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## FOLLOW THE LEADER: ELIMINATING PERVERSE GLOBAL FISHING SUBSIDIES THROUGH UNILATERAL DOMESTIC TRADE MEASURES

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### INTRODUCTION

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## INTRODUCTION

A large proportion of the global population lives near the coast. As a result, the oceans are the world's largest source of protein, with more than 2.6 billion people depending on the oceans as their primary source of protein.<sup>1</sup> In addition to food benefits, marine fisheries and related industries are estimated to generate \$3 trillion dollars in revenue per year or about five percent of global gross domestic product ("GDP").<sup>2</sup> But these benefits for nutrition and job security come with financial costs that can lead to long-term environmental damage as long as governments continue to underwrite unsustainable fishing through perverse subsidies.

In spite of the rhetoric of fishing as a sustainable enterprise, the reality is that marine catches that would otherwise be worth \$105 billion dollars are now being sold for \$80 billion dollars with the difference being covered by taxpayers around the world in the form of various subsidies.<sup>3</sup> The \$3 trillion dollar industry of fishing depends on "perverse subsidies"<sup>4</sup> from the government, such as the fuel subsidies that allow vessels to travel further than the market price of fish would otherwise support, and the distant water fishing/economic development subsidies that allow fleets from Asia and Europe to regularly exploit African waters.

"Perverse subsidies" are, however, a two-edged sword, or perhaps a double-barbed fishing hook. On the one barb, subsidies ensure profit for a struggling industry where margins may be slim given the incessant competition from fishing operations peppered across the globe. On the same barb, subsidies also protect consumer access to cheap fish for sushi rolls and salmon bakes. Without some subsidies, prices would need to be increased to cover costs to the dismay of consumers and to the alarm of fishing companies which would lose sales. Meanwhile, on the other barb of the two-barbed hook, there are legitimate concerns about how certain common subsidies are impacting global food security policies. Almost any subsidy that encourages fishermen to fish during the present season in a depleted fishery rather than wait for the stock to rebuild to healthier levels for a future fishing season is a "perverse subsidy." Cheaper technological advancements in finding and extracting fish have created conditions where overfishing has become a global norm rather than an exception. Now fewer and fewer individuals are able to operate large vessels with lengthy nets leading to fewer opportunities for fishing. High seas fishing and fishing at the boundaries between the high seas and the Exclusive Economic Zone (EEZ), in particular, are now in the realm of multinational factory fishing corporations instead of artisanal fishermen or small

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1. *Rio+20 Feature: Seven Issues, Seven Experts - Oceans*, UN NEWS CENTRE (June 13, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42221&Cr=Sustainable+Development&Cr1=#.UINGiXFbyJU>.

2. *Id.*

3. NORMAN MYERS & JENNIFER KENT, *PERVERSE SUBSIDIES: HOW TAX DOLLARS CAN UNDERCUT THE ENVIRONMENT AND THE ECONOMY* 190 (2001).

4. Perverse subsidies refer to any government support provided to an economic actor to encourage certain activities that directly or indirectly lead to environmental degradation. It is not the intention of this article to argue that subsidies are inherently poor policy choices. There are, in fact, a number of subsidies that can promote environmentally friendly technology. These subsidies are not the focus of this article.

fishing cooperatives.

Like other essays in the field of fisheries and trade, this paper argues that perverse subsidies must be eliminated, but unlike previous writings in this field, this article provides a different line of argument suggesting that unilateral actions to end subsidies in the sphere of fishery trading may be more effective than the currently stalled Doha deliberations on fishery reforms. In Part 1, this paper reviews the long-term consequences of perverse subsidies on fishery resources. In Part 2, this paper explains why multilateral environmental approaches have no potential of tackling perverse subsidies and why current multilateral trade negotiations are unlikely to result in an elimination of perverse subsidies. Finally, in Part 3, this paper argues that the parties that have been seeking reforms of perverse subsidies, including the elimination of these subsidies before the World Trade Organization, should instead apply their efforts to unilaterally restricting trade in fishery products from states that continue to provide perverse subsidies that impact both economic competition for limited resources and continued viability of some of these resources. This third part argues that exceptions under Article XX of the General Agreement for Trade and Tariffs (“GATT”) will protect states undertaking unilateral trade measures that are intended to further resource conservation.

#### I. DANGER OF CONTINUING PERVERSE SUBSIDIES FOR FOOD SECURITY

When Wilbert Mcleod Chapman introduced the concept of “maximum sustainable yield” in the late 1940s,<sup>5</sup> there did not seem to be a problem with the cumulative impact of overharvesting because fish were regarded as infinitely renewable and the fishing community was regarded as responsive to declines in key fisheries. In a rational market, once fishing for particular species becomes unprofitable because the maximum sustainable yield of a given fish was low, then fishing should stop and the species should be able to recover while the fishing industry focuses on other species. When the final negotiations of the United Nations Convention on the Law of the Sea concluded in 1982, the states decided to maintain the extraction standard of “maximum sustainable yield” to be qualified by conservation and management measures that support “populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors.”<sup>6</sup> The proponents of “maximum sustainable yield” as the foundation for global fishery management never took into account the possibility of government subsidies to the fishing industry funding what would otherwise be unprofitable fishing. In fact, the Law of the Sea Convention never directly mentioned subsidies.

It is not surprising that the Law of the Sea failed to even mention the existence of subsidies as a potential threat to the conservation of living resources. The levels

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5. CARMEL FINLEY, *All the Fish in the Sea: Maximum Sustainable Yield and the Failure of Fisheries Management* 4 (2011). Mr. Chapman after his military service during World War II in the Pacific theater was focused on expanding American fishing efforts into the Pacific ocean in order to compete with Japanese fishing efforts and strengthen American military presence. *Id.*

6. United Nations Convention on the Law of the Sea, art. 61, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994)..

of overexploitation of ocean resources were not yet fully contemplated. When the Law of the Sea was negotiated, the focus was on promoting fishery products as an approach for economic development so that states that were unable to fully utilize living resources within their exclusive economic zones could provide opportunities for other states to fish the “surplus of the allowable catch.”<sup>7</sup> The idea was to promote both “equitable and efficient” utilization of the ocean’s resources.<sup>8</sup> State decisionmakers failed to understand just how efficient a growing pool of subsidized industrial trawlers, who do not have to directly pay for externalities, can be in extracting fish biomass.

The first large set of subsidies in the twentieth century was focused on creating the conditions for national food security. Before and after World War II, states raced to secure limited sources of food for growing populations, and did so by encouraging domestic industries to ramp up production, not just for fish, but also for fishery related products. For example, in 1936, the U.S. Jones Act offered indirect subsidies to the U.S. shipbuilding industry by requiring all ships expected to be used to land fish in the U.S. be manufactured in the U.S.<sup>9</sup> Because this led to an increase in the costs for fishing companies participating in the U.S. market, the U.S. offered to cover some new debt through the Fisheries Finance Program for U.S. vessel construction. In response to these programs initiated in the 1960s, the U.S. fishing industry expanded.<sup>10</sup>

Fishing fleets are now ultra-efficient in their fishing extraction with large storage hulls, immense nets, and technological support from satellites and sonars for locating fish schools. A number of perverse subsidies contribute to this “efficiency.” There has been broad recognition that governments need to remove environmentally harmful subsidies, especially in the area of fisheries.<sup>11</sup> Overexploitation of fishing resources around the world includes the following yield losses: North America (23%), Europe (19%), Africa (19%), Asia (14%), Oceania (13%), High Seas (11%), and South America (7%).<sup>12</sup>

It has not been easy for researchers and policymakers to determine which direct and indirect subsidies are supporting an industry because governments are not forthcoming with the necessary information.<sup>13</sup> Based on modeling, researchers have calculated around \$15 billion dollars of non-fuel “bad subsidies” including subsidies for boat construction and modernization, fishing port construction, marketing/processing and storage infrastructure, tax exemptions, fishing access

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7. *Id.* art. 62.

8. *Id.*

9. WILLIAME. SCHRANK, FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, INTRODUCING FISHING SUBSIDIES 16 (2003).

10. *Id.*

11. See generally Patrick ten Brink, *Reforming Subsidies, in* The Economics and Ecosystems and Biodiversity in National and International Policy Making 259, 259-297 (Patrick ten Brink ed., 2011).

12. U. Thara Srinivasan et al., *Food Security Implications of Global Marine Catch Losses Due to Overfishing*, 12 J. OF BIOECONOMICS 183, 194 (2010), available at <http://www.ecomarres.com/downloads/Thara2.pdf>.

13. See generally CATCHING MORE BAIT: A BOTTOM UP RE-ESTIMATION OF GLOBAL FISHERIES SUBSIDIES (Ussif Rashid Sumaila & Daniel Pauly eds., 2d ed. 2006) (discussing data collection methodology).

agreements, and fishery development projects.<sup>14</sup> All of these are considered “bad subsidies” because they increase fleet capacity and fleet fishing effort in a time when most commercial fishing stocks are already overexploited. One of the most pervasive set of perverse subsidies offered are fuel subsidies where fishermen pay less for fuel than other industries or individuals. Estimated to range between \$4.2 billion to \$8.5 billion dollars annually,<sup>15</sup> these subsidies are offered by governments through lower costs of fuel at port facilities, tax rebates on fuel, or other kickback mechanisms. From the perspective of the fishing industry, these subsidies are essential because almost all of the major fishing states provide some sort of fuel subsidy, since fuel can amount to up to sixty percent of the fishing costs for certain fisheries, such as Hong Kong,<sup>16</sup> and for most other fisheries it accounts for ten to twenty-five percent of the fishing costs.<sup>17</sup> The largest fuel subsidies provided for high seas fishing activity are offered by Japan, South Korea, Russia, and Spain,<sup>18</sup> which respectively provide somewhere around twenty-five cents, eighteen cents, eighteen cents, and ten cents per liter for a subsidy.<sup>19</sup> Estimated across 144 coastal states, these fuel subsidies account for twenty-five percent of total fishery subsidies and sixty-five percent of the subset of subsidies that have been defined as perverse subsidies (e.g., encouraging excess fishing effort and overcapitalization particularly for industrial fishing fleets).<sup>20</sup> Subsidized fuel is one of the key drivers for excess fishing effort since each ton of fish landed requires about half a ton of fuel to capture the fish.<sup>21</sup>

As a result of such perverse incentives, the fishing industry has become overcapitalized, with too many boats catching too few fish. This has resulted in market losses. According to the World Bank and the Food and Agricultural Organization, the combination of competition between industrial fishing fleets

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14. *Id.* at 23.

15. Ussif Rashid Sumaila, et al. *Fuel Price Increase Subsidies, Overcapacity, and Resource Sustainability*, 65 J. OF MARINE SCIENCE 832, 835 (2008), available at <http://www.icesjms.oxfordjournals.org/content/65/6/832.full.pdf>.

16. Sarah Harper et al., *Fueling the Fisheries Subsidy Debate: Agreements, Loopholes, and Implications*, 113 FISHERIES RESEARCH 143, 143 (2012).

17. Rolf Willmann & Kieran Kelleher, *Economic Trends in Global Marine Fisheries*, in HANDBOOK OF MARINE FISHERIES CONSERVATION AND MANAGEMENT 26 (R. Quentin Grafton et al. eds., 2010).

18. Nic Fleming, *Scientists Call for Fuel Subsidies Ban to Protect Fish*, THE TELEGRAPH (Feb. 19, 2007, 12:01 AM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1543142/Scientists-call-for-fuel-subsidies-ban-to-protect-fish.html>.

19. Ussif Rashid Sumaila et al., *Fuel Subsidies to Global Fisheries: Magnitude and Impacts on Resource Sustainability*, in CATCHING MORE BAIT: A BOTTOM UP RE-ESTIMATION OF GLOBAL FISHERIES SUBSIDIES 38, 38-42 (2nd ed. 2006) (stating that the single largest fuel subsidy described in this report was 40 cents per liter for Hong Kong); See also Ussif Rashid Sumaila et al., *Subsidies to High Seas Bottom Trawl Fleets and the Sustainability of Deep Sea Benthic Fish Stocks*, in CATCHING MORE BAIT: A BOTTOM UP RE-ESTIMATION OF GLOBAL FISHERIES SUBSIDIES 49, 49-53 (2nd ed. 2006) (identifying Japan, South Korea, and Russia’s subsidies to bottom trawlers which consume a large amount of fuel as respectively \$290 million, \$146 million, and \$163 million).

20. Ussif Rashid Sumaila et al., *Fuel Subsidies to Global Fisheries: Magnitude and Impacts on Resource Sustainability*, in CATCHING MORE BAIT: A BOTTOM UP RE-ESTIMATION OF GLOBAL FISHERIES SUBSIDIES 47 (2nd ed. 2006).

21. Willman & Kelleher, *supra* note 17, at 28 (observing that a ton of fish worth \$918 requires \$282 of fuel).

relying on perverse subsidies, poor regulation, and no enforcement has led to losses of \$50 billion dollars in potential revenue in marine fisheries.<sup>22</sup> Although subsidies are not the only problem for healthy fishery management, they are a substantial contributor to oversupply of boats in already overexploited fisheries. A number of countries are unapologetic about their use of subsidies, including perverse incentives in order to maintain an industry. For example, in China, the second largest global subsidizer of its fishing industry,<sup>23</sup> Chinese economists have observed that subsidies necessary for the China National Fisheries Corporation (China's state-owned fishing industry) to operate were almost half of the company's net profit in 2008.<sup>24</sup>

Perverse subsidies have created a problem with socio-ecological feedback loops. There is an assumption that markets operate as balanced feedback loops where prices are set depending on the shifting balance between supply and demand. These prices should signal something to buyers about the health of specific resources such as a commercial fishery. Yet markets where subsidies have been introduced are unable to provide appropriate feedback about the ecological condition of a given resource until it is too late. Perverse subsidies delay the provision of necessary information about the state of marine resources to decision-makers. Since perverse subsidies externalize certain essential costs, making the cost of production less expensive, the producers see this coverage from society as a signal to do more of whatever activity is provided for by the subsidy. Fuel subsidies encourage more fuel usage. Ship building subsidies encourage more shipbuilding. Subsidized port infrastructure encourages expansion of fleets to use the new ports. All of these subsidies focused on growing an already bloated industry threaten to bring an end to commercial fishing.

Consumers remain inured to the vicious cycle of perverse subsidization. They may justifiably believe that the low cost of fish is not a result of over-exploitation financed by subsidies, but rather a result of an overabundance of a resource. Cheap prices for consumers mean that the demand continues for large quantities of fish. Raising the market price of fish to reflect the realities of what it actually costs to obtain the fish is an unattractive option for private fishermen as long as governments continue to pay subsidies. As long as certain types of subsidies, such as fuel subsidies for large highly profitable fishing fleets, continue to be treated as industry entitlements, there will continue to be recurring threats to long-term food security.

A study by Ransom Myers and Boris Worm concluded in 2003 that when industrialized fishing begins in a marine community, the amount of biomass may

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22. WORLD BANK & FOOD AND AGRIC. ORG., *THE SUNKEN BILLIONS: THE ECONOMIC JUSTIFICATION FOR FISHERIES REFORM* 41 (2009), available at <http://siteresources.worldbank.org/EXTARD/Resources/336681-1224775570533/SunkenBillionsFinal.pdf>

23. Tabitha Grace Mallory, *China's Distant Water Fishing Industry: Evolving Policies and Implications*, 38 *MARINE POLICY* 99, 103 (2012) (twenty percent of the subsidies offered are considered perverse subsidies).

24. *Id.*

be reduced by eighty percent.<sup>25</sup> This number is particularly concerning from a food security perspective since much of the reduction in biomass has either been discarded as bycatch or used for products other than traditional fish and seafood markets. Indeed, a substantial amount of what is being harvested from the seas is not being used for basic human nutrition. The state of the modern marine fisheries today parallels in many respects the United States Plains where basic food crops such as corn<sup>26</sup> are being harvested, not as food, but as the building blocks for chemicals or as stock for biofuel production. Instead of harvesting corn, marine industrial trawlers are harvesting menhaden, a member of the herring family, for omega-3 fish oil as a nutritional supplement, chicken feed, pet food ingredient, lipstick base, paint additive, and salad dressing ingredient.<sup>27</sup>

The fuel subsidies that contribute to making the harvest of large quantities of menhaden and other fish so profitable are potentially undercutting long-term food security. By creating conditions for the industrial harvest of fish in part through subsidies for a number of extraneous products that provide, at best, indirect nutrition for humans (e.g., chicken and livestock feed), we may be jeopardizing the future viability of much bigger food fisheries. Menhaden are an important part of the marine food chain<sup>28</sup> and without sufficient menhaden, other fish species will collapse, including tuna and striped bass.

While states are limited to available technical options for resuscitating dying fisheries, the cessation of perverse subsidies is a recurring available option. The question is what approach is most effective. It is clear that perverse subsidies such as fuel subsidies offered by one country have competitive trade implications for other states. Presumably, the more money that a country puts into fuel subsidies, the more fishing vessels it can partially finance or the further afield its flagged vessels can travel in search of fish and the more fish these vessels can capture.

Once the subsidies have been introduced, they are very difficult to retract. In some instances, distant water fishing fleet subsidies result in competitive advantages over the local fishing fleets.<sup>29</sup> Vessels from China, Taiwan, and Korea might be more reluctant to fish off the coast of Africa if the capital and operating costs involved were not partially underwritten by their respective governments. It is the state subsidies that make fishing in foreign waters so attractive. While China may be improving its own food security by shipping some of the catch back to China and selling other fish into foreign markets as an economic trade strategy, it may

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25. Ransom A. Myers & Boris Worm, *Rapid Worldwide Depletion of Predatory Fish Communities*, 423 NATURE 207, 280 (2003), available at <http://www.nature.com/nature/journal/v423/n6937/pdf/nature01610.pdf>.

26. As the documentary *King Corn* demonstrates, corn crops grown for chemical production are not even edible if there was a need to harvest the crops for food. KING CORN (Mosaic Films 2007).

27. H. BRUCE FRANKLIN, THE MOST IMPORTANT FISH IN THE SEA 115-116 (2008); Paul Greenberg Op-Ed., *A Fish Oil Story*, N.Y. TIMES, Dec. 15, 2009, <http://www.nytimes.com/2009/12/16/opinion/16greenberg.html>.

28. FRANKLIN, *supra* note 27, at 42.

29. Edward N. Kimani et al., *Fisheries in the Southwest Indian Ocean: Trends and Governance Challenges*, in THE INDIAN OCEAN: RESOURCE AND GOVERNANCE CHALLENGES 3, 11 (Ellen Laipson & Amit Pandya eds., 2009).

also be jeopardizing the ability of other states to meet their food security goals.<sup>30</sup> Politically, it becomes quite difficult for national or provincial leaders to retract what has become deemed an entitlement for the industry.<sup>31</sup> The following sections examine how multilateral solutions are unlikely to eliminate, in a timely fashion, existing perverse subsidies that are leading to excess fishing capacity and impacting long-term global food security.

## II. THE WISHFUL AND MAGICAL THINKING OF MULTILATERAL SOLUTIONS TO ELIMINATE PERVERSE SUBSIDIES

Multilateral cooperation has become the platinum standard of international policy in fisheries. This tendency to seek multistate participation is rational because many fish are migratory or straddling stocks and collectively we still know remarkably little about the interaction among various fish stocks spanning politically designated boundaries. In a world of political leaders who prioritize long-term conservation matters over other matters, such as immediate economic benefits to existing voters, multilateralism should be the sine qua non of fishery decision-making. Unfortunately, as described below, multilateralism has failed to deliver conservation benefits in a timely fashion such that fishery stocks continue to collapse in spite of greater international awareness. A multilateral environmental solution to the continued assignation of perverse subsidies is a matter of wishful thinking. As many of the collapsing fish stocks are target species for trade, the trade regime seems better equipped to create binding rules for eliminating perverse subsidies. Yet, the trade regime has become locked into inertia as some key fish trading World Trade Organization (“WTO”) parties push for reform while other key fish trading parties resist reform. As the Doha Round fails to create consensus and parties continue to assign subsidies to their fleets, a multilateral trade solution seems to become a product of magical thinking.

### A. *Wishful Thinking: Limitation of Environmental Multilateralism in Fisheries Conservation*

Most existing fisheries conservation efforts have been the result of multilateralism through either international treaties or regional agreements. This section will discuss a number of efforts that have the untapped potential to address perverse subsidies including the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Fish Stocks Agreements, Food and Agriculture Organization soft law, the Port State Agreement, and the Aichi Targets under the Convention on Biological Diversity.

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30. See generally U.N. Special Rapporteur on the Right to Food: Fisheries and the Right to Food: Report by Olivier de Schutter (Oct. 2012),

[http://www.awsassets.panda.org/downloads/executivesummary\\_october2012\\_ii\\_en\\_1.pdf](http://www.awsassets.panda.org/downloads/executivesummary_october2012_ii_en_1.pdf)

31. ORG. OF ECON. COOPERATION AND DEV., ENVIRONMENTALLY HARMFUL SUBSIDIES: CHALLENGES FOR REFORM 62 (2005), available at [http://www.oecd-ilibrary.org/agriculture-and-food/environmentally-harmful-subsidies\\_9789264012059-en](http://www.oecd-ilibrary.org/agriculture-and-food/environmentally-harmful-subsidies_9789264012059-en) (“It is well recognized that subsidies become capitaliz[ed] into the prices of factors of production . . . . The expectation that subsidy programmes will continue also tend to become embedded in the expectations of producers and consumers.”).



In 1973, states negotiated the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>32</sup> (“CITES”) in order to limit the trade in overexploited species. While the treaty protects primarily land-based animals and birds, there are also a few marine fish, mollusk, turtle, and shark species listed for either total protection or controlled trade that might otherwise be in the food trade. For example, Appendix I provides for full protection of marine turtles and marine mussels and Appendix II provides for controlled trade in a number of shark species.

CITES also includes an Appendix III where states can identify species that are subject to regulation within their own state in order to solicit cooperation from other parties in controlling trade of these species. Surprisingly, there are no commercial marine fish species listed in Appendix III of the treaty. This is a missed opportunity for states that might otherwise be used to control trade, particularly for species that certain countries have domestically deemed threatened. In some ways, this was a lost opportunity in 2010 when countries such as Monaco, supported by the U.S., called for the Atlantic bluefin tuna to be listed as an Appendix I species.<sup>33</sup> After the twenty countries supporting this listing failed to gain support for this proposal,<sup>34</sup> each of these countries could have applied for an Appendix III listing. While an Appendix III listing does not have the same implications as an Appendix I or II listing in terms of triggering a prohibition on trade or an export permit,<sup>35</sup> it signals to other countries a clear conservation objective regarding a particular species.

Instead of agreeing upon listings that would trigger affirmative action on the part of a Management Authority and Scientific Authority under the treaty,<sup>36</sup> the parties instead agreed to vague unenforceable cooperative goals. The 2002 attempt by Australia to have the Patagonian toothfish listed as an Appendix II species subject to additional trade controls failed to gain support.<sup>37</sup> Instead, the parties agreed to a non-binding resolution to respond to the crisis over illegal, unreported, and unregulated fishing of Patagonian toothfish in the Antarctic waters. Ultimately, the CITES parties called for better cooperation with the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Regional

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32. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 14537 U.N.T.S. [hereinafter CITES].

33. *United States Supports Bluefin Tuna Trade Ban*, ENV'T NEWS SERV. (Mar. 4, 2010), <http://www.ens-newswire.com/ens/mar2010/2010-03-04-02.html>.

34. David Jolly & John M. Broder, *U.N. Rejects Export Ban on Atlantic Bluefin Tuna*, N.Y. TIMES (Mar. 18, 2010), [http://www.nytimes.com/2010/03/19/science/earth/19species.html?\\_r=0](http://www.nytimes.com/2010/03/19/science/earth/19species.html?_r=0) (observing that a similar proposal for bluefin tuna protection had been proposed for CITES listing in 1992 by Sweden).

35. The import of an Appendix III species requires a certificate of origin. An export permit is also required if a species has been listed as an Appendix III species by the exporting country. While the requirement to provide permits and certificates would not limit the trade in species such as bluefin tuna, it would provide potential critical information about fishing activities in terms of where threatened fish are being captured.

36. CITES, *supra* note 32, at art. IX.

37. Food and Agric. Org., *Patagonian Toothfish*, FAO CORP. DOCUMENT REPOSITORY, <http://www.fao.org/docrep/006/Y5261E/y5261e09.htm> (last visited Jan. 25, 2013) (Australia proposed the inclusion of both the Patagonian toothfish and the Antarctic toothfish *Dissostichus mawsonii* in Appendix II to CITES but withdrew the proposal during COP 12).

Fisheries Management Organization with some jurisdiction over the toothfish fishing area.<sup>38</sup> Regarding trade of toothfish products, the parties “recommend[ed]” requiring the production of catch documentation requirements used by CCAMLR and introducing verification requirement.<sup>39</sup> Ultimately, the toothfish trade remained outside of the binding purview of the CITES treaty.

Even if the Monaco/U.S. proposal for listing of the Atlantic bluefin tuna and the Australia proposal for listing of the Patagonian toothfish had prevailed, leading to the first commercial fish listings, parties to CITES still would have the power to enter into reservations to listings under Appendix I and II. What this means in practice is that a potentially large number of parties to CITES can become treaty non-parties for those species for which they have entered a reservation, without needing to provide any justification for the reservations.<sup>40</sup> The possibility of entering species by species reservations has the potential to undermine the effectiveness of the treaty as a tool to globally regulate trade in species for which there are serious scientific concerns about the existing conservation management.

CITES could be used as a tool for conservation of commercial marine species, but has yet to be relied upon by any state as part of a conservation strategy based on regulated trade. Assuming that proposals for listing of commercial stocks would be more likely under the controls of Appendix II than the moratorium of Appendix I, there is detailed language in Article IV regarding the certification of species that arrive in a country as a result of trade and an “introduction from the sea.”<sup>41</sup> From a species protection perspective, Article IV provides that Scientific Authorities should only provide certification for trade of a species when they are satisfied “that the introduction will not be detrimental to the survival of the species involved.” In spite of plummeting stocks,<sup>42</sup> no commercial fisheries species have yet to be listed because many states involved in commercial fish trading fear that conservation measures will prove to be trade barriers for their products. Because of the political inertia surrounding high-volume commercial species, states have never arrived at the more complicated issues of figuring out how to implement potential restrictive trade measures to protect threatened marine commercial species.<sup>43</sup>

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38. *Cooperation Between CITES and the Commission for the Conservation of Antarctic Marine Living Resources Regarding Trade in Toothfish*, CITES.ORG, <http://www.cites.org/eng/res/12/12-04.php> (last visited Jan. 25, 2013).

39. *Id.*

40. CITES, *supra* note 32, at art. XXIII.

41. *Id.* at art. IV; *see also id.* at art. I(e) (defining “[i]ntroduction from the sea” as “transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State”).

42. FOOD AND AGRIC. ORG., *THE STATE OF WORLD FISHERIES AND AQUACULTURE 30* (2012), available at <http://www.fao.org/docrep/016/i2727e/i2727e00.htm>.

43. There are a number of technical challenges in enforcing trade restrictions related to marine species. Unlike ivory tusks or tortoiseshells, many marine species are processed at sea before they enter the channels of trade. As a result, they are difficult to recognize and inspectors have to rely heavily on labeling. Investigating whether boxes have been properly labeled is also a trick proposition because fish products can easily spoil and so time is of the essence in any inspection if States want to avoid the liability associated with spoiled cargo. Finally, even if boxes can be opened easily for visual inspection, this may not be sufficient for identifying because of the similarities between fish products. States might then need to rely on genetic testing which may be costly and would definitely require a certain level of technical sophistication that may be lacking in a number of global ports likely to inspecting products.

If CITES, as a first-generation environmental treaty,<sup>44</sup> has proven to do little to benefit exploited marine species that support food security strategies in spite of its potential for focusing on reducing trade, subsequent generations of multilateral environmental treaties in effect have failed to provide any more effective mechanisms than CITES. The 1995 Fish Stocks Agreement<sup>45</sup> does not directly address trade or subsidies. Members are simply expected to “take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources.”<sup>46</sup> Indirectly, the Fish Stocks Agreement does provide that parties to the Agreement can treat either non-members of a regional fisheries management organization or non-parties to the Fish Stocks Agreements differently such that fish caught by either nonmembers or nonparties who fail to apply adequate conservation and management measures can be refused in ports.<sup>47</sup> There is no evidence that the Fish Stocks Agreement has been used to ban shipments of fish from countries supporting heavily subsidized fleets.

The 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing<sup>48</sup> (“IUU fishing”) encouraged states to exercise the opportunity to close ports to vessels that are suspected of being engaged in illegal fishing so that they cannot offload their fish. Presently, the Agreement is not yet in force because there are only four members to this Agreement<sup>49</sup>: Norway the European Union, Sri Lanka and Myanmar.<sup>50</sup> For states that implement it, this Agreement has the potential to have substantial trade implications for particular fleets and possibly particular flag states.

Unfortunately, the Agreement is limited to closing ports to vessels that are engaged in fishing activities that have been designated as illegal, unreported, or unregulated.<sup>51</sup> Because of the restrictive definition of IUU fishing, there is no opportunity under the agreement to close fishing ports to legally subsidized vessels that may be engaged in fishing of already limited stocks, but not technically engaged in IUU fishing, that will in the short-term lead to fisheries collapse.<sup>52</sup>

In addition to multilateral treaty efforts to combat overfishing and species

44. Mark A. Drumbl, *Actors and Law-making in International Environmental Law*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 15 (Malgosia Fitzmaurice et al. eds., 2010).

45. United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, 34 ILM 1542 (1995).

46. *Id.* at Article 5 (1550).

47. *Id.* at Article 23 and Article 33.

48. *Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing*, FAO.ORG, [http://www.fao.org/fileadmin/user\\_upload/legal/docs/1\\_037t-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/1_037t-e.pdf) (last visited Jan 25, 2013).

49. *Id.*

50. *Id.*

51. *Id.* at art. 1.

52. One of the few areas of agreement regarding the trade negotiations over subsidies among all States is that subsidies should not be provided to vessels that have been prosecuted for IUU fishing. Unfortunately, certain entities such as the European Union continue to provide subsidies in spite of vessels having an IUU record. *See generally Identified Infringements*, FISHSUBSIDY.ORG, <http://fishsubsidy.org/infringements/> (last visited Feb. 8, 2013).

extinction through trade channels, there are also non-binding soft law efforts to reduce fishing capacity. In 1998, the Food and Agriculture Organization (“FAO”) prepared an International Plan of Action (IPOA) for the Management of Fishing Capacity to support the FAO’s efforts to create a code of conduct for responsible fisheries. According to the Code, parties were expected to make sure that “excess fishing capacity is avoided and . . . [that] the economic conditions under which fishing industries operate promote responsible fisheries.”<sup>53</sup> The voluntary IPOA specified that states with overcapacity should create national plans for managing fishing capacity including an assessment of “all factors, including subsidies, contributing to overcapacity”<sup>54</sup> and then work to “reduce and progressively eliminate all factors, including subsidies . . . which contribute, directly or indirectly to the build-up of excessive fishing capacity, thereby undermining the sustainability of marine living resources.”<sup>55</sup>

In concept, the IPOA could serve as an important non-binding policy tool respecting the different development statuses of each state and the need for flexibility in addressing capacity problems. It allows each state to independently assess its particular challenge with overcapacity and then tackle those issues. Unfortunately, very few states have taken the opportunity to publicly share their national plans for managing fishing. According to the FAO website, the only three submissions were from Indonesia (2008), Namibia (2007), and the U.S. (2004).<sup>56</sup> Even if all countries participated in publicizing their national plans, the national plans may have provided ultimately little strategic direction in subsidy reform. As discussed below in the section on multilateral trade interventions, certain countries such as Japan and Korea do not regard subsidies as particularly problematic, but focus attention almost exclusively on poor fishing management practices. While subsidies are not the singular cause for unsustainable marine resource extractions, the language in the IPOA offers states an opportunity to discuss subsidies as just another factor in overcapacity and not as a priority subject for policymaking.<sup>57</sup>

Reflecting on the multilateral environmental treaties that are currently in effect, or might go into effect, reveals a disconnect between the globalized trade in fish products and the crisis of overfishing fueled by subsidies. None of the multilateral environmental treaties mandates an elimination of perverse subsidies. The Convention on Biological Diversity has been the most explicit with its Aichi Targets set to address the decline in biodiversity.<sup>58</sup> Target 3 requires that

By 2020, at the latest, incentives, including subsidies, harmful to biodiversity are

53. FOOD AND AGRIC. ORG., CODE OF CONDUCT FOR RESPONSIBLE FISHING 10 (1995), available at <http://www.fao.org/docrep/005/v9878e/v9878e00.HTM>.

54. *International Plan of Action for the Management of Fishing Capacity*, FAO CORP. DOCUMENT REPOSITORY, <http://www.fao.org/docrep/006/X3170E/x3170e04.htm> (last visited Feb. 8, 2013).

55. *Id.*

56. *National Plans of Action, International Plan of Action for the Management of Fishing Capacity*, FOOD AND AGRIC. ORG. OF THE U.N., <http://www.fao.org/fishery/ipoa-capacity/npoa/en> (last accessed Jan. 25, 2013).

57. REPUBLIC OF NAMIBIA, NATIONAL PLAN OF ACTION (NPOA) FOR THE MANAGEMENT OF FISHING CAPACITY 17 (2007) (Namibia observes that “[t]he fishing industry is not supported by subsidies (other than some rebates granted on fuel purchases).”).

58. *Aichi Biodiversity Targets*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/sp/targets/> (last visited Feb. 8, 2013).

eliminated, phased out or reformed in order to minimize or avoid negative impacts, and positive incentives for the conservation and sustainable use of biodiversity are developed and applied, consistent and in harmony with the Convention and other relevant international obligations, taking into account national socioeconomic conditions.<sup>59</sup>

Perverse subsidies were recognized as one of the underlying reasons for biodiversity decline.<sup>60</sup> The Aichi Target is probably the clearest statement with a timeline demanding reform of perverse subsidies.

It is unlikely, however, that a multilateral environmental treaty alone or soft law that is supported by a majority of states will be able to tackle the removal of subsidies. There is simply too much political inertia for maintaining the current subsidy structures. In giving a technical rationale for Target 3 of the Aichi Targets, the Convention on Biological Diversity Secretariat observes that “[c]urrent negotiations under the Doha Trade Round . . . have the potential to generate high synergies with this target, and are therefore a key vehicle for achieving [it].”<sup>61</sup> Yet, as the following section will explain, multilateral solutions in the trade sector appear as unlikely as a multilateral intervention by environmental treaty makers to end perverse subsidies in any timely fashion. Yet time is of the essence in conserving remaining commercial fish stocks. Multilateral trade solutions alone will not achieve the phasing out process of harmful subsidies because of a seeming lack of political will as developed economies continue to deny the biological limitations of global fisheries contained in their national policies. Wishful (or perhaps fish full) thinking is powerful, but not effective policymaking.

*B. Magical Thinking: Reluctance to Conclude the Doha Round of Multilateral Trade Negotiations*

If relying on multilateralism through environmental negotiation represents wishful thinking, then the current approach of attempting to negotiate the removal of subsidies through trade multilateralism verges on magical thinking. Negotiations to remove subsidies that encourage overcapacity and excess fishing effort have been ongoing for nearly twelve years with little to show in terms of final agreements.

The Subsidies and Countervailing Measures Agreement (“SCM”) under the GATT requires that parties submit to the WTO information about when they provide a subsidy to an industry in order to expose potential sources of trade distortion.<sup>62</sup> States have been reluctant to submit this information to the WTO because of a perception of competitive disadvantage. Parties to GATT disagree about what constitutes a subsidy in relationship to the fishery industry and whether certain “good subsidies,” such as supporting purchase of equipment that eliminates bycatch, should even be considered subsidies for the purpose of implementing the

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59. *Id.*

60. *Id.*

61. *TARGET 3 – Technical Rationale Extended*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/sp/targets/rationale/target-3/> (last visited Feb. 8, 2013).

62. Agreement on Subsidies and Countervailing Measures, art. 25, Apr. 15, 1994, 1867 U.N.T.S. 14.

SCM agreement or whether the focus should be exclusively on prohibited subsidies and actionable subsidies.<sup>63</sup> States have raised further questions about whether the category of prohibited subjects under the SCM agreement is too narrow since the only prohibited subsidies are those contingent on export performance or the use of domestic goods rather than imported goods.<sup>64</sup>

In 2001, parties to the WTO negotiations on trade as a strategy for development in Doha, Qatar, agreed to address the issue of subsidies and the fishing industry because “improved disciplines are required to address the exceptional and distinctive adverse effects arising from some fisheries sector subsidies.”<sup>65</sup> In the portion of the declaration dedicated to “trade and environment,” the parties observed “that fisheries subsidies form part of the negotiations provided for” in the negotiations specifically on WTO Rules.<sup>66</sup> This effort to reform subsidies in the field of fishing by reforming the WTO Rules has been championed by a group that has been labeled the Friends of the Fish and opposed by a group that might be named the Friends of Industrial Fishing. Among the Friends of the Fish are Australia, Chile, Ecuador, Iceland, New Zealand, Peru, the Philippines, and the U.S.<sup>67</sup> Among the Friends of Industrial Fishing are Japan, Taiwan, South Korea, and the European Union, which have been reluctant to undertake subsidy reforms, claiming that more effort should be put on conservation management measures rather than trade measures.<sup>68</sup> These parties have argued for a ‘bottom-up approach’ allowing for all subsidies except for a few prohibited subsidies such as subsidies to vessels engaged in IUU fishing. China has accepted the need for subsidy reform but has aligned its interests with states requiring special and differentiated treatment.<sup>69</sup>

The Friends of the Fish proposal is to explicitly provide that certain types of fishery subsidies that contribute to overcapacity, overfishing, or other “direct trade-distorting effects” should be prohibited with limited exceptions.<sup>70</sup> This prohibition approach is deemed a “top down” approach that is “a simple, administrable, [sic] enforceable and realistic structure for strengthened disciplines on fisheries subsidies, with sufficient flexibility to address the realities of the fisheries sector and the legitimate interests of Members.”<sup>71</sup> Although most “perverse subsidies” would be considered “red box” prohibited subsidies, there would also be the possibility of “dark amber” subsidies that would be presumed harmful unless the

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63. *Id.* at art. 4 & art. 5.

64. *Id.* at art. 4.

65. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

66. *Id.*

67. WTO Negotiating Group on Rules, *The Doha Mandate to Address Fisheries Subsidies: Issues*, TN/RL/W/3 (Apr. 23, 2002).

68. WTO Negotiating Group on Rules, *Japan’s Basic Position on the Fisheries Subsidies Issue*, ¶ 20, TN/RL/W/11 (July 1, 2002).

69. *See, e.g.*, WTO Negotiating Group on Rules, *Fisheries Subsidies*, TN/RL/W/241/Rev.1 (Oct. 15, 2009).

70. WTO Negotiating Group on Rules, *Possible Approaches to Improved Disciplines on Fisheries Subsidies*, ¶ 5, TN/RL/W/77 (Mar. 19, 2003).

71. WTO Negotiating Group of Rules, *Additional Views on the Structure of the Fisheries Subsidies Negotiations*, TN/RL/W/169 (Dec. 13, 2004).

member could show “that the subsidy was not being used to fish in a fishery that is overfished, or that effective restrictions were placed on the operation of the programme so that it does not result in overcapacity or overfishing.”<sup>72</sup> Some states have proposed specific categories of subsidies that should be prohibited. For example, Chile has proposed banning subsidies that: permit the transfer of existing ships into either high seas operations or third-country operations; contribute to the purchase of new or used ships; modernize existing fleets; reduce production costs of fishing; provide favorable discriminatory tax treatment for the capture, processing, or marketing of fish products; or result in additional access to credit.<sup>73</sup>

In 2005, the parties at the Hong Kong Ministerial meeting indicated “that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing . . . .”<sup>74</sup> In 2007, the Committee on Rules provided a draft negotiating text to WTO members to advance discussions.<sup>75</sup> The text provided a section on specific prohibitions on subsidies, exceptions to the prohibitions such as fishing safety, special treatment for developing countries in relation to some of the prohibited subsidies, and a general discipline on subsidies.<sup>76</sup> Key actors from the Friends of the Fish expressed enthusiasm about this proposal because it reflects the “top down” approach of prohibiting most subsidies with limited exceptions.<sup>77</sup>

For almost five years, the stalemate between the Friends of the Fish and the Friends of the Fishing Industry over approving the draft has continued with certain large industry players such as China using the negotiations as an opportunity to advance concerns about special and differentiated treatment of developing countries. In 2010, China stated in a shared communication with India, Mexico and Brazil that:

Our assumption here is that the prohibition of subsidies causing excessive fishing effort and negatively impacting fisheries resources can and shall be reconciled with the important role of fisheries subsidies in the economic development of developing countries. The applicable controls should allow developing countries to achieve development priorities, poverty reduction, and address their livelihood and food security concerns.<sup>78</sup>

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72. WTO Negotiating Group on Rules, *supra* note 69, at ¶ 6.

73. WTO Negotiating Group on Rules, *Possible Approaches to Improve Disciplines on Fisheries Subsidies*, ¶ 8, TN/RL/W/115 (June 10, 2003).

74. World Trade Organization, Ministerial Declaration of 22 December 2005, WT/MIN(05)/DEC.

75. WTO Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213 (Nov. 30, 2007).

76. *Id.* at art I-IV.

77. WTO Negotiating Group on Rules, *Fisheries Subsidies*, ¶ 6, TN/RL/W/235 (July 18, 2008) (stating “[t]he Chair’s draft text of a new fisheries subsidies agreement represents a substantial advance in the negotiations and a landmark in the efforts of the world community to get global fisheries back on a sustainable path. The text addresses all the key issues in innovative and thoughtful ways, drawing on virtually all contributions made by Members.”). The Chair in 2007 and 2008 was Ambassador Guillermo Valles Galmés from Uruguay, a country that has not self-identified as either a Friend of the Fish or Friend of the Fishing Industry.

78. WTO Negotiating Group on Rules, *Fisheries Subsidies: Special and Differential Treatment*, TN/RL/GEN/163 (Feb. 8, 2010).

Brazil, China, and Mexico, joined by Ecuador and Venezuela, had earlier asserted that developing countries must not be prevented from providing operational and capital support for high seas activities by their fleets.<sup>79</sup> China's participation in both of these communications must be regarded with some disingenuousness in light of China's subsidized overexploitation of West African waters and the high seas.<sup>80</sup> China may be using the negotiations as an opportunity to avoid drawing additional attention to its subsidy practices. Japan's resistance to the WTO negotiations has drawn substantial attention from NGOs and the media.

The Republic of South Korea is skeptical of the multilateral efforts to prohibit certain types of subsidies and suggests that attention should instead be shifted to "means of identifying maximum sustainable yield (MSY), vessel registration, allowable catch quotas, effective enforcement, monitoring and surveillance, and effective penalties for violation."<sup>81</sup> While these actions may also be necessary to address serious issues of unregulated fishing, they also serve as distractions in the context of the multilateral trade negotiations. Korea takes a position that only a narrow category of subsidies should be prohibited, such as subsidies to vessels engaged in illegal, unreported or unregulated fishing, allowing for the transfer of fishing vessels to third countries, transferring access rights, and enhancing fishing capacity of vessels.<sup>82</sup> Accepting that fuel subsidies have the potential to lead to excess fishing effort, Korea is particularly reluctant to support any removal of fuel subsidies because the "categorical prohibition of fuel subsidy in its entirety, simple as it may be, would cause substantially negative impact [sic] on the livelihood of the Members' fishing households that have been traditionally dependent upon such measures."<sup>83</sup>

The newly appointed frustrated Chair of the Negotiating Group on Rules, career diplomat Ambassador Dennis Francis from Trinidad and Tobago, observed in 2011 that parties:

[A]ppear[ed] to be focusing principally on maintaining their own status quo by placing on "others" the main responsibility to implement solutions, while minimizing the impact of disciplines on their own activities. Thus in spite of the nearly universal calls for disciplining subsidies in an effective way, many delegations in practice seem to elevate the exceptions above the disciplines. For some developed Members, a main reason given is that subsidies are necessary to protect traditional ways of life, vulnerable coastal communities, and jobs in the fisheries sector. For many developing Members, a main reason often cited is the need for policy space to subsidize in order to harness fisheries as a basis for development, economic growth, and employment. In the face of the sharp and continuing declines in the fisheries resources, however, it is hard to see how such strategies can either protect communities and jobs or be a source of food security

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79. WTO Negotiating Group on Rules, *supra* note 69.

80. Mallory, *supra* note 23, at 103-104.

81. WTO Negotiating Group on Rules, *Framework of the Disciplines on Fisheries Subsidies*, ¶ 23, TN/RL/W/245 (Nov. 23, 2009).

82. *Id.* ¶ 17.

83. *Id.* ¶ 19.



and stable growth over the long-term.<sup>84</sup>

The Chairman remained optimistic that a compromise could be reached though he urged the negotiators to focus on the realities of collapsing stocks and the damage to the fishing industry as a result, “and less on protecting their short-term defensive interests.”<sup>85</sup> But, as of 2012 after the latest Ministerial Conference in Bali, there has been no progress on advancing a text that will prohibit certain perverse fishing subsidies. Meanwhile, certain entities such as the European Commission (“EC”) have renewed their subsidies for their fleets while continuing to set quotas that exceed scientific advice.<sup>86</sup> In 2011, the EC observed that sixty-three percent of Europe Atlantic waters were overfished, as were eighty-two percent of the Mediterranean waters.<sup>87</sup> In Fall 2012, however, European fishing ministers agreed to maintain fishing subsidies, including subsidies to modernize fleets.<sup>88</sup> Until negotiating parties can focus on the overcapacity of fishing fleets as a problem requiring a long-term commitment, a multilateral solution will remain in the realm of magical thinking. The final section proposes unilateral efforts or a limited ten or twelve country multilateral effort from the Friends of Fish to design trade measures to protect fishery resources from perverse subsidies.

### III. UTILIZING UNILATERAL TRADE MEASURES TO TACKLE PERVERSE SUBSIDIES

Trade plays an especially important role in global marine capture fisheries since thirty-seven percent of harvested fish is traded internationally and provides foreign currency to a number of developing states.<sup>89</sup> Among the larger importing states and entities are Japan, the European Union, and the U.S. Imports valued at \$13.1 billion dollars accounted for eighty-four percent of the seafood eaten in the U.S. with imports from China, Thailand, Canada, Indonesia, Vietnam, Ecuador, and Chile.<sup>90</sup> Ordinarily, undertaking unilateral trade measures for conservation is strongly discouraged because international trade depends on an absence of barriers. Yet multilateral solutions have become mired in endless loops of debates punctuated by proposals from the Friends of the Fish that remain unfulfilled and largely aspirational. If cooperative multilateralism will not be part of the solution here, then multilateralism should not prove a barrier for states that seek to end

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84. WTO Negotiating Group on Rules, *Communication from the Chairman*, 48, TN/RL/W/254 (Apr. 21, 2011).

85. *Id.* at 49.

86. Fiona Harvey, *EU Fishing Quotas Defy Scientific Advice, Say Conservationists*, THE GUARDIAN (Dec. 20, 2012, 3:14 PM), <http://www.guardian.co.uk/environment/2012/dec/20/eu-fishing-quotas-conservationists>.

87. David Holly, *E.U. Proposal for Fishing Industry Support Raises Eyebrows*, N.Y. TIMES (Dec. 2, 2011), [http://www.nytimes.com/2011/12/03/business/global/eu-proposal-for-fishing-industry-support-raises-eyebrows.html?\\_r=0](http://www.nytimes.com/2011/12/03/business/global/eu-proposal-for-fishing-industry-support-raises-eyebrows.html?_r=0).

88. European Marine Programme, *EU Fisheries Ministers Fail to End Subsidies that Promote Overfishing*, THE PEW CHARITABLE TRUSTS (Oct. 24, 2012), <http://www.pewenvironment.org/news-room/other-resources/eu-fisheries-ministers-fail-to-end-subsidies-that-promote-overfishing-85899425171>.

89. THE WORLD BANK, FOOD & AGRIC. ORG., & WORLD FISH CT., *THE HIDDEN HARVESTS: THE GLOBAL CONTRIBUTION OF CAPTURE FISHERIES* 24 (2010).

90. K. McDonald, *U.S. Agricultural Imports – Part II*, BIG PICTURE AGRICULTURE (Feb. 23, 2011), <http://www.bigpictureagriculture.com/2011/02/us-agricultural-imports-part-ii.html>.

certain perverse fishing subsidies. As long as states eliminate these perverse subsidies for their own fishing fleets, they can require the same from other states.

Perverse fishing subsidies require action now. Even while the WTO negotiators become stymied by the discussion of agricultural subsidies, the fish subsidy issue should be decoupled. As Christopher Stone wrote fifteen years ago remarking on the overcapacity of fishing fleets, “[t]here are many arguments against farm subsidies, but long-term impairment, and the collapse of productivity are not usually among them.”<sup>91</sup> Since Professor Stone wrote his article suggesting a test case for fisheries subsidies under the Subsidy and Countervailing Measure Agreement,<sup>92</sup> the extent of overexploitation of stocks has increased. In the 1998 FAO State of World Fisheries and Aquaculture report, an estimated forty-four percent of fish stocks were fully exploited, six percent were depleted, and sixteen percent were overexploited.<sup>93</sup> In the 2012 report, 57.4 percent of fish stocks were fully exploited, and almost 29.9 percent were overexploited (a category now containing depleted and recovering fish).<sup>94</sup>

The interpretation of Article XX of the GATT suggests that certain types of unilateral trade exceptions such as prohibiting the import of fishing products reliant on perverse subsidies may be legal within the GATT framework. Article XX provides that nothing in the GATT “shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption[.]”<sup>95</sup> This section is conditioned on the Article XX chapeau requiring that the measures not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries” or as “a disguised restriction on international trade.”<sup>96</sup> Here a unilateral elimination of perverse subsidies such as those identified by the Friends of the Fish would clearly relate to the “conservation of exhaustible natural resources” as long as domestic producers of the fish were not the recipient of trade-distorting subsidies. Certain types of subsidies such as fuel tax exemption interfere with competing conservation measures since multinational ships are able to continue to engage in distant water fishing that would otherwise be unprofitable. But for the subsidies, the fishery resources may remain in situ because of a reduced incentive to engage in expensive industrial harvesting trips. Keeping resources in situ is an effective conservation measure. This would be especially true for high seas bottom trawlers where recent estimates of fuel subsidies are approximately \$78 million dollars per year which is about twenty-five percent of their total landed

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91. Christopher D. Stone, *Too Many Fishing Boats, Too Few Fish: Can Trade Laws Trim Subsidies and Restore the Balance in Global Fisheries?*, 24 *ECOLOGY L.Q.* 505, 536 (1997).

92. *Id.* at 505-544.

93. FAO Fisheries and Aquaculture Dept., Food and Agric. Org., *The State of World Fisheries and Aquaculture Part 1*, FAO CO. DOCUMENT REPOSITORY, [http://www.fao.org/docrep/w9900e/w9900e02.htm#P0\\_0](http://www.fao.org/docrep/w9900e/w9900e02.htm#P0_0) (last visited Jan. 31, 2013).

94. FAO FISHERIES AND AQUACULTURE DEPT., FOOD & AGRIC. ORG., *THE STATE OF WORLD FISHERIES AND AQUACULTURE 53* (2012), available at <http://www.fao.org/docrep/016/i2727e/i2727e01.pdf>.

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

96. *Id.*

value in an industry where profits are less than ten percent of the landed value.<sup>97</sup>

Given analysis by the Appellate Body in its most recent decision on the application of Article XX(g) the U.S.-Shrimp/Turtle dispute,<sup>98</sup> a unilateral trade measure prohibiting products suspected of being financed through perverse subsidies would survive a challenge. This Shrimp/Turtle decision presents the most recent thinking of the WTO Dispute Settlement system on the application of Article XX(g) to conservation measures, the same exception that might be invoked in the case of a challenge to measures prohibiting subsidized fishery product.

The Shrimp/Turtle case is particularly instructive because of the approach taken by the Appellate Body in applying both the exception language in Article XX(g) and the chapeau. Involving a trade restriction on shrimp products from countries that did not have turtle conservation programs equivalent to the United States, the appellate body confirmed the possibility that unilateral measures based on “conservation measures” would be legal. Sea turtles were considered “exhaustible natural resources”<sup>99</sup> and the fishing restriction program under U.S. public law<sup>100</sup> was a conservation measure that was “not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species.”<sup>101</sup> The means provided in the measure were “reasonably related to the ends.”<sup>102</sup>

The Appellate body’s interpretation of Article XX(g) poses no difficulty for a measure prohibiting imports of products subsidized by “perverse subsidies” encouraging overcapacity and excess fishing effort. Fish have already been found to be an “exhaustible natural resource.”<sup>103</sup> Any measure that prohibits the subsidy for both foreign fishing fleets and domestic fishing fleets would likewise be considered to be reasonably related to the ends of restoring threatened global fisheries.

In its analysis of the chapeau, the Appellate Body makes a number of important observations about the manner in which a specific conservation measure is applied. As long as the conservation measure does not result in an “abuse or misuse” of the GATT treaty,<sup>104</sup> then parties can exercise a trade-restrictive measure as long as it does not result in “arbitrary or unjustifiable” discrimination or a disguised restriction on trade. The Appellate Body found that the conservation measure in question imposed “a single, rigid and unbending requirement that

97. U. Rashid Sumaila et al., *Subsidies to High Seas Bottom Trawl Fleets and the Sustainability of Deep-Sea Demersal Fish Stocks*, 34 MARINE POL’Y 495, 497 (2010) (observing that the fuel subsidies should not increase subsidies “to a fleet that wastes fuel to maintain paltry catches of fish, from highly vulnerable stocks, while destroying their habitat in the process.”).

98. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle*].

99. *Id.* ¶ 134.

100. Conservation of Sea Turtles: Importation of Shrimp, Public Law 101-162, (November 21, 1989) 103 Stat. 1037.

101. *Id.* ¶ 141.

102. *Id.*

103. *Id.* ¶ 131. See also Report of the Panel, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, ¶ 4.4, L/6268 (Mar. 22, 1988); Report of the Panel, *United States – Restrictions on Imports of Tuna*, ¶ 4.9, DS29/R (June 16, 1994).

104. *Shrimp/Turtle*, *supra* note 98, ¶ 156.

countries . . . adopt a comprehensive regulatory program that is essentially the same as the United States' program without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries."<sup>105</sup> In response, the U.S. amended its measure to require programs that did not have to be the same as the U.S. program but needed to be "comparable in effectiveness." When the U.S. was challenged on this revised measure, the WTO Appellate Body concluded that "conditioning market access on the adoption of a programme comparable in effectiveness, allows for sufficient flexibility in the application of the measure so as to avoid 'arbitrary and unjustifiable discrimination.'" <sup>106</sup>

This interpretation also poses no problems for a prohibition on perverse subsidies. Here, a state undertaking a unilateral conservation measure might be able to draft a measure that would not specifically eliminate specific types of subsidies but would instead start with a presumption of prohibiting subsidized products unless states trading fish products can demonstrate conservation measures that offset the provision of perverse subsidies (e.g. effective restoration subsidies equal to subsidies provided for extraction). This provision would provide the same flexibility as the amended U.S. provision by relying on efforts that might be "comparable in effectiveness" in terms of conserving fish stocks without ruling out the possibility of other effective approaches to protecting stocks from overfishing such as the implementation of a Marine Protected Area to restore fish stocks in overexploited habitats.

One final aspect of the Appellate Body decision is unlikely to interfere with a proposal for unilateral anti-subsidy measures. The Appellate Body observed that the U.S. on the matter of sea turtle protection had failed to engage "in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members."<sup>107</sup> While the U.S. had concluded a treaty in Latin America on the conservation of sea turtles,<sup>108</sup> no similar efforts were made in Asia. Because it seemed that "the United States negotiated seriously with some, but not with other Members [of the WTO],"<sup>109</sup> the US measures were discriminatory. Here the Friends of the Fish who might be willing to politically pursue a unilateral import prohibition have already engaged in serious multilateral negotiations with no compromise being reached with the Friends of Industrial Fishing. There are ample documented good faith efforts of WTO members attempting to reach a multilateral solution to the problem of oversubsidized fleets depleting fishery resources. Imposing unilateral conservation measures in the form of trade restrictions when other WTO members appear unwilling to negotiate in good faith is a reasonable end protected by Article XX.

Because it can be lonely in the lead, there is no reason that any single country from the Friends of the Fish need take the lead in imposing unilateral measures.

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105. *Id.* ¶ 177.

106. Appellate Body Report, *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, ¶ 144, WT/DS58/AB/RW (Oct. 22, 2001).

107. *Shrimp/Turtle*, *supra* note 98, ¶ 166.

108. *Id.* ¶ 169.

109. *Id.* ¶ 177.

Rather, it may be possible for all of the Friends of the Fish to negotiate a multilateral treaty among themselves based on their existing interpretations of the WTO subsidy rules and invite the remainder of the WTO countries to join the treaty. The basis of the treaty could be two fold. First, it could be an important international environmental treaty providing subsidy reductions as a conservation measure. Second, it could be a preferential international trade treaty to highlight that countries that insist on continuing to provide subsidies are undercutting the ability of other states to competitively sell their fish. After all, fishing fleets whose capital costs are largely covered by their governments are in a better financial position to sell their fish products at prices below market value. The implementation of a multilateral treaty embodying the current proposals of the Friends of the Fish would survive a GATT Article XX(g) challenge for the same reasons that a unilateral measure by a single country would survive.

While much has been written about the relationship between trade and the environment, little has been done to use trade mechanisms to ensure conservation of commercial fisheries. Given the importance of fish products for international trade, the chronic inability to restrict trade to reflect the biological constraints of rebuilding stocks has had devastating impacts on fishery resources. The collapse of fisheries today is a multi-pronged problem with no single panacea. Devising trade rules, however, that understand the environmental limitations of trading in certain resources is essential. CITES has failed to curb the extensive trade in overexploited species such as tuna. FAO initiatives have failed to change the behavior of states in financially underwriting destructive fishing practices, and the WTO, the venue most likely to be able to rewrite trade rules, is stalled. In contrast to a full WTO revision, unilateral conservation measures or limited multilateral responses are viable options.

#### CONCLUDING THOUGHTS

Unilateralism can be a powerful tool of persuasion in improving implementation of conservation measures. In 1995, Canada unilaterally implemented legislation permitting it to board and arrest foreign vessels on the high seas that were fishing in breach of Northwest Atlantic Fisheries Organization (NAFO) conservation and management measures.<sup>110</sup> When Canada seized the *Estai*, Spain accused Canada of high seas piracy. Eventually, Spain and Canada agreed to improve fishery control and enforcement within the NAFO area and to negotiate voluntary quotas for the straddling stocks.<sup>111</sup> Thus, Canada's unilateral action provoked a needed response. Today both countries maintain, "[i]n the sector of fisheries management and conservation . . . a constructive cooperation based on dialogue and cooperation . . . to ensure that fishing resources are exploited in a

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110. Coastal Fisheries Protection Act, R.S.C. 1985, c. C-33 (Can.), available at <http://faolex.fao.org/docs/pdf/can1078.pdf>.

111. David Freestone, Current Legal Developments, *Canada/European Union: Canada and the EU Reach Agreement to Settle the Estai Dispute*, 10 INT'L J. OF MARINE & COASTAL L. 397, 397 (1995).

sustainable and responsible manner.”<sup>112</sup>

As one of the Friends of the Fish, Canada could take a strong position on sourcing its fish in line with the stand it took in arresting the Estai under its domestic laws. The U.S. already has legislation through the Pelly Amendment prohibiting the import of fish products from foreign countries whose vessels conduct “fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program.”<sup>113</sup> Depending on whether the voluntary International Program of Action on Fishing Capacity can be construed as an international fishery conservation program within the meaning of the Pelly Amendment, the U.S. may already be in a position to domestically prohibit the importation of products underwritten by perverse subsidies. It would be an admirable step for the U.S. Secretary of Commerce, in cooperation with the U.S. Trade Representative, to request that the President implement the fishery subsidy recommendation that the U.S. has been offering during the Doha Round through the Pelly Amendment.

Unilateralism serves a role when multilateralism falters. It offers opportunities for states to end protracted negotiations and act in a manner that will further needed conservation goals. The fishing subsidy debates must not become entrapped in the circular debates that have monopolized multilateral climate change negotiations. The GATT offers the necessary exceptions for states to act and to ensure that states will not face empty nets in the near future because of their inability to act decisively now.

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112. *Canada-Spain Relations*, GOV. CAN., [http://www.canadainternational.gc.ca/spain-espagne/bilateral\\_relations\\_bilaterales/canada-spain-espagne.aspx?lang=eng&view=d](http://www.canadainternational.gc.ca/spain-espagne/bilateral_relations_bilaterales/canada-spain-espagne.aspx?lang=eng&view=d) (last visited Feb. 5, 2013).

113. Fisherman’s Protective Act of 1967, 22 U.S.C. § 1978(a) (2006).