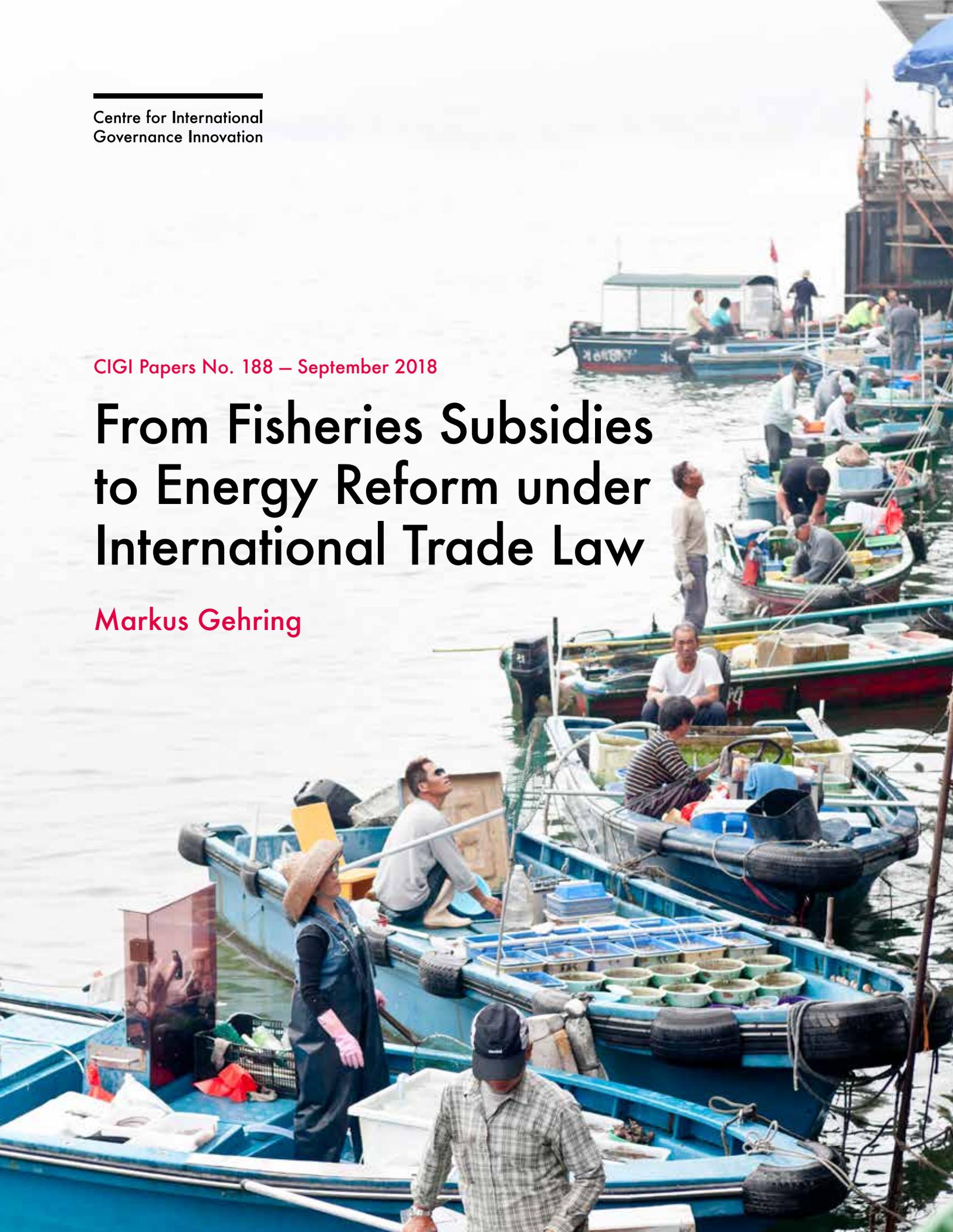


CIGI Papers No. 188 – September 2018

From Fisheries Subsidies to Energy Reform under International Trade Law

Markus Gehring



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CIGI Masthead

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About the Author

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About the Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Introduction

Economic, environmental and other international regimes are jointly facing a wicked climate problem.¹ Climate change impacts on human activity and ecosystems have the potential to jeopardize attaining shared goals of these different regimes, and yet can only be addressed by overcoming the division and occasional conflict between their different stakeholders and areas of focus. Discussions have begun in the hallways on how trade law could best be leveraged to bring the international community together to prevent climate-related harms.² This paper argues that World Trade Organization (WTO) fisheries subsidies negotiations should be a priority area for those practitioners and researchers building links between trade and climate law. It is submitted that successful fisheries subsidies reform will directly contribute to the implementation of the Paris Agreement³ and to the delivery of Sustainable Development Goal (SDG) 13 (“Take urgent action to combat climate change and its impacts”),⁴ given the important synergies that exist between the transformation of fisheries subsidies and climate mitigation and adaptation.

Furthermore, fisheries subsidies negotiations are of crucial importance for international climate law because they can provide a case study to learn from and increase chances of success with fossil fuel subsidy reform. The Buenos Aires WTO Ministerial Conference of December 2017, which issued a Ministerial Decision on Fisheries Subsidies to work toward a comprehensive agreement on fisheries subsidies by 2019,⁵ can be seen as a learning experience for fossil fuel

subsidies reform, both in terms of approach and processes, and in terms of linking trade law and the Paris Agreement in the future.

This paper first provides a brief historical overview of trade law negotiations aiming to reduce and reform fisheries subsidies. Second, it will show the important synergies that exist between reforming fisheries subsidies and implementing the Paris Agreement as well as the SDGs. Examples will illustrate how these synergies have already been expressed in certain trade agreements, despite lack of advances within WTO negotiations, and show the important opportunity that currently stands before us for further creative developments both within and outside the WTO.

The paper then extracts five drivers for success that can be observed from the current process of fisheries subsidies reform: leadership of key countries and of the WTO Secretariat itself; meticulous academic, scientific and policy background analysis; commitment by civil society and the private sector; the development of alternatives to those subsidies that encourage overfishing; and inter-regime learning. Lastly, the paper will discuss the transferability of these drivers for success to prevent climate harms and to address more general challenges encountered in both the climate and trade regimes. The paper concludes that the transfer potential is important, especially as alternatives for fossil fuel subsidies have already been identified and since the potential for inter-regime learning in the context of sustainable development is huge.

1 Kelly Levin et al, “Overcoming the tragedy of super wicked problems: Constraining our future selves to ameliorate global climate change” (2012) 45:2 Pol’y Sciences 123; Richard J Lazarus, “Super wicked problems and climate change: Restraining the present to liberate the future” (2009) Cornell L Rev 1153.

2 For a general discussion of trade and sustainable development, see Markus W Gehring & Marie-Claire Cordonier Segger, *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005).

3 Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015 (entered into force 4 November 2016).

4 *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UNGAOR, 70th Sess, UN Doc A/RES/70/1 (2015) [SDGs] at 13.

5 WTO, *Fisheries Subsidies*, Ministerial Decision of 13 December 2017, WTO Doc WT/MIN(17)/64.

Historical Overview of Fisheries Subsidies Reform Negotiations

More than 20 years have passed since the first attempts to regulate fisheries subsidies in 1995. The best available science on diminishing stocks now makes it clear that the window of opportunity to implement a sustainable approach to fisheries is rapidly closing.⁶ This protracted process should serve as a cautionary tale in the fossil fuel subsidy reform context, where the window of opportunity is similarly slim. It suggests a need to leapfrog lengthy discussions on the need for subsidy reform, which this paper will address in the final section.

Since the Doha Round was launched in 2001, efforts of WTO members, international organizations and others to reduce and reform fisheries subsidies have intensified.⁷ There is reason for increased attention to this process and some cautious optimism in that the WTO Ministerial Conference, prompted by a large coalition of stakeholders, has recently raised expectations for an agreement to be reached by 2019. Yet it must be remembered that the current negotiations build on a long history of attempts to regulate fisheries subsidies that dates all the way back to 1995, when the Agreement on Subsidies and Countervailing Measures (SCM) came into force as part of the WTO agreements.⁸

The SCM is not specific to fisheries. It applies to all types of subsidies, in general, and to all 164 WTO members. It contemplates disciplines on three categories of subsidies: prohibited subsidies, which aim at boosting export performance or that require and favour local over imported content; actionable subsidies, in the sense that members may challenge those subsidies and adopt measures to offset their adverse effects; and non-actionable subsidies that are not specific to particular

enterprises or industries or that, even if specific, have a purpose that is limited to providing assistance for certain research activities, disadvantaged regions, or to promote the adaptation of existing facilities to new environmental requirements.

In 2001, ministers of WTO members met in Doha and agreed to “aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries” in the context of the new round of negotiations that were launched there and that have come to be known as the Doha Development Round.⁹ The following year, the World Summit on Sustainable Development urged states to eliminate subsidies contributing to illegal, unreported and unregulated fishing (IUU).¹⁰ In 2007, the chair of the WTO Negotiating Group on Rules (the working group in charge of negotiating the WTO Antidumping Agreement and the SCM) proposed a new negotiation text as annex to the SCM that would prohibit certain types of fisheries subsidies¹¹ and issued a report in 2011 summarizing the progress made to that point.¹² Finally, in December 2016, three separate proposals were presented to the WTO negotiating group,¹³ all “aimed at reaching a decision” at the 2017 Ministerial Conference in Buenos Aires.¹⁴

Even though the 2017 Ministerial Conference did not result in the adoption of a common declaration, a clear decision has been taken on the need for “comprehensive and effective disciplines that prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and [on the need to] eliminate subsidies that contribute to IUU-fishing.” A deadline has also been set for the Ministerial Conference of 2019,

6 For further references on the current state of fisheries and the urgency of subsidy reform, see notes 16–18.

7 Anja von Moltke, *Fisheries Subsidies, Sustainable Development, and the WTO* (UNEP & Routledge, 2011); David A Gantz, *Liberalizing International Trade after Doha: Multilateral, Plurilateral, Regional and Unilateral Initiatives* (New York: Cambridge University Press, 2013).

8 Margaret A Young, “Energy Transitions and Trade Law: Lessons from the Reform of Fisheries Subsidies” (2017) University of Melbourne Legal Studies Research Paper No 746 [Young, “Energy Transitions”].

9 WTO, Ministerial Declaration of 14 November 2001, WTO Doc WT/MIN(01)/DEC/1 (2001).

10 *Report of the World Summit on Sustainable Development*, 4 September 2002, UN Doc A/CONF.199/20.

11 WTO, Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213 (30 November 2007), Annex VIII to the SCM Agreement, 87–93.

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

13 One came from Argentina, Australia, Canada, Chile, Colombia, New Zealand, Norway, Papua New Guinea, Peru, Singapore, Switzerland, Uruguay and the United States (14 September 2016), the other from the European Union (20 October 2016), and the last from Rwanda on behalf of the ACP Group (16 November 2016).

14 Seven proposals were ultimately put forward. See WTO, *Compilation of Seven Fisheries Subsidies Proposals Circulated to WTO Members* (28 July 2018), online: <www.wto.org/english/news_e/news17_e/fish_28jul17_e.htm>.

and two working documents reflect the views of parties and the state of progress on the details of the expected decision (for example, preamble, definitions, scope, transitional provisions and institutional arrangements).¹⁵ As such, consensus has been reached on the necessity to address fisheries subsidies, despite the complexity of the economic¹⁶ and legal¹⁷ issues at play. This development opens up opportunities for progress on subsidies reform to be achieved under other related international regimes, whether multilateral or bilateral, especially at the trade, sustainable development and climate interface.

Some figures are required at this stage to give a sense of the alarmingly high levels of overfishing, and to put in context the important impacts that pushing back agreement on this issue for another two years will have. In 2013, 31 percent of fish stocks were fished at a biologically unsustainable level and 58 percent were fully fished.¹⁸ By 2016, nearly 90 percent of fish stocks were either fully exploited or overfished. Between 20 and 32 percent of fish imports into the United States are caught illegally.¹⁹ Yet, US\$35 billion in subsidies are

provided every year to the fishing sector globally.²⁰ Subsidies that enhance the capacity of fishing operations occupy the main share of this yearly amount, with fuel subsidies in the first position (22 percent), followed by subsidies for management (20 percent) and for ports and harbours (10 percent).²¹

As suggested by an explicit mention of this issue in the Ministerial Decision on Fisheries Subsidies, a potential stumbling block for the 2019 agreement is the question of special and differential treatment for developing and least-developed countries, in particular with respect to Africa, and the obligation on them to eliminate certain fisheries subsidies. Nonetheless, a successful process could contribute to the realization of the goals of the climate regime and the sustainable development framework, as discussed in the following section. Time is of the essence, as the window of opportunity to stabilize temperature increases at 1.5°C over pre-industrial averages by curbing global GHG emissions is rapidly closing.²²

International regimes interact,²³ and agreement on principles or processes in one area of international negotiations may influence the conduct of negotiations in other areas. This is particularly the case when the issues at play overlap, such as in the case of fisheries subsidies regulation, climate change and sustainable development.²⁴ Even in the absence of an agreement at the 2019 WTO Ministerial Conference, the trade, climate and sustainable development regimes present opportunities for “out of the box” thinking in the way that they relate and the design of practical approaches to address climate change in new settings.

15 WTO Documents TN/RL/W/274/Rev.2 and RD/TN/RL/29/Rev.3.

16 OECD, *The Economics of Adapting Fisheries to Climate Change* (Paris: OECD Publishing, 2011) [OECD, *Economics of Adapting*]; José-Maria Da-Rocha et al, “The social cost of fishery subsidy reforms” (2017) 83 *Marine Pol’y* 236; R Quentin Grafton, “Adaptation to climate change in marine capture fisheries” (2010) 34 *Marine Pol’y* 606; Roman Grynberg, “WTO fisheries subsidies negotiations: implications for fisheries access arrangements and sustainable management” (2003) 27 *Marine Pol’y* 499; Andrés M Cisneros-Montemayor, Enrique Sanjurjo, Gordon Munro & Rashid U Sumaila, “Strategies and rationale for fishery subsidy reform” (2016) 69 *Marine Pol’y* 229; U Rashid Sumaila et al, “Climate change impacts on the biophysics and economics of world fisheries” (2011) 1 *Nature Climate Change* 449; Alice Tipping, “Building on progress in fisheries subsidies disciplines” (2016) 69 *Marine Pol’y* 202.

17 Young, “Energy Transitions”, *supra* note 8; Chen-Ju Chen, *Fisheries Subsidies under International Law* (New York: Springer Verlag, 2010); Yi Chou & Ching-Hsiewn Ou, “The opportunity to regulate domestic fishery subsidies through international agreements” (2016) 63 *Marine Pol’y* 63 118; Don Gourlie, “Reeling in Uncertainty: Adapting Marine Fisheries Management to Cope With Climate Effects on Ocean Ecosystems” (2017) 47:1 *Envtl L* 179; Margaret A Young, “International trade law compatibility of market-related measures to combat illegal, unreported and unregulated (IUU) fishing” (2016) 69 *Marine Pol’y* 209.

18 FAO, *State of World Fisheries and Aquaculture* (Rome: FAO, 2016) [FAO, *SOFIA 2016*]; World Bank, *The Sunken Billions Revisited: Progress and Challenges in Global Marine Fisheries* (Washington, DC: World Bank, 2016) [World Bank, *Sunken Billions*].

19 Ganapathiraju Pramoda et al, “Estimates of illegal and unreported fish in seafood imports to the USA” (2014) 48 *Marine Pol’y* 102. For a survey on catches, fisheries policies and agreements, see Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (Cambridge, UK: Cambridge University Press, 2015).

20 U Rashid Sumaila et al, “Global fisheries subsidies: An updated estimate” (2016) 69 *Marine Pol’y* 189.

21 *Ibid* at 190.

22 United Nations Environment Programme, *The Emission Gap Report 2016: A UNEP Synthesis Report* (Nairobi, 2016) at xiv.

23 Margaret A Young, ed, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge, UK & New York: Cambridge University Press, 2012); Sebastian Oberthür, “Linkages between the Montreal and Kyoto Protocols—Enhancing Synergies between Protecting the Ozone Layer and the Global Climate” (2001) 1:3 *Intl Envtl Agreements* 357; Thomas Gehring & Sebastian Oberthür, eds, *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (Cambridge, MA & London, UK: MIT Press, 2006); Margaret A Young, “Climate Change Law and Regime Interaction” (2011) *Carbon & Climate L Rev* 147.

24 Margaret A Young, *Trading Fish, Saving Fish: The Interaction Between Regimes in International Law* (New York: Cambridge University Press, 2011); Margaret A Young, “Fragmentation or Interaction: The WTO, Fisheries Subsidies, and International Law” (2009) 8:4 *WT Rev* 477.

Synergies between Reducing Fisheries Subsidies and Implementing the SDGs and the Paris Agreement

Opportunity for a “Triple Win”

Reforming fisheries subsidies has the tremendous potential to foster advancement in the climate and sustainable development regimes at the same time, and thereby yield a triple win. Elimination of harmful subsidies, in particular, frees up much-needed resources that can be allocated to other important collective interests, such as environmental protection and the sustainable development of local fishing communities. Ideally, a government would strive to structure its expenditures so as to achieve a return to society that is roughly similar for each dollar spent, but subsidies can easily upset that balance.

Eliminating fisheries subsidies that contribute to overcapacity and overfishing has direct implications for the achievement of sustainable development, as affirmed at the Rio+20 United Nations Conference on Sustainable Development.²⁵ In fact, Target 14.6 explicitly references the WTO negotiations on fisheries subsidies. It provides the following goals: “By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least-developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation.” Given that fish provide, on average, 17 percent of the global population’s animal protein intake, and

more than 50 percent in some coastal countries,²⁶ depletion of world fisheries would have a dire impact on achieving SDG 2 (“End hunger, achieve food security and improved nutrition and promote sustainable agriculture”). Fisheries management is therefore intimately and undoubtedly linked to food security and the attainment of SDG 2.²⁷

Reforming fisheries subsidies can also contribute directly to achieving SDG 13 on climate change and to the implementation of the Paris Agreement. Reforming support to fisheries would contribute to reducing GHG emissions from fishing operations since, as mentioned, 22 percent of fisheries subsidies go to the purchase of fuel for fishing vessels and to lower other costs of operating fuel-dependent ships.²⁸ Subsidies thus result in extending ships’ capacity and reach, with direct impact on overfishing.²⁹ Into play, then, comes the Paris Agreement, whereby parties committed to the overall objective of achieving decarbonization of the global economy before the end of the century (article 4(1)). Decarbonization implies transformation of energy subsidies, as made explicit through the goal to make “finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development” (article 2).

Perturbation of fish stocks by climate change already has a direct impact on the local economy and health of island and coastal populations.³⁰ Yet overfishing increases ocean vulnerability to climate change, because it reduces biodiversity and affects

25 *The Future We Want*, GA Res 66/288, UNGAOR, 2012, UN Doc A/RES/66/288 at para 173. See also Carmel Finley, *All the Boats on the Ocean: How Government Subsidies Led to Global Overfishing* (Chicago: University of Chicago Press, 2017).

26 FAO, *SOFIA 2016*, *supra* note 18; World Bank, *Sunken Billions*, *supra* note 18, Overview; Samuel J Barkin & Elizabeth R DeSombre, *Saving Global Fisheries: Reducing Fishing Capacity to Promote Sustainability* (Cambridge, MA: MIT Press, 2013).

27 Nicole Weisfelt & Rosemary Gail Rayfuse, eds, *The Challenge of Food Security: International Policy and Regulatory Frameworks* (Northampton, MA: Edward Elgar, 2012); Tim McClanahan, Edward H Allison & Joshua E Cinner, “Managing Fisheries for Human and Food Security” (2015) 16:1 *Fish & Fisheries* 78.

28 OECD, *Economics of Adapting*, *supra* note 16; OECD, “Support to fisheries: Levels and impacts” (2017) OECD Food, Agriculture and Fisheries Papers No 103; Sumaila et al, *supra* note 20.

29 Von Moltke, *supra* note 7; Roger Martini, “Fuel Tax Concessions in the Fisheries Sector” (2012) OECD Food, Agriculture and Fisheries Papers No 56.

30 Robert Blasiak et al, “Climate change and marine fisheries: Least developed countries top global index of vulnerability” (2017) 12:6 *PLoS ONE*; Vicky WY Lam et al, “Projected change in global fisheries revenues under climate change” (2016) 6 *Scientific Reports*; M Aaron MacNeil et al, “Transitional states in marine fisheries: adapting to predicted global change” (2010) 365 *Philosophical Transactions of the Royal Society B* 3753.

ecosystem balance, and because pH levels are in part regulated by fish excretions.³¹ Thus, mitigating dangerous climate change, through action on fisheries subsidies as well as at many other levels, will have direct impacts on human development.³²

Ultimately, the funds freed up through subsidies reform could be invested to allow the climate adaptation of fishing communities, increase the resilience of coastal populations, and address climate loss and damage, as sought under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts and the Sendai Framework for Disaster Risk Reduction,³³ which were specifically included in the Paris Agreement and its adoption decision, respectively.

The foregoing shows that the drive to reform fisheries subsidies has the potential to foster or frustrate progress on climate change and sustainable development. The subsidies reform process will have important bearing on the implementation of SDGs 2 (zero hunger), 13 (climate action) and 14 (“Conserve and sustainably use the oceans, seas and marine resources for sustainable development”). This shows the synergy between trade, climate and sustainable development actions, which was also highlighted in a 2016 joint statement by the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Food and Agriculture Organization (FAO).³⁴ There is a clear opportunity for a triple win, but it will require great efforts at the WTO, as well as on the ground at the stage of national implementation in both developed and developing countries.

Recognition of Synergy in Trade Agreements

The literature is starting to suggest opportunities for linkages between the trade, climate and

sustainable development frameworks.³⁵ For example, a paper from the International Centre for Trade and Sustainable Development (ICTSD) notes that there is “no automatic mechanism within the trade system for constraining trade at points where it is clear that the scale of trade and production are out of proportion to the availability of the fisheries resources,” thus pointing to the need for an improved rules-based multilateral approach that is reflective of the vulnerabilities of human populations and ecosystems.³⁶

One alternative that can be explored concurrently is to develop innovative provisions in regional trade agreements (RTAs).³⁷ For example, the European Union-Colombia-Peru-Ecuador Free Trade Agreement seeks to support both sustainable fisheries management and responses to climate change. Article 274 recognizes “the need to conserve and manage fish resources in a rational and responsible manner, in order to ensure their sustainability” and article 275 commits parties to “facilitating the removal of trade and investment barriers to access to, innovation, development, and deployment of goods, services and technologies that can contribute to mitigation or adaptation” to climate change.³⁸

Similarly, the European Union-CARIFORUM Economic Partnership Agreement addresses both sustainable fisheries and climate action priorities

31 RW Wilson et al, “Contribution of fish to the marine inorganic carbon cycle” (2009) 323:5912 *Science* 359.

32 Kaisa Karttunen et al, *Addressing Agriculture, Forestry and Fisheries in National Adaptation Plans* (Rome: FAO, 2017).

33 UN, *Sendai Framework for Disaster Risk Reduction 2015–2030*, Third UN World Conference, Sendai, Japan, 18 March 2015.

34 UNCTAD-FAO, *Regulating Fisheries Subsidies Must Be an Integral Part of the Implementation of the 2030 Sustainable Development Agenda*, Joint Statement, UNCTAD, 14th Sess, 17–20 July 2016.

35 Sadeq Z Bigdeli, “Will the ‘Friends of Climate’ Emerge in the WTO? The Prospects of Applying the ‘Fisheries Subsidies’ Model to Energy Subsidies” (2009) 2:1 *Carbon & Climate L Rev* 78; Thijs Van de Graaf & Harro van Asselt, “Introduction to the special issue: energy subsidies at the intersection of climate, energy, and trade governance” (2017) 17:3 *Intl Envtl Agreements* 313; Harro van Asselt & Kati Kulovesi, “Seizing the opportunity: tackling fossil fuel subsidies under the UNFCCC” (2017) 17:3 *Intl Envtl Agreements* 357.

36 ICTSD, “Fisheries, International Trade and Sustainable Development” (2006) ICTSD Policy Discussion Paper at xii. See also Carl-Christian Schmidt, “Issues and Options for Disciplines on Subsidies to Illegal, Unreported and Unregulated Fishing” (2017) ICTSD; Christophe Bellman et al, “Tackling Perverse Subsidies in Agriculture, Fisheries and Energy” (2016) ICTSD, Programme on Global Economic Policy and Institutions, Information Note (June); Gilles Hosch, “Trade Measures to Combat IUU Fishing: Comparative Analysis of Unilateral and Multilateral Approaches” (2016) ICTSD Issue Paper.

37 Markus W Gehring et al, “Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs): An Overview” (2013) ICTSD, Programme on Global Economic Policy and Institutions, Issue Paper No 3.

38 *Trade Agreement Between the European Union and Colombia and Peru*, 26 June 2012, OJ L 354. Ecuador acceded to the treaty on 11 November 2016.

in several ways.³⁹ Article 37 contains a recognition “that ensuring food security and enhancing livelihoods of rural and fishing communities are critical elements of the eradication of poverty, and the pursuit of sustainable development.” Likewise, article 138 commits signatories to foster “forms of innovation that benefit the environment in all sectors of their economy. Such forms of eco-innovation include energy efficiency and renewable sources of energy.”

Lastly, the former Trans-Pacific Partnership (TPP) free trade agreement contained different provisions to address both fisheries and energy subsidies,⁴⁰ and these survived into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) signed on March 8, 2018, without the United States. Importantly, the Donald Trump administration has been comfortable promoting the fisheries subsidies approach reflected in the TPP text in the WTO context, which shows another example of regime interaction, despite the country’s abandonment of the treaty. Chapter 20 of the CPTPP on the environment contains a recognition of “the importance of mutually supportive trade and environmental policies and practices to improve environmental protection in the furtherance of sustainable development” (article 20.3), an acknowledgment “that transition to a low emissions economy requires collective action” and the possibility of cooperation on “clean and renewable energy sources” (article 20.15), and an acknowledgment “that the fate of marine capture fisheries is an urgent resource problem facing the international community” (article 20.16). This last provision also contains a commitment to ban “subsidies for fishing that negatively affect fish stocks that are in an overfished condition; and subsidies provided to any fishing vessel while listed by the flag State or a relevant Regional Fisheries Management Organisation or Arrangement for IUU fishing in accordance with the rules and procedures of that organisation or arrangement and in conformity with international law.” Interestingly, article 20.16.11 requires parties to provide information about

other forms of fisheries subsidies made available, and specifically includes fossil fuel subsidies.

This analysis shows that it is possible for trade agreements to seek to foster sustainable fisheries management and climate change objectives at the same time. The different RTAs identified show approaches that can be used to reduce both subsidies to fossil fuels and fisheries based on the same rationale of sustainable development, and that will now have to withhold the test of implementation. Another policy option lies in the regulation of fossil fuel subsidies directly at the WTO. New sets of rules could “mandate full disclosure of fossil fuel subsidies under WTO rules, affirm that fossil fuel subsidies are actionable subsidies under those rules, and agree on the gradual phase-out and ultimate prohibition of such subsidies.”⁴¹ This option is the subject of a more in-depth discussion in the final section.

Five Drivers for Success in Fisheries Subsidies Reform

The WTO is currently negotiating reductions of fisheries subsidies in a generalist manner, activating trade law to help address a crucial global sustainable development challenge. A deadline for subsidies reform now has been set for the 2019 WTO Ministerial Conference. The main proposals on the table have in common a call for a multilateral outcome to be agreed upon, for the achievement of SDG 14.6 (on prohibiting certain forms of fisheries subsidies that contribute to overcapacity and overfishing by 2020), and for recognition of the need for special and differential treatment for developing and least-developed countries.

Five important drivers for this momentous task can be identified: leadership of key countries and of the WTO; meticulous academic, scientific and policy background analysis; engagement by civil society and the private sector; the development of alternatives to subsidies that encourage

39 *Economic Partnership Agreement between the CARIFORUM States and the European Community*, 30 October 2008, OJ L 289.

40 Amanda Rologas Tsangalis, “Fisheries Subsidies under the Trans-Pacific Partnership: Towards Positive Outcomes for Global Fisheries Sustainability and Regime Interaction under International Law” (2016) 17:2 *Melbourne J Intl L* 445.

41 ICTSD & World Economic Forum, *Strengthening the Global Trade and Investment System for the 21st Century: E15 Full Thematic Policy Options* (Geneva: ICTSD & World Economic Forum, 2016).

overfishing; and inter-regime learning. These are drawn both from personal experience with trade law as well as the literature, and are meant more as hypotheses for future action than as empirical claims. They are discussed in sequence for fisheries with a view to identifying how they, and ultimately their progress and relative success, could be transferred to fossil fuel subsidies reform efforts under international trade law. These drivers have been identified through observation and analysis of the fisheries subsidies discussions in the WTO. They have been highlighted by commentators and are summarized here as to the importance of progress made in this area.⁴²

The first important driver for successful fisheries subsidies reform is the leadership of key countries willing to “negotiate for the issue,” as well as high-level political endorsement in the WTO itself. An example of such a proactive attitude can be found in the 2005 WTO Ministerial Statement, which noted 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 over-fishing.”⁴³ An informal group of WTO parties identified as “Friends of Fish” has developed “a categorisation of fisheries subsidies in an effort to create a negotiating platform on fisheries subsidies” and could show an example of constructive engagement for the fossil fuel subsidies reform stakeholders.⁴⁴

The second driver is the careful and meticulous academic, scientific and policy background analysis that preceded WTO negotiations. This kind of analysis accomplished the important task of demonstrating without doubt that fisheries subsidies have perverse effects at the environmental, social and

economic levels.⁴⁵ Academics and practitioners have also contributed to the debate by developing a classification methodology that allows distinguishing between beneficial subsidies, capacity-enhancing subsidies and ambiguous subsidies.⁴⁶

The third driver is engagement by both civil society and important private sector actors with an interest in reducing fisheries subsidies. Examples of involved actors include the following:

- The Global Ocean Commission, an independent international commission founded in 2013 by former heads of state, government officials and business leaders.
- The Global Partnership for Oceans created by the World Bank, which brings together governments, civil society organizations, private sector companies, associations, research institutions, UN agencies, development banks and foundations.⁴⁷
- Oceana, established in 2001 by a group of leading foundations: the Pew Charitable Trusts, Oak Foundation, Marisla Foundation (formerly Homeland Foundation), and the Rockefeller Brothers Fund. Their stated objective is to achieve “measurable change by conducting specific, science-based campaigns with fixed deadlines and articulated goals.”⁴⁸

The fourth driver is the reaching of a tipping point in the development of alternatives to subsidies that encourage overfishing. The fishing industry is currently presented with the challenge of identifying broadly accepted alternatives to subsidies. These could include different kinds of subsidies to allow small-scale fishing operations to continue in a way that is sustainable in cases where these support the livelihood of

42 On negotiations, see generally Amrita Narlikar, *Deadlocks in Multilateral Negotiations: Causes and Solutions* (Cambridge, UK: Cambridge University Press, 2010). On fisheries subsidies in particular, see von Moltke, *supra* note 7. Several delegations highlighted these drivers; reporting on fisheries negotiations, see e.g. ICTSD, “WTO Negotiators Debate Revisions to Integrated Fisheries Text”, *BRIDGES* 21:37 (9 November 2017).

43 WTO, Ministerial Declaration of 18 December 2005, WTO Doc WT/MIN(05)/DEC (2005), Annex D(I)(9).

44 ICTSD, “Friends of Fish’ Press for Negotiations on Fisheries Subsidies at WTO”, *BIORES* (21 February 2003).

45 UNEP, *Analyzing the Resource Impact of Fisheries Subsidies: A Matrix Approach* (Geneva: UNEP, Economics and Trade Branch, Division of Technology, Industry and Economics, 2004); Lena Westlund, “Guide for identifying, assessing and reporting on subsidies in the fisheries sector” (2004) FAO Fisheries Technical Paper No 438; FAO, “Report of the Technical Consultation on the Use of Subsidies in the Fisheries Sector” (2004) FAO Fisheries Report No 752.

46 U Rashid Sumaila et al, “A bottom-up re-estimation of global fisheries subsidies” (2010) 12:3 *J Bioecon* 201.

47 World Bank, “Global Partnership for Oceans”, World Bank Brief (1 July 2015), online: <www.worldbank.org/en/topic/environment/brief/global-partnership-for-oceans-gpo>.

48 Oceana, online: <<http://oceana.org/about-oceana/about-us>>.

communities. They could also include other ways of addressing the losses incurred by large-scale operations as a result of subsidy reform.⁴⁹ Furthermore, subsidies reform presents the opportunity of dedicating the amounts currently earmarked toward subsidies to support fishing communities in adapting to climate change.⁵⁰

The last driver involves inter-regime learning. As this paper has shown by comparing fisheries subsidies, fossil fuel subsidies and the pursuit of sustainable development, trading nations should be gaining comfort with the idea of including, in any given negotiation setting, decisions or concepts that have emerged in other regimes. International organizations can be linked through the harmonization of the goals that they pursue, the cross-referencing of the normative developments that their membership develops, and the formal or informal linkage of the mechanisms and processes that are established in the furtherance of their goals. Margaret Young argues that this should not be resisted by negotiating parties, since “models that link authority and contestability, and ensure a ‘thick stakeholder consensus’ in the underlying rules, provide legitimacy for states.”⁵¹ In the case of fisheries subsidies, important headway in crafting fisheries subsidies rules and tackling IUU fishing has been achieved in non-binding declarations addressing sustainable development and adopted RTAs. Full profit of these advances was reaped in Buenos Aires and should inform the negotiations leading up to the 2019 WTO Ministerial Conference.

Applicability of Drivers for Fisheries Subsidies Success to the Broader Climate Change and Trade Challenges

Currently, there are no negotiations to reduce fossil fuel subsidies, although leading countries have begun to point to the challenge of perverse subsidies for fossil fuels, and other subsidies that exacerbate climate change. The task ahead is important: the total amount of subsidies to fossil fuel in 2015 was \$5.3 trillion, or 6.5 percent of global GDP, if externalities are considered.⁵² It should be highlighted that this study is somewhat contested as it is seen as somewhat hypothetical and includes a large variety of traditional subsidies. However, other studies have identified figures between \$2.6 and \$3.7 trillion. According to David Coady and his co-authors, subsidy reform “would have reduced global carbon emissions in 2013 by 21 percent and fossil fuel air pollution deaths 55 percent, while raising revenue of 4 percent, and social welfare by 2.2 percent, of global GDP.”⁵³ The country breakdown of such subsidies in 2013 is as follows: China (\$1.8 trillion), the United States (\$0.6 trillion), followed by Russia, the European Union and India (approximately \$0.3 trillion each). Consumption subsidies for fossil fuels alone reached US\$260 billion in 2016.⁵⁴ Anticipating that this may become a negotiation challenge in the relatively short term, this last part of the paper discusses the transferability of the drivers for success (identified above) to the fossil fuel subsidies context in order to prevent climate harms.

With regard to the first identified driver, high-level political recognition of the challenge presented by energy subsidies is emerging. As has been seen in recent Group of Twenty (G20) and Group of Eight (G8) declarations, fossil fuel

49 Michael J Trebilcock, *Dealing with Losers: The Political Economy of Policy Transitions* (Oxford, UK: Oxford University Press, 2015).

50 Clare Shelton, “Climate Change Adaptation in Fisheries and Aquaculture: Compilation of Initial Examples” (2014) FAO Fisheries and Aquaculture Circular No 1088.

51 Young, “Energy Transitions”, *supra* note 8 at 387, quoting Joost Pauwelyn, Ramses Wessel & Jan Wouters, eds, *Informal International Lawmaking* (Oxford, UK: Oxford University Press, 2012).

52 David Coady et al, “How Large Are Global Fossil Fuel Subsidies?” (2017) 91 *World Development* 11. See also Elizabeth Bast et al, *Empty promises: G20 subsidies to oil, gas, and coal production* (Washington, DC: Oil Change International & Overseas Development Institute, 2015).

53 Coady et al, *supra* note 52 at 12.

54 IEA, *World Energy Outlook 2017* (Paris: IEA, 2017) at 84.

subsidies are increasingly being recognized by key countries as problematic, and coalitions that call for their reform are developing.

The strong implication of the UNFCCC Secretariat, as represented by Executive Secretary Christiana Figueres in the run-up to the Twenty-first Conference of the Parties (COP 21) in Paris, provides an interesting example of the opportunity for political leadership by treaty secretariats during difficult negotiations linked to climate change. In this case, the high-level political engagement that she and the French hosts of the COP were able to generate was crucial to the successful adoption of the treaty. Similar political leadership may be taking shape regarding fossil fuels, as shown for instance by the inclusion of an annex to the 2017 G20 Summit in Hamburg that affirmed the parties' "commitment to rationalise and phase out, over the medium-term, inefficient fossil fuel subsidies that encourage wasteful consumption" (with the abstention of the United States).⁵⁵ This echoed the main G20 declaration committing the 19 parties to "increased innovation on sustainable and clean energies and energy efficiency, and work towards low greenhouse-gas emission energy systems."⁵⁶ Similarly, the Taormina G7 Communiqué of 2017 had parties (except the United States) commit to "ensuring open, transparent, liquid and secure global markets for energy resources and technologies."⁵⁷ It was also echoed by the ultimately failed Charlevoix G7 Communiqué in 2018: "We strive to reduce tariff barriers, non-tariff barriers and subsidies."⁵⁸

These political declarations, together with continued attention by international organizations, civil society and leading research institutes,⁵⁹ may provide the basis for the coalitions necessary for a breakthrough on fossil fuel subsidies at the WTO or within other settings.

55 Annex to G20 Leaders' Declaration, G20 Hamburg Climate and Energy Action Plan for Growth, July 2017.

56 G20 Leaders' Declaration, *Shaping an Interconnected World*, Hamburg (8 July 2017) at para 23.

57 G7 Taormina Leaders' Communiqué (27 May 2017) at para 31.

58 G7 Charlevoix Summit Communiqué (9 June 2018), online: <<https://g7.gc.ca/en/official-documents/charlevoix-g7-summit-communique/>>.

59 Joint report by IEA, OPEC, OECD and the World Bank on fossil fuel and other energy subsidies: *An update of the G20 Pittsburgh and Toronto Commitments*, Prepared for the G20 Meeting of Finance Ministers and Central Bank Governors (Paris, 14–15 October 2011) and the G20 Summit (Cannes, 3–4 November 2011).

With regard to the second driver of success, the careful and meticulous academic, scientific and economic data and policy analysis that precedes and supports negotiations, identifying fossil fuel and other related subsidies as perverse has only just begun. The scientific, academic and economic policy research showing the scale of the subsidies, their scope and their damaging contribution to climate change is only just being taken up by leading institutions such as the Intergovernmental Panel on Climate Change (IPCC)⁶⁰ the International Monetary Fund (IMF),⁶¹ the Organisation for Economic Co-operation and Development (OECD),⁶² and the World Bank.⁶³ Drawing inspiration from the fisheries subsidies experience, more data and analysis are necessary, especially at the country and subnational levels.

With regard to the third driver, higher levels of civil society and private sector engagement are fundamental. While subsidies to the coal industry have been identified as particularly perverse because of their adverse impact on health over and above their contribution to climate change,⁶⁴ a similar intensity of research, awareness-raising, education and action may be necessary for other fossil fuel subsidies. While the WTO has traditionally included many businesses and business associations, ever since the Doha Ministerial in 2001, environmental NGOs and other civil society groups have become a growing voice in the corridors of the WTO. This could provide an opportunity for higher levels of civil society engagement.

Drawing again from the experience of the Paris Agreement shows the importance of civil society

60 An entire section was dedicated to this issue in *Climate Change 2001: Mitigation*, A Report of Working Group III of the Intergovernmental Panel on Climate Change. See "Reducing Subsidies in the Energy Sector", 9.2.1.2, online: <www.ipcc.ch/ipccreports/tar/wg3/index.php?idp=357>.

61 Coady et al, *supra* note 52; Javier Arze del Granado et al, "The Unequal Benefits of Fuel Subsidies: A Review of Evidence for Developing Countries" (2010) IMF Working Paper.

62 OECD, *Investing in Climate, Investing in Growth* (OECD Publishing: Paris, 2017). <http://dx.doi.org/10.1787/9789264273528-en>. See also Richard Dobbs et al, *Resource Revolution: Meeting the World's Energy, Materials, Food, and Water Needs* (New York: McKinsey Global Institute, 2011).

63 World Bank, *Turn Down the Heat: Confronting the New Climate Normal* (Washington, DC: World Bank, 2014).

64 See e.g. Paul R Epstein et al, "Mining Coal, Mounting Costs: The Life Cycle Consequences of Coal" (2011) 1219 *Annals of the New York Academy of Sciences* 92.

in facing climate change. The identification by the COP 21 presidency of “non-Party stakeholders” as one of the four pillars of a new climate treaty⁶⁵ can be linked both to the success of the negotiations and to the prospect of achieving the treaty’s implementation. On the one hand, civil society organizations and the corporate sector were actively engaged in the UNFCCC process through the nine acknowledged constituencies⁶⁶ and were heavily represented at the COP21 venue.⁶⁷ On the other hand, non-party stakeholders (civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and Indigenous peoples) received a direct invitation to respond to climate change in the treaty Adoption Decision,⁶⁸ which adopted the Paris Agreement and contains many details without constituting a formal part of the international agreement. It has the legal status of a COP decision and contains important interpretative decisions for the Paris Agreement. They have at their disposal such tools as the Non-State Actor Zone for Climate Action to maximize the visibility and transparency with which they do so.⁶⁹

With regard to the fourth driver, the climate change debates might already be positioned to achieve real progress. In the work to develop alternatives to fossil fuel subsidies and to build coalitions for a swift transition to a low-carbon economy, the climate community has seen remarkable changes in the less than three years since the Paris Agreement was adopted. Sustainable energy sources, such as solar and wind energy, are now outstripping fossil fuels in terms of investment, and outperforming them in terms of new energy provision to grids worldwide. Of the new power generating capacity added globally in 2016

(138.5GW), 55 percent came from renewable sources, the highest ever.⁷⁰ According to the optimistic scenario proposed by Bloomberg New Energy Finance, \$10.2 trillion will be invested in new power generation capacity worldwide by 2040. Some 72 percent, or \$7.4 trillion, are predicted to go to renewables. By that year and according to these projections, wind and solar sources would account for 48 percent of installed capacity and 34 percent of electricity generation worldwide⁷¹

With regard to the fifth driver, there are immense opportunities for inter-regime learning in the area of fossil fuel subsidies, by incorporating in one regime references to acceptable, open and transparent standards developed in other regimes. Examples include the reform of coal subsidies within certain national jurisdictions, the fisheries subsidies process, and negotiations regarding agriculture subsidies.⁷² In each case, the principles and processes to identify subsidies that are harmful to social, environmental and economic objectives can be transferred from one regime to the other. The concept of sustainable development provides the theoretical framework necessary to translate experiences from one regime to another.⁷³

In conclusion, the potential to apply the same hypothetical drivers for the success of fisheries subsidies reforms to the climate challenge is important, especially as alternatives to fossil fuel subsidies have already been identified and since the potential for inter-regime learning in the context of sustainable development is immense. Increased high-level political leadership, strong civil society and private sector engagement, and greater scientific, academic and economic policy research appear as the three areas where efforts could be put in the short term to achieve progress.

65 Laurent Fabius, Minister of Foreign Affairs and International Development, President of COP21, Press Briefing, “Climate change: COP21”, New York (29 June 2015), online: <www.diplomatie.gouv.fr/en/french-foreign-policy/climate/events/article/climate-change-cop21-press-briefing-by-laurent-fabius-new-york-29-06-15>.

66 These are: business and industry NGOs (BINGO), environmental NGOs (ENGO), Indigenous peoples’ organizations (IPO), local government and municipal authorities (LGMA), research and independent NGOs (RINGO), trade union NGOs (TUNGO), farmers’ NGOs (Farmers), women and gender NGOs (Women and Gender), and Youth NGOs (YOUNGO).

67 Michele Merrill Betsill & Elisabeth Corell, eds, *NGO Diplomacy: The Influence of Nongovernmental Organizations in International Environmental Negotiations* (Cambridge, MA: MIT Press, 2008).

68 UNFCCC, *Adoption of the Paris Agreement*, 12 December 2015, Dec CP.21, 21st Sess, UN Doc FCCC/CP/2015/L.9 at paras 117–24, 134–37.

69 Andrea Bianchi & Anne Peters, eds, *Transparency in International Law* (Cambridge, UK: Cambridge University Press, 2013).

70 Frankfurt School-UNEP Centre/BNEF, *Global Trends in Renewable Energy Investment 2017* at 11, online: <www.fs-unep-centre.org>.

71 Bloomberg New Energy Finance, *New Energy Outlook 2017*, Executive Summary.

72 For an analysis of the role of international organizations in WTO dispute settlement, see Marina Foltea, *International Organizations in WTO Dispute Settlement: How Much Institutional Sensitivity?* (Cambridge, UK & New York: Cambridge University Press, 2012).

73 Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (New York: Oxford University Press, 2004).

Conclusion

This paper points to an opportunity for a triple win in economic, social and sustainable development regimes through the removal of perverse incentives for the fisheries industry. The Buenos Aires WTO Ministerial Conference of December 2017 charts a path for resolution in 2019 and calls for heightened involvement from all stakeholders to deliver on several SDGs and the Paris Agreement. Lack of agreement at the 2019 Ministerial Conference, however, would not be fatal to this process, which could either continue under the aegis of the WTO or in other fora that interact with the trade regime. New research shows that when the rules adopted in one regime are supported by a “thick stakeholder consensus,” their greater perceived authority will make them easier to transfer to other fora through inter-regime learning.⁷⁴

One important caveat is in order. Even if fisheries subsidies reform succeeds in 2019 at the WTO or within other parallel fora, and even if countries take the necessary implementing actions, there can only be real progress for oceans recovery if climate change is also addressed successfully.

Based on the fisheries subsidies reform experience, three hypothetical drivers for progress in the short term on fossil fuel subsidies reform can be identified: increased high-level political leadership, strong civil society and private sector engagement, and greater scientific, academic and economic policy research. In order to enable these drivers for success, this paper closes with suggestions for three cross-cutting research items going forward:

→ Efforts should be enhanced to highlight the scale, scope and specific focus of perverse fossil fuel subsidies, and to communicate them to the highest political level in countries that have an interest in developing energy alternatives, or in redirecting subsidies to other priorities. These efforts will be most successful if they engage civil society actors and succeed in harnessing the resources and persuasive influence of alternative industry actors, inter-governmental agencies, and leading governments that have identified an “enlightened self-interest.”

→ Concentrated and expert-based research and negotiations will be essential to develop the standards and detailed rules that will be necessary, if and when governments are able to turn to fossil fuel subsidies reform. In order to ensure that inter-regime references and learning can be made successfully, including with regard to the goals and principles established in the Paris Agreement and the SDGs, the standards in question must be legitimate, independent, inclusive and, indeed, nearly beyond reproach. For climate change, only in the last two years are such standards finally starting to be developed through the efforts of organizations such as the IPCC and International Organization for Standardization.

→ Transparency has been a major theme of reform efforts in both fisheries and fossil fuel subsidies. Careful analysis of the opportunities and legal rules that provide for transparency, good governance, participation, consultation, access to information, observer status and capacity-building in energy-related negotiations will be important.

Further work is needed on each of these three strategic proposed ways forward. Such work could take the form of an issues brief, followed by a workshop or focused dialogue bringing together key stakeholders and partners.

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74 Young, “Energy Transitions”, *supra* note 8.

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