁶⁸ Small-scale fisheries with a commercial aspect.

⁸⁶⁹ Chair's Draft Text (2007) op cit note 60 art III.2(a).

⁸⁷⁰ Ibid art III.2(b)(2).

⁸⁷¹ As noted in Chapter 4 section III, effort creep occurs when advances in technology make equipment more efficient.

⁸⁷² Chair's Draft Text (2007) op cit note 60 art V.

⁸⁷³ Exceptions were that access privileges in a system could include community-based rights systems and, for subsistence fishers, the management system could be 'adapted as necessary to the particular situation, including by making use of indigenous fisheries management institutions and measures' – Ibid art V.1, read with fn 148, and art III.2(a) respectively.

⁸⁷⁴ Ibid arts III.1-2.

⁸⁷⁵ See, for example, India, Indonesia and China (2008) op cit note 648 at 6-7 and 14; WTO, 'Fisheries Subsidies, Communication from Brazil, China, Ecuador, Mexico and Venezuela, Revision (TN/RL/W/241/Rev.1)' (16 October 2009) at 2; Morocco (2010) op cit note 648 at 7; WTO, 'Drafting Proposal on Issues Relating to Article III.4 ("Special and Differential Treatment of Developing Country Members")', Communication from the ACP and SVEs Groups (TN/RL/GEN/158)' (22 May 2008) at 2; WTO, 'WTO Disciplines on Fisheries Subsidies: Elements of the Chair's Draft, Communication from New Zealand (TN/RL/W/218)' (21 February 2008) at 5.

disagreement on the definition of small-scale fisheries.⁸⁷⁶ Developed countries also argued that they should be allowed to subsidise their small-scale fisheries.⁸⁷⁷

Other provisions that developing countries took issue with include non-binding technical assistance provisions,⁸⁷⁸ the onerous nature of notification requirements for small developing countries,⁸⁷⁹ and the fact that only the LDCs were specifically excluded from complying with the provisions on harmful subsidies. The SVE Group, consisting of countries with only a small percentage of world trade and marine capture fisheries, was particularly perturbed that it hadn't been granted additional flexibilities in the text.⁸⁸⁰ The ACP Group, too, asked for specific flexibilities for certain small developing countries (those with less than 0.60% of global marine wild capture).⁸⁸¹ As discussed in Chapter 3, there was also a pushback on the disciplining of access subsidies.⁸⁸²

Finally, and most controversially, large developing countries, some of which are classified as developed when it comes to statistics and commentary on marine capture fishing and fisheries subsidies,⁸⁸³ argued that they should be allowed to continue building and subsidising distant water fishing fleets for the purpose of fishing in other countries' waters and on the high seas. Their arguments in this regard revolved around the issue of unfairness and 'policy space', as developed countries had been able to build their fleets and fish the seas for many years before developing countries were in a position to do so.⁸⁸⁴

The concerns raised by developing countries are, therefore, wide-ranging. For ease of reference, the remainder of the section divides the analysis of these issues into those related to developing countries and those related specifically to small-scale fisheries. Clearly, however, there is no neat dividing line between the two issues, and a certain amount of overlap will occur.

⁸⁷⁶ See, for example, Morocco (2010) *ibid* at 1-2 and 4-5; New Zealand (2008) *ibid* at 7; Ecuador and Peru (2011) *op cit* note 543.

⁸⁷⁷ WTO, 'Fisheries Subsidies - De Minimis Exemption, Communication from Canada (TN/RL/GEN/156)' (2 May 2008); Japan (2011) *op cit* note 85 at 10-11 and 15-16.

⁸⁷⁸ Ecuador and Egypt (2011) *op cit* note 528; ACP and SVE Groups (2008) *op cit* note 875.

⁸⁷⁹ Morocco (2010) *op cit* note 648 at 8; ACP and SVE Groups (2008) *ibid* at 2.

⁸⁸⁰ See, for example, SVE Group (2008) *op cit* note 817; WTO, 'Fisheries Subsidies, Communication from Barbados (TN/RL/W/242)' (7 October 2009).

⁸⁸¹ ACP Group (2011) *op cit* note 525.

⁸⁸² Chapter 3 section II(a)(ii).

⁸⁸³ See Sumaila R, Khan A, Dyck A, et al., 'A Bottom-Up Re-Estimation of Global Fisheries Subsidies' (2014) 12 *Journal of Bioeconomics* at 208 which classified China, Russia and Taiwan as developed countries based on fishing capacity.

⁸⁸⁴ For a composite summary of contributions by large developing countries on this issue see Brazil, China, India and Mexico (2010) *op cit* note 510.

(a) Developing Country Concerns

It is instructive to turn to the 2018 Working Document to determine whether the demands of developing countries are being taken into account in the WTO negotiations. As noted in Chapter 3, this document can be convoluted and confusing at times and reflects the current uncertainties in the negotiations.⁸⁸⁵ However, it does give clarity on certain issues.

To begin with, notification requirements no longer apply to LDCs and the text also states that '[n]otification requirements shall not be burdensome on developing countries with capacity constraints'.⁸⁸⁶ This suggests that further flexibilities may be attached to the notification provisions. Access subsidies are also excluded in the 2018 Working Document.⁸⁸⁷ Thus, the conditionalities attached to access subsidies in the Chair's 2007 Draft, which revolved around transparency and the implementation of a fisheries management system,⁸⁸⁸ have effectively disappeared.⁸⁸⁹

Similarly, the text has specifically chosen to remove aquaculture,⁸⁹⁰ recreational fishing⁸⁹¹ and inland fisheries from its ambit,⁸⁹² thereby greatly limiting the scope of the disciplines. The reasons for this are unclear from a reading of member submissions, but Juan He has noted that the exclusion of aquaculture subsidies 'came as a collective relief for developing country groups'⁸⁹³ as many large developing countries are world leaders in aquaculture and are continuing to grow in this area. The views of this thesis on these topics have been canvassed in earlier chapters,⁸⁹⁴ and will not be reiterated in any detail here. Suffice it to say that, while some of these exclusions are potentially positive for developing countries or small-scale fisheries, many of these issues are nuanced or potentially problematic from a sustainability and/or development point of view, and subsidies in these areas should ideally be dealt with in a comprehensive trade agreement on fisheries subsidies. However,

⁸⁸⁵ Chapter 3 section II. A good illustration of this is the fact that fuel subsidies are allowed and prohibited at the same time, as discussed in Chapter 3 section II(a)(i).

⁸⁸⁶ Chair's Working Document (2018) op cit note 12 arts 5.19-5.20.

⁸⁸⁷ Ibid art 2.4(h).

⁸⁸⁸ Chair's Draft Text (2007) op cit note 60 art III.3 – it should be noted that the fisheries management requirements in this section were not as complicated and stringent as those in Article V.

⁸⁸⁹ The views of the thesis on this topic have been discussed extensively in Chapter 3 section II(a)(ii).

⁸⁹⁰ Chair's Working Document (2018) op cit note 12 art 2.4(a) – this is subject to farmed fish not being fed with wild capture fish – see art 1.

⁸⁹¹ Ibid art 2.4(d).

⁸⁹² Ibid art 2.4(c).

⁸⁹³ He (2015) op cit note 469 at 110. See also UNEP (2011) op cit note 15 at 146 which notes that large developing countries like China and Brazil have been against the disciplining of aquaculture subsidies since the beginning of the negotiations.

⁸⁹⁴ See Chapter 3 section II(a)(i) and Chapter 4 section III.

this may be a hard sell in terms of both feasibility and political considerations, given that certain of these issues, such as aquaculture, are politically sensitive, and their deliberation would require an extended negotiating period for which states, and particularly WTO members, are unlikely to have an appetite at present.

Most of the alternative technical assistance provisions proposed in the 2018 Working Document contain promising mandatory language in the form of ‘shall provide’.⁸⁹⁵ These provisions require technical assistance in the areas of fisheries management, stock assessment, and research and development, which could offset some of the concerns with the fisheries management provisions. Although it is the opinion of the author that these types of provisions could go further in protecting small-scale fisheries, the current provisions do have value for development purposes.⁸⁹⁶ Furthermore, these are the types of provisions that were requested by developing countries,⁸⁹⁷ and would largely fulfil the demands of developing countries if implemented.

The lengthy management system conditionality and its replacement with a simplified and more flexible prescription in the 2018 Working Document⁸⁹⁸ is also a clear move to accommodate developing country concerns. So too is the inclusion of certain flexibilities for SVEs.⁸⁹⁹ If these flexibilities are ultimately provided, developing countries will be differentiated into three groups – large developing countries, LDCs and SVEs. Although both of these changes are important to ensure that development concerns are adequately accounted for, the further division of developing countries beyond the traditional least-developed and developing groupings has been opposed by those states termed by Campling and Havice as ‘defensive large developing’ (including China, India and Indonesia) and ‘developed demandeur’ (including the US, New Zealand and Australia).⁹⁰⁰

The issue of high seas fishing has also been addressed in the 2018 Working Document. Although Yingying has suggested that large developing countries are moving towards acceptance on the issue of EEZ limitations,⁹⁰¹ the 2018 Working Document shows no sign of this being the case. Rather, it contains an exception for developing countries to

⁸⁹⁵ See Chair’s Working Document (2018) op cit note 12 arts 5.15-5.20.

⁸⁹⁶ As discussed in Chapter III section II(a)(iii).

⁸⁹⁷ See Ecuador and Egypt (2011) op cit note 528; ACP Group (July 2017) op cit note 530 at 3.

⁸⁹⁸ Chair’s Working Document (2018) op cit note 12 arts 5.9-5.10.

⁸⁹⁹ Ibid arts 5.14-5.15.

⁹⁰⁰ Campling & Havice (2013) op cit note 22 at 845 and 847.

⁹⁰¹ Yingying W, ‘Negotiation on Fisheries Subsidies within the Framework of the WTO-Special and Differential Treatment for Developing Members’ (2017) *China Oceans L. Rev.* at 44-45.

provide capacity-enhancing subsidies to exploit RFMO rights.⁹⁰² Even if there could be said to be some acceptance of limitations (i.e. in areas not covered by RFMOs) it is likely because fuel subsidies, which form a large part of developing country subsidies,⁹⁰³ may not be banned in the final disciplines, just as they are not banned in the CPTPP and USMCA. Coupled with the probable exclusion of access subsidies and the fact that large developing countries such as China have already built up a sizeable distant water fishing fleet, there may be no need for large developing countries to fight for specific flexibilities around harmful subsidies such as boat-building and modernisation any longer.

Although the general exclusion of problematic subsidies may bring large developing countries (and indeed some developed countries) to the negotiating table, it is troubling when we consider sustainability concerns, which in turn have effects on livelihoods and poverty reduction in coastal communities,⁹⁰⁴ as well as the problematic trade implications of providing such subsidies.⁹⁰⁵ In this regard, it is debatable whether an agreement which does not, at least, adequately discipline fuel subsidies and subsidies for distant water fishing will have a positive effect on sustainability and development concerns. Leaving these subsidies unregulated will largely undermine the purpose of disciplining fisheries subsidies and members should consider carefully whether this is an issue on which they can afford to compromise. At the very least there should be limits on the use of these subsidies, or other mechanisms to improve their control.⁹⁰⁶

An agreement that allows large carve-outs for all developing countries will also be unlikely to find approval from developed countries which do not provide large subsidies to

⁹⁰² Chair's Working Document 2018 op cit note 12 art 5.8(g).

⁹⁰³ Mallory points out that, in 2013, 94% of fishing subsidies from China's central government were fuel subsidies – Mallory TG, 'Fisheries Subsidies in China: Quantitative and Qualitative Assessment of Policy Coherence and Effectiveness' (2016) 68 *Marine Policy* at 74. Sumaila et al also note that China, Russia, Korea, India, Indonesia and Thailand give very large fuel subsidies to their fishing fleets – Sumaila UR, Teh L, Watson R, et al., 'Fuel Price Increase, Subsidies, Overcapacity, and Resource Sustainability' (2008) 65 *ICES Journal of Marine Science* 6 at 835.

⁹⁰⁴ See, in this regard, the discussions on the problems caused by access agreements in Chapter 2 section III and Chapter 3 section II(a)(ii). See also Abdallah PR & Sumaila UR, 'An Historical Account of Brazilian Public Policy on Fisheries Subsidies' (2007) 31 *Marine Policy* 4 at 449; UNEP (2011) op cit note 15 at 74.

⁹⁰⁵ As with most agricultural subsidies, the ultimate losers of such policies are those in poor developing countries and operating small enterprises, who cannot compete on domestic or world markets against subsidised products – see Narayanan (2017) op cit note 5 at 13-14.

⁹⁰⁶ For example, both Jaemin Lee and Korea have suggested that states maintaining fuel prices below an agreed-upon average price index should be precluded from instituting proceedings against a state maintaining fuel prices above such index – see Lee J, 'Looking for a Panacea in the SCM Agreement-Systemic Challenges for Post-Bali Fisheries Subsidies Discussion and Some Food for Thought to Overcome Them' (2014) 9 *Asian J. WTO & Int'l Health L & Pol'y* at 509; WTO, 'Comments Regarding the Fuel Subsidy in the Fisheries Subsidies Annex, Communication from the Republic of Korea (TN/RL/W/251)' (29 March 2011) at 3.

their fishing fleets, such as the US, New Zealand and Norway.⁹⁰⁷ It may also be opposed by smaller developing countries that cannot afford to provide large subsidies to their fishing industries, as this will render them less competitive in the international market,⁹⁰⁸ although political considerations may prevent these members opposing large developing countries like China. It may be better, then, to move away from the development framing when it comes to demands on resources by major fishing nations, especially in an organisation like the WTO where states are allowed to self-declare their developing status.⁹⁰⁹

Cho suggests that we consider the goal of the negotiations when determining which countries should receive S&DT flexibilities.⁹¹⁰ While the fisheries subsidies negotiations are concerned with trade and development, a central part of these negotiations is sustainability and this should be taken into account in determining what constitutes appropriate S&DT. Thus, some sort of differentiation between major fishing powers (determined through factors such as total marine capture, fleet capacity and level of fishing subsidies provided⁹¹¹) and those with low marine capture and capacity, could be a better metric for allowing the use of certain subsidies in the negotiations.⁹¹² Certainly, this is a less arbitrary differentiation, and it could more easily be discerned when a country crosses the threshold to large fishing power than when it changes from developing to developed country (which is particularly arbitrary in the WTO), especially if there are well-designed and enforceable notification provisions in the agreement text. This could also provide an alternative to the time-based phasing out of

⁹⁰⁷ See UNEP (2011) op cit note 15 at 23 and Campling & Havice (2013) op cit note 22 at 848-844. The US has also taken issue with certain countries claiming developing status in the negotiations and voiced strong concerns around carve-outs for large developing countries during the Virtual Ocean Dialogues – see WTO, 'An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance, Communication from the United States (WT/GC/W/757)' (16 January 2019) at 11; Parmentier, Parkes, Wills, et al (2020) op cit note 63.

⁹⁰⁸ UNEP (2011) *ibid* at 103-104, 194 and 196.

⁹⁰⁹ As discussed in Chapter 3 section II(a)(iv). Members that have self-declared as developing in the negotiations include China, Indonesia, Russia and Hong Kong - see Yingying (2017) op cit note 901 at 38. Indeed, in the history of the WTO, all members apart from the US, EU, Canada, Japan, Australia, New Zealand and Switzerland have self-elected as developing at least once – Cho Y, 'The Concept of Developing Countries in the Context of the WTO Fisheries Subsidies Negotiation' (2018) 9 *Beijing L. Rev.* at 142.

⁹¹⁰ Cho (2018) *ibid* at 146-151.

⁹¹¹ Certain of these metrics are already being used by the SVE Group as well as the ACP Group to distinguish themselves from other developing countries – see, for example, Barbados (2009) op cit note 880 at 4-5; ACP Group (2011) op cit note 525 at 3.

⁹¹² This view is also taken by Jaemin Lee who notes that 'the current discussion, by adopting a simplistic approach in the S&D treatment provision comprising broad exceptions for developing Members, does not pay enough attention to the need to introduce a system that ensures cooperation from all major fishing powers.' – Jaemin Lee (2014) op cit note 906 at 514. The US and Australia, which have opposed the further differentiation of developing countries, have also recently adopted an approach of differentiating states according to level of marine capture production – see Australia and the US (2019) op cit note 862 at 1-2.

flexibilities, at least for the LDCs and SVEs, which has been controversial in the negotiations.⁹¹³

(b) Concerns Relating to Small-Scale Fisheries

While many proposals have been made in the WTO negotiations around protections for small-scale fisheries and there is clear political will to protect this group, the inclusion of such suggestions in the final disciplines is fundamentally dependent on how small-scale fisheries are eventually defined by WTO members. Unfortunately, the definitional issue has proven to be one of the most intractable problems of the negotiations and does not appear any closer to a resolution than it did at the outset. The importance of resolving this impasse cannot be overstated, however. It is vital to ensure that small-scale fisheries are properly provided for in the final disciplines and that sustainability concerns arising around protections for small-scale fisheries are addressed.

Numerous definitions of small-scale fisheries have been suggested in the WTO negotiations, some of which are reflected in the 2007 Draft Text and the 2018 Working Document. Certain of these definitions relate to boat size⁹¹⁴ or to the characteristics of the operation.⁹¹⁵ As noted above, however, attempting to define small-scale fishing based on boat size or fixed characteristics is problematic, for reasons relating to both sustainability and development – not least of which is the exclusion of certain fishers who are poor and in need of assistance to improve their security, well-being and prospects. It is also very unlikely to be a feasible option from a political point of view, as the views of states on what constitute appropriate characteristics or boat length vary widely, undoubtedly owing to the vast disparities among small-scale fisheries around the world.

An issue that has further muddied the waters and prevented a decision being made on the definition of small-scale fisheries is the insistence of many members in differentiating between subsistence, small-scale and artisanal fishing or referring to some amalgamation of

⁹¹³ See Yingying (2017) op cit note 901 at 42-43; WTO, 'Working Document from the Chairman (TN/RL/W/232)' (28 May 2008) at C-79. In general, time-phased periods do not correspond to any meaningful metric such as level of development, or in the case of fishing, level of fishing effort, level of subsidies and trade flows of fish – see UNEP (2011) op cit note 15 at 199.

⁹¹⁴ See, for example, Indonesia (2017) op cit note 457 at 3; Ecuador and Peru (2011) op cit note 543 at 4; Japan, Korea and Chinese Taipei (2007) op cit note 569 at 4.

⁹¹⁵ See, for example, Ecuador and Peru (2011) ibid at 4; Indonesia (2017) ibid at 2; WTO, 'Fisheries Subsidies: "Fisheries Adverse Effects" and "S&D" Treatment, Paper from Brazil (TN/RL/W/212)' (29 June 2007) at 4; Morocco (2010) op cit note 648 at 1-2; WTO, 'Small Scale, Artisanal Fisheries, Submission by India (TN/RL/W/203)' (6 March 2006) at 4.

these concepts (e.g. small-scale artisanal fishing).⁹¹⁶ While certain countries may differentiate between these terms for their own purposes, others do not, and doing so in the negotiations has only created more confusion.⁹¹⁷ This approach is also at odds with the SSF Guidelines, which provide that small-scale fisheries should be defined in accordance with national legislation, subject to participatory and consultative processes.⁹¹⁸ Certain commentators, too, have adopted the FAO's approach when dealing with small-scale fisheries in a global context.⁹¹⁹

The idea that small-scale fisheries should be defined in line with national legislation has been suggested by some WTO members.⁹²⁰ The thesis also takes the view that employing national definitions is a good starting point for defining small-scale fisheries in the WTO negotiations, as small-scale fisheries differ widely from place to place and it is usually necessary to assess the situation on the ground. Yet it is important to address the risks of using such an approach in a fisheries subsidies agreement, which could lead to wide definitions being employed by members to circumvent the disciplines.⁹²¹

Attaching the sort of safeguards discussed in Chapter 4⁹²² to problematic subsidies exemptions for small-scale fisheries, is an important aspect of curbing abuse in this regard, and should leave little scope for states to circumvent the disciplines. Additional protections should also be included, such as a requirement that states involve small-scale fishers in the creation of the definition as well as notifying the definition and the procedures taken in its determination to the SCM Committee for approval within a specific timeframe (potentially in conjunction with the FAO and/or other relevant international organisations). Apart from improving sustainable development outcomes, such measures would likely be necessary to ensure acceptance of this provision by members that favour a narrow definition of small-scale

⁹¹⁶ See, for example, Chair's Working Document (2018) op cit note 12 at 4-5; WTO, 'Fisheries Subsidies: Compilation Matrix of Textual Proposals received to date, Introduction by the Chair (TN/RL/W/273)' (28 July 2017) at 10.

⁹¹⁷ Indeed, the Chair has indicated that a creative solution to this issue should be found given the dearth of internationally-agreed definitions of terms such as subsistence or artisanal fishing – Sumaila UR, Arthur R, Wills S, et al., 'IUU Fishing and Subsidies (Panel Discussion)' (18-22 May 2020), *12th International Forum on Illegal, Unreported and Unregulated Fishing* (London).

⁹¹⁸ SSF Guidelines supra note 1 art 2.4.

⁹¹⁹ See, for example, Schuhbauer, Chuenpagdee, Cheung, et al (2017) op cit note 4 Supplementary Information A.

⁹²⁰ ACP Group (July 2017) op cit note 530 at 2; LDC Group (2017) op cit note 457 at 2; Argentina, Colombia, Costa Rica, Panama, Peru, and Uruguay (2017) op cit note 457 at 3.

⁹²¹ This is opposed to the SSF Guidelines which, being voluntary development and poverty reduction guidelines, do not attempt to put strictures on what countries can and cannot do.

⁹²² At Chapter 4 section IV.

fishing and limited exemptions for this group.⁹²³ Thus, while perhaps not a perfect solution, the use of national definitions with appropriate safeguards is the one most likely to protect vulnerable fishers and give them a voice in the process, and, from a political perspective, to be the most feasible option for a definition of small-scale fisheries.

The other important issue when it comes to provisions on small-scale fisheries is whether these should be part of the S&DT provisions or dealt with separately.⁹²⁴ Although one of the exemptions for small-scale fishers discussed in Chapter 3 is found in the general exemptions provisions of the 2018 Working Draft,⁹²⁵ at present the bulk of the provisions on small-scale fishing are located within the section on S&DT.⁹²⁶ This is despite the demands from some developed countries that they be able to subsidise their small-scale fishing, within limits. However, because the 2018 Working Document reflects both views to a certain extent, it is unclear what members will ultimately decide.

The position of this thesis is that S&DT and small-scale fisheries should be two separate issues, as small-scale fisheries should be given assistance, within limits, wherever in the world they reside.⁹²⁷ Separating these issues would mean that S&DT provisions would deal solely with industrial fishing in developing countries. This is not to say that there will be no overlap. Certain fisheries infrastructure, for example, will be used by both industrial and small-scale fishing. However, in areas such as capital and operating costs, it is suggested that there be separate disciplines. This will allow for disciplines suited to each area which will render them more effective, as there are different considerations at play when dealing with small-scale and industrial fisheries. These include the fact that subsidies to industrial fishing are, on the whole, more environmentally destructive, and that this industry generally has greater resources to implement more stringent management measures.

Naturally, providing benefits for small-scale fisheries in developed as well as developing countries makes it even more important that the definition of small-scale fisheries has appropriate safeguards attached to prevent abuse. However, it is vital that a trade agreement allows for the protection of all vulnerable fishers, and the safeguards discussed

⁹²³ The question of how members proposed to prevent loopholes in a nationally-based definition of small-scale fisheries was, in fact, raised in a submission by New Zealand and Iceland in 2018 – New Zealand/Iceland (2018) op cit note 27 at 3.

⁹²⁴ This has been an issue since the beginning of the negotiations – see UNEP (2011) op cit note 15 at 221.

⁹²⁵ Chair's Working Document (2018) op cit note 12 art 2.8. Also see the discussion in Chapter 3 section II(a)(iv).

⁹²⁶ Chair's Working Document (2018) *ibid* art 5.8.

⁹²⁷ See also Chapter 2 section I; Chapter 3 section II(a)(iv).

should ensure that sustainability concerns are minimised in this regard. It is also suggested that many of the concerns around S&DT could be avoided if these issues were separated. If small-scale fisheries are dealt with separately, these provisions could focus specifically on issues affecting small-scale fisheries, and provide fairer and less stringent conditionalities for subsidies to small-scale fisheries.⁹²⁸ This approach would also allow for the separation of issues affecting different groups of developing countries. In this regard, small developing countries tend to be more concerned with small-scale fishing than large developing countries which, while concerned with both small-scale and industrial fishing, have focused primarily on the latter in their submissions. Thus, such an approach would allow for differentiation between developing countries by way of the issues they are concerned about, rather than external criteria. This could be another means of distinguishing major developing fishing powers from small developing countries which may be more acceptable to those members which do not accept further differentiation of developing countries beyond the current paradigm.

In sum, while the issue of development carve-outs is one of the most controversial of the WTO negotiations – which is likely why S&DT provisions were not included in the CPTPP or USMCA – there does seem to be movement towards resolving these concerns. It remains to be seen, however, whether these issues will be resolved in the best interests of small-scale fisheries, small developing countries, and the health of fish stocks. To do so it will be necessary to reign in the demands of large fishing powers, adopt an inclusive definition of small-scale fisheries with appropriate safeguards, deal with small-scale fisheries separately to S&DT, and find a basis on which to differentiate large developing fishing powers from small developing countries. Further negotiation on other areas, such as access agreements, recreational fishing, aquaculture, and expansion of technical assistance would also be beneficial, although these areas do not appear to be controversial at present.

III. Dispute Settlement

The dispute settlement body (DSB) of the WTO has often been seen as the shining light of the multilateral trade system. Its success is unprecedented in an intergovernmental organisation, owing primarily to its formal adjudicative structure. Under this structure, formalised in the WTO's Dispute Settlement Understanding (DSU),⁹²⁹ states may not opt out

⁹²⁸ Such as those discussed in Chapter 4 section IV(d).

⁹²⁹ DSU *supra* note 24.

of adjudication or block the adoption of an unfavourable ruling, and successful complainants are given the power to retaliate through trade restrictions. Similar dispute settlement mechanisms have been included in the CPTPP⁹³⁰ and USMCA.⁹³¹

Yet, the WTO dispute settlement process has not been without its problems, including extremely long disputes because of non-compliance, and difficulties of access for developing countries – particularly small developing countries. Indeed, many aspects of the system are skewed against developing countries: the prohibitive cost of litigation, lack of expertise and resources in many developing countries, and the ineffectiveness of retaliatory trade measures for these countries.⁹³² The dispute settlement systems of RTAs are often simpler and less cumbersome, as they attempt to avoid some of the pitfalls of the WTO process.⁹³³ They are rarely used, however,⁹³⁴ and the WTO system remains the primary arbiter of international trade disputes.

When it comes to enforcement of an environmental agreement, especially one dealing with harmful subsidies, further difficulties arise.⁹³⁵ Subsidies disputes currently have one of the highest rates of non-compliance of all WTO disputes,⁹³⁶ which means that retaliation

⁹³⁰ CPTPP Environment supra note 9 art 20.23; CPTPP Dispute Settlement supra note 24.

⁹³¹ USMCA Environment supra note 10 art 24.32; USMCA Dispute Settlement supra note 24.

⁹³² Retaliatory trade measures are generally ineffective when implemented by a small economy against a large economy. In such a case, trade restrictions have very little effect on the large economy and are more likely to harm consumers in the retaliating economy, who face price increases from higher tariffs – see Lee H-y, 'Remedying the Remedy System for Prohibited Subsidies in the WTO: Reconsidering Its Retrospective Aspect' (2015) 10 *Asian J. WTO & Int'l Health L & Pol'y* at 430; Bianchi A & Gradoni L, *Developing Countries, Countermeasures and WTO Law: Reinterpreting the DSU against the Background of International Law* (2008) *ICTSD*, available at <https://www.academia.edu/23525842/>, accessed on 13 August 2020 at 1; Mitchell AD & Salonidis C, 'David's Sling: Cross-Agreement Retaliation in International Trade Disputes' (2011) 45 *Journal of World Trade* 2 at 462-463.

⁹³³ Vidigal G, 'Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement' (2018) 20 *Journal of International Economic Law* 4 at 942; Chase C, Yanovich A, Crawford J-A, et al., *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements—Innovative or Variations on a Theme?* (2013) *WTO*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279720, accessed on 13 August 2020 at 50-51.

⁹³⁴ Vidigal (2018) *ibid* at 929-932; Chase, Yanovich, Crawford, et al (2013) *ibid* at 46-49.

⁹³⁵ Although the Chair's Draft Text (2007) op cit note 60 included dispute settlement provisions (art VIII), there has not been much discussion in this area since then. A recent paper by Canada raises a number of general issues that need to be resolved in this regard, including remedies, use of experts, possible limitations to review, and alternative dispute resolution. These discussion points are addressed in this chapter to the extent that they relate to, or could mitigate, the problems discussed – see WTO, 'Dispute Settlement in a WTO Fisheries Subsidies Agreement: Discussion Paper, Communication from Canada (TN/RL/GEN/198)' (21 May 2019).

⁹³⁶ Hyo-Young Lee (2015) op cit note 932 at 425. This is likely because of a phenomenon noted by Vidigal – namely that when states see a measure as designed to fulfil an important social or public policy goal, they are less likely to withdraw the measure and more likely to amend it, which can lead to further litigation – Vidigal (2018) op cit note 933 at 941-942.

procedures are an important aspect of enforcing a subsidies agreement. However, the authorisation of retaliation measures generally requires there to be harm to a complainant's trade.⁹³⁷ This is at odds with the approach of disputes centred on environmental concerns, which consider harm to the environment. In this regard, while there may be some instances where the use of fisheries subsidies can be linked to trade effects, this will not always be the case, and is often a difficult undertaking.⁹³⁸

This is problematic, as strong and well-structured enforcement mechanisms are vital not only for the operation of a trade agreement dealing with fisheries subsidies but also for the protection of small-scale fisheries. Effective enforcement mechanisms can ensure that any bans on subsidies to industrial fishing are adhered to, which will improve equity between small- and large-scale fisheries. Similarly, conditions on fisheries management and notification of subsidies must be enforced for equity purposes, in order to maintain the stocks that small-scale fisheries depend upon for their livelihoods. Proper structuring of enforcement provisions can also help promote good equity and governance outcomes. For example, provisions that allow for small-scale fisheries to participate in disputes in some manner can assist in strengthening access to justice and participation, while the extension of technical assistance for this purpose will ensure that these provisions are made operational.⁹³⁹

Structuring enforcement mechanisms in such a manner as to improve the ability of developing countries to utilise dispute settlement mechanisms is also important for small-scale fisheries, given that the majority of small-scale fisheries are found in developing countries. Ignoring these issues could derail the possibility of many developing countries using litigation to protect or defend their small-scale fisheries or providing subsidies that might contravene the provisions. These problems illustrate both a need for clarity around the provisions on small-scale fisheries and S&DT,⁹⁴⁰ as well as the introduction of measures that could assist developing countries to better participate in the system, such as collective enforcement and burden of proof shifting mechanisms, as discussed in Section III(c) below.

⁹³⁷ This may not always be the case with disputes around harmful subsidies, as discussed in Section III(a) below, but this is currently unclear.

⁹³⁸ As discussed in Section III(a) below.

⁹³⁹ As discussed further in Section III(b) below.

⁹⁴⁰ As discussed in Section II above and Chapters 3 and 4.

Apart from a retaliation mechanism, trade agreements may also include a remedy of compensation for non-compliance. Both the DSU⁹⁴¹ and the CPTPP⁹⁴² provide for a remedy of negotiated compensation prior to retaliation. USMCA, similarly, provides for mutually acceptable compensation as an alternative to eliminating the non-conformity, prior to commencing retaliation.⁹⁴³ Negotiated compensation in trade agreements generally takes the form of trade concessions but monetary compensation has also been used.⁹⁴⁴ Under the DSU, negotiated compensation must be ‘consistent with the covered agreements’ which means that it must be provided on a most-favoured nation (MFN) basis.⁹⁴⁵ The probability of reaching agreement under these circumstances is low, however, and compensation has hardly ever been used as a remedy at the WTO.⁹⁴⁶ In regard to monetary compensation, several authors have noted that, apart from a number of general problems,⁹⁴⁷ this may become a ‘final remedy’.⁹⁴⁸ It would, therefore, appear to be an inappropriate remedy for environmental harm.

Moreover, there seem to be little in the way of alternatives to current compensation provisions in the circumstances. Members are unlikely to agree to mandatory compensation because of sovereignty concerns.⁹⁴⁹ Alternatively, requiring that compensation has an environmental bent (e.g. reducing tariffs on environmental goods and services, creating environmental offsets, or using monetary compensation to counteract the environmental harm), would be a poor substitute for withdrawal of the harmful measure. Thus, while these options should not be entirely discounted as methods of last resort where compliance is not feasible,⁹⁵⁰ as a general rule compensation does not appear to be an appropriate or useful remedy for environmental harm.

⁹⁴¹ DSU supra note 24 art 22.

⁹⁴² CPTPP Dispute Settlement supra note 24 art 28.20.

⁹⁴³ USMCA Dispute Settlement supra note 24 art 31.18.2.

⁹⁴⁴ See Mercurio B, 'Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding' (2009) 8 *World Trade Review* 2 at 14-15.

⁹⁴⁵ WTO, 'European Communities - Measures Affecting the Importation of Certain Poultry Products (WT/DS69/AB/R), Appellate Body Report adopted on 23 July 1998' (1998) at 35-36. The MFN principle is a cornerstone of the WTO trading system and requires that a member give equal treatment to all other WTO members except under certain specified conditions, such as when retaliation has been authorised.

⁹⁴⁶ Mercurio (2009) op cit note 944 at 10-11; Van den Bossche P & Zdouc W, *The Law and Policy of the World Trade Organization* (2018) 4 ed (Online, Cambridge University Press) at 204.

⁹⁴⁷ See Mercurio (2009) *ibid* at 15-21.

⁹⁴⁸ *Ibid* at 16; Hyo-Young Lee (2015) op cit note 932 at 447-448.

⁹⁴⁹ See Mercurio (2009) *ibid* at 12-13.

⁹⁵⁰ For example, the Biodiversity Consultancy notes that, as well as being uncertain and costly to implement, marine biodiversity offsets are generally designed to counteract unavoidable impacts and should only be used as a last resort – see Consultancy TB, 'Marine Biodiversity Offsets' (2017), available at

Thus, the remainder of the section looks at factors that may affect the efficacy of retaliation procedures, as well as ways to improve representation and protection of small-scale fisheries and developing countries in dispute settlement proceedings. Section III(a) considers how the retaliatory amount can be calculated for an environmental agreement where trade effects are difficult or impossible to determine, and focuses on the general enforceability of environmental agreements in a trade setting. Section III(b) discusses the structure of enforcement provisions in a fisheries subsidies context. It considers how the means of retaliation adopted by states could affect the efficacy of retaliation processes, as well as how enforcement provisions could be designed to promote and protect the needs of small-scale fisheries, including improvements to the system to benefit developing countries. The discussion focuses almost entirely on WTO law, given that so few trade disputes are decided under RTA dispute settlement mechanisms.

(a) Calculation of Retaliatory Amount

The amount and form that retaliation may take under WTO law depends on which agreement is in issue. The majority of the WTO's covered agreements are subject to the DSU, which requires that retaliation be 'equivalent to the level of the nullification or impairment'.⁹⁵¹ Although the DSU also applies to ASCM disputes, parts of the DSU have been modified by the ASCM, which requires that retaliation be 'appropriate' in the case of prohibited subsidies.⁹⁵² A number of WTO arbitrators have interpreted this to mean that the retaliatory amount must be high enough to be effective in ensuring that a prohibited subsidy is withdrawn, and have relied on the value of the prohibited subsidy for this purpose, rather than its trade effects.⁹⁵³ Indeed, the arbitrator in *US-FSC* noted that 'as far as prohibited subsidies are concerned, there is no reference whatsoever in remedies foreseen under Article 4 to such concepts as "trade effects", "adverse effects" or "trade impact"'.⁹⁵⁴ However, in the *US-*

http://www.thebiodiversityconsultancy.com/es/wp-content/uploads/2017/03/Marine-offsets-20170228_FINAL.pdf, accessed on 13 August 2020.

⁹⁵¹ DSU supra note 24 art 22(4).

⁹⁵² ASCM supra note 53 art 4.10.

⁹⁵³ WTO, 'Brazil - Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement (WT/DS46/ARB), Authorisation to Retaliate Granted on 12 December 2000' (2000) at 15-18 (*Brazil-Aircraft*); WTO, 'United States-Tax Treatment for "Foreign Sales Corporations", Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement (WT/DS108/ARB), Authorization to Retaliate Granted on 7 May 2003' (2002) (*US-FSC*) at 16-17; WTO, 'Canada-Export Credits and Loan Guarantees for Regional Aircraft, Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement (WT/DS222/ARB), Authorisation to Retaliate Granted on 18 March 2003' (2003) (*Canada-Aircraft II*) at 9-10.

⁹⁵⁴ *US-FSC* ibid at 14.

Upland Cotton arbitration,⁹⁵⁵ the arbitrator took the view that the trade effects on the complaining party are material to the determination of the award even in the case of a prohibited subsidy.⁹⁵⁶

The reasoning in *US-Upland Cotton* is highly problematic in a fisheries subsidies context for two reasons. First, a key purpose of provisions disciplining fisheries subsidies is to improve sustainability, and a state should have the means to enforce compliance to fulfil this purpose even if a violation of a subsidy ban has no adverse effects on its trade. This is, indeed, the primary problem with negotiating environmental agreements in a trade context, and it is vital that this issue be resolved if such agreements are to be enforced effectively. Secondly, even where a state does suffer adverse trade effects, it is often difficult to prove a direct link between a fishing subsidy and harm to a complainant's trade. Subsidies for boat production or building of port infrastructure, for example, are often too far removed from the specific harm complained about to be seen as causally responsible for it, while the homogenous nature of fish means that fish products can be comprised of many different catches from many different boats, including those flying the flags of different countries.

It is clear, then, that a fisheries subsidies agreement must ensure that the amount of retaliation is not limited to the value of any trade effects if it is to be enforceable.⁹⁵⁷ One way to do so is to make the agreement an annexure to the ASCM or to incorporate ASCM provisions in the agreement, given that arbitrators are more likely to authorise retaliation unrelated to trade impacts under ASCM provisions.⁹⁵⁸ This would also be beneficial because the ASCM provides shorter time periods for both the dispute settlement process and the withdrawal of a prohibited subsidy.⁹⁵⁹ While these guidelines have not always been followed

⁹⁵⁵ WTO, 'United States - Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement (WT/DS267/ARB/1), Authorisation to Retaliate Granted on 19 November 2009' (2009) (*US-Upland Cotton*).

⁹⁵⁶ *Ibid* at 429-430 and 437-438.

⁹⁵⁷ This would also need to be made applicable to the use of countervailing duties if members decide to use such a mechanism as an alternative to multilateral dispute settlement, as is currently the case in the ASCM – see ASCM *supra* note 53 part V. Such a provision would need to look very different in a fisheries subsidies context, however, as the ASCM specifically relies on a causal link between the subsidy and harm to a local industry. It is also unclear whether WTO members are considering such a course at present.

⁹⁵⁸ WTO members appear open to this possibility. The 2007 Draft Text, which drew on early submissions in the WTO negotiations, was drafted as an Annex to the ASCM, while the 2018 Working Document states that '[t]he instrument provides specific provisions regarding fisheries subsidies [and it is an integral part of the Agreement on Subsidies and Countervailing Measures (SCM Agreement)]' – Chair's Draft Text (2007) *op cit* note 60 at 87; Chair's Working Document (2018) *op cit* note 12 art 2.1.

⁹⁵⁹ ASCM *supra* note 53 arts 4.6-4.12. The time-period for withdrawal of a subsidy is usually set at 90 days – see Hyo-Young Lee (2015) *op cit* note 932 at 429.

in practice,⁹⁶⁰ they would be more appropriate for environmental problems requiring urgent action than the longer time periods set out in the DSU.

However, because of the mixed jurisprudence on the issue of trade effects under the ASCM, there will likely also need to be a specific provision in the agreement to the effect that the retaliatory amount is not dependent on the trade effects of a measure.⁹⁶¹ Whether such a provision could be made applicable to the entire agreement, including actionable subsidies such as the S&DT provisions which would otherwise be governed by DSU procedures,⁹⁶² is likely to be a contentious question. A violation under the actionable subsidies provisions would occur where a condition attendant on a subsidy exemption is breached, rather than where a prohibited subsidy is provided, but there would still be a breach of the trade agreement with potentially deleterious effects on sustainability. However, the clear indications in DSU jurisprudence that trade effects should be taken into account in calculating retaliation may make it difficult to obtain consensus on this point, especially as developing countries will likely see this as an attempt to curb S&DT. Thus, it may be useful to explore alternative means of improving compliance in regard to certain sensitive actionable issues, as discussed further in Section IV below.

If retaliation is to go beyond trade effects in a fisheries subsidies agreement, the question then becomes: on what basis could an appropriate level of retaliation be calculated? Jung and Jung consider this question in the context of the CPTPP fisheries subsidies provisions. The CPTPP uses the term ‘benefits of equivalent effect’⁹⁶³ when discussing retaliation, which is closer to the language of the DSU than the ASCM. However, there are considerations beyond this language that make the provisions difficult to enforce in a fisheries subsidies context. Certain of these considerations are dealt with in the analysis on the structure of retaliation provisions in Section III(b). For the purposes of determining the appropriate *level* of retaliation, however, Jung and Jung suggest different bases for retaliation,

⁹⁶⁰ Hyo-Young Lee (2015) *ibid* at 431-433.

⁹⁶¹ Bartels and Morgandi note that members may fear the influence of such a provision on the interpretation of ASCM Article 4 in matters not related to fisheries subsidies – Bartels L & Morgandi T, 'Options for the Legal Form of a WTO Agreement on Fisheries Subsidies' (2017) *University of Cambridge Faculty of Law Research Paper* 53 at 4. However, not inserting such a provision would make a fisheries subsidies agreement all but unenforceable if the reasoning in *US-Upland Cotton* is followed, which is clearly an untenable position.

⁹⁶² Although dispute settlement provisions are not included in the 2018 Working Document, in the 2007 Draft Text only prohibited subsidies were to follow the procedures in Article 4 of the ASCM, while provisions on general exemptions and S&DT were to follow DSU procedures – Chair’s Draft Text (2007) *op cit* note 60 art VIII.1. This accords with the different approaches to enforcement of prohibited and actionable subsidies in the ASCM – see ASCM *supra* note 53 arts 4 and 7.

⁹⁶³ CPTPP Dispute Settlement *supra* note 24 art 28.20.3.

such as the injury to the environment or the benefit received by the violating party, but stress that the arbitrator must be given flexibility to decide what will best allow for compliance by the retaliating party under the circumstances.⁹⁶⁴

Of course, injury to the environment is not always easy to determine or attribute and arbitrators may need to rely on cruder measurements in certain cases, such as the amount of the subsidy. However, the position on flexibility accords with the reasoning in the *US-FSC* arbitration⁹⁶⁵ and would seem especially pertinent in a case where there are strong social policy reasons to keep a measure in place. It is also possible to go beyond the parameter of quantification and consider other interventions. For example, retaliation in the form of port state measures on fishery products from a non-complying state (including import and transshipment⁹⁶⁶ bans) could prove effective where the market of the importing country is large enough.⁹⁶⁷ Indeed, the EU already does this under its yellow and red card system for states that it feels are not effectively controlling IUU fishing in their waters.⁹⁶⁸

Thus, allowing an arbitrator flexibility is necessary to ensure that the retaliatory amount is set at an appropriate level, particularly in cases where there are multiple complainants in different stages of development. Ultimately, without allowing disproportionate or punitive retaliation, arbitrators should be able to determine the retaliatory amount in line with the goal of generating compliance, as this is an important purpose of retaliation.⁹⁶⁹ Such a goal is highly relevant in the case of harm to the environment which is

⁹⁶⁴ Jung H & Jung NR, 'Enforcing 'Purely' Environmental Obligations Through International Trade Law: A Case of the CPTPP's Fisheries Subsidies' (2019) 53 *Journal of World Trade* 6 at 1016-1017.

⁹⁶⁵ *US-FSC* supra note 953 at 11 – the arbitrator noted, however, that, in terms of the ASCM, this flexibility is bounded by the notion of appropriateness and cannot be disproportionate to the violating measure and/or its effects on the complainant. A similar safeguard could be applied in a fisheries subsidies agreement, provided harmful effects also included effects on fish stocks and aquatic ecosystems.

⁹⁶⁶ Transshipment occurs when catch is transferred from one ship to another while at sea and may be used to evade fisheries management restrictions.

⁹⁶⁷ A similar suggestion to suspend access for fishing vessels to ports as a form of retaliation was made by Iceland, New Zealand and Pakistan – Iceland, New Zealand and Pakistan (2017) op cit note 637. The use of a wider range of port state measures, including import bans, would provide even more options for states in this regard.

⁹⁶⁸ See European Commission, 'Questions and Answers - Illegal, Unreported and Unregulated (IUU) fishing in general and in Thailand' (2019), available at https://europa.eu/rapid/press-release_MEMO-19-201_en.htm, accessed on 13 August 2020.

⁹⁶⁹ DSU supra note 24 arts 3.7 and 22(1); *US-Upland Cotton* supra note 955 at 38-39. It should be noted, however, that the arbitrator in *US-Offset Act* took the view that this was not the only purpose, but simply a purpose of WTO retaliation - WTO, 'United States - Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by Brazil), Recourse to Arbitration by the United States under Article 22.6 of the DSU, Authorization to Retaliate Granted on 26 November 2004 (WT/DS217/ARB/BRA)' (2004) at 22.

potentially irreversible, and is also significant when considering the structure of retaliation provisions.

(b) Structure of Enforcement Provisions

In considering how to make retaliation effective in an agreement dealing with fisheries subsidies, it is important to look not only at the level of retaliation, but also at how retaliation can best be implemented. Vidigal notes that parties generally do not opt to implement retaliation up to the full retaliatory amount immediately (when they choose to use retaliation at all⁹⁷⁰), but may do so incrementally or put in place a structure to do so within a particular time period as a threat to induce compliance.⁹⁷¹ Mitchell and Salonidis also claim that the structure of retaliation is all-important in determining its efficacy in certain cases.⁹⁷² Thus, while a high level of retaliation can function as an effective threat, the way this threat is used is likely the most important element of inducing compliance. At present, however, retaliation mechanisms are impractical for enforcing compliance with environmental provisions.

Under the DSU agreement (as well as in the CPTPP⁹⁷³ and USMCA⁹⁷⁴) states must follow a certain structure when they retaliate.⁹⁷⁵ Members are first required to retaliate under the same agreement that was violated and, if this is not feasible, can apply for cross-sector retaliation (i.e. still under the same agreement, but in a different sector under that agreement) or, failing this, cross-agreement retaliation.⁹⁷⁶ This is slightly different in the RTAs, which do not have multiple agreements. Instead, the RTAs require either retaliation in the same sector (USMCA) or same subject matter (CPTPP) or, failing that, in a different sector or subject matter.⁹⁷⁷ Clearly, same agreement or sector or subject matter retaliation cannot occur in a situation where an environmental agreement is enforced, as this would require the retaliating party to suspend its environmental obligations – thus undermining the purpose of the

⁹⁷⁰ Parties will often go through multiple compliance proceedings rather than use retaliation procedures – Vidigal (2018) op cit note 933 at 948.

⁹⁷¹ Ibid at 947-948. See also Mitchell & Salonidis (2011) op cit note 932 at 477-478.

⁹⁷² Mitchell & Salonidis (2011) ibid at 480-488.

⁹⁷³ CPTPP Dispute Settlement supra note 24 art 28.20.4.

⁹⁷⁴ USMCA Dispute Settlement supra note 24 art 31.19.2.

⁹⁷⁵ This procedure is also applicable to prohibited subsidies under the ASCM – see *US-Upland Cotton* supra note 955 at 78-81.

⁹⁷⁶ DSU supra note 24 art 22(3). All agreements on goods, including the WTO's plurilateral agreements, are considered to be one agreement for retaliation purposes.

⁹⁷⁷ CPTPP Dispute Settlement supra note 24 art 28.20.4; USMCA Dispute Settlement supra note 24 art 31.19.2.

provisions.⁹⁷⁸ It seems, then, that cross-agreement/sector/subject-matter retaliation must be the norm in dispute settlement under a trade agreement dealing with fisheries subsidies.

This type of retaliation can also be beneficial to developing countries, particularly small developing countries for whom conventional retaliation may ultimately be more harmful than for the (larger) non-complying country. Within the WTO, suspension of obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)⁹⁷⁹ can be a powerful tool for members that do not have sufficient levels of trade for suspension of goods or services to have any meaningful effect in inducing compliance. Retaliation under the TRIPS Agreement has been authorised by the DSB in certain cases involving small developing countries and was even authorised for Brazil in the case of *US-Upland Cotton*.⁹⁸⁰ However, Mitchell and Salonidis argue that this is not a foolproof method of inducing compliance, and that retaliatory measures must be structured very carefully to be effective and avoid the various pitfalls associated with breach of intellectual property rights.⁹⁸¹ They also point to the case of *US-Gambling*⁹⁸² where Antigua and Barbuda simply did not have the resources to effectively retaliate in this, or any other, manner.⁹⁸³

This raises the issue of collective enforcement. Currently, the DSU allows, and indeed mandates, similar disputes to be joined together,⁹⁸⁴ in which case successful complainants may retaliate together. The DSU also allows members with a 'substantial interest' in a dispute to be joined as third parties,⁹⁸⁵ in which case they can make submissions that may lead to retaliatory measures being approved but cannot themselves retaliate. The general inability for collective retaliation by all parties with an interest in the matter is problematic

⁹⁷⁸ See Jung & Jung (2019) op cit note 964 at 1014.

⁹⁷⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C 1994, 1869 *UNTS* 299.

⁹⁸⁰ *US-Upland Cotton* supra note 955 at 123-124. Note, however, that this authorisation did not cover the entire retaliation amount but only that part that exceeded imports of consumer goods from the US in a given year.

⁹⁸¹ Mitchell & Salonidis (2011) op cit note 932 at 479-488.

⁹⁸² WTO, 'United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Arbitration by the United States under Article 22.6 of the DSU, Authorization to Retaliate Granted on 28 January 2013 (WT/DS285/ARB)' (2007).

⁹⁸³ Mitchell & Salonidis (2011) op cit note 932 at 477 and 479.

⁹⁸⁴ DSU supra note 24 art 9. See also USMCA Dispute Settlement supra note 24 art 31.6.7; CPTPP Dispute Settlement supra note 24 art 28.7.6.

⁹⁸⁵ DSU *ibid* art 10. See also USMCA Dispute Settlement *ibid* arts 31.6.5 and 31.14; CPTPP Dispute Settlement *ibid* art 28.14.

both for developing countries⁹⁸⁶ and for the enforcement of environmental agreements. In the case of environmental agreements, the problem arises not because a party *cannot* retaliate on its own, but because it may not *want* to retaliate on its own.⁹⁸⁷ Even if compliance was achieved by the retaliating member, there would be no direct and immediate benefit to that member, unless the subsidy in question was directly harming its trade interests. Thus, it would harm its own economic interests for the purpose of a moral victory or, at best, a nebulous future benefit of increased fish stocks.

Enforcement of these provisions by many different states through retaliatory measures would ease this burden and improve the chances of enforcement and compliance. Indeed, it would accord with what Scott refers to as the ‘truism’ that many environmental problems require collaborative approaches to resolve.⁹⁸⁸ It would also be necessary for the operation of a remedy like port state measures, which may require many ports in an area to put in place restrictions in order for these to be effective. Whether this type of provision could be included in a trade agreement as a mandatory obligation is questioned by Jung and Jung on political grounds.⁹⁸⁹ However, they do suggest that an optional provision, allowing but not forcing states to retaliate collectively, would be more palatable, and could be an important aspect of enforcing an agreement.⁹⁹⁰ Likely this would still be effective, given that there are many powerful developed countries with an interest in preserving fish stocks.

There are also a number of other dispute settlement mechanisms that could be beneficial for small developing countries and small-scale fisheries if included in an agreement, both to encourage participation and to prevent litigation against them. For example, an agreement could include restraint provisions that require parties to consider certain realities before acting. Some of these are already included in the agreements under consideration. Article 24 of the DSU requires that parties must ‘exercise due restraint’ before instituting and enforcing proceedings against an LDC,⁹⁹¹ while Article 20.23 of the CPTPP requires a complainant to consider whether it maintains environmental measures similar to

⁹⁸⁶ See further in this regard Pauwelyn J, ‘Enforcement and Countermeasures in the WTO: Rules are Rules - Toward a More Collective Approach’ (2000) 94 *The American Journal of International Law* 2 at 342-344; Bianchi & Gradoni (2008) op cit note 932 at 17.

⁹⁸⁷ See Jung & Jung (2019) op cit note 964 at 1014.

⁹⁸⁸ Scott J, ‘International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO’ (2004) 15 *European journal of international law* 2 at 341.

⁹⁸⁹ Jung & Jung (2019) op cit note 964 at 1018.

⁹⁹⁰ Ibid at 1018.

⁹⁹¹ DSU supra note 24 art 24.1.

those at issue in the dispute before instituting dispute settlement.⁹⁹² This type of provision could also be useful in protecting small-scale fisheries. For example, a state could be made to consider whether its own conduct harms small-scale fisheries before instituting proceedings regarding subsidies given to small-scale fisheries in another state.

Similarly, burden of proof shifting mechanisms could discourage litigation against vulnerable groups. For example, where large fishing powers bring actions against LDCs and SVEs, or actions involving small-scale fisheries in developing countries, the respondent could be required only to show, *prima facie*, that it has a fisheries management system in place (e.g. through the provision of regulations and other documents) after which time the burden would shift to the complainant to prove that the management system is inadequate to fulfil the respondent's obligations under the agreement. Whether such a measure would be acceptable to members is an open question, as nothing similar has been proposed to date. Likely it would be more acceptable if it is confined to vulnerable groups and countries, in line with existing provisions like Article 24 of the DSU.

Technical assistance for dispute settlement, as well as the inclusion of small-scale fishers, fisheries organisations and fisheries experts in dispute settlement processes, can also be useful tools to ensure that sustainable development outcomes are achieved in the enforcement of a trade agreement.⁹⁹³ Technical assistance could take the form of direct assistance or the creation of a fund for a particular purpose, such as the participation of small-scale fisheries in issues that affect them. Developed countries could further be encouraged to become members of the Advisory Centre for WTO Law, which assists developing and least-developed countries with WTO litigation, although it is unlikely that such a provision could be made enforceable in a binding agreement. It must also be accepted that there are power dynamics that prevent small developing countries instituting litigation at the WTO.⁹⁹⁴ However, there is still the possibility of assisting these states to participate as third parties, which seems to be the comfort zone of the LDCs at present.

Ultimately, certain of the suggestions discussed above are necessary to ensure that a fisheries subsidies agreement (or provision) is capable of enforcement. These include the

⁹⁹² CPTPP Environment *supra* note 9 art 20.23.4.

⁹⁹³ The role of external organisations and experts in enforcement and implementation processes is discussed further in Section IV below.

⁹⁹⁴ Elsig M & Stucki P, 'Low-Income Developing Countries and WTO Litigation: Why Wake up the Sleeping Dog?' (2012) 19 *Review of International Political Economy* 2 at 297-298 and 304-306.

ability to use cross-agreement or cross-sector retaliation as well as some form of collective retaliation, and provisions for flexibility and use of non-conventional remedies. It would also be prudent for negotiators to attempt to close various loopholes that have come to light in subsidies disputes under the ASCM, such as the lack of a remedy for non-recurring subsidies and the re-introduction of inconsistent measures after the conclusion of a dispute.⁹⁹⁵ Other suggestions, such as shifting the burden of proof, restraint provisions, improved participation and technical assistance for dispute settlement, aim to improve equity and governance outcomes. Thus, while they are not strictly necessary for the agreement to function, they are vital for the enhancement of sustainable development.

IV. Regime Interaction and Harmonisation

Best practices around fisheries management, small-scale fisheries and fisheries subsidies are contained in a number of international agreements. There are also several IGOs and NGOs that have expertise in these areas, including the FAO, OECD, UNEP, The United Nations Conference on Environment and Development (UNCED), and the World Wide Fund for Nature (WWF). Trade bodies have experience dealing with trade-distorting subsidies, but do not have the expertise on fisheries found in these IGOs and NGOs. Thus, interaction between these organisations and trade bodies (regime interaction⁹⁹⁶) and harmonisation of fisheries law are particularly important issues in the context of a trade agreement dealing with fisheries subsidies.

The WWF has noted that regulation of fisheries subsidies requires an interdisciplinary approach, allowing for the inclusion of external bodies and fisheries experts in dispute and review proceedings. Not doing so would, in its view, lead to policy incoherence.⁹⁹⁷ One of the consequences of policy incoherence, or fragmentation, is that states may be subject to

⁹⁹⁵ For a full analysis of these issues see Hyo-Young Lee (2015) op cit note 932 at 441-457. The need to deal with non-recurring subsidies through retrospective retaliation is particularly important in a fisheries subsidies agreement, as certain proposed subsidy bans (e.g. the building of fisheries infrastructure and increases in fleet capacity) often take the form of once-off payments. The issue of retrospective retaliation has also been raised by Canada in a submission to the Rules Group – see Canada (2019) op cit note 935 at 3.

⁹⁹⁶ This thesis uses the definition of regimes adopted by Margaret Young – namely ‘a set of laws, processes and institutions that have evolved by addressing a particular problem or function’ – Margaret Young (2011) op cit note 6 at 19.

⁹⁹⁷ Schorr DK, *Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fisheries Subsidies in the World Trade Organization* (2004) WWF, WWF, available at https://www.wto.org/ENGLISH/forums_e/ngo_e/posp43_wwf_e.pdf, accessed on 13 August 2020 at 101.

different, and potentially opposing, obligations on similar issues.⁹⁹⁸ This can lead to problems applying provisions on fisheries subsidies in a meaningful way.

As with enforcement problems, this can impact on equity between small- and large-scale fisheries. However, the ramifications for small-scale fisheries of policy incoherence go beyond this issue. Chapter 2 maintained that cooperation and coordination between those dealing with fisheries issues is an important governance principle.⁹⁹⁹ Not taking advantage of the expertise on small-scale fisheries found in organisations like the FAO and UNEP would subvert this principle to the detriment of small-scale fisheries. In addition, the FAO has created, and continues to create, comprehensive guidelines and codes on issues pertaining to the development of small-scale fisheries.¹⁰⁰⁰ Not acknowledging these important sources of information would not only lead to poorer outcomes for small-scale fisheries in regard to issues such as basic necessities, security, gender equity and so on, it would also reduce the potential for small-scale fisheries to participate in issues that affect them. This is because the FAO often conducts widespread participatory processes in creating these codes and guidelines, including with small-scale fisheries where relevant.¹⁰⁰¹ Thus, regime interaction is a vital aspect of ensuring that a fisheries subsidies agreement is consistent with international law and gives effect to meaningful development outcomes for small-scale fisheries.

Within the WTO, some fragmentation has been averted in the past by a progressive reading of provisions by the Appellate Body.¹⁰⁰² However, the Appellate Body has not been able to operate since the end of 2019 because of repeated refusals by the US to appoint new members.¹⁰⁰³ Although this is a political issue which may be resolved by a change of government (it seems unlikely to be resolved through negotiation¹⁰⁰⁴) this cannot be

⁹⁹⁸ Indeed, the Chair has noted that the negotiations are complicated by the need for new disciplines to fit in with the many other international fisheries instruments that currently exist – Sumaila, Arthur, Wills, et al (2020) op cit note 917.

⁹⁹⁹ Chapter 2 section IV(d)(iv).

¹⁰⁰⁰ These documents are referred to throughout the thesis, and include, *inter alia*, the SSF Guidelines, FAO Code of Conduct, and several Technical Guidelines on Responsible Fisheries on issues such as MPAs, recreational fishing and the EAF.

¹⁰⁰¹ See, for example, SSF Guidelines supra note 1 foreword; FAO Code of Conduct supra note 91 Annex 1.

¹⁰⁰² See, for example, *US-Shrimp*, in which the Appellate Body adopted an ‘evolutionary’ interpretation of GATT Article XX(g) which drew partly on WTO agreements, such as the preamble to the Marrakesh Agreement, and partly upon non-WTO agreements such as CITES and UNCLOS – WTO, ‘US-Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58/AB/R) Report of the Appellate Body adopted on 6 November 1998’ (1998) at 47-51.

¹⁰⁰³ Correct as at 28 August 2020.

¹⁰⁰⁴ The current US administration does not appear open to suggestions for reform of the DSU, nor is it offering any suggestions of its own – see Wagner M, ‘The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic?’ in Lo C-f, Nakagawa J and Chen T-f (eds) *The Appellate Body of the WTO and*

predicted, especially as the US has had issues with the Appellate Body overstepping for years.¹⁰⁰⁵ As this issue may not be resolved in the near future, it will fall to states to ensure that a fisheries subsidies agreement is consistent with international fisheries law.¹⁰⁰⁶ Negotiators may also need to consider alternative means of oversight, such as peer review.

To date there has been a certain amount of informal interaction with external organisations in the WTO negotiation process, which appears to have influenced the proposals made by members and the various texts and working documents that have been created by the Chair.¹⁰⁰⁷ In the context of fisheries management, the 2007 Draft Text referred to standards such as UNFSA,¹⁰⁰⁸ the FAO Code of Conduct¹⁰⁰⁹ and the FAO's Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement¹⁰¹⁰).¹⁰¹¹ The CPTPP, which has been drawn upon to a certain extent in the 2018 Working Document, makes specific reference to UNCLOS, UNFSA, the FAO Code of Conduct, the FAO Compliance Agreement and the FAO's International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU)¹⁰¹² in its fisheries management provisions.¹⁰¹³ USMCA, which could also be drawn upon in the WTO negotiations, invokes the same instruments as the CPTPP and further includes the PSMA.¹⁰¹⁴

In the 2018 Working Document, there are various scattered references to UNCLOS,¹⁰¹⁵ the FAO Code of Conduct,¹⁰¹⁶ the IPOA-IUU,¹⁰¹⁷ the SSF Guidelines,¹⁰¹⁸ the

Its Reform (2020) at 18-19. Talks on DSU Reforms running parallel to the Doha Round have also made very little progress.

¹⁰⁰⁵ *Ibid* at 12-17; Hillman JA 'A Reset of the World Trade Organization's Appellate Body' *Council on Foreign Relations* 14 January 2020, available at <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>, accessed on 13 August 2020.

¹⁰⁰⁶ As many RTA cases are decided in the WTO, this applies to RTA parties as well as WTO members – see Vidigal (2018) op cit note 933 at 930-935; Chase, Yanovich, Crawford, et al (2013) op cit note 933 at 46-49.

¹⁰⁰⁷ See Margaret Young (2011) op cit note 6 at 111-114 and 121; Margaret Young (2017) op cit note 47 at 11; UNEP (2011) op cit note 15 at 145.

¹⁰⁰⁸ Chair's Draft Text (2007) op cit note 60 arts III.3, IV.1 and V.1

¹⁰⁰⁹ *Ibid* arts III.3, IV.1 and V.1.

¹⁰¹⁰ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993, 2221 *UNTS* 91.

¹⁰¹¹ Chair's Draft Text (2007) op cit note 60 arts III.3, IV.1 and V.1.

¹⁰¹² IPOA-IUU supra note 115.

¹⁰¹³ CPTPP Environment supra note 9 art 20.16.3, fn 12.

¹⁰¹⁴ USMCA Environment supra note 10 art 24.18.3.

¹⁰¹⁵ Chair's Working Document (2018) op cit note 12 arts 1, 5 and 8.

¹⁰¹⁶ *Ibid* arts 2.8, fn 3 and 5.15(d).

¹⁰¹⁷ *Ibid* arts 1 and 3.2.

¹⁰¹⁸ *Ibid* art 5.8(c), fn 11.

SDGs,¹⁰¹⁹ UNFSA,¹⁰²⁰ and decisions of RFMOs.¹⁰²¹ Other agreements, such as the FAO Compliance Agreement, have been removed. As the FAO Code of Conduct is a wide-ranging instrument with ecosystem guidelines for fisheries management, its inclusion is very important, although it is currently only used in a limited way. Similarly, the SSF Guidelines have, thus far, only been referred to in the context of defining small-scale fisheries. A wider inclusion is to be hoped for, however, as this may offset many current deficiencies of the negotiations when it comes to small-scale fisheries, including the lack of attention paid to issues like tenure security and gender equity. The 2018 Working Document also provides for some limited interaction with the FAO, RFMOs, and UNCTAD in regard to technical assistance and scientific advice.¹⁰²²

Yet, despite these signs of interaction, there was much opposition to the reliance on external fisheries management standards¹⁰²³ in the 2007 Draft Text,¹⁰²⁴ and there is little clarity, at present, on whether the inclusions in the 2018 Working Document have widespread support or will be further developed.¹⁰²⁵

There has also been contention over whether an adjudicative trade body like the WTO's dispute settlement body is equipped to handle disputes on substantive environmental issues such as fisheries management.¹⁰²⁶ This is in spite of the ability of panels to call scientific experts for assistance and accept non-solicited amicus briefs,¹⁰²⁷ and the 2007 Draft Text stating that in disputes raising scientific and technical fisheries questions, a panel *should* seek advice from fisheries experts.¹⁰²⁸

Given these objections, it could be supposed that states would prefer another type of compliance mechanism to resolve issues around fisheries management, especially as these

¹⁰¹⁹ Ibid preamble.

¹⁰²⁰ Ibid art 5.15.

¹⁰²¹ Ibid arts 1, 2, 3, 5, 6 and 8.

¹⁰²² Ibid arts 5.17 and 8.5.

¹⁰²³ 'Standards' in this section refers to both binding and non-binding instruments, although these are differentiated where necessary for purposes of the analysis.

¹⁰²⁴ See, for example, Japan, Korea and Chinese Taipei (2007) op cit note 569 at 3-4; India, Indonesia and China (2008) op cit note 648 at 3; Brazil, China, India and Mexico (2010) op cit note 510 at 2 and 5-6.

¹⁰²⁵ The Chair has not given a lot of insight into regime interaction concerns, simply noting that the disciplines must fit in with other fisheries instruments and will rely on certain external definitions, such as the definition of IUU fishing – Sumaila, Arthur, Wills, et al (2020) op cit note 917.

¹⁰²⁶ See Schorr (2004) op cit note 997 at 101; Canada (2019) op cit note 935 at 1-2.

¹⁰²⁷ See DSU supra note 24 art 13; *US-Shrimp* supra note 1002 at 39.

¹⁰²⁸ Chair's Draft Text (2007) op cit note 60 art VIII.4. This is stronger language than Article 13 of the DSU, under which panels *may* and *have the right to* seek information – DSU supra note 24. Jurisprudence also makes it clear that panels need not seek information at all under this article – see *US-Shrimp* ibid at 37.

issues are particularly pertinent to the provision of S&DT and exemptions for small-scale fisheries. Peer review mechanisms are an alternative to formal dispute resolution and are particularly useful in international law, which often does not have formal mechanisms of dispute settlement. Peer review is used extensively by the OECD, for example.¹⁰²⁹ Similarly, as discussed in Chapter 4, MEAs make use of compliance bodies to improve implementation and avoid formal dispute settlement.¹⁰³⁰ In the case of fisheries management, review by a body with sufficient expertise in the matter could, indeed, lead to improvements in fisheries management systems, be tailored to local circumstances and, unlike dispute settlement, need not be accompanied by sanctions. Despite this, many developing members called for the removal of a provision in the 2007 Draft Text which required that, prior to granting a subsidy under the S&DT flexibilities, developing countries should submit information on the nature and operation of their fisheries management systems to the FAO for peer review.

Members further vetoed¹⁰³¹ a proposal by the WWF to create a standing committee of fisheries experts, in cooperation with the FAO, UNEP and RFMOs, to make binding rulings and assist with monitoring and review of the fisheries subsidies disciplines.¹⁰³² As noted in Chapter 4,¹⁰³³ however, a 2011 submission by Japan, Korea and Chinese Taipei suggested the creation of an ad hoc group of experts, partly for the purposes of peer review.¹⁰³⁴ Japan also suggested that peer review by the FAO should be explored provided that the WTO retained decision-making powers,¹⁰³⁵ while a number of members in a UNEP workshop ‘voiced discomfort with the idea of giving an FAO panel a decision making role in the administration of WTO rules.’¹⁰³⁶ This suggests that members do not have an issue with the creation of an expert group or peer review in itself, but rather with the involvement of external organisations in its creation and management.

The reasons that have been advanced for member’s mistrust of external standards and organisations include the need to stay within the mandate of the WTO,¹⁰³⁷ the fact that non-

¹⁰²⁹ OECD, 'The OECD's Peer Review Process' (2018), available at <https://www.oecd.org/site/peerreview/>, accessed on 13 August 2020; Dimitropoulos G, 'Compliance Through Collegiality: Peer Review in International Law' (2015) 37 *Loy. LA Int'l & Comp. L. Rev.* at 291.

¹⁰³⁰ See Chapter 4 section IV(d).

¹⁰³¹ See Margaret Young (2011) op cit note 6 at 129.

¹⁰³² Schorr (2004) op cit note 997 at 105.

¹⁰³³ Chapter 4 section IV(d).

¹⁰³⁴ Japan, Korea and Chinese Taipei (2007) op cit note 569 at 8.

¹⁰³⁵ Japan (2011) op cit note 85 at 7.

¹⁰³⁶ New Zealand (2008) op cit note 875 at 6.

¹⁰³⁷ WTO, 'Communication from India and the ACP Group (TN/RL/W/217)' (15 February 2008) at 1.

binding instruments may become binding through inclusion in the WTO disciplines,¹⁰³⁸ the absence of parallel membership between the WTO and the standard-setting or peer review body,¹⁰³⁹ and the lack of clarity on how the peer review function would be administered.¹⁰⁴⁰ The first of these concerns – keeping within the mandate of the WTO – is clearly not possible. There will necessarily be overlap with other regimes when dealing with cross-cutting trade, environment and development issues. Given that members are aiming for a ‘triple win’ from the negotiations (an outcome to the negotiations which is a win for trade, a win for the environment and a win for development)¹⁰⁴¹ this objection does not appear to have any merit. The other objections – non-binding instruments, parallel membership and lack of clarity – require more in-depth consideration.

(a) Non-Binding Standards and Parallel Membership

The gist of the objections to the inclusion of standards in the 2007 Draft Text is not with the standards themselves, but the extent to which members would have to rely on them. These concerns relate to both non-binding (soft law) instruments, and binding agreements that have not been ratified or fully implemented by all members becoming binding on all WTO members.¹⁰⁴² The latter refers to the issue of lack of parallel membership.

Although these complaints have been raised by developed¹⁰⁴³ and developing¹⁰⁴⁴ country members, it is primarily developing countries that are concerned about this issue. This is related to the inability of developing countries to create fisheries management systems that are fully consonant with these standards and fears that these systems will be subject to dispute settlement.¹⁰⁴⁵ The prejudice to small-scale fisheries of overly complex management

¹⁰³⁸ Japan, Korea and Chinese Taipei (2007) op cit note 569 at 3-4; India, Indonesia and China (2008) op cit note 648 at 3.

¹⁰³⁹ Chair’s Working Document (2008) op cit note 913 at C-59.

¹⁰⁴⁰ New Zealand (2008) op cit note 875 at 6.

¹⁰⁴¹ Campling & Havice (2013) op cit note 22; WTO, ‘Lamy: “Trade Opening Has Much to Contribute to the Protection of the Environment”’ (2010), available at https://www.wto.org/english/news_e/news10_e/dgpl_05jun10_e.htm, accessed on 13 August 2020.

¹⁰⁴² See Morocco (2010) op cit note 648 at 6-7, which suggested that fisheries management be based on standards ‘duly ratified by the Member country’, and India, Indonesia and China (2008) op cit note 648 at 7 which note that many developing countries have ratified binding agreements like UNFSA but are still in the process of implementing these agreements.

¹⁰⁴³ Japan, Korea and Chinese Taipei (2007) op cit note 569 at 3-4.

¹⁰⁴⁴ India, Indonesia and China (2008) op cit note 648 at 3; Brazil, China, India and Mexico (2010) op cit note 510 at 2 and 5-6; Morocco (2010) op cit note 648 at 2 and 6-7.

¹⁰⁴⁵ See India, Indonesia and China (2008) *ibid* at 3; New Zealand (2008) op cit note 875 at 5.

standards was also raised in a UNEP workshop discussing the 2007 Draft Text, because of the difficulty of managing this sector.¹⁰⁴⁶

There are, as discussed, a number of references to standards in the 2018 Working Document, some in the context of fisheries management. Whether inclusion of these instruments represents widespread acceptance by members is unclear at this stage, however. Given the earlier objections, it is to be supposed that this issue remains contentious. Thus, it is worth considering what conditions, if any, could make the inclusion of standards on fisheries management in the disciplines acceptable to members.

Reference to both specific standards and general rules for reliance on standards is made in the WTO's Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)¹⁰⁴⁷ and the Agreement on Technical Barriers to Trade (TBT Agreement).¹⁰⁴⁸ These have not always been binding standards, nor is there a need for them to be adopted by consensus in the standard-setting body.¹⁰⁴⁹ However, Scott notes that the Appellate Body has shown 'explicit and principled reluctance to vest (international) standards with obligatory force and effect' and that 'their authority in the WTO would seem...to be modest in the extreme.'¹⁰⁵⁰ Thus, fears that members have about being held strictly to external standards in a fisheries subsidies agreement may be unfounded.

In addition, the language in the 2007 Draft Text, which noted that a fisheries management system should be 'based on' internationally-recognised best practices, does not suggest a need for strict conformity, particularly when considering jurisprudence on the term in the SPS and TBT Agreements.¹⁰⁵¹ In this regard, the Appellate Body in *EC-Hormones*

¹⁰⁴⁶ New Zealand (2008) *ibid* at 5.

¹⁰⁴⁷ Agreement on the Application of Sanitary and Phytosanitary Measures 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A 1994, 1867 *UNTS* 493 (SPS) art 3.

¹⁰⁴⁸ Agreement on Technical Barriers to Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A 1994, 1868 *UNTS* 120 (TBT) art 2 and Annex 3. Note that the TBT defines standards as voluntary and technical regulations as mandatory, whereas this chapter uses the generic term 'standards' to refer to both voluntary and mandatory documents.

¹⁰⁴⁹ *Ibid* Annex 1.2; WTO, 'European Communities - Trade Description of Sardines (WT/DS231/AB/R), Appellate Body Report adopted on 23 October 2002' (2002) (*EC-Sardines*) at 61-63; WTO, 'EC-Measures Concerning Meat and Meat Products (Hormones) (WT/DS26/R/USA), Panel Report adopted on 13 February 1998' (1997) at 178. For purposes of the TBT this applies only to voluntary standards and not mandatory technical regulations.

¹⁰⁵⁰ Scott (2004) *op cit* note 988 at 330.

¹⁰⁵¹ Although the interpretation of one WTO agreement cannot be directly extrapolated to another, jurisprudence on the phrase 'based on' in Article 3.1 of the SPS was used to interpret 'as a basis of' in Art 2.4 of the TBT and vice versa – see *EC-Sardines* *supra* note 1049 at 68 and WTO, 'Russian Federation - Measures on the Importation of Live Pigs, Pork and other Pig Products from the European Union (WT/DS475/R), Panel Report circulated on 19 August 2016' (2016) (*Russia-Pigs*) at 102-103. Thus, it could be interpreted similarly in a fisheries subsidies agreement.

interpreted ‘based on’ as a less restrictive standard than ‘conform to’ in relation to standards in the SPS Agreement, finding that the choice of the term ‘based on’ was a clear indication that members did not intend to ‘transform those standards...into binding norms.’¹⁰⁵²

Although the Appellate Body in *EC-Sardines* took the view that a standard cannot be used ‘as a basis of’ a measure where it contradicts that standard,¹⁰⁵³ in *Russia-Pigs* the Panel noted that, in some cases, a measure could be based on a standard even when an element of the measure deviates from the standard.¹⁰⁵⁴ It is also worth pointing out that only those parts of the instruments relating to fisheries management would become ‘binding’ on WTO members, and only if they wished to use certain fisheries subsidies.

Despite these considerations, however, developing countries have still pushed for a lighter standard than ‘based on’. A submission by Brazil, China, India and Mexico advocated for the term ‘referenced on’,¹⁰⁵⁵ while the 2018 Working Document provides for ‘taking into account’ the FAO Code of Conduct.¹⁰⁵⁶ Morocco suggested that the words ‘duly ratified by the Member country’¹⁰⁵⁷ be inserted, although it is unclear how this would apply to a non-binding standard. There are many other phrases that could be used instead of ‘based on’, such as ‘noting the provisions of’, ‘considering’, ‘taking cognisance of’ or something similar, which may be more acceptable to developing countries. As the concept of ‘based on’ does not seem to be particularly problematic, there should not be too much difficulty reaching agreement in this regard. However, other provisions may be more substantively useful in assisting developing members and small-scale fisheries regarding concerns around external standards.

Rules discussed in the previous section to prevent overzealous litigation against developing countries and small-scale fisheries, such as burden of proof shifting and restraint provisions,¹⁰⁵⁸ would help to ameliorate fears around challenges to the fisheries management systems of certain developing countries. Alternative compliance mechanisms, such as peer review, may also help prevent this, as discussed further in Section IV(b) below. Simpler regulations or exemptions for small developing countries will further ensure that those least

¹⁰⁵² WTO, ‘EC-Measures Concerning Meat and Meat Products (Hormones) (WT/DS26/AB/R; WT/DS48/AB/R), Appellate Body Report adopted on 13 February 1998’ (1998) at 62-65.

¹⁰⁵³ *EC-Sardines* supra note 1049 at 69.

¹⁰⁵⁴ *Russia-Pigs* supra note 1051 at 103.

¹⁰⁵⁵ Brazil, China, India and Mexico (2010) op cit note 510 at 5-6.

¹⁰⁵⁶ Chair’s Working Document (2018) op cit note 12 art 2.8, fn 3.

¹⁰⁵⁷ Morocco (2010) op cit note 648 at 6-7.

¹⁰⁵⁸ See Section III(b) above.

able to comply with strict management standards are not punished for their inability to do so.¹⁰⁵⁹ Similarly, there could be simpler regulations for subsidies provided to small-scale fisheries, as discussed in Chapter 4.¹⁰⁶⁰ Strong technical assistance provisions will be another important factor in encouraging developing countries to accept the use of fisheries management standards in the agreement, as well as helping with their implementation.¹⁰⁶¹

Members could, moreover, consider applying rules or guidelines for the inclusion of standards in the agreement, particularly in the case of future standards or amendments to current standards.¹⁰⁶² A good place to start in this regard are the SPS and TBT agreements. Both of these agreements contain oversight mechanisms¹⁰⁶³ and require that standard-setting bodies be open to all WTO members or relevant bodies of members.¹⁰⁶⁴ Standards adopted under the TBT must also be created through transparent, open, impartial, effective, and coherent procedures which deal with constraints on developing countries through, for example, technical assistance.¹⁰⁶⁵

Commentators have considered this problem in the context of dispute settlement. Scott suggests that a dispute settlement body could consider the extent and breadth of support for an organisation (including an appropriate balance between developing, developed and least-developed countries), openness to external actors, such as NGOs, whether the agreement is sufficiently flexible to accommodate different needs in different states, and even subsidiarity in cases where trans-boundary cooperation is needed, requiring states to enter into agreements on specific topics for their trade measures to be considered lawful.¹⁰⁶⁶ In a fisheries context, these measures are largely endorsed by Young, who further suggests that there be more cooperation and transparency between secretariats.¹⁰⁶⁷ These various sources can be usefully drawn upon to consider what sorts of rules might be apposite for the

¹⁰⁵⁹ As discussed in Chapter 4 section IV, however, these exemptions could not apply where states receive assistance for large projects that have potentially deleterious effects on sustainability.

¹⁰⁶⁰ *Ibid.*

¹⁰⁶¹ See, in this regard, ACP and SVE Groups (2008) *op cit* note 875.

¹⁰⁶² The 2007 Draft Text appeared to envision the use of other instruments besides those specifically mentioned. It also provided for 'related or successor instruments' – Chair's Draft Text (2007) *op cit* note 60 art V.1.

¹⁰⁶³ The SPS and TBT Agreements both provide for committees to oversee the implementation and operation of their respective agreements – SPS *supra* note 1047 arts 3.5; 5.5; 10.3 and 12; TBT *supra* note 1048 arts 12.8-10, 13 and 15.

¹⁰⁶⁴ SPS (*ibid*) Annex A.3(d); TBT (*ibid*) Annex 1.4.

¹⁰⁶⁵ WTO, 'Decisions of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement (G/TBT/1/Rev.14)' (2000) at 62-64.

¹⁰⁶⁶ Scott (2004) *op cit* note 988 at 344-347.

¹⁰⁶⁷ Margaret Young (2011) *op cit* note 6 at 237.

protection of developing countries and small-scale fisheries, in regard to reliance on external standards in a fisheries subsidies agreement.

First, widespread participation in a standard-setting body is vital. This includes participation of WTO members as well as external organisations and actors, such as NGOs, fisheries organisations, other standard-setting bodies, academics, small-scale fisheries, legal professionals, or civil servants such as judges, as appropriate. The extent to which such participation is scrutinised could also be specified by members – whether the organisation must simply have policies allowing for participation or whether evidence of actual participation would be required, the latter being preferable but requiring more in-depth interrogation.

Secondly, an appropriate mixture of developing and developed countries participating in, or funding, a standard-setting body is critical when relying on standards in an agreement which deals with sustainable development concerns. This could even be refined further to consider whether the organisation contains an appropriate number of LDCs, SVEs, and ACP countries, particularly as these groups have been uncharacteristically vociferous in their demands in the WTO negotiations. Further to this point, and specifically for the purpose of protecting the most vulnerable, it might also be considered whether the organisation provides technical assistance for participation, pays sufficient attention to the special situation of small-scale fisheries and small developing countries in its fisheries work, and whether fisheries organisations or NGOs representing small-scale fisheries are given an opportunity to participate in the creation of relevant standards. Indeed, such rules could assist in the creation of a fisheries management provision that is not based predominantly on western conceptions of management, but also includes elements of co-management and traditional and community-based resource governance.

Thirdly, there would need to be some form of oversight of standard-setting bodies and their procedures. In the WTO, the SCM Committee (drawing on fisheries experts), or an entirely new expert committee set up to deal with the fisheries subsidies agreement, could be tasked with overseeing that the amendment, revision or replacement of the standards included in the agreement is done in a fair manner, taking into account considerations around participation, conflicts of interest and flexibility. A committee could also be tasked with reviewing new international agreements pertaining to fisheries management on similar

grounds. It could further liaise with the appropriate secretariat or similar body in the standard-setting organisation to perform these functions.

Finally, and specifically in the case of binding standards, it would have to be made clear that, where members are already bound by an agreement, they, or another WTO body, could not refuse to apply it on the basis that it did not meet certain WTO criteria or rules. The purpose of such rules is to ensure that non-parties are not forced to comply with a standard absent careful scrutiny of its processes, not to allow the WTO to override international treaties in the absence of a conflict rule.

These types of clear and equitable rules would be beneficial in increasing transparency, improving participation of small-scale fisheries, and giving developing countries more of a voice in the creation of standards on which they would have to rely, while still ensuring that there is appropriate oversight of these standards by the WTO. This, along with strong technical assistance provisions, differentiated commitments for developing countries, and protections for developing countries and small-scale fisheries in dispute settlement, would do much to answer the objections and alleviate the fears of members on the use of standards in fisheries management provisions, as well as improving development outcomes.

(b) Lack of Clarity on Peer Review

It has already been noted, both in this section and in Section II above, that developing countries were very unhappy with the strict conditionalities in the section on fisheries management in the 2007 Draft Text. It is also highly probable that one of the problems that developing countries had with the peer review function was that the fisheries management conditions were too stringent and they were concerned about not meeting these standards in a peer review process, especially as there was no indication as to what would occur in the event of an unfavourable outcome. Dealing with concerns around standards and creating a simpler and more flexible fisheries management system would, therefore, go some way towards ameliorating the fears of developing countries in regard to peer review. However, this will likely not be enough. It is also highly important that there are clear rules governing the process.

Although peer review can be more beneficial to developing countries than dispute settlement, as it can be tailored to specific circumstances, the peer review function as included in the 2007 Draft Text lacked specifics. It provided only that:

Information as to the nature and operation of these [fisheries management] systems, including the results of the stock assessments performed, shall be notified to the relevant body of the FAO, where it shall be subject to peer review prior to the granting of the subsidy.¹⁰⁶⁸

Thus, it contained no information on how peer review would be administered, what it would entail and, as mentioned, what the consequences would be if a fisheries management system was found wanting. A particular problem with peer review, too, is that it can be a lengthy and expensive process.¹⁰⁶⁹ Although the 2007 Draft Text appeared to envision only a review of documents, rather than site visits, the scope of such review was unclear. Notification can be an arduous process in itself, even for particular subsidies, let alone all information on the ‘nature and operation’ of a fisheries management system. Developing countries would be well-justified in questioning the operation of such a provision, including how notification and review would be administered and paid for and whether developing countries would receive technical assistance to conduct the process and make improvements in the event of an unfavourable outcome. Ideally, a peer review measure would be timely and cost-effective, especially in regard to subsidies for small-scale fisheries, and assistance would be provided to under-resourced countries. Similar rules to those noted in the context of standard-setting bodies, including transparency, participation and oversight, could also be made applicable to external peer review.¹⁰⁷⁰

As a result, clarification on exactly what peer review would entail, how it would be paid for, the imposition of time limits, and other important issues would improve the possibility of members accepting a peer review provision. The creation of a committee of fisheries experts within the WTO, with the input of IGOs and NGOs dealing with fisheries issues, seems to provide a similar mechanism, and could be an alternative to external peer review or review by one particular organisation, as well as assisting with other

¹⁰⁶⁸ It also made provision for peer review by another relevant international organisation where the member was not an FAO member – Chair’s Draft Text (2007) op cit note 60 art V.1.

¹⁰⁶⁹ See Dimitropoulos (2015) op cit note 1029 at 319-320. The funding and organisation of an FAO peer review panel was also discussed by WTO members in a UNEP workshop in 2008 – see New Zealand (2008) op cit note 875 at 6.

¹⁰⁷⁰ See also Meliado F, ‘Fisheries Management Standards in the WTO Fisheries Subsidies Talks: Learning How to Discipline Environmental PPMs?’ (2012) 46 *Journal of World Trade* 5 at 1133-1134, who, in considering the question of peer review by the FAO, takes the view that assessment of conformity should be non-discriminatory, independent, accurate, and free of conflicts of interest.

implementation issues. The sharing of expertise, personnel and costs would, indeed, allow for a quicker and more legitimate process. It is suggested that with clear rules in place, potentially including a provision that left final decisions to the WTO, members may be open to such a possibility. It is certainly something that they should consider, given the difficulties that are likely to arise around enforcement of actionable provisions¹⁰⁷¹ and the fact that these are sensitive issues for developing states, which would benefit from a less expensive and adversarial process that provides compliance assistance, rather than sanctions.

V. Conclusion

The many teething problems of a new trade agreement are often aired in dispute settlement forums. With the Appellate Body not functioning, however, there is a need to pay greater attention to the negotiation of trade agreements and to provide all the tools to make them enforceable, coherent and equitable. This is particularly important in a fisheries subsidies agreement, with its goal of sustainable development. Whether agreement in such a case is reached through careful analysis and negotiation or through a blanket rule, such as subsidy caps, will ultimately be up to those drafting the agreement. However, this chapter has shown that many intractable problems can be resolved through careful textual drafting and the setting up of oversight mechanisms to ensure fairness and predictability.

This chapter also provided context for the analysis in the thesis. The section on development carve-outs considered the particular concerns that have arisen in the negotiations around small-scale fisheries, including problems with definitions and structure. The section also looked at other concerns raised by developing countries in regard to the S&DT provisions after the release of the 2007 Draft Text. It is clear that many of these concerns have been taken into account in the 2018 Working Document. However, there will have to be stronger provisions on fuel subsidies and high seas fishing, and large developing countries will have to accept these, if the agreement is to be effective and acceptable to other members.

The sections on dispute resolution and regime interaction focused on issues of enforcement and policy coherence. It is highly important to resolve these problems if trade agreements are to be enforceable, minimise conflict or incoherence with other international instruments, particularly instruments affecting small-scale fisheries like the SSF Guidelines,

¹⁰⁷¹ As discussed in Section III(a) above.

and provide for good equity and governance outcomes for small-scale fisheries. The section on dispute resolution suggested ways to strengthen the compliance systems of the WTO and tailor these to a fisheries subsidies context, considerations which are also pertinent to RTAs with similar dispute resolution mechanisms, such as the CPTPP and USMCA. The section on regime interaction noted the concerns of WTO members around the reliance on external standards and peer review bodies in regard to fisheries management, and considered ways in which these could be ameliorated in order to promote policy coherence, improve oversight, give more control to developing countries, improve development outcomes for small-scale fisheries, and deal with sensitive issues in a constructive and effective manner.

Resolution of these issues, some of which have dogged the negotiations almost since their inception, should go a long way towards the creation of effective disciplines that are also acceptable to members and provide for the development needs of small-scale fisheries. Blanket solutions like subsidy caps do not reflect the original ambitions of the negotiations nor their full potential. Certainly, they do not live up to what the negotiations could achieve for small-scale fisheries, which are likely to again be shunted aside in favour of industrial fishing under such an agreement. The suggestions made in this chapter could also be beneficial in the creation and enforcement of other trade agreements containing environmental provisions as well as enhancing policy coherence between international regimes.

The final chapter concludes and offers recommendations for provisions that will benefit small-scale fisheries in trade agreements. In doing so it draws the various elements of the thesis together by considering the needs of small-scale fisheries in light of sustainability, practicality, and feasibility concerns. This ensures that the thesis presents the most effective and useful recommendations for inclusion in a trade agreement dealing with fisheries subsidies.

CHAPTER 6 – CONCLUSION AND RECOMMENDATIONS

I. Introduction

The overarching objective of this thesis was to identify provisions for the sustainable development of small-scale fisheries that could be included in trade agreements dealing with fisheries subsidies. In order to do so, the thesis created a framework of development needs for small-scale fisheries and then identified potential limitations – sustainable, practical and political – on the content of any provisions proposed for inclusion in a trade agreement. This analysis was vital to ensure that the recommendations proposed in this chapter do not only give effect to the development of small-scale fisheries, but also do so in a manner that does not lose sight of resource limitations and the realities attendant on complex trade negotiations. These recommendations are presented in Section III below and aim to provide meaningful proposals for trade agreements going forward.¹⁰⁷²

II. Findings of the Thesis

The first research sub-question of the thesis, the subject of Chapter 2, analysed the development needs of small-scale fisheries. The question of what would best serve the majority of small-scale fisheries was not an easy one to answer, not least because of the vast disparities between small-scale fisheries the world over. Thus, it was necessary to construct a broad yet flexible framework of development needs of small-scale fisheries to act as a lens through which trade agreements could be scrutinised, criticised and improved.

Taking these considerations into account, the framework as developed comprised four overlapping and interconnecting areas, each of which would be applicable to a greater or lesser degree depending on the situation of the small-scale fisheries within a particular state. These areas were environmental equity, access to basic necessities, security and good governance:

- **Environmental equity:** The analysis concluded that there should be greater equity between different fishing sectors, in terms of access to benefits, licenses and fishing grounds; that small-scale fisheries should not be removed or excluded from their traditional lands and fishing grounds; that access agreements should be better

¹⁰⁷² This includes the WTO negotiations and/or any future RTAs that contain provisions on fisheries subsidies, although these proposals may also be useful if parties to RTAs already in force, such as the CPTPP and USMCA, choose to make any amendments to these agreements.

regulated; and that issues of gender equity and marginalisation should be addressed.¹⁰⁷³

- Access to basic necessities: Many small-scale fisheries lack access to basic necessities, such as health care, food, clean water and sanitation, electricity, education, and decent work. These problems may be caused or exacerbated by geographical isolation. The thesis, therefore, argued for the expansion of social development programmes such as education and electrification programmes, as well as the building of roads and provision of transport for rural or isolated areas. It also maintained that programmes providing tenure security (including access to beaches and fishing grounds), and improved technology and other fishing inputs would assist with food security.¹⁰⁷⁴
- Security: The thesis argued that there are three main considerations when it comes to security for small-scale fisheries. First, dangers that accompany fishing are a serious concern that should be addressed through provision of safety gear, communications equipment, laws mandating improved working conditions, and rescue and warning services. Secondly, social security and social safety nets are particularly important given the dangers and uncertainty of fishing, and can include the provision of social grants, alternative livelihoods or support for community insurance schemes. Thirdly, tenure security can ensure livelihood continuity and be immensely valuable for the welfare of small-scale fisheries.¹⁰⁷⁵
- Good governance: The need to improve governance, especially of natural resources, was seen as particularly vital for small-scale fisheries. Apart from addressing general governance concerns affecting the poor and marginalised, such as lack of access to information or justice, the thesis contended that there is a need for greater participation of small-scale fisheries in resource management, cooperation between entities dealing with fisheries issues, and improved accountability, transparency and flexibility in fisheries governance in order to accommodate the particular needs and practices of small-scale fisheries, combat corruption in the fishing industry, and hold those in power to account.¹⁰⁷⁶

¹⁰⁷³ Chapter 2 section III(a)(ii).

¹⁰⁷⁴ Chapter 2 section III(b)(ii).

¹⁰⁷⁵ Chapter 2 section II(c)(iv).

¹⁰⁷⁶ Chapter 2 section II(d)(iv).

Chapter 3 drew on this framework to answer research sub-question 2 – namely how the development needs of small-scale fisheries are currently represented in international trade agreements. In considering the scope of these agreements, it also sought partially to answer research sub-question 4, which asked whether there are limitations on the type of development initiatives that can be proposed in an international trade forum. The chapter analysed three large multilateral agreements dealing with fisheries subsidies, all of which have a mixture of developed and developing countries and represent a significant part of world trade – the WTO negotiations on fisheries subsidies, the CPTPP and USMCA. This analysis revealed two important points. First, a lack of careful provision for small-scale fisheries in such agreements is likely to be detrimental to development, both because of the danger of social programmes falling under banned subsidies,¹⁰⁷⁷ and because small-scale fisheries are so often overlooked in subsidy allocations, which perpetuates inequalities around distribution of subsidies.¹⁰⁷⁸

Secondly, there are varying levels of representation in these agreements. The greatest focus on small-scale fisheries is found in the WTO negotiations, likely because these negotiations are more ambitious and detailed than the two RTAs with regard to fisheries subsidies. However, in all the agreements there were significant gaps in relation to issues affecting small-scale fisheries, including a lack of clarity and specificity, little to no provision for important development needs, and lack of agreement on fundamental issues such as definitions.¹⁰⁷⁹ The recommendations in Section II of this chapter aim to fill these gaps in order to provide robust and meaningful development provisions for small-scale fisheries in trade agreements going forward.

The third research sub-question, the subject of Chapter 4, was whether any of the development needs identified in Chapter 2, when translated into subsidies, might have sustainability implications. This was a crucial question, for two reasons. First, there is a clear relationship between sustainable fish stocks and livelihoods. Nor is it impossible for small-scale fisheries, even in developing countries, to overfish stocks, particularly with the assistance of harmful, capacity-enhancing subsidies.¹⁰⁸⁰ Secondly, a fundamental purpose of including provisions on fisheries subsidies in trade agreements is to improve sustainability of

¹⁰⁷⁷ Chapter 3 sections I and II(b)(i).

¹⁰⁷⁸ Chapter 3 section II(a)(i).

¹⁰⁷⁹ See, particularly, Chapter 3 section III.

¹⁰⁸⁰ Chapter 1 section I; Chapter 4 section IV(b).

fish stocks. Suggestions that undermine this purpose would not be acceptable to many states negotiating these agreements.¹⁰⁸¹

In considering how best to balance sustainability and development concerns in small-scale fisheries, Chapter 4 looked at various fisheries management approaches. From this analysis, it argued that the ecosystem approach to fisheries (EAF), as embodied in the FAO Code of Conduct, was the most appropriate method for management of small-scale fisheries, given its emphasis on holistic management (including the human element of fisheries) and the involvement of small-scale fisheries in the management process.¹⁰⁸² While the Chapter 2 framework had already rejected large modernisation programmes as inappropriate from both a sustainability and development point of view,¹⁰⁸³ there were still sustainability concerns with a number of important development programmes. These included the creation of fisheries infrastructure, provision of transport and telecommunications networks, and supply of operating inputs, such as ice, gear, and fuel. Chapter 4, thus, drew on the EAF as well as mechanisms specifically applicable to trade agreements operating at the international sphere, such as notification provisions, to suggest safeguards for the particular subsidies identified. This approach also catered for different circumstances prevalent in different states, such as the LDCs and SVEs.¹⁰⁸⁴

Finally, Chapter 5 addressed the fourth sub-research question. While Chapter 3 had already considered this question in the context of textual limitations, Chapter 5 had the more challenging job of considering it in regard to practical and political limitations. However, the vast wealth of information provided by the Rules Group of the WTO, several insightful articles by those that have worked within the WTO and FAO, and a number of talks and conferences organised online during the COVID-19 pandemic¹⁰⁸⁵ were sufficient for an in-depth analysis of the question. The focus of this chapter was, necessarily, on the WTO negotiations, given their large scope, high level of ambition and seemingly impassable conflicts. However, analysis of the CPTPP and USMCA provided valuable insight into how such agreements could be concluded as well as the problems that might arise in their enforcement.

¹⁰⁸¹ See Chapter 5 section II(a).

¹⁰⁸² Chapter 4 section II.

¹⁰⁸³ Chapter 2 section IV(b)(ii). See also Chapter 4 section IV(b).

¹⁰⁸⁴ For a full discussion on these issues see Chapter 4 section IV.

¹⁰⁸⁵ See Chapter 1 section VIII.

The chapter noted that there were a number of contentious areas that could bar the resolution of negotiations or hamper the enforcement of an agreement on fisheries subsidies, including development carve-outs, dispute settlement, and regime interaction. Yet the analysis found that resolution of these problems could be achieved through careful textual drafting in ways that are acceptable to most parties, and which can also give effect to the overarching concerns around sustainable development in these agreements. Resolution of these issues is important in order to bring about the conclusion of robust and meaningful agreements on fisheries subsidies that cater for both sustainability of fish stocks and development of small-scale fisheries. When it comes to specific recommendations around small-scale fisheries, as laid out in Section III below, the issues around S&DT are of particular relevance. However, all the issues canvassed in Chapter 5 are dealt with in some fashion in the recommendations.

III. Recommendations

In Chapter 2, the thesis adopted an aspirational and development-oriented view of what should be provided for small-scale fisheries by governments, while the remainder of the thesis aimed at focusing and refining these broad prescriptions. The following recommendations reflect this balancing process and seek to provide guidance for the negotiation of trade agreements dealing with fisheries subsidies as well as other important environment and trade issues, where applicable. In doing so, the recommendations do not suggest the types of more general provisions that could be provided in a comprehensive RTA, such as those provisions in the chapters on development and governance in the CPTPP. This is primarily because subsidies concerns are the central focus of the thesis, but also because these general provisions are often of limited use in protecting small-scale fisheries.¹⁰⁸⁶

In considering the various issues raised by the thesis, the recommendations can be divided into two distinct categories. The first is overarching issues. These recommendations deal with definitions, structure and enforcement. The second category deals with the more specific concerns that have been raised in the thesis, and includes recommendations around, *inter alia*, access subsidies, provision for gender equity and marginalisation, and specific subsidy exclusions.

¹⁰⁸⁶ See Chapter 3, particularly section II(b).

(a) Overarching Issues

The recommendations addressed in this part can conceivably be said to deal with gateway issues. If provisions dealing with these issues are not carefully structured or cannot be agreed upon, there will be little or no opportunity for adequate protection of small-scale fisheries in a trade agreement. While dealing with specific issues is important, there is more room for debate about exactly what these should comprise amongst a range of options. These can also more easily be amended at a later date. There is less room to manoeuvre with the issues discussed in this section, which set the tone of the agreement as well as its scope. Thus, they are arguably the principal concerns for small-scale fisheries in the negotiation of a trade agreement.

(i) Definitions

It is critical that the definition of small-scale fisheries in trade agreements is inclusive. The difficulties faced by many small-scale fisheries around the world, including poverty, isolation, increasing food insecurity and lack of access to basic necessities, demand that governments should be able to help these fishers and communities wherever possible. Subsidy bans can create problems for social programmes targeted at fishing communities, which can lead to anomalous situations where governments may assist other vulnerable groups with basic necessities, but not small-scale fisheries.¹⁰⁸⁷ Yet, in the creation of a large trade agreement, it is difficult to come up with one single definition of small-scale fisheries based on common characteristics that is inclusive and acceptable to negotiators. This suggests the need for a nationally-tailored definition. Giving states this sort of leeway naturally leaves the door open to abuse and inconsistent application. However, this concern can be resolved through appropriate safeguards centred on important governance principles like transparency and participation.

To begin with, definitions of small-scale fisheries in trade agreements should follow the approach adopted in the SSF Guidelines¹⁰⁸⁸ – namely allowing each state to decide on an appropriate definition at a national level, with input and participation from small-scale fisheries.¹⁰⁸⁹ In this process, particular emphasis should be placed on including all voices to

¹⁰⁸⁷ See Chapter 3 section II(b)(i).

¹⁰⁸⁸ SSF Guidelines supra note 1 art 2.4.

¹⁰⁸⁹ As discussed in Chapter 5 section II(b).

improve representation of women and other marginalised groups.¹⁰⁹⁰ There should also be provision for technical assistance for under-resourced states, particularly those with many small-scale fisheries, to conduct this process, in order to ensure that a robust and inclusive definition is reached. As the FAO is already helping states to implement its SSF Guidelines,¹⁰⁹¹ it could be of assistance in this process.

Given the potential for overexploitation in the context of fisheries subsidies, however, there should be additional safeguards over and above a requirement for participatory processes. In this regard, states should notify their definition of small-scale fisheries to the trade body in charge of administering the agreement and such definition should be made publicly available. In doing so, a state should provide detailed explanations of the participatory process undertaken and how it made its decision, including development and sustainability considerations that were taken into account. The definition could then be discussed and be open to challenge by other parties to the agreement and the general public if there is a perception that the decision-making process was not sufficiently robust or that the definition is an attempt to circumvent restrictions on subsidies to industrial fishing. Appropriately limiting and safeguarding the types of subsidies that can be provided to small-scale fisheries in light of sustainability concerns, as discussed in Chapter 4 and in Section III(b)(iii) below, is also an important element in preventing abuse in regard to definitions.

(ii) Structure of the Agreement

One of the most worrying aspects of the WTO negotiations for small-scale fisheries has been the conflation of issues affecting S&DT and those affecting small-scale fisheries.¹⁰⁹² Not only has this obscured important issues specifically relevant to small-scale fisheries, it has also dismissed the problems faced by small-scale fisheries in developed countries.¹⁰⁹³ Yet, small-scale fisheries, wherever they are found in the world, are vital for food security and poverty alleviation, and create livelihoods where no others may exist. They also do not, generally, place as much pressure on resources and ecosystems as industrial fisheries, nor are they the primary recipients of damaging capacity-enhancing subsidies.¹⁰⁹⁴ Thus, they should be dealt with as a separate category in a trade agreement dealing with fisheries subsidies.

¹⁰⁹⁰ See Chapter 2 sections IV(d)(ii) and (iv).

¹⁰⁹¹ Chapter 2 section IV(d)(iv) at note 424.

¹⁰⁹² Chapter 5 section II(b).

¹⁰⁹³ Ibid. See also Chapter 3 section II(a)(iv).

¹⁰⁹⁴ Chapter 1 section I; Chapter 3 section II(a)(i).

Another concern in regard to structure is the issue of specificity.¹⁰⁹⁵ While discussions on the meaning and minutiae of provisions are often left to dispute settlement bodies, in the case of small-scale fisheries, it would be beneficial to be as specific as possible in detailing which subsidies can be provided to this group, in order to bring these issues to the fore and to strike the requisite balance between sustainability and development. This is not an impossible ask for a trade agreement. The specific listing of exemptions is being attempted in the WTO negotiations in the 2018 Working Document,¹⁰⁹⁶ while very specific suggestions regarding small-scale fisheries have been made by WTO members in their submissions to the Rules Group.¹⁰⁹⁷ This type of specific listing is also important for states with few resources, as this would allow for certain social assistance programmes to be exempt from onerous administrative and management provisions and for exemptions to be tailored depending on the likelihood of sustainability problems as well as the status of a particular state (i.e. whether the state is an LDC, SVE etc.). The specifics of these provisions are discussed further in Sections III(b)(ii) and (iii) below.

A caveat to this is that specific listing can lead to the exclusion of some beneficial development programmes, either because these were not considered at the time of negotiations or negotiators cannot reach agreement on certain issues. Thus, while specificity is important, it is also necessary to have a general catch-all provision to obviate any problems that may arise with this approach.¹⁰⁹⁸ The creation of an expert body to, amongst other functions, assess the sustainability implications of specific projects would also be an invaluable resource in this regard.¹⁰⁹⁹

(iii) Enforcement

One of the most crucial aspects of creating a trade agreement is the ability to enforce such agreement. Indeed, robust dispute settlement mechanisms are often the appeal of negotiating environmental agreements or provisions in the international trade arena.¹¹⁰⁰ The discussion in Chapter 5 detailed many of the issues attendant upon dispute settlement in a trade agreement dealing with environmental concerns, and these issues are important for states to resolve in

¹⁰⁹⁵ As discussed throughout Chapter 3 and in Chapter 4 section I.

¹⁰⁹⁶ Including around issues such as safety and disaster relief, recreational fishing, inland fishing and so on – see Chair's Working Document (2018) op cit note 12 art 2.4, and the discussions in Chapter 3 sections II(a)(i) and II(c)(i).

¹⁰⁹⁷ See, particularly, Chapter 3 section II(b).

¹⁰⁹⁸ See Chapter 4 section IV(d)(iv).

¹⁰⁹⁹ As discussed in *ibid* and Section III(b)(ii) below.

¹¹⁰⁰ See Chapter 1 section II.

order to improve the enforceability of an agreement. Given that these issues have been canvassed in detail, however, the recommendations in this part do not reiterate all of these points but simply highlight and expand upon enforcement issues that directly affect small-scale fisheries, including enforcement of subsidy exemptions for small-scale fisheries, giving small-scale fisheries a voice in dispute settlement proceedings which affect them, and protecting small-scale fisheries in dispute settlement proceedings.

Provisions on exemptions for small-scale fisheries should, of course, be capable of challenge. Subsidy programmes may be detrimental to sustainability, particularly if any relevant conditions on their implementation are not fulfilled. Yet it is also important to take account of harmful effects to the small-scale fisheries implicated in the dispute. In order to strike a balance in this regard, certain protections should be put in place.

One type of protection would be provisions that discourage litigation against, or ease the burden of litigation for, certain vulnerable groups. In disputes involving subsidies to small-scale fisheries, especially those in under-resourced countries like the LDCs, SVEs, and many ACPs, states should be required to exercise restraint before instituting proceedings.¹¹⁰¹ This does not necessarily mean that a state should stop pursuing a matter. Indeed, this would be counterintuitive in the face of legitimate sustainability concerns. Rather, restraint in such a case could include exploring alternative means of dispute settlement, such as those procedures available under Article 24(2) of the DSU,¹¹⁰² and/or assisting the responding state to restructure a programme or fulfil a condition if it lacks the resources to do so. These types of processes could be facilitated by an expert group on fisheries which, as discussed in Chapters 4 and 5, could assist with implementation and handle certain sensitive non-compliance matters for which formal dispute resolution may not be apposite.¹¹⁰³ Burden of proof shifting mechanisms can also restrain litigation and provide protection for under-resourced states once litigation has begun.¹¹⁰⁴

Whether these provisions should be limited to under-resourced states or be applicable to all states is an important question. Although in general, the thesis takes the view that all small-scale fisheries are worthy of assistance, in this particular case, the recommendation is

¹¹⁰¹ For a fuller discussion of the concept of restraint provisions see Chapter 5 section III(b).

¹¹⁰² DSU supra note 24 art 24(2) – this provision offers the opportunity to engage in good offices, conciliation and mediation on the request of an LDC before a panel can be constituted.

¹¹⁰³ Chapter 4 section IV(d); Chapter 5 section IV.

¹¹⁰⁴ See Chapter 5 section III(b).

to limit these concessions to under-resourced states. This is the more politically feasible option¹¹⁰⁵ and is also in keeping with the purpose of the concession, which is to protect small-scale fisheries where their states may struggle to fulfil conditions and/or defend their subsidy programmes in a dispute settlement forum because of lack of funds and expertise. These states also tend to be minor contributors to fish stock depletion around the world.

Another means of protecting the interests of small-scale fisheries in dispute settlement would be to require representation of affected small-scale fisheries in dispute settlement proceedings.¹¹⁰⁶ Representatives from fishers' organisations or NGOs could be present at hearings and submit reports, either as experts on the matter or as a part of the delegation of a party state. There are dangers in such an approach, of course. A representative may not necessarily act for all the interests of a diverse community, and this could reinforce patterns of gender discrimination or other forms of marginalisation.¹¹⁰⁷ In order to obviate this concern, a panel of diverse representatives could be created for purposes of the proceeding or, if this is not feasible, a representative could be required to produce proof of the support of those in a particular community or area, such as a letter of consent signed by all fishers in the area. Although not a foolproof method of ensuring that diversity of experience is represented, this would certainly assist in improving representation.

Another potential problem with this approach is resource constraints. However, with rapid expansion and adoption of technology all over the world, including low-cost video and telephonic communication, this may be less of a problem in reality, provided there can be sufficient organisation of participants through a group such as an NGO or fishers' organisation. Extending technical assistance provisions beyond resource governance, to cover broader governance concerns like access to justice, would also be a means of assisting with resource constraints in this regard.¹¹⁰⁸

¹¹⁰⁵ See discussion in *ibid.*

¹¹⁰⁶ See *ibid* and Chapter 3 section II(d)(ii) – as discussed, this type of measure was suggested by Japan, Korea and Chinese Taipei (2007) *op cit* note 569 at 8-9.

¹¹⁰⁷ See Chapter 2 sections IV(d)(ii) and (iv).

¹¹⁰⁸ As discussed in Chapter 5 section III(b).

(b) Specific Issues

(i) Gender Equity and Marginalisation

Gender equity and marginalisation are significant concerns in small-scale fisheries.¹¹⁰⁹ In considering appropriate recommendations around definitions and enforcement in Sections III(a)(i) and (iii) above, the thesis has addressed certain issues around gender equity and marginalisation in representation. In section III(b)(ii) below, the recommendations further address development issues which are generally of greater benefit to women and children, such as provision of running water and electricity. Yet, while these types of provisions are crucial in improving equity, it may also be useful to provide further protection for marginalised groups in the form of a general provision.

Such a provision could not constitute an exemption to the bans on fisheries subsidies. This would not be advisable, or likely acceptable to certain members, because it is too broad and vague, and could encompass any number of groups and any type of subsidy. Thus, it would certainly be open to abuse, and undermine the carefully structured exemptions recommended in this chapter. However, issues around gender and marginalisation could be highlighted in a fisheries subsidies agreement through a different means, such as a preamble to the provisions on small-scale fisheries, which would bring these issues to the fore while not compromising sustainability or the conclusion of an agreement. Such a statement could be something to the effect of:

Recognising the need to protect and provide for the poor and marginalised, and to promote gender equity and representation in the small-scale fisheries sector and fishing communities, parties may provide the following subsidies to their small-scale fisheries...¹¹¹⁰

It is clear that a preamble of this sort is not a panacea and does not place any direct obligations on a state. However, preambles are often used as interpretation tools in international agreements. In this regard, the Vienna Convention on the Law of Treaties provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose',¹¹¹¹ and further provides that this 'context' includes preambles and annexes to a

¹¹⁰⁹ For a full discussion on these concerns see Chapter 2 section IV(a)(ii).

¹¹¹⁰ If parties agree to it, such statement could also incorporate the SSF Guidelines, which is an important text in this regard – see Chapter 2 section IV(a)(ii) and Chapter 5 section IV.

¹¹¹¹ Vienna Convention on the Law of Treaties 1980, 1155 *UNTS* 331 art 31(1).

treaty.¹¹¹² In a trade setting, the DSB has often given effect to this principle. For example, the Appellate Body in *US-Shrimp* relied upon the Preamble to the Marrakesh Agreement in interpreting GATT Article XX,¹¹¹³ while the preamble or ‘chapeau’ of Article XX of the GATT has functioned as a pivotal aspect of many WTO disputes dealing with environmental issues.¹¹¹⁴ Thus, a preamble to the provisions on small-scale fisheries could be used as an important guiding principle by a panel in a case involving the interpretation of these provisions.

(ii) *Subsidy Exemptions Without Safeguards*

As discussed in Chapter 3, it is difficult to say with any level of certainty that subsidies for social infrastructure to small-scale fisheries will fall outside the ambit of bans on fisheries subsidies.¹¹¹⁵ Of course, for a social programme to be prohibited it must contravene the subsidy bans. If a programme does fall foul of the bans, some might argue that it should not be allowed, or should have onerous conditions attached to it. This is true in some instances, as discussed in the following section, but in others this could lead to absurd outcomes. A simple example would be the provision of running water to a house in a fishing community where women collect shellfish. In such a case it could be said that, because the women of that house no longer have to walk long distances to fetch water, they could spend more time gathering shellfish. If shellfish stocks are considered overfished (which may include unassessed stocks) the provision of running water to that household could be said to contravene the subsidy ban.

Clearly such a situation is untenable and states negotiating these agreements must make it absolutely clear that certain types of social infrastructure do not contravene the subsidy bans. Given that some types of social infrastructure have non-negligible sustainability effects, however, it is recommended that different types of social infrastructure should be treated differently as far as possible. This would allow for a tailored structure designed to give as little difficulty as possible in the creation of these programmes, while still addressing sustainability concerns. In this regard, programmes dealing with issues such as

¹¹¹² Ibid art 31(2).

¹¹¹³ As noted in Chapter 5 section IV at note 1002 – see *US-Shrimp* supra note 1002 at 48.

¹¹¹⁴ See, for example, *US-Shrimp* ibid at 55-76, WTO, 'US - Standards for Reformulated and Conventional Gasoline (WT/DS2/AB/R) Report of the Appellate Body adopted on 20 May 1996' (1996) at 22-29; WTO, 'Brazil - Measures Affecting Imports of Retreaded Tyres (WT/DS332/AB/R) Report of the Appellate Body adopted on 29 August 2008' (2007) at 85-99.

¹¹¹⁵ Chapter 3, particularly section II(b)(i).

water and sanitation, electrification, tenure security,¹¹¹⁶ housing, education, and health care have development benefits that far outweigh any minor sustainability concerns that may arise.¹¹¹⁷ Thus, it is recommended that they should be specifically excluded from any subsidy ban without conditions attached. To the extent that these are part of broader subsidy programmes also including problematic subsidies, however, conditions attendant on those other subsidies would have to be fulfilled.

Yet, while specifying exclusions in this way is important, it is also necessary to deal with situations where certain beneficial subsidies with little in the way of sustainability effects are not specifically listed as exempt from conditions. In such cases, an expert body could assess these projects and potentially exempt them from complying with certain conditions, or assist states to implement conditions if it decides that these are necessary.¹¹¹⁸

(iii) Subsidy Exemptions with Safeguards

In keeping with the need to appropriately balance considerations of sustainability and development when dealing with fisheries subsidies, states wishing to implement beneficial social programmes for their small-scale fisheries that have non-negligible impacts on sustainability will need to fulfil conditions prior to providing these subsidies. These problematic subsidies include creation of ports, landing sites and similar infrastructure;¹¹¹⁹ building of roads, transport and telecommunications infrastructure; and the provision of operating inputs, such as fuel, ice, gear and income support.

Although these issues were discussed in Chapter 4¹¹²⁰ and will not be repeated in detail here, it is important to reiterate that states must provide for safeguards on these subsidy programmes. Maximum benefits in terms of balancing sustainability and development can be gained by dealing with each type of programme separately, and this would be the optimum outcome in a trade agreement. In this regard, conditions such as a requirement to implement a management system based on the EAF, notification requirements, and ratification and implementation of appropriate external agreements (such as the PSMA when dealing with

¹¹¹⁶ For these purposes, tenure security includes physical access to fishing grounds (e.g. access to beaches and landing sites) but excludes access to fishing grounds provided through quotas, agreements, traditional rights and similar measures, which are an aspect of fisheries management, as discussed in Chapter 3 section II(b)(iii).

¹¹¹⁷ For a full discussion on these issues see Chapter 3 sections II(b)(i)-(ii) and II(c)(iii).

¹¹¹⁸ As discussed in Chapter 4 section IV(d).

¹¹¹⁹ Although discussed in this context in Chapter 4, this section does not include aquaculture subsidies, which are dealt with in Section III(b)(vi) below. This is because of the current political and practical limitations on the disciplining of aquaculture subsidies, as discussed in Chapter 5 section II(a).

¹¹²⁰ Chapter 4 section IV.

port subsidies) would all be beneficial in ensuring that an appropriate balance is maintained. Exclusions from certain (although not all) of these conditions for small developing states would also be appropriate, provided exceptions are made for situations where technical assistance is provided for the creation of large and potentially problematic fisheries infrastructure, such as ports.

As noted in Section III(a)(ii) above, a catch-all provision with general safeguards is also necessary where specific lists of exclusions are made.¹¹²¹ This will allow for programmes designed to protect small-scale fisheries where there is no specific provision covering that programme. It is especially important in a trade agreement where parties may struggle to reach consensus on certain issues, in which case some social programmes for small-scale fisheries could be banned under the agreement.

It should also be noted that the implementation of a management system based on the EAF is particularly beneficial for small-scale fisheries and to improve governance of resources. While the EAF does have its basis in conventional fisheries management¹¹²² and may be seen to place a higher burden on states in regard to conservation requirements, one of its major advantages is that it emphasises the inclusion of alternative management approaches, such as co-management and use of traditional knowledge,¹¹²³ which is beneficial for both sustainability and development. It also strives for improved cooperation and collaboration and holistic protection of all elements of the ecosystem, including the human elements of that ecosystem.¹¹²⁴

Given the potential difficulties for under-resourced states in implementing any form of fisheries management, however, strong technical assistance provisions on the implementation of fisheries management, such as those argued for by developing country groupings in the WTO negotiations,¹¹²⁵ are vitally important in trade agreements. Sharing of simple and low-cost technology that can improve coverage, tracking and traceability, and encouraging public-private partnerships in this regard, is particularly necessary and should be mentioned in any technical assistance provisions.¹¹²⁶

¹¹²¹ See also Chapter 4 section IV(d).

¹¹²² Chapter 4 section II.

¹¹²³ Chapter 4 section III.

¹¹²⁴ Ibid.

¹¹²⁵ Chapter 3 section II(a)(iii); Chapter 5 section II(a).

¹¹²⁶ See Chapter 4 section III.

(iv) Safety Initiatives and Disaster Relief

As stressed in Chapters 2 and 3, safety is of paramount concern in fishing.¹¹²⁷ This is particularly true for small-scale fisheries, owing to unsafe landing sites, lack of safety and communications equipment, exposure of coastal communities to extreme weather events, and vulnerability of poor fishers to exploitative labour practices. Although the WTO negotiations have focused extensively on issues such as acquisition and installation of safety equipment, disaster relief, safety and working conditions for fishers, and resilience to climate change, there has been little to no mention of these concerns in the RTAs, and then only in a general development context.¹¹²⁸ Even in the WTO negotiations, these exemptions are made applicable to all fishers and, thus, do not apply specifically to small-scale fisheries.¹¹²⁹ Although safety is important for all fishers, this structure is potentially problematic for small-scale fisheries, as they receive so little in the way of subsidies.

Given the importance of this issue and the fact that the safety of small-scale fisheries is more likely to be overlooked under the sort of structure proposed in the WTO negotiations, it is suggested that specific exemptions for safety concerns should be included in the provisions on small-scale fisheries. This would need to include exemptions for the provision of safety equipment, resilience, adaptation and disaster relief subsidies (including economic disaster relief), and subsidies for the improvement of safety and working conditions. Such provisions would certainly be necessary in RTAs that do not have the type of general subsidy exemptions found in the WTO documents.

These provisions would generally not need to be subject to the type of conditionalities discussed in section III(b)(iii) above – apart from a statement to the effect that safety improvements could not lead to capacity enhancement of any kind and, in the case of disaster relief, could only restore an industry to its pre-disaster state.¹¹³⁰ However, an exception to the rule on capacity enhancement would be the building of basic landing sites to service remote fishing communities which, as noted in Chapter 4, could potentially be exempted from the regular restrictions on building of fisheries infrastructure.¹¹³¹ These sites would be very

¹¹²⁷ Chapter 2 section IV(c)(iv); Chapter 3 section II(c)(i).

¹¹²⁸ Chapter 3 section II(c)(i).

¹¹²⁹ *Ibid.*

¹¹³⁰ See *ibid* at note 613. In the case of an economic crisis like that caused by COVID-19, this could take the form of providing support for a limited time period (e.g. until the industry could fully reopen).

¹¹³¹ Chapter 4 section IV(a).

helpful in improving safety for small-scale fishers, although certain basic conditions would need to be attached to the exemption to prevent abuse.

First, the landing sites would have to be simple – used only for landing, launching, and protecting boats from bad weather. Basic cold storage could also be provided but structures for processing, transportation and similar infrastructure would make the creation of these sites subject to conditions normally attendant on the building of fisheries infrastructure, including notification and proper fisheries management.¹¹³² Secondly, there would have to be no other safe and viable landing sites in the immediate area. These parameters should prevent the landing of large industrial catches at these sites, as the sites would not be large or well-equipped enough to dock or unload these catches. Limitations on the number of sites would make these sites easier to police, if necessary, and ensure the effective distribution and proper use of resources for improving safety in fishing.

(v) *Effective Disciplines on Industrial Fishing Subsidies*

Judging by the rhetoric surrounding the WTO negotiations, particularly the idea of the ‘triple win’, it could be supposed that a central purpose of banning harmful fisheries subsidies was to curb overfishing in industrial fisheries.¹¹³³ To date, however, it is clear that the bans that have been included or proposed in trade agreements, while a good start, are not likely to be effective in curbing overfishing to any great extent.¹¹³⁴ This is problematic for small-scale fisheries, which often suffer the effects of heavily subsidised industrial fishing, which diminishes food security and leads to conflict over space and resources.¹¹³⁵

A central concern when it comes to proper disciplines on subsidies to industrial fishing, is to ensure that major fishing powers that claim developing status are not able to take advantage of exemptions meant to benefit developing countries with little or no industrial fishing.¹¹³⁶ One way to do so is to move away from the developed/developing paradigm, which has lost a lot of its meaning in organisations like the WTO anyway,¹¹³⁷ and rather distinguish states based on more intuitive parameters – including total marine capture, fleet capacity and level of subsidies provided – which would determine exemptions from the

¹¹³² As discussed in Chapter 4 sections IV(a)-(b).

¹¹³³ See Chapter 1 section III(a); Chapter 5 section IV.

¹¹³⁴ Chapter 5 section II(a).

¹¹³⁵ See Chapter 3 sections II(a)(i)-(ii).

¹¹³⁶ Chapter 5 section II(a).

¹¹³⁷ Chapter 3 section II(a)(iv).

general rules on subsidies.¹¹³⁸ This would accord with the wishes of states like the SVEs, which have sought to distinguish themselves in a similar manner.¹¹³⁹ To the extent that this is not acceptable to large developing countries, however, separating small-scale fisheries from industrial fishing in the S&DT provisions, could produce a similar outcome.¹¹⁴⁰ Although perhaps not as effective as an outright ban on harmful subsidies used by major developing fishing nations, this would at least allow exemptions for subsidies to industrial fishing in these countries to be tailored to the circumstances attendant on this sector. Thus, because this sector has a greater impact on sustainability and less effect on development and food security, as well as more resources to comply with conditions than the small-scale sector, exemptions could be fewer and subject to stricter conditionalities.

There is, furthermore, a general failure to properly discipline fuel subsidies in the agreements. At present, these subsidies are not specifically banned nor do the agreements deal with so-called ‘non-specific’ fuel subsidies in any meaningful way.¹¹⁴¹ Yet fuel subsidies make up a large proportion of harmful fisheries subsidies worldwide, and are a major driver of overfishing on the high seas and in the waters of other states.¹¹⁴² They cannot simply be ignored in a trade agreement dealing with fisheries subsidies.

There are a number of courses that states could take in regard to fuel subsidies in a trade agreement. The first, and best, course would be the banning and phasing out of these subsidies, with exemptions for states with low levels of fishing, like the SVEs. This would need to apply to all programmes that benefit the fishing industry, including ‘non-specific’ fuel subsidies. A second approach, which would not be as effective as phasing out fuel subsidies but would be more politically feasible, is to use fuel subsidies (including ‘non-specific’ fuel subsidies) as a type of restraint provision, whereby the fuel subsidies given by one state would affect its ability to commence dispute settlement proceedings against another state.¹¹⁴³

A third course would be to allow fuel subsidies but make them subject to conditions, such as the implementation of a robust fisheries management system and a requirement to provide detailed notifications on these subsidies to the trade body administering the

¹¹³⁸ Chapter 5 section II(a).

¹¹³⁹ Chapter 5 section II.

¹¹⁴⁰ Chapter 5 section II(b).

¹¹⁴¹ Chapter 3 section II(a)(i).

¹¹⁴² *Ibid*; Chapter 5 section II(a).

¹¹⁴³ As proposed by both Jaemin Lee and Korea – see Chapter 5 section II(a) at note 906; Jaemin Lee (2014) *op cit* note 906 at 509; Korea (2011) *op cit* note 906 at 3.

agreement. This would build upon what is already being done in the trade agreements under discussion.¹¹⁴⁴ However, there are serious difficulties in enforcing proper fisheries management on the high seas and the waters of other states, and notification, while helpful to put pressure on states to change their practices, is likely not enough in itself to significantly curb the provision of fuel subsidies to industrial fleets, particularly in non-democratic states or those with powerful fishing lobbies.

A fourth approach would be to allow fuel subsidies only in the providing state's EEZ. Although this could be beneficial in preventing distant water fishing, this would still be a poor substitute for an outright ban, even if it could be agreed upon.¹¹⁴⁵ Such a limitation would, in the first place, be difficult to enforce¹¹⁴⁶ and, secondly, would put more pressure on areas that contain the majority of the world's fish stocks and biodiversity. A further problem that could potentially arise from a negotiating perspective (i.e. whether certain states would agree to EEZ limitations) is that some EEZs, particularly in smaller seas like the Mediterranean, are disputed, undeclared, or reduced in size because space is limited.

Looking at the problem of fuel subsidies from both a sustainability and feasibility point of view, the best course would likely be a combination of the approaches discussed. This could be used to work around the practical and political constraints on effective disciplines. For example, longer time lines could be given for phasing out, provided states adhere to strict notification programmes and agree to restraint provisions.

Related to the issue of fuel subsidies is the question of access subsidies, which are not dealt with, or are specifically excluded, in the trade agreements and negotiations discussed.¹¹⁴⁷ Both fuel and access subsidies are used extensively for fishing in the EEZs of other states. Yet access subsidies seem to be the more controversial issue in the WTO, with developing members fighting vehemently for their exclusion.¹¹⁴⁸ In some ways, it is easy to understand why developing members would take this attitude. Access fees are relied on by certain states, especially small island developing states, and sometimes form the major part of

¹¹⁴⁴ As discussed in Chapter 3 section II(a)(i), notification provisions for fuel subsidies have been included in the RTAs and the 2018 Working Document.

¹¹⁴⁵ For a discussion on the political feasibility of EEZ limitations in the context of fuel subsidies see Chapter 5 section II(a).

¹¹⁴⁶ Difficulties in enforcing EEZ limitations arise for two reasons. First, EEZs often cover very large areas and most states currently do not have the capacity to police such vast tracts of ocean. Secondly, the border of an EEZ is an arbitrary boundary which can cut across ecosystems and fishing grounds. Thus, even if fishers are aware of this border, it may make little sense to adhere to a seemingly illogical cut-off point.

¹¹⁴⁷ Chapter 3 section II(a)(ii).

¹¹⁴⁸ *Ibid.*

their income. They may also be put towards better fisheries management or the state requesting access may assist with management and development, and the presence of industrial fleets can create some livelihood opportunities for local communities.¹¹⁴⁹ In practice, however, these benefits rarely materialise or do the good they are supposed to do. In the majority of cases, access agreements are more harmful to development than supportive of it, and generally have a negative effect on fish stocks.¹¹⁵⁰

Nevertheless, these potential benefits, coupled with the extensive pushback against disciplining of access subsidies in the WTO negotiations¹¹⁵¹ suggests that the answer in such a case is to find a middle course. It is suggested, then, that the best approach, taking all these circumstances into account, would be to allow access subsidies subject to strict conditions around transparency (through notification), engagement and participation of coastal communities in the negotiation process, effective fisheries management (with the assistance of the accessing state), and, potentially, the creation of development projects, with the accessing state required to assist local fishing communities.¹¹⁵²

(vi) Excluded Issues

Apart from access agreements, a number of issues pertinent to disciplines on fisheries subsidies have been specifically excluded or ignored in the trade agreements and negotiations under discussion. These include aquaculture, recreational fisheries and inland fishing. Yet these subsidies seem to be excluded for political and practical reasons, not because they have no effect on sustainability or development or are not subject to subsidisation programmes.¹¹⁵³

This is understandable in some respects. These areas have different types of subsidisation, different effects, and different political constraints from marine capture fishing. However, this does not remove the very real concerns that attend the subsidisation of these practices. Aquaculture is a rapidly growing industry, particularly in large developing countries, and there are significant ecological benefits to aquaculture. Yet, unsustainable aquaculture abounds, with consequences for both sustainability and development. This is made blatantly clear by the highly destructive shrimp farming practices used in developing

¹¹⁴⁹ Ibid.

¹¹⁵⁰ Ibid.

¹¹⁵¹ Ibid.

¹¹⁵² For the full discussion on safeguards that could be included in access subsidies disciplines see *ibid.*

¹¹⁵³ Chapter 5 section II(a).

countries which destroy important coastal areas and displace local fishers.¹¹⁵⁴ Subsidised inland fishing can, likewise, be harmful to sustainability and development, especially as the majority of small-scale fisheries are inland fisheries,¹¹⁵⁵ although sustainability problems in inland fisheries cannot always be as starkly attributed to overfishing as in the marine environment.¹¹⁵⁶ Recreational fishing is primarily practiced in developed countries, which generally have less small-scale fishing and better management practices. However, it is increasingly becoming popular in large developing countries and there may also be instances of it in small developing countries for tourism purposes. This can have benefits and drawbacks for both small-scale fisheries and sustainability.¹¹⁵⁷

There is a need, therefore, to discipline subsidies going to these sectors in order to obtain an appropriate balance between sustainability and development.¹¹⁵⁸ There is no reason these subsidies could not be dealt with in an agreement on fisheries subsidies. The problem remains a political and practical one. In the WTO negotiations, the lack of agreement on subsidies to marine capture fishing after nearly twenty years shows how difficult it would be at present to obtain agreement on these other, more politically-sensitive, issues. RTAs may have a better chance at negotiating successfully on these topics, but at present show no inclination to do so.

Given these political constraints, especially in the WTO negotiations, it is suggested that the best course at present would be to leave these issues for future negotiation in trade agreements. This does not mean that they should be completely excluded, however. In the first place, an agreement to agree at a later date could be included, to ensure that these issues are not completely taken off the table. Secondly, to the extent that these practices impact marine capture fishing they should be subject to any rules in a trade agreement. This has already been done to a certain extent in the WTO negotiations with aquaculture,¹¹⁵⁹ but more could certainly be achieved in this regard. Thus, important caveats to exclusion of these issues from an agreement would be aquaculture using marine capture fish for food or seed

¹¹⁵⁴ See Chapter 2 section IV(a)(ii) at note 211.

¹¹⁵⁵ Chapter 3 section II(a)(i).

¹¹⁵⁶ See Chapter 4 section III at note 725. Pollution from manufacturing, agriculture, incorrect waste disposal, and power projects such as dams significantly affect fish stocks in inland water sources. These effects are well-documented by Garcia – Garcia, Zerbi, Aliaume, et al (2003) op cit note 684 at 12-15.

¹¹⁵⁷ For a discussion on these effects see Chapter 3 section II(a)(i).

¹¹⁵⁸ The FAO could certainly assist in these matters, as could the wealth of information in its biennial SOFIA Reports and its many guidelines, reports and codes on these issues.

¹¹⁵⁹ See Chapter 3 section II(a)(i) at note 490; Chapter 5 section II(a) at note 890; Chair's Working Document (2018) op cit note 12 arts 1 and 2.4(a).

stock, recreational fishing targeting marine capture fish, and ‘inland’ fishing occurring in areas such as deltas, river mouths or sensitive coastal areas which border the marine environment, and/or which targets diadromous fish.¹¹⁶⁰

IV. Conclusion

The protection of small-scale fisheries is of paramount importance in a world in which fish stocks and aquatic ecosystems are under threat from many different quarters. Overfishing, climate change, pollution, habitat destruction and conflict over space and resources, are all threats to people who are already vulnerable and marginalised.

Including provisions on fisheries subsidies in trade agreements may be the most effective means of properly disciplining overfishing, given that these agreements generally include binding dispute settlement mechanisms.¹¹⁶¹ Yet in their creation, it is vital that small-scale fisheries and their needs are not ignored. In this vein, the thesis considered not only how to avert any potential harm to small-scale fisheries but also how these agreements could benefit small-scale fisheries. It also strove to balance competing interests, including sustainability and development considerations, and to ensure that the recommendations provided did not overlook the all-important element of political efficacy that so often stymies efforts to conclude far-reaching and effective agreements in the international trade arena.

The implementation of the recommendations in this chapter would go a long way to ensuring that small-scale fisheries are protected and their interests promoted in such agreements. Some of the most controversial issues include what the chapter termed ‘overarching’ or ‘gateway’ concerns – those around definitions, structure and enforcement – but these are also the most important to resolve if small-scale fisheries are to be adequately provided for in trade agreements. The other specific concerns are no less important, but there is more room for discussion around exactly what these should entail. At a minimum, however, they should address important concerns around social infrastructure, security, and equity, and should ensure that safeguards are put in place, where necessary, to prevent stock depletion and ecosystem damage. It must also be remembered that at the root of many of these issues is a need for good governance – including participation, cooperation and

¹¹⁶⁰ Diadromous fish spend part of their lives in the marine environment and part in freshwater. The term ‘marine capture fish’ as used in regard to the caveats on aquaculture and recreational fishing would also need to cover diadromous species.

¹¹⁶¹ Chapter 1 section II. Whether these mechanisms are effective will depend on whether dispute settlement provisions are specifically tailored to an environmental agreement, as per the discussion in Chapter 5 section III.

transparency – to ensure that marginalised voices are heard, important considerations taken into account, and governments held accountable for their decisions.

It was Sir Walter Scott who made the poignant observation that: ‘It's no fish ye're buying, it's men's lives.’¹¹⁶² This is truer today than ever before. Ultimately, while not losing sight of the intrinsic value of the oceans, subsidies disciplines are put in place by states primarily to curb overfishing for the purpose of preserving a vital resource. Small-scale fishers and fishing communities are more dependent on this resource than any other group. They must be protected, along with the resources they depend upon, if we are to achieve the much-discussed and lauded ideal of sustainable development in fisheries.

¹¹⁶² Scott W, *The Antiquary* (2004 - First Published 1816) (Online, Project Gutenberg) ch 11.

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ANNEXURE 1: MEMBERS OF THE ACP, LDC AND SVE GROUPS

African, Caribbean and Pacific (ACP) Group	Least-Developed Countries (LDC) Group	Small and Vulnerable Economies (SVE) Group
Angola	Afghanistan	Albania
Antigua and Barbuda	Angola	Antigua and Barbuda
Belize	Bangladesh	Armenia
Bahamas	Benin	Barbados
Barbados	Bhutan	Belize
Benin	Burkina Faso	Bolivia
Botswana	Burundi	Botswana
Burkina Faso	Cambodia	Brunei Darussalam
Burundi	Central African Republic	Cameroon
Cameroon	Chad	Cuba
Cape Verde	Comoros	Dominica
Central African Republic	Democratic Republic of the Congo (Kinshasa)	Dominican Republic
Chad	Djibouti	Ecuador
Comoros	Eritrea	El Salvador
Congo (Brazzaville)	Ethiopia	Fiji
Congo (Kinshasa)	Gambia	FYR Macedonia
Cook Islands	Guinea	Gabon
Cote d'Ivoire	Guinea-Bissau	Georgia
Cuba	Haiti	Ghana
Djibouti	Kiribati	Grenada
Dominica	Lao People's Democratic Republic	Guatemala
Dominican Republic	Lesotho	Guyana
Eritrea	Liberia	Honduras
Ethiopia	Madagascar	Jamaica
Fiji	Malawi	Jordan
Gabon	Mali	Kenya
Gambia	Mauritania	Kyrgyzstan
Ghana	Mozambique	Macao, China
Grenada	Myanmar	Mauritius
Republic of Guinea	Nepal	Moldova
Guinea-Bissau	Niger	Mongolia
Equatorial Guinea	Rwanda	Namibia
Guyana	Sao Tome and Principe	Nicaragua
Haiti	Senegal	Panama
Jamaica	Sierra Leone	Papua New Guinea
Kenya	Solomon Islands	Paraguay
Kiribati	Somalia	Saint Kitts and Nevis
Lesotho	South Sudan	Saint Lucia
Liberia	Sudan	Saint Vincent and the Grenadines
Madagascar	Timor-Leste	Sri Lanka
Malawi	Togo	Suriname
Mali	Tuvalu	Swaziland
Marshall Islands	Uganda	Trinidad and Tobago
Mauritania	Tanzania	Uruguay
Mauritius	Vanuatu	Zimbabwe
Micronesia	Yemen	
Mozambique	Zambia	
Namibia		
Nauru		
Niger		
Nigeria		
Niue		
Palau		
Papua New Guinea		
Rwanda		
St. Kitts and Nevis		
St. Lucia		
St. Vincent and the Grenadines		
Solomon Islands		
Samoa		
Sao Tome and Principe		
Senegal		
Seychelles		
Sierra Leone		
Somalia		
South Africa		
Sudan		
Suriname		
Swaziland		
Tanzania		
Timor Leste		
Togo		
Tonga		
Trinidad and Tobago		
Tuvalu		
Uganda		
Vanuatu		
Zambia		
Zimbabwe		

Source: WTO, 'Fisheries Subsidies, Communication from Barbados (TN/RL/W/242)' (7 October 2009). This list may not encompass all eligible SVEs - for example, both the Maldives and Tonga, which do not appear in this list, have co-written SVE submissions.

Source: UN Office of the High Representative for the Least Developed Countries; Landlocked Developing Countries and Small Island Developing States, 'About LDCs' (2018), available at <http://unohrls.org/about-ldcs/>, accessed on 13 August 2020.

Source: ACP Secretariat, 'African, Caribbean and Pacific Group of States: About Us' (2011), available at <http://www.acp.int/content/secretariat-acp>, accessed on 13 August 2020.