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The 'Law of the Sea' Obligations Underpinning Fisheries Subsidies Disciplines

Margaret A. Young



International Centre for Trade
and Sustainable Development

Reference Paper

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LIST OF ABBREVIATIONS

ACP	African, Caribbean and Pacific Group of States
EEZ	exclusive economic zone
EU	European Union
FAO	Food and Agriculture Organization
ICJ	International Court of Justice
IPOA-IUU	International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing
ITLOS	International Tribunal for the Law of the Sea
IUU	illegal, unreported and unregulated
LDC	least developed country
PSMA	Port State Measures Agreement
RFMO	Regional Fisheries Management Organisation
SRFC	Sub-Regional Fisheries Commission
TPP	Trans-Pacific Partnership
UNCLOS	United Nations Convention on the Law of the Sea
UNFSA	United Nations Fish Stocks Agreement
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

FOREWORD

Harmful fisheries subsidies are a pervasive challenge to the sustainability of the world's fish stocks. They are the subject of a specific target set in the United Nations 2030 Agenda for Sustainable Development to prohibit, by 2020, certain subsidies that contribute to overcapacity and overfishing and to eliminate subsidies that contribute to illegal, unreported and unregulated (IUU) fishing.

Proposals for new disciplines on fisheries subsidies currently under negotiation at the World Trade Organization (WTO) will build on existing international legal regimes and in particular the law of the sea. While this potential interaction between regimes represents an important development in international governance, it also presents a distinct challenge to WTO negotiators, as they craft rules that go beyond traditional trade policy issues. Using existing concepts and rights and obligations under the law of the sea coherently will be crucial, however, to ensuring an agreement on fisheries subsidies supports meaningful reform of government policies.

This paper, written by Margaret Young, aims to help negotiators to understand the corpus of international law that underlies the disciplines they are building on subsidies to the fishing industry. Margaret is an Associate Professor of Law at the University of Melbourne, Australia. An expert in international trade law, international environmental law and the law of the sea, she is uniquely qualified to address the implications of an agreement that encompasses all three international legal regimes.

The paper identifies the existing legal rules and concepts that are relevant to the fisheries negotiations, and explains their implications for WTO negotiators. Importantly, the paper articulates how the establishment of new disciplines on fisheries subsidies would help to give practical effect in domestic economic policy to states' existing rights and obligations under the law of the sea. The paper also identifies where elements of some proposals, for example regarding exemptions for subsidies provided to fishing within exclusive economic zones, would need to be carefully implemented to make certain that they did not undermine existing obligations under the law of the sea to ensure resources are not overexploited.

The international community has a clear opportunity to make progress towards the target set in the 2030 Agenda for Sustainable Development by crafting meaningful disciplines on fisheries subsidies. There have been an overwhelming number of calls for action on fisheries subsidies from the United Nations in New York, including from the Ocean Conference in June this year; calls that WTO members can and should respond to by adopting such disciplines at the WTO's Ministerial Conference in Buenos Aires in December 2017. We hope that this paper proves a useful contribution to this effort.



Ricardo Meléndez-Ortiz

EXECUTIVE SUMMARY

Negotiations underway at the WTO on rules on fisheries subsidies rely in various ways on maritime zones and other jurisdictional concepts established in international law. This reference paper sets out key areas where the new trade rules might depend upon key principles of the law of the sea, as developed primarily in binding agreements, non-binding codes of conduct, and dispute settlement decisions.

The United Nations Convention on the Law of the Sea (UNCLOS) is the principal legal instrument governing the world's seas and oceans. While not all WTO members are party to UNCLOS, most of its provisions are recognized as codifying customary international law. UNCLOS establishes both rights and obligations that are relevant context to proposed subsidy disciplines, particularly with respect to fishing operations in different maritime zones. Key amongst these is that coastal states have sovereign rights to exploit resources within their Exclusive Economic Zone, but must also ensure those resources are not over-exploited. If flexibilities were provided for subsidies to fishing within EEZs, for example, existing UNCLOS obligations mean that members would need to ensure these subsidies are not undermining the sustainability of resources, or the interests of others in those resources.

While all states' nationals can fish on the high seas, under UNCLOS states must control this activity to ensure the conservation of living resources on the high seas, including by cooperating with other states. An obligation not to subsidise fishing activities with respect to overfished high seas stocks, for example, or to refrain from contributing to overcapacity or overfishing on the high seas could help to support coherence between a state's existing rights and obligations with respect to fishing on the high seas and that state's domestic economic policy.

The United Nations Fish Stocks Agreement (UNFSA) further develops key UNCLOS obligations regarding cooperation over shared stocks, including through Regional Fisheries Management Organisations (RFMOs). Several WTO proposals suggest identification of illegal, unreported and unregulated (IUU) fishing for the purpose of subsidy rules could be made by RFMOs, but some concerns remain regarding how this would happen in practice. Parties to the UNFSA are obliged not only to cooperate to establish but also to respect all RFMOs' conservation measures—including of those RFMOs to which they are not members. Countries that are not parties to the UNFSA or members of a relevant RFMO are not specifically obliged to respect that RFMO's decisions, given the *pacta tertiis* rule, but may still be subject to the UNCLOS obligation to cooperate in the conservation and management of the relevant shared fish stocks. The UNFSA requires RFMOs to operate in a transparent and non-discriminatory way, which could assuage some non-Parties' concerns.

WTO proposals also variously suggest governments could identify IUU fishing in their capacities as subsidising, flag or coastal states; the latter two are concepts developed in the law of the sea. While the primary obligation to take measures to prevent IUU fishing within the relevant EEZ rests with the coastal state, recent case law has clarified that flag states are obliged to exercise “due diligence” by taking all necessary measures to prevent IUU fishing by fishing vessels flying its flag. All Parties to UNCLOS must ensure that vessels flying their flag fishing in a foreign EEZ comply with the laws and regulations adopted by the coastal state. Arguably, a WTO prohibition on subsidies to IUU fishing would support the realisation of these existing duties through members' domestic economic policy. Enabling coastal states to notify the WTO of vessels or operators found to be flouting conservation measures applicable in that EEZ could also help to support coastal states in discharging their responsibility over those resources, and flag states in their due diligence with respect to vessels under their flag.

1. INTRODUCTION

Proposals for new disciplines on fisheries subsidies at the World Trade Organization (WTO) rest on established rules and understandings about the shared uses of the oceans. Relevant international law comes especially from “the law of the sea.” This reference paper sets out key areas where the new trade rules might depend upon key principles of the law of the sea, as set out in the United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982¹ and other relevant sources.

Several of the textual proposals that have been received by the Negotiating Group on Rules² rely in various ways on maritime zones and other jurisdictional concepts. These relate to waters under national jurisdiction (i.e. coastal states’ jurisdiction) and waters in the “high seas,” as well as the jurisdiction that flows from the registration of the “flags” of vessels by states. For example, a major emphasis has been placed in the negotiations on illegal, unreported and unregulated (IUU) fishing, with proposals seeking to prohibit subsidies that support such fishing. Determining whether fishing is illegal, and indeed whether it is unreported or unregulated, depends on rights and duties that have been established under the law of the sea, including under cooperative arrangements such as Regional Fisheries Management Organisations (RFMOs). Maritime

zones also feature in proposed exceptions to subsidy prohibitions: some proposals, for example, contain exemptions for subsidies for fishing activities within coastal states’ territorial seas or exclusive economic zones (EEZs).³

This paper begins in section 1 with an introduction to the law of the sea, including the primary legal sources relating to fisheries and their status among WTO members. It refers to key institutions such as RFMOs and other cooperative arrangements where states agree on conservation and management practices or fishing quotas. It also assesses the difference between binding agreements (and the cases that have interpreted or applied them) and voluntary instruments, noting the impact that subsidy disciplines will have on enforcement. In section 2, an overview is given of the maritime zones of the territorial sea, the exclusive economic zone and the high seas. The concept of such zones has developed over time, and some of the proposals are careful to ensure that the new disciplines will not affect the delimitation of contested areas. In section 3, the rights and obligations of states when exercising their various fishing entitlements is described, with specific reference to how these rights and obligations coexist with proposed subsidy rules.

1 United Nations Convention on the Law of the Sea, concluded at Montego Bay on 10 December 1982; opened for signature 4 June 1992, 1833 UNTS 396 (entered into force 16 November 1994).

2 As summarised in a “matrix” document produced by the Chair, TN/RL/W/273, 28 July 2017. The matrix includes the following textual proposals: TN/RL/GEN/186: New Zealand, Iceland, Pakistan; TN/RL/GEN/181/Rev.1: European Union; TN/RL/GEN/189/Rev.1: Indonesia; TN/RL/GEN/192: Guyana on behalf of the African, Caribbean and Pacific Group of States (ACP Group); TN/RL/GEN/187/Rev.2: Argentina, Colombia, Costa Rica, Panama, Peru, Uruguay; TN/RL/GEN/193: Cambodia on behalf of the Least Developed Countries Group (LDC Group); and TN/RL/GEN/191: Norway.

3 These are different from proposed exceptions relating to small-scale fishing; on such proposed exceptions, see Sumaila (2017).

2. THE LAW OF THE SEA AND FISHERIES

The law of the sea constitutes the treaties, customary international law⁴ and other instruments governing the seas and oceans. This section gives a brief overview of the principal instrument, UNCLOS, as well as additional sources of fisheries law within the United Nations and regional approaches.

2.1 UNCLOS and Relevant Implementing Agreements

UNCLOS seeks to “promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.”⁵ It codifies maritime zones as described in section 2. There are a large number of parties to UNCLOS (currently, 168 states), with some notable exceptions such as the United States (which signed the treaty but did not ratify it). Notwithstanding that there is not identical membership as between the WTO (whose membership currently numbers 164) and UNCLOS, it is important to note that most of the provisions of UNCLOS are now regarded as codifying customary international law, and thus bind all states. One example is the concept of the

exclusive economic zone of 200 nautical miles from the coast of a state, which is described in more detail in section 2.2. Moreover, under the Vienna Convention on the Law of Treaties (VCLT), states that have signed but not yet ratified a treaty must refrain from acts that would defeat the object and purpose of the treaty.⁶

UNCLOS is accompanied by more specific treaties, such as an implementing agreement on straddling fish stocks and highly migratory fish stocks (United Nations Fish Stocks Agreement, UNFSA).⁷ The UNFSA seeks to address ongoing problems for such stocks, especially the overutilisation of resources within the high seas.⁸ It also requires parties to provide for transparency in the decision-making process and other activities of RFMOs, which is described further in section 1.3.⁹ The UNFSA is considered to be “a major improvement to the international framework for sustainable fishing” (Rothwell and Stephens 2016, ch. 13.III.F). The membership of the UNFSA, though broad with 86 ratifications, is not as extensive as UNCLOS.¹⁰ About half of the WTO membership is party to the UNFSA.¹¹ Some of the WTO members that have not ratified the UNFSA, such as Argentina, Colombia, Peru,¹² Guyana,¹³

4 Such custom is developed from state practice and *opinio juris* (i.e., the belief by states as to the binding nature of the rule), and continues to play an important role in the law of the sea.

5 UNCLOS, preamble.

6 VCLT Article 18.

7 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; see further http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm. Note that highly migratory species are listed in Annex I of UNCLOS, which lists 17 species, not all of which would be considered as “highly migratory fish stocks” (i.e. dolphins and cetaceans).

8 UNFSA, preamble, and further noting “that there are problems of unregulated fishing, over-capitalization, excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of sufficient cooperation between States.”

9 UNFSA Article 12(1).

10 Note that the UNFSA stands alone from UNCLOS: e.g., some non-UNCLOS parties such as the United States have ratified the UNFSA.

11 At the current time, of the 164 WTO members, 89 are not party to the UNFSA. See Annex.

12 Argentina, Colombia and Peru, which have not ratified the UNFSA, have joined with UNFSA parties Costa Rica, Panama and Uruguay to submit TN/RL/GEN/187/Rev.2.

13 Guyana has submitted TN/RL/GEN/192 on behalf of the ACP Group.

Cambodia¹⁴ and Pakistan,¹⁵ have co-authored textual proposals for subsidy disciplines. Of the (overlapping) countries within the blocks of African, Caribbean and Pacific countries and least developed countries, most have not ratified the UNFSA.

2.2 FAO Agreements and Voluntary Instruments

Further sources of fisheries law, which have been prepared under the auspices of the United Nations Food and Agriculture Organization (FAO), include the 1993 FAO Compliance Agreement¹⁶ and the 1995 FAO Code of Conduct for Responsible Fisheries (FAO Code of Conduct). The FAO has also convened cooperative efforts against illegal, unreported and unregulated fishing. IUU fishing continues to be a major problem in oceans governance, both within the high seas and in EEZs (Wang 2014).

To help prevent, deter and eliminate IUU fishing, the FAO has provided guidance in the form of an international plan of action (IPOA-IUU).¹⁷ This voluntary instrument describes IUU fishing with reference to maritime zones, as well as the governance arrangements of

RFMOs,¹⁸ a description which has been taken up in the textual proposals on subsidy disciplines.¹⁹ The FAO has also overseen the recently in force Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA).²⁰ The PSMA seeks to harmonise the measures undertaken by port states against foreign vessels, including in blocking the flow of IUU-caught fish into national and international markets, and allows for any vessel engaged in IUU fishing to be denied entry into ports.²¹ The subsidy rules are expected to strengthen these existing arrangements by providing an enforceable prohibition against the provision of any financial support by WTO members to IUU fishing activities.²²

2.3 Regional Agreements Including RFMOs

Regional agreements provide additional sources of fisheries law. Regional Fisheries Management Organisations began historically as bodies that developed (generally unenforceable) fishing regulations between participants, and evolved to have competence to make legally binding conservation and management measures regarding fisheries.²³ This dominance of regional approaches is not so different from trade law, where regional trade agreements

14 Cambodia has submitted TN/RL/GEN/193 on behalf of the LDC Group.

15 Pakistan is a co-author, with Iceland and New Zealand (both of which are UNFSA parties), of TN/RL/GEN/186.

16 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.

17 FAO IPOA-IUU (<http://www.fao.org/fishery/ipoa-iuu/en>). Note also the FAO IPOA-Capacity (<http://www.fao.org/fishery/ipoa-capacity/en>) and the FAO Voluntary Guidelines on Flag State Performance (<http://www.fao.org/fishery/topic/16159/en>).

18 FAO IPOA-IUU, para. 3.

19 Of the seven proposals listed in the matrix, five reference the IPOA-IUU definition, while one of them modifies that definition slightly by removing its self-reference to the IPOA: see TN/RL/GEN/192, Annex I.

20 On the Port State Measures Agreement, see further <http://www.fao.org/fishery/psm/agreement/en>

21 PSMA Article 9(4). Note that this depends in part on the compilation of lists of vessels implicated in IUU, and has been analogised to subsidy proposals that also depend on such lists: see TN/RL/GEN/186 and discussion in this paper.

22 WTO obligations are enforceable using the Dispute Settlement Understanding which is part of the WTO agreements.

23 It is important to note the differences in terminology, as expressed by the UNFSA's reference to "regional fisheries management organizations and/or arrangements." See, for example, the preference for the broader language of "regional fisheries management regimes" by Henriksen, Hønneland and Sydnese (2006). This book analyses and compares four regional management organisations and one commission: respectively, the Northwest Atlantic Fisheries Organization, the North East Atlantic Fisheries Commission, the South East Atlantic Fisheries Organization, the Western and Central Pacific Fisheries Commission and the Joint Russian-Norwegian Fisheries Commission. The FAO commonly uses the term "regional fishery bodies."

are pervasive. The activities of RFMOs (which now number 20 or so) are important for specific geographic areas, such as the high seas and overlapping EEZ areas, as well as some high-value migratory fish stocks such as tuna.²⁴

The UNFSA aims to provide oversight for such arrangements by requiring that states with a real interest in the relevant fishery shall become members or agree to apply the measures adopted by an existing RFMO.²⁵ The terms of the RFMO “shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.”²⁶ Only states which have become RFMO members or applied RFMO measures shall have access to the relevant fishery resources.²⁷ It should be noted that according to the *pacta tertiis* rule, these access rules only apply to members of the UNFSA, and the access rules are not generally considered to be customary international law (Franckx 2000). However, the adoption of port state restrictions against non-UNFSA parties

that flout conservation obligations according to the PSMA is said to close this regulatory gap.²⁸

Where there is no existing RFMO, the UNFSA provides that coastal and other states fishing in the high seas are required to cooperate to establish such an organisation,²⁹ and in doing so they are to inform all interested states.³⁰ Such new arrangements shall include a range of considerations,³¹ and states are to “adopt and apply any generally recommended international minimum standards for the responsible conduct of fishing operations.”³² Transparency in decision-making is required under Article 12 of the UNFSA and is an important feature of new and established RFMOs.³³

One of the key management tools of RFMOs is to establish lists of vessels active in the relevant fishery. These can take the form of negative lists³⁴—or “black lists” of vessels implicated in IUU fishing—or positive “white lists” of vessels deemed to be of good standing.³⁵ Lists of vessels implicated in IUU fishing can also be shared between RFMOs.³⁶

24 Henriksen, Hønneland and Sydnes (2006, 3). Note other regional arrangements such as the United Nations Environment Programme’s Regional Seas Programme (which relates to a wide range of environmental management and pollution control issues).

25 UNFSA Article 8(3). The requirement within the UNFSA for countries to have a real interest in an RFMO they seek to join means that, by design, not all RFMOs will necessarily be open to the membership of any WTO member, and a key question will be the interpretation of “real interest.” “Real interest” is not defined in the UNFSA. It is argued by Molenaar to encompass, most obviously, the flag states fishing for the stocks on the high seas and the relevant coastal states (whose maritime zones are included in, or adjacent to, the relevant regulatory area). To these categories, he adds: (1) flag states that fished in the regulatory area previously and want to resume fishing; (2) flag states without a catch history that want to fish in the future; and (3) states with no intention to fish that nevertheless want to participate, most obviously to further community interests for sustainability and the safeguarding of biodiversity: see Molenaar (2000, 495).

26 UNFSA Article 8(3).

27 UNFSA Article 8(4); Article 17.

28 Rothwell and Stephens (2016). In addition to domestic laws of port states, several RFMOs have adopted various requirements and minimum standards in accordance with the PSMA: see further, Swan (2016).

29 UNFSA Article 8(5).

30 UNFSA Article 9(2). The requirement is to inform states which have a real interest in the work of the proposed organisation, of which the initiating states are aware.

31 UNFSA Article 9(1).

32 UNFSA Article 10(c).

33 UNFSA Article 12.

34 For an example from the North-East Atlantic Fisheries Commission, see Stokke (2009).

35 For an example from the International Commission for the Conservation of Atlantic Tunas, see Young (2016).

36 On RFMO listing processes and their link to the subsidy negotiations, see Schmidt (2017).

2.4 Case Law from Binding Dispute Settlement

Decisions of international tribunals form a subsidiary source of the law of the sea. According to the compulsory system of dispute settlement between parties for certain violations of UNCLOS,³⁷ such disputes may be heard by the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ) or ad hoc arbitral bodies.³⁸ The case law from such disputes, and the advisory opinions that may be requested by parties or certain international organisations, form an important and growing source of law, and provide enhanced understanding about legal principles, in a similar way that the findings of WTO dispute settlement bodies contribute to trade law.

A distinction may be made between binding rules and non-binding “soft-law”. Voluntary instruments such as the FAO Code of Conduct are non-binding and provide guidance for states and other actors,³⁹ as well as interpretative context for other areas of international law,⁴⁰ but do not contain procedures for the resolution of disputes. Given non-compliance with international law is often based on lack of state capacity rather than lack of state intent, it is useful to note that some of the subsidy proposals include provisions for technical assistance to enable developing countries to better meet these non-binding principles, as well as the rules of RFMOs.⁴¹

UNCLOS and the UNFSA contain detailed provisions for compulsory dispute settlement, meaning they may be enforced through adversarial cases at ITLOS and other tribunals. It is important to note that any dispute between UNFSA parties concerning the interpretation or application of a relevant RFMO agreement, including any dispute concerning the conservation and management of such stocks, will be subject to UNCLOS Part XV procedures.⁴² This is relevant to the WTO negotiators, because if there were to be a dispute relating to an IUU vessel listing, UNFSA parties could seek redress through litigation. It should be noted, however, that some areas of fisheries policy are exempted from these processes (especially concerning resource management decisions of coastal states within their EEZ), as is discussed further in section 3.3.⁴³ Moreover, the compulsory dispute settlement system of UNCLOS may be disrupted if states choose to settle their disputes by an alternative means.⁴⁴ This leads to a practical implication for WTO negotiators. On the one hand, the WTO system of dispute settlement provides a strong prospect for enforcement against violations of subsidy rules, including the potential for retaliatory action in cases of non-compliance by the country that has been found to be providing the subsidy to the IUU activity. On the other hand, the disciplines on subsidies should be carefully crafted so it is clear that they do not create alternative means to resolving disputes concerning the interpretation or application of UNCLOS or the UNFSA.

37 UNCLOS Part XV.

38 See especially UNCLOS Article 287.

39 See e.g. Code of Conduct, 7.8.1: “States should encourage banks and financial institutions not to require, as a condition of a loan or mortgage, fishing vessels or fishing support vessels to be flagged in a jurisdiction other than that of the State of beneficial ownership where such a requirement would have the effect of increasing the likelihood of non-compliance with international conservation and management measures.”

40 See Code of Conduct, para 1.2 (noting that while the code is voluntary, certain parts of it are based on relevant rules of international law, including UNCLOS and other obligatory legal instruments).

41 See, e.g., TN/RL/GEN/189/Rev.1 (Indonesia).

42 UNFSA Article 30(2).

43 UNCLOS Article 297(3); UNFSA Article 32.

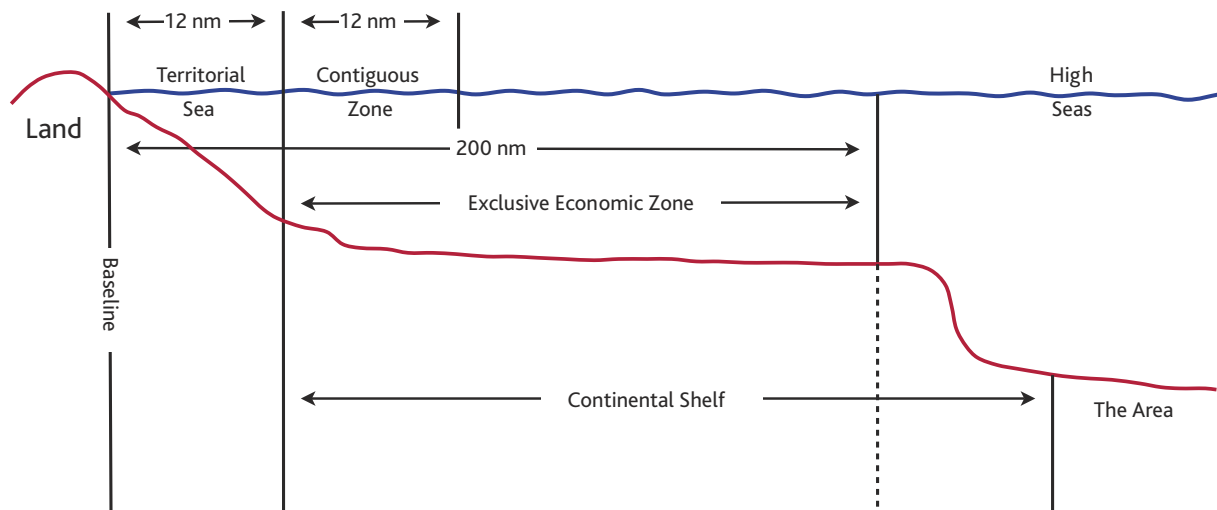
44 UNCLOS Articles 280-2; see further *Southern Bluefin Tuna (Australia & New Zealand v. Japan)* (Jurisdiction and Admissibility) (2000) 119 ILR 508. For critique, see Boyle (2001, 448).

3. MARITIME ZONES

Some of the proposals for subsidy disciplines have drawn upon the maritime zones established by the law of the sea, and this section provides some important background to these concepts. UNCLOS provided major clarity on the rights and obligations held by coastal states and other states over areas close to the coast, especially the territorial sea and the exclusive economic zone.⁴⁵ The high seas is an “area beyond national jurisdiction”;⁴⁶ these zones are set out in Figure 1 and are

described in further detail in section 2. Although the zones are settled, there remain some disputed aspects about the content of the entitlements of coastal states as well as the precise delimitation of some contested territory.⁴⁷ This element of contestation accounts in part for the inclusion in some of the proposals of an express clause ensuring that the subsidy rules will not have any legal effect on the delimitation of maritime jurisdiction.⁴⁸

Figure 1: Maritime zones



Source: Rothwell and Stephens (2016), online edition.

3.1 The Territorial Sea

One of the current proposals, by the EU, seeks to exclude fishing within the territorial sea from the application of some subsidy prohibitions.⁴⁹ The territorial sea is an extension of the sovereignty of a coastal state and is enshrined

in UNCLOS as extending 12 nautical miles seaward from the territorial baseline.⁵⁰ The coastal state has sovereignty over the water column, seabed and airspace within this zone, and its rights and duties are set out in UNCLOS and also exist in other areas of international law.⁵¹ An important duty is to grant innocent

⁴⁵ Other zones include internal waters and archipelagic waters (in the case of an archipelagic state); these have not been referenced in the subsidy proposals and are not discussed here.

⁴⁶ An additional area beyond national jurisdiction, “the Area,” relates to the deep seabed and ocean floor, and is governed by Part XI of UNCLOS and a specific implementing agreement. The Area is not referenced in subsidy proposals and is not discussed here.

⁴⁷ See further Rothwell and Stephens (2016, 86); see also Tanaka (2015).

⁴⁸ See, e.g., TN/RL/GEN/187/Rev2. (para. 1.1); TN/RL/GEN/192 (Article 1.4); TN/RL/GEN/193 (Article 1.4).

⁴⁹ TN/RL/GEN/181/Rev.1 (Article 1bis).

⁵⁰ UNCLOS Part II (Territorial sea and contiguous zone).

⁵¹ UNCLOS Article 2(3). Rothwell and Stephens (2016) point to human rights and other examples: see their chapter 3.

passage to vessels of other states.⁵² In addition, the duties relating to conservation and management established by UNCLOS⁵³ apply to the territorial sea.⁵⁴ Thus, while coastal states enjoy sovereignty over the natural resources contained within their territorial sea, their rights are not without restriction.

3.2 The Exclusive Economic Zone

Some of the proposals seek to differentiate subsidies that support fishing by WTO members within and outside their own EEZ. For example, the ACP Group proposal prohibits subsidies that contribute to overfishing and overcapacity by developed and developing countries alike, although these prohibitions do not apply to fishing activity within developing countries' own EEZ.⁵⁵ The LDC Group proposal contains a similar exemption,⁵⁶ while the Indonesian proposal conditions this exemption to situations where a member's EEZ resources are "underexploited."⁵⁷ Iceland, New Zealand and Pakistan would prohibit subsidies "in connection with fishing and fishing related activities in areas beyond the national jurisdiction of the subsidizing Member" (i.e., in the high seas or in other members' EEZs).⁵⁸ Similarly, Argentina et

al. would restrain the prohibitions on subsidies relating to overcapacity to areas outside the EEZ.⁵⁹

The EEZ extends up to 200 nautical miles seaward from the baseline. Finding agreement on the EEZ concept was a celebrated achievement of UNCLOS, especially for coastal states (some of which were recently decolonised) which had been seeking greater opportunities to exploit the marine resources adjacent to their coasts.⁶⁰ It was also hoped that enclosure of these areas—representing one-third of ocean space—would allow for better resource management.⁶¹ Maritime nations that were used to fishing in distant waters were required to seek agreement on the continued exploitation of these areas, or restrict their fishing practices to the remaining "high seas" (described in section 2.3).⁶² Fish stocks within EEZs are generally more commercially important than high sea stocks (with one study finding that <0.01 percent of the quantity and value of commercial fish taxa are obtained from catch taken exclusively in the high seas) (Sumaila et al. 2015), although the codification of the EEZ has seen an increase in fishing on the high seas by distant water fishing nations.

52 UNCLOS Article 17.

53 See especially UNCLOS Articles 192 and 194. See further in section 3 of this paper.

54 See *In the Matter of the South China Sea Arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (Philippines v. China)* (Jurisdiction and Admissibility) (29 October 2015), para. 408; see also *In the Matter of the South China Sea Arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (Philippines v. China)* Award (12 July 2016), para. 927. See further Harrison (2017, 170-1).

55 TN/RL/GEN/192 (Article 2.1.3(c)).

56 TN/RL/GEN/193 (Article 3.2(b)).

57 TN/RL/GEN/189/Rev.1 (Article 3.3(a)).

58 TN/RL/GEN/186 (Article 1.3).

59 TN/RL/GEN/187/Rev.2 (Article 2.1.3). The key footnote (footnote 6) states that such subsidy disciplines should be restrained to "areas beyond national jurisdiction." It is rather unclear whether the intention is to allow for subsidies by the subsidising member within its own EEZ or for its fishing activities in other EEZs as well. This question of the payment by states to access the EEZs of other states featured in earlier rounds of negotiations: see further Young (2009).

60 For a history, see Deborah Cass, 'The Quiet Revolution: The Development of the Exclusive Economic Zone and Implications for Foreign Fishing Access in the Pacific' (1987) 16 *Melbourne University Law Review* 83.

61 Rothwell and Stephens (2016), noting also the limited realisation of these hopes.

62 UNCLOS Part V (Exclusive Economic Zone).

The concept of the EEZ is now regarded as part of customary international law.⁶³ While the 200 nautical miles is not considered as the “territory” of the coastal state in the same way as the territorial sea, it is a zone that provides “sovereign rights” to coastal states. For example, under UNCLOS, coastal states enjoy sovereign rights “for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil.”⁶⁴ Yet coastal states are also required to cooperate with other states and international organisations in ensuring that the resources are optimally utilised, including with states which have habitually fished in those zones.⁶⁵ Under Article 61, coastal states “shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.” Under Article 62, the conservation measures of the coastal states “shall be consistent with [UNCLOS],” and nationals of other states shall comply with them. These provisions, as well as the rules relating to highly migratory fish stocks and fish stocks straddling the EEZ and high seas (Articles 63-4), were given further clarity by the UNFSA, and have been interpreted by ITLOS and other tribunals. Section 3 of this paper provides a more detailed consideration of the rights and duties of coastal states, and discusses the enforceability of such rights and obligations (which are outside of UNCLOS’s compulsory dispute settlement system⁶⁶). As a preliminary point, however, it can be noted that parties to UNCLOS are obliged to ensure the sustainable use of resources within their EEZ. If the proposed subsidy disciplines were to allow them to continue to subsidise fishing

within their EEZ, they would need to do so within the context of their existing obligations to sustainably use those resources.

3.3 The High Seas

The concept of the high seas is central to many of the proposals to differentiate subsidies. As already described, the proposed exemptions from disciplines for subsidies for activities within the EEZ would focus the impact of the subsidies disciplines on high seas activities as well as fishing in the EEZ of other countries (distant-water fishing). Some proposals would carve some high seas fishing out of the disciplines: Indonesia would allow developing countries to provide subsidies to exploit rights held by the member in high seas fishing quotas.⁶⁷ Argentina et al. include as prohibited subsidies those related to overcapacity in areas beyond national jurisdiction except for “subsidy programs of Members aimed to fulfill a quota or a right established by an RFMO.”⁶⁸

The high seas is an ancient concept that conjures up ideas of unrestricted freedoms, but it is now understood that the freedoms of the high seas are not absolute.⁶⁹ By codifying the concept of the EEZ, UNCLOS represented a constriction of the amount of oceans represented by “high seas,” which is now thought to represent around 60 percent of the ocean surface, and to be less commercially significant than the EEZs (Sumaila et al. 2015). Freedom of fishing is to be exercised with “due regard” for the interests of other states.⁷⁰ While all states have the right for their nationals to engage in fishing on the high seas, this activity must be undertaken subject to their treaty obligations, certain rights and duties of coastal states as identified in Part V of UNCLOS, and

63 Continental Shelf (Libyan Arab Jamahiriya/Malta) [1985] ICJ Rep 13, [34].

64 UNCLOS Article 56(1)(a).

65 UNCLOS Articles 61 and 62.

66 UNCLOS Article 297(3). On limits to the compulsory dispute settlement system of UNCLOS, see generally Klein (2005).

67 TN/RL/GEN/189/Rev.1 (Article 3.3(b)).

68 TN/RL/GEN/187/Rev.2 (Article 2.1.3 (footnote 6)); see also (Article 2.1.2(b)).

69 UNCLOS Part VII.

70 UNCLOS Article 187(2).

other relevant provisions.⁷¹ Under UNCLOS Article 117, all states have the duty to “take, or to cooperate with other states in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.” States whose nationals exploit the same living resources, or different living resources in the same high seas area, shall negotiate to take measures necessary for the conservation of the living resources, for example through RFMOs (Article 118). States shall use best scientific evidence and take into account generally recommended international standards,⁷² and shall ensure that conservation measures are non-discriminatory (Article 119). These provisions are given more detail in the UNFSA, which requires, for example, that states that authorise vessels flying their flag to fish on the high seas shall exercise effectively their responsibilities under UNCLOS and the UNFSA,⁷³ and inform other interested states of measures they have adopted for regulating the activities of vessels flying their flag.⁷⁴ In the context of the subsidy negotiations, a proposed obligation to refrain from subsidising fishing activities with respect to overfished high seas stocks, for example, or to refrain from contributing to overcapacity or overfishing on the high seas could be seen

as part of the existing duties relating to conservation and management. That is, the subsidy rules would help to support coherence between a state’s duties in the high seas and that state’s domestic economic policy.

These issues are discussed in terms of the exercise by states of their entitlements under the law of the sea in the following section. Before doing so, it is important to note a current parallel set of negotiations within the United Nations General Assembly for a new UNCLOS implementing agreement which would protect biodiversity in areas beyond national jurisdiction.⁷⁵ Also important to note in the development of state practice in the law of the sea is the key principle of “ecosystem-based management.” This principle seeks to apply an integrated approach that considers the entire ecosystem, including stressors and pressures with direct or indirect effects, and seeks to develop cross-sectoral ecosystem-level management plans. The gradually expanding application of this principle has implications for the management of fishing in the high seas, especially if “no-fishing” zones are declared in the high seas, and is arguably consistent with prohibitions on subsidies for high seas activities.

71 See especially UNCLOS Article 116.

72 UNCLOS Article 119(a) and (b). A good example of such a standard is the Commission for the Conservation of Antarctic Marine Living Resources, which covers both EEZ and high seas areas. For a list of other examples, see DOALOS (2004, 50-1).

73 UNFSA Article 18.

74 UNFSA Article 7(8).

75 UN Doc A/69/L/65 (2015); see also, on the work of the Preparatory Committee established by General Assembly Resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, see <http://www.un.org/depts/los/biodiversity/prepcom.htm>

4. THE EXERCISE OF ENTITLEMENTS

As was made clear in the preceding section, the exercise of fishing entitlements is subject to specific rights and obligations relating to the territorial sea, EEZ or the high seas,⁷⁶ as well as to general duties. The subsidy proposals rely on different kinds of jurisdiction exercised by states over fishing activities, and the laws that may be established by states in their capacities as flag states, coastal states, port states or other actors. This section thus seeks to provide more specific analysis of the exercise of relevant entitlements. For example, when vessels exercise freedom of fishing in the high seas, or fish in the EEZ of another state, they do so under the jurisdiction, and responsibility, of the state whose flag they fly: in this situation, the state regulates its vessels' fishing in its capacity as a flag state. If that same state identifies companies that are entitled to public funds, it is a subsidising state that will be subject to the proposed disciplines. In the context of assessing the proposals for subsidy rules, this section considers the exercise of entitlements in the law of the sea in terms of: (1) general rights and obligations; (2) flag states; (3) coastal states; and (4) shared stocks.

4.1 General Rights and Obligations

UNCLOS recognises that states have a general obligation for the conservation and

management of fish stocks, which operates alongside the specific exercise of states' entitlements and other obligations. This general obligation can be derived from provisions relating to the EEZ and high seas that have been addressed (especially Articles 63, 64, 117 and 118), the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states and of areas beyond national control,⁷⁷ and the general obligation to protect and preserve the marine environment in Part XII of UNCLOS.⁷⁸ Although Part XII of UNCLOS relates to pollution, this "fundamental principle" extends to living resources and marine life, and as such has been applied in the context of fisheries.⁷⁹ The duty is applicable regardless of the zone in which fishing occurs.⁸⁰

The general obligation applies not only to activities directly undertaken by states, but also to their duties to "ensure" activities within their jurisdiction and control do not harm the marine environment.⁸¹ The concept of duties of "conduct" rather than "result" have developed in a series of cases at the ICJ and ITLOS,⁸² and have been termed "due diligence" obligations. The more specific elaborations with respect to flag states are described in more detail in the next subsection.

76 As mentioned, internal waters and archipelagic waters are additional zones which have not been addressed in the subsidy disciplines and are not discussed here.

77 See, e.g., *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, pp. 226-67 at pp. 240-2, para. 29.

78 UNCLOS Part XII, see also fourth paragraph of preamble. See especially Article 192.

79 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, at p. 295, para. 70 ("the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment"); see also *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, see International Tribunal for the Law of the Sea, Case No. 21, 2 April 2015, <http://perma.cc/KY5V-EMXP> (SRFC Advisory Opinion), para. 216.

80 See, e.g., where China was found to have failed to control the environmental impact of the fishing activity of its vessels on the coral reef and vulnerable marine ecosystems: *South China Sea Arbitration* (Award), para. 961; see further UNCLOS Article 194.

81 *South China Sea Arbitration* (Award), para. 994.

82 See, e.g., *Pulp Mills on the River Uruguay* case, which elucidated the obligation to act with due diligence as, "an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as

4.2 Rights and Obligations of Flag States

The rights and duties of flag states are relevant in the context of the proposals on the table that would apply subsidy prohibitions to vessels or operators identified by their flag state as having engaged in IUU activities. They are also relevant to proposed prohibitions on subsidies that support fishing for shared stocks in the absence of membership of a relevant RFMO.⁸³

Under the UNCLOS framework, states grant their nationality to ships when they register those ships, with which they must have a “genuine link.”⁸⁴ The duties of flag states include the assumption of jurisdiction over a wide range of technical, social and administrative matters concerning the ship.⁸⁵ The FAO Code of Conduct provides *inter alia* that states should ensure that states exercise “effective control” over the vessels flying their flags, and ensure that the vessels do not “undermine the effectiveness of conservation and management measures taken in accordance with international law and adopted at the national, subregional, regional or global levels.”⁸⁶ The Voluntary Guidelines on Flag State Performance provide guidance for the flag state on monitoring, control and surveillance activities, especially in identifying IUU fishing. There are also various initiatives to strengthen flag state performance, including through the UNFSA (Articles 18-22), and RFMO constituent instruments and decisions, which apply to high seas and to areas where migratory

or straddling fish stocks may also be fished across the high seas and EEZs.

Of particular relevance to the negotiations relating to fishing in the EEZ is the obligation on all flag states that are parties to UNCLOS to take necessary measures, including those of enforcement, to ensure compliance by vessels flying their flag with the laws and regulations adopted by the coastal state (which may be based at national, subregional or regional levels).⁸⁷ This duty was the subject of a recent ruling when China was found to have breached Article 58 by failing to prevent its nationals from unlawfully fishing in the EEZ of the Philippines.⁸⁸

A recent advisory opinion from ITLOS has given further clarity to the responsibilities of flag states in relation to the activities of vessels undertaking IUU fishing activities within the EEZs of other states.⁸⁹ While the primary obligation to take measures to prevent IUU fishing within the relevant EEZ rests with the coastal state, flag states have obligations of conduct to take necessary measures to enforce the rules applicable in the area where the fishing is taking place, exercise control over administrative matters, investigate allegations and report to the relevant coastal states; in short, they must exercise “due diligence”⁹⁰ with respect to the operations of their vessels in foreign EEZs.⁹¹ Proposed subsidy disciplines that prohibit subsidies to vessels

the monitoring of activities undertaken by such operators ...” The ITLOS Seabed Disputes Chamber has relied on the ICJ elucidations and broadly defined the “due diligence” obligation: see *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, 1 February 2011. For further discussion, see Young and Sullivan (2015).

83 TN/RL/GEN/186.

84 UNCLOS Article 91. See also *M/V Virginia G (Panama/Guinea-Bissau)* (2014) 53 ILM 1164, [113].

85 UNCLOS Article 94.

86 FAO Code of Conduct, para. 6.11.

87 UNCLOS Article 58(3); 62(4).

88 *South China Sea Arbitration* (Award), para. 757. (Note that China did not accept the jurisdiction of the tribunal in this case.)

89 SRFC Advisory Opinion.

90 See earlier note on the *Pulp Mills on the River Uruguay* case, the Advisory Opinion of the ITLOS Seabed Disputes Chamber in 2011, and Young and Sullivan (2015).

91 SRFC Advisory Opinion, paras 130-40.

identified as operating illegally in a coastal state's EEZ would make more concrete the content of these due diligence obligations in the economic policy of flag states. Moreover, if future subsidy rules include notification obligations by coastal states (bilaterally or to the Committee on Subsidies and Countervailing Measures) of infractions by vessels, this would assist flag states in discharging their duties of due diligence.

In the high seas, flag states' freedom of fishing is subject, under UNFSA, to constraints from RFMOs regarding particular areas or species,⁹² and, under UNCLOS, to the interests of coastal states in shared or migratory stocks (described in section 3.3 below). Flag states are thus subject to rules that bind all parties to UNCLOS relating to the need to conserve and manage living resources of the high seas⁹³ and the general obligation to protect and preserve the marine environment,⁹⁴ including obligations of due diligence identified earlier.⁹⁵ As noted in section 1, the UNFSA extends the obligation to respect RFMO measures to non-members of those RFMOs, but this is generally considered to apply only to UNFSA parties (because otherwise it would violate the *pacta tertiis* rule⁹⁶). Proposed subsidy disciplines that would prohibit subsidies for fishing activities on the high seas that are already overfished might be seen to be already compatible with these existing obligations, albeit expressed in new, economic terms.

The term "flags of convenience" is included in the proposal from Indonesia, which provides

that members shall not grant subsidies to vessels flying flags of convenience.⁹⁷ "Flags of convenience" refers to states that have registered vessels yet have minimal connection or regulatory oversight. This would require a different verification procedure from the one relating to prohibitions on subsidies for IUU activity.⁹⁸ In contrast, several proposals provide that subsidies will be attributed to the member conferring them, regardless of the flag of the vessel involved.⁹⁹ This is presumably to avoid the familiar situation of vessels reflagging or renaming, which is part of the justification for the "white lists" used by some RFMOs (Stokke 2009, 346).

4.3 Rights and Obligations of Coastal States

Rights and obligations of coastal states are relevant for the proposed subsidy disciplines that are linked to IUU fishing (because coastal states could identify IUU activity), and for the proposed exceptions for subsidies provided for fishing within a country's territorial sea or EEZ.

Of most relevance to the fisheries subsidies discussion is the fact that coastal states have sovereign rights over fisheries as well as duties to ensure these resources are not overexploited. As set out in section 2, there are no specific obligations in UNCLOS for a coastal state to cooperate with respect to stocks occurring within that state's territorial seas, although the coastal state is subject to more general obligations. This contrasts with the legal regime for the EEZ (contained in Part V of UNCLOS), which includes express duties to cooperate.

92 See UNFSA, especially Article 8(4) and Article 17 (Part IV, "Non-members and non-participants").

93 UNCLOS Articles 116-20.

94 UNCLOS Articles 192 and 193.

95 See especially UNCLOS Articles 117-20.

96 See Franckx (2000) and text in section 1.3.

97 TN/RL/GEN/189/Rev.1 (Article 2.2).

98 Such a verification procedure would have been helped by a 1986 United Nations Convention on Conditions for Registration of Ships, but this is only in draft form and has not entered into force. The FAO is currently supporting an initiative for a "Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels," which involves the compilation of an online repository of vessels involved in fishing operations by states and RFMOs and focusing on vessels of 100 gross tonnage, or of 24 metres in length: see further <http://www.fao.org/3/a-i5446e.pdf>

99 TN/RL/GEN/186, Article 3; TN/RL/GEN/181/Rev.1 (para. 1.4); TN/RL/GEN/192 (Article 1.2); TN/RL/GEN/193 (Article 1.2).

Part V of UNCLOS provides sovereign rights for coastal states “for the purpose of exploring and exploiting, conserving and managing the natural resources” within their EEZ while having “due regard” to the rights and duties of other states and acting compatibly with UNCLOS.¹⁰⁰ In exercising these rights and obligations, the coastal state is entitled to determine the allowable catch for the living resources in its EEZ.¹⁰¹ The coastal state shall take into account “the best scientific evidence available to it” to ensure, through proper conservation and management measures, that the maintenance of the living resources in the EEZ is not endangered by overexploitation.¹⁰² In doing so, the coastal state is to cooperate with competent international organisations (including RFMOs).¹⁰³ Some additional agreements, including the UNFSA and some regional treaties, require the coastal state to adopt the precautionary approach to conservation and management measures where scientific evidence is insufficient.¹⁰⁴

Coastal states’ conservation and management measures shall aim for the production of “maximum sustainable yield,” although this concept is to be qualified by relevant environmental and economic factors.¹⁰⁵ Coastal states must take into account fishing patterns, the interdependence of stocks, and generally recommended international minimum standards,¹⁰⁶ which may come from the UNFSA, the Convention on Biological Diversity, and

regional treaties including the constitutive instruments of RFMOs.¹⁰⁷ The coastal state is expected to promote the objective of “optimum utilisation” in its EEZ and, if it does not have capacity to harvest the entire allowable catch, it shall give other states access to the surplus.¹⁰⁸

If the coastal states decide to allow other vessels access to the EEZ to fish for surplus stocks, they may impose conservation measures and other terms and conditions that must be complied with by foreign-flagged fleets.¹⁰⁹ Examples of such conditions include those relating to fishing seasons and areas of fishing, fishing gear, the number of vessels and the placing of observers on board vessels. Case law has been important in providing understanding of the rights of coastal states: for example, ITLOS has confirmed that the coastal state may regulate the bunkering of foreign vessels fishing in the EEZ.¹¹⁰

To ensure compliance with its laws and regulations concerning the conservation and management measures for living resources pursuant to Article 73(1), the coastal state may take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary. Arrested vessels and their crew are to be promptly released upon the posting of a reasonable bond or other security,¹¹¹ and this requirement has been the subject of disputes at ITLOS.¹¹²

100 UNCLOS Article 56.

101 UNCLOS Article 61(1).

102 UNCLOS Article 61(2).

103 UNCLOS Article 61(2).

104 UNFSA Article 6 and Annex II; see also the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (MCA Convention) considered by ITLOS in the SRFC Advisory Opinion, para. 208.

105 UNCLOS Article 61(3).

106 UNCLOS Article 61(3).

107 See further DOALOS (2004, 47-8).

108 UNCLOS Article 62.

109 UNCLOS Article 62(4).

110 *M/V Virginia G (Panama/Guinea-Bissau)* (2014) 53 ILM 1164, paras 208-17.

111 UNCLOS Article 73.

112 See, e.g., *M/V Saiga (No 1) Case (Saint Vincent and the Grenadines v. Guinea)* (prompt release) (1997) 110 ILR 736; *Camouco (Panama v. France)* (prompt release) (2000) 125 ILR 151; *Monte Confurco (Seychelles v. France)* (prompt release) (2000) 125 ILR 203; *Grand Prince (Belize v. France)* (prompt release) (2001) 125 ILR 251; *Volga (Russian*

The discretion of coastal states to manage these marine living resources is broad, in the sense that the allocation of surpluses to other states and conservation and management requirements are not subject to the compulsory dispute settlement contained in Part XV of UNCLOS.¹¹³ The discretion of states to decide whether to give access to other states to their surplus fisheries is thus challengeable only with the agreement of the relevant coastal state. If a coastal state has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered, it may be required to submit to compulsory conciliation,¹¹⁴ although the subsequent conciliation report is not binding.¹¹⁵

Notwithstanding these limitations, there have been several cases at ITLOS and elsewhere that have dealt with the requirement that coastal states protect and preserve the marine environment.¹¹⁶ In addition, the duties of coastal states to have regard to the interests of their neighbours was confirmed recently in relation to the United Kingdom's proclamation of a marine protected area.¹¹⁷

In summary, it is clear from both treaties and case law that coastal states have jurisdiction over resources in their EEZs, but that they also have

obligations under international law to ensure those resources are exploited sustainably. This is important context to proposals to exempt fishing within EEZs from subsidy disciplines. WTO members would need to be sure, under any such flexibility, that any new or ongoing subsidies to fishing within their EEZs are not undermining the sustainability of resources in their EEZs, or the interests of others in those resources. In the context of proposals on IUU fishing, enabling coastal states to notify the WTO of vessels or operators found to be flouting conservation measures applicable in that EEZ is arguably consistent with, and could help to support, coastal states in discharging their responsibility over those resources.

4.4 Rights and Obligations with Respect to Shared Stocks

Parties to UNCLOS are required to seek to cooperate in the management of shared stocks.¹¹⁸ This obligation is given more concrete expression in the UNFSA, which applies to highly migratory fish stocks and fish stocks that straddle the high seas and EEZs,¹¹⁹ and which sets out key procedures for the establishment and functions of RFMOs. It provides that parties to the UNFSA who fail to become members of an existing regional regime and refuse to apply conservation and management measures can be denied access to the relevant fishery.¹²⁰

Federation v. Australia) (prompt release) (2003) 42 ILM 159; *Juno Trader (St Vincent and the Grenadines v. Bissau)* (prompt release) (2004) 44 ILM 498; *Hoshinmaru (Japan v. Russian Federation)* (prompt release) 6 August 2007; *Tomimaru (Japan v. Russia)* (prompt release) (2007) 46 ILM 1185. Commentators have considered ITLOS to have favoured the interests of flag states in these disputes: see Andreone (2015, 159, 169).

113 UNCLOS, Article 297(3).

114 UNCLOS Article 297(3)(b)(i).

115 See further UNCLOS Annex V. As noted by Rothwell and Stephens (2016), the Annex V procedure has not been invoked to date.

116 See, e.g., SRFC Advisory Opinion; *South China Sea Arbitration* (Jurisdiction and Admissibility); *South China Sea Arbitration* (Award). For further consideration of the types of duties that may be owed by coastal states when the wider ecosystem is considered, see Turnipseed et al. (2009).

117 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* Award of 18 March 2015. See further <https://pca-cpa.org/en/cases/11/>.

118 See especially UNCLOS Article 63(2).

119 UNFSA, Article 3.

120 UNFSA, Article 8(3) and (4). It also provides for the application of a precautionary approach to the conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks: Article 6. For interpretation of this provision by five selected RFMOs, see Henriksen, Hønneland and Sydnes (2006, 197-9).

Moreover, the (voluntary) FAO Code of Conduct provides guidance for all FAO members to ensure that they do not support IUU fishing.¹²¹

RFMOs play an important role in the operation of the rules regarding IUU fishing, and in proposals on the table with respect to subsidies to IUU activity. RFMOs have their own procedures for both including and eliminating vessels on IUU lists. All the proposals on the table propose a prohibition on subsidies to IUU activity, and all reference—more or less directly—lists of IUU vessels generated by RFMOs. Norway, for example, proposes a rule that would require members to ensure that a fishing vessel that might be a recipient of a subsidy “neither appears on an IUU-vessel list of a Regional Fisheries Management Organization nor ... has operated in waters under the jurisdiction of any Member without the permission of that Member during the preceding five years.”¹²²

Parties to the UNFSA are obliged not only to cooperate to establish RFMOs but also to respect all RFMOs’ conservation measures—including of those RFMOs to which they are not parties.¹²³ However, the duty of countries that are not party to the UNFSA to respect RFMO rules is less clear-cut. Countries that are not parties to either an RFMO or the UNFSA are not specifically obliged to respect that RFMO’s decisions, given the *pacta tertiis* point identified earlier. It should be recalled, though, that such countries are not discharged from the UNCLOS obligation to cooperate in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks,¹²⁴ and the “duty to cooperate” has been recognised as giving rise to substantive obligations in other fisheries contexts.¹²⁵

The situation of countries that are not party to the UNFSA or to relevant RFMOs appears to be reflected indirectly in the proposal by Argentina et al. that relates to a prohibition on subsidies to IUU fishing (of the six countries that have submitted the proposal by Argentina et al., only Costa Rica, Panama and Uruguay have ratified the UNFSA). The revised proposal suggests that WTO members shall recognise lists of vessels of RFMOs to which they are not a party provided that the recognising member verifies that the listing has respected standards of due process and that the RFMO is open to all WTO members and in conformity with relevant rules of international law and the FAO IPOA-IUU.¹²⁶

This can be compared to the signed text of the Trans-Pacific Partnership (where only half of the original 12 TPP signatories were party to the UNFSA). The relevant provision prohibited subsidies, inter alia, that were provided to any fishing vessel “while listed by the flag State or a relevant Regional Fisheries Management Organization or Arrangement for illegal, unreported or unregulated fishing in accordance with the rules and procedures of such organization or arrangement and in conformity with international law.”¹²⁷

A related issue in several proposals is the desire to ensure that in recognising RFMO lists of IUU vessels for the purpose of subsidy disciplines, WTO members do not inadvertently find themselves subject to other rules of RFMOs they are not party to: the proposal by Argentina et al., for example, provides that: “Except as otherwise provided in this instrument, a Member does not thereby become bound by measures or decisions of, or recognize, any regional fisheries

121 FAO IPOA-IUU, elaborated pursuant to FAO Code of Conduct, Article 2(d).

122 TN/RL/GEN/191.

123 UNFSA Article 8(3).

124 UNFSA Article 17(1).

125 The tribunal in the *South China Sea Arbitration* drew upon the duty to cooperate when making its finding that China had, through its toleration and protection of, and failure to prevent, Chinese fishing vessels engaging in harmful harvesting activities of endangered species, breached Articles 192 and 194(5) of UNCLOS: *South China Sea Arbitration* (Award), para. 992.

126 TN/RL/GEN/187/Rev.2, para 2.1.1(b).

127 TPP Environment Chapter (not in force) Article 20.16.5(b).

management organization of which it is not a Party to.”¹²⁸ This language appears also in the PSMA,¹²⁹ and is designed to ensure that even if parties to the PSMA or proposed fisheries subsidies agreement reference RFMO IUU lists, they are not inadvertently bound by other (non-IUU list related) decisions of the RFMO to which they are not a party.

To summarise, RFMOs are key to management of shared stocks, and their listing of IUU vessels could give them an important role in the proposed subsidy disciplines. This is uncontroversial for UNFSA parties, which are already required to join

RFMOs or respect their decisions, or otherwise be shut out of access to the relevant fishery. The broader corpus of states that are parties to UNCLOS are less clearly bound to respect the decisions of RFMOs, but arguably should do so due to their more general duties to cooperate. Comfort may be given to such states that RFMOs are required to operate in a transparent and non-discriminatory way according to the UNFSA and the FAO Code of Conduct.¹³⁰ Finally, the language from the PSMA could help to assuage concerns about inadvertently committing non-parties to RFMO decisions beyond recognition of IUU lists.

128 TN/RL/GEN/187/Rev.2, para 1.5.

129 PSMA, Article 4.

130 FAO Code of Conduct paras 78-84 relate to the operation of RFMOs, such as the requirement that RFMOs “should address the issue of access to the resource in order to foster cooperation and enhance sustainability in the fishery, in accordance with international law” (para. 83).

5. CONCLUSION

This reference paper has pointed to key concepts of the law of the sea that form the background to the subsidy disciplines as they are currently under discussion at the WTO. Where the proposed rules prohibit subsidies for IUU fishing activity, they invoke concepts of what is legal and regulated under UNCLOS, including with respect to EEZs and the high seas. Where the proposed rules differentiate between subsidies supporting fishing activities conducted in the high seas vis-à-vis fishing activity within EEZs or members' territorial seas, the maritime zones codified in UNCLOS will again be important. Evaluating the operation of the proposed subsidy disciplines thus requires an understanding of the general and specific rights and obligations of states within different maritime zones.

The binding rules of the law of the sea have developed over time, and are codified primarily in UNCLOS as well as the UNFSA and the new PSMA. These rules are applicable to different WTO members depending on their own ratification of or accession to the relevant rule, though some aspects of UNCLOS are considered to codify customary international law and therefore bind all WTO members. While some WTO members have expressed concern that RFMO rulings will be determinative in establishing lists of IUU vessels (which they are reluctant to accept if they are not parties to the relevant RFMO), it was noted that the UNFSA requires open and transparent practices of RFMOs. This presumably gives comfort at least to parties to the UNFSA, and arguably, in terms of practical effect, to non-parties as well. Moreover, the UNFSA allows for dispute settlement, and thus could provide a court process to remedy any IUU vessel listing that was not in conformity with international law.

Issues of enforcement are complicated by the prospect of different forums, and the paper has cautioned WTO members to take care in crafting subsidy dispute settlement provisions so that they may operate alongside existing ITLOS and other tribunal procedures. It was also noted that the law of the sea includes non-binding sources such as the FAO Code of Conduct and

the IPOA-IUU, which although voluntary can inform the application of the proposed subsidy rules—indeed, the IPOA-IUU's description of IUU fishing has been taken up in the WTO proposals.

The key maritime zones that have been discussed in the negotiations—the territorial sea, the EEZ and the high seas—are settled concepts within the law of the sea. This paper has pointed to the much higher volume and value of available resources in the EEZs as compared to the high seas; by implication, any exceptions for subsidies for EEZ fishing may be extremely wide in practice and would need to be implemented very carefully to ensure consistency with UNCLOS obligations regarding the sustainability of EEZ resources. In contrast, prohibitions on subsidies for high seas fishing are compatible with parallel efforts within the United Nations General Assembly to create better protection for biodiversity in areas beyond national jurisdiction.

The law of the sea contains a set of entitlements for flag states and coastal states, as well as a set of rights and obligations of all states with respect to shared stocks (highly migratory fish stocks and fish stocks that straddle the high seas and EEZs). This paper has pointed to the general rights and obligations applicable to these activities, especially with respect to conservation and management and the protection and preservation of the marine environment. In relation to IUU fishing, for example, there is an obligation on a state to exercise “due diligence” by taking all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag. Arguably, the proposed subsidy prohibitions relating to IUU fishing would in practice support the realisation of states' existing duties through domestic economic policy in a form that is enforceable through WTO procedures. In several places, in fact, the establishment of new disciplines on fisheries subsidies would help to give practical effect in domestic economic policy to states' existing rights and obligations under the law of the sea.

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ANNEX: WTO MEMBERS AND PARTIES TO THE UN FISH STOCKS AGREEMENT

	WTO Member	Party to UNFSA
Afghanistan	X	
Albania	X	
Angola	X	
Antigua and Barbuda	X	
Argentina	X	
Armenia	X	
Australia	X	X
Austria	X	X
Bahamas*		X
Bahrain, Kingdom of	X	
Bangladesh	X	X
Barbados	X	X
Belgium	X	X
Belize	X	X
Benin	X	
Bolivia	X	
Botswana	X	
Brazil	X	X
Brunei Darussalam	X	
Bulgaria	X	X
Burkina Faso	X	
Burundi	X	
Cabo Verde	X	
Cambodia	X	
Cameroon	X	
Canada	X	X
Lithuania	X	X
Luxembourg	X	X
Macao, China	X	
Madagascar	X	
Malawi	X	
Malaysia	X	
Maldives	X	X
Mali	X	
Malta	X	X
Marshall Islands		X
Mauritania	X	
Mauritius	X	X
Mexico	X	
Micronesia (Federated States of)		X
Moldova, Republic of	X	
Monaco		X

	WTO Member	Party to UNFSA
Mongolia	X	
Montenegro	X	
Morocco	X	X
Mozambique	X	X
Myanmar	X	
Namibia	X	X
Nauru		X
Nepal	X	
Netherlands	X	X
New Zealand	X	X
Central African Republic	X	
Chad	X	
Chile	X	X
China	X	
Colombia	X	
Congo	X	
Cook Islands		X
Costa Rica	X	X
Côte d'Ivoire	X	
Croatia	X	X
Cuba	X	
Cyprus	X	X
Czech Republic	X	X
Democratic Republic of the Congo	X	
Denmark	X	X
Djibouti	X	
Dominica	X	
Dominican Republic	X	
Ecuador	X	X
Egypt	X	
El Salvador	X	
Estonia	X	X
European Union	X	X
Fiji	X	X
Finland	X	X
France	X	X
Gabon	X	
Gambia	X	
Georgia	X	
Germany	X	X
Ghana	X	X
Greece	X	X
Grenada	X	
Guatemala	X	
Guinea	X	X

	WTO Member	Party to UNFSA
Guinea-Bissau	X	
Guyana	X	
Haiti	X	
Honduras	X	
Hong Kong, China	X	
Hungary	X	X
Iceland	X	X
Nicaragua	X	
Niger	X	
Nigeria	X	X
Niue		X
Norway	X	X
Oman	X	X
Palau		X
Pakistan	X	
Panama	X	X
Papua New Guinea	X	X
Paraguay	X	
Peru	X	
Philippines	X	X
Poland	X	X
Portugal	X	X
Qatar	X	
Romania	X	X
Russian Federation	X	X
Rwanda	X	
Saint Kitts and Nevis	X	
Saint Lucia	X	X
Saint Vincent and the Grenadines	X	X
Samoa	X	X
Saudi Arabia, Kingdom of	X	
Senegal	X	X
Seychelles	X	X
Sierra Leone	X	
Singapore	X	
Slovak Republic	X	X
Slovenia	X	X
Solomon Islands	X	X
South Africa	X	X
Spain	X	X
Sri Lanka	X	X
Suriname	X	
Swaziland	X	
Sweden	X	X
Switzerland	X	

	WTO Member	Party to UNFSA
Chinese Taipei	X	
Tajikistan	X	
Tanzania	X	
Thailand	X	X
India	X	X
Indonesia	X	X
Iran*		X
Ireland	X	X
Israel	X	
Italy	X	X
Jamaica	X	
Japan	X	X
Jordan	X	
Kazakhstan	X	
Kenya	X	X
Kiribati		X
Korea, Republic of	X	X
Kuwait, the State of	X	
Kyrgyz Republic	X	
Lao People's Democratic Republic	X	
Latvia	X	X
Lesotho	X	
Liberia	X	X
Liechtenstein	X	
The former Yugoslav Republic of Macedonia	X	
Togo	X	
Tonga	X	X
Trinidad and Tobago	X	X
Tunisia	X	
Turkey	X	
Tuvalu		X
Uganda	X	
Ukraine	X	X
United Arab Emirates	X	
United Kingdom	X	X
United States	X	X
Uruguay	X	X
Vanuatu	X	
Venezuela, Bolivarian Republic of	X	
Viet Nam	X	
Yemen	X	
Zambia	X	
Zimbabwe	X	

*Observer to the WTO

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