

TOWARDS SUSTAINABLE FISHERIES ACCESS AGREEMENTS

Issues and Options at the World Trade Organization

Prepared by

Marcos A. Orellana

Center for International Environmental Law (CIEL)

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For more information regarding UNEP's work on fisheries subsidies, please contact Anja von Moltke, Economics Affairs Officer, Economics and Trade Branch, at tel.: +41 22 917 8137 or email anja.moltke@unep.ch.

For more information on the general programme of the Economics and Trade Branch, please contact:

Hussein Abaza

Chief, Economics and Trade Branch (ETB)

Division of Technology, Industry and Economics (DTIE)

United Nations Environment Programme (UNEP)

11-13 Chemin des Anemones

1219 Chatelaine/Geneva

Tel: +41 22 917 8179

Fax: +41 22 917 8076

<http://www.unep.ch/etb>

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Acronyms

ACP	African, Caribbean and Pacific Countries
ASCM	Agreement on Subsidies and Countervailing Measures (“SCM Agreement”)
CFFA	Coalition for Fair Fisheries Arrangements
DTIE	Division of Technology, Industry, and Economics (UNEP)
DWFN	Distant Water Fishing Nation
EEZ	Exclusive Economic Zone
ETB	Economics and Trade Branch (UNEP/DTIE)
EU	European Union
GATT	General Agreement on Tariffs and Trade
ICTSD	International Centre for Trade and Sustainable Development
IUU Fishing	Illegal, Unreported and Unregulated Fishing
OECD	Organisation for Economic Co-operation and Development
SIDS	Small Island Developing States
UNCLOS	United Nations Convention on the Law of the Sea (“LOS Convention”)
UNEP	United Nations Environment Programme
WTO	World Trade Organization

Abstract

Fisheries access agreements can be described as a form of trade, where a country with fisheries resources in its Exclusive Economic Zone (EEZ) sells fishing rights to another country, the Distant Water Fishing Nation (DWFN). The treatment of subsidies related to fisheries access arrangements has emerged as a sensitive topic within WTO fisheries subsidies negotiations. This is due to the high dependency of many small island and coastal developing countries on access fees. At the same time, access agreements have come under international scrutiny as a result of their negative impacts both on fisheries resources, including associated ecosystems, and on international markets. These impacts are aggravated as a result of the lack of transparency surrounding access agreements. This paper aims to support ongoing WTO negotiations by, firstly, analyzing the legal framework governing access agreements and, secondly, exploring options for improved disciplines on “access-related” fisheries subsidies.

Based on a legal analysis of the WTO Agreement on Subsidies and Countervailing Measures (ASCM) and relevant jurisprudence, the paper comes to the conclusion that access agreements per se do not breach any rules of the ASCM. However, certain fisheries enabled by access agreements may fall within the agreement’s disciplines, subject to confirmation through a case-by-case analysis. Examining the ASCM provisions in detail, the paper finds that a “financial contribution” – as per the ASCM definition of a subsidy – exists where a DWFN provides its fleet with access rights to fish in a foreign EEZ. Such financial contribution “confers a benefit” – the second element of the ASCM subsidy definition – where the DWFN fails to receive sufficient payment in exchange for the right to fish that it provides to its fleet. Different methods, depending on the particular case, may be used to determine a “sufficient payment” (the numerical value of a benefit). The benchmark would be constructed on the basis of prevailing market conditions in the country of provision (mainly prices), on the basis of production costs or taking into account world markets.

Based on this analysis, the paper presents concrete textual suggestions for improving the ASCM with regards to “access-related” fisheries subsidies. Suggested options range from improving the definition of subsidies to introducing criteria-conditioned exceptions for developing countries and strengthening transparency requirements of access agreements. With regard to ongoing WTO negotiations, the paper argues that a clarification on “access-related” subsidies within reformed fisheries subsidies disciplines would establish a solid basis for dealing with a key element of international fisheries policy and avoid potential litigation at a later stage. It would also provide the opportunity to establish conditions to ensure that access agreements enhance and not undermine the sustainable development of small island and coastal developing countries.

1. Background and State of Play

The treatment of subsidies related to access arrangements¹ has emerged as a sensitive topic within the current WTO fisheries subsidies negotiations. While a consensus has emerged on the need to discipline fisheries subsidies that contribute to overcapacity and over-harvesting, in light of their negative impacts on international trade, the marine environment, and sustainable development more generally, subsidized fishing enabled by access arrangements has emerged as a controversial issue. Delegations from countries highly dependent on access fees have been especially uneasy, fearing that new WTO rules could reduce the North-South monetary transfers these fees represent. Other countries have pointed to the lack of transparency surrounding these agreements and to their negative impacts both on sustainability and on international markets. The discussion on this topic has been further compounded by terminological difficulties, which have made it difficult to clearly identify what the subsidy element is, if any, involved in access arrangements.

The access arrangements at issue here, generally involve government-to-government payments in return for foreign access to developing countries' Exclusive Economic Zones (EEZ).² Such access arrangements constitute significant sources of income for some developing countries, in particular Small Island Developing States (SIDS), and thus may be important to meeting legitimate development needs. In light of their importance for the budget of certain coastal developing countries, SIDS and other countries have proposed excluding access arrangements from any definition of fishing subsidy.

At the same time, fisheries access arrangements now form the main supply for fishery species such as tuna, some demersal fishes, and molluscs to the EU and Japan, which are major Distant Waters Fishing Nations (DWFNs). Fisheries access payments, subsidies on fishing vessels, financial credits and compensation on joint ventures with third countries form significant fisheries budgets in these DWFNs.

Environment and development implications of fisheries access arrangements

It is clear that developing countries do not always get the best end of the access arrangement bargains.³ The terms of the arrangements often leave the host country with only a fraction of the actual resource value, and more than a few access arrangements have led to the depletion of host country stocks.

¹ Since the establishment of the 200-mile Exclusive Economic Zone (EEZ) by the 1982 UNCLOS, 90 per cent of the world's exploitable fish resources are under the control of coastal States. Since then, access agreements have become an increasingly important part of trade and development relations between developed and developing countries. These arrangements allow distant fishing nations to fish in the host country waters in return for 'access fees' paid by the distant nation to the coastal State.

² Certain government-to-government access arrangements do not exchange access for payments, but may establish reciprocal EEZ access or other arrangements. Other types of access agreements are concluded between government and the private sector (industry associations or single companies).

³ Stephen Mbithi Mwikya, *Fisheries Access Agreements: Trade and Development Issues*, ICTSD 2006, pgs. 12 et seq.

Case studies in Senegal and Argentina have shown how Distant Water Fishing Nations, facing overexploitation and fisheries collapse in their own waters, have transferred their problem of overcapacity to distant waters via bilateral access agreements.⁴ Research on former Euro-African fishing agreements reveals how distant water fleets significantly contributed to overfishing and declining yields in African waters.⁵ Moreover, as the Senegalese example illustrates, vessels often discard as “bycatch” fish that are not of the required species or size agreed in the arrangements in order to maximize the value of their output. Furthermore, in the absence of proper means and equipment for monitoring fishing activities, fishing by foreign fleets in Senegal’s EEZ takes place virtually without control on the part of the Senegalese authorities.⁶ Such practices compound the problems raised by the fact that access agreements are only very rarely accompanied by thorough stock assessments – hence, frequently neither the surplus of a fishery is determined before concluding arrangements,⁷ nor are precise provisions consistently included related to effort or catch limits.⁸

Declining fish stocks, and related impacts on the marine eco-system, entail severe social and economic consequences for the local fishing population and the development of the island or coastal State.⁹ Some agreements have attracted particular attention not only because they comprise high-volume fish catches, but also since they involve species that are endangered or used locally, *i.e.*, that are strategic from the point of view of food security. Frequent conflicts between distant fishing fleets and local small-scale fleets relate to competing for the same stocks, gear conflicts when vessels occupy the same fishing grounds and destruction of locally-important habitats such as reefs and seagrass beds.¹⁰ In addition, access arrangements have often been criticized as unfair given that they are very rarely based on resource rent principles – access agreements in the South West Indian Ocean and also the Western and Pacific Ocean, for example, are estimated to account for not more than 5-10 per cent of the value of the catch.¹¹

⁴ UNEP, *Fisheries Subsidies and Marine Resource Management: Lessons learned from Studies in Argentina and Senegal*, 2003, pg. 8. Especially the EU’s second generation agreements with Argentina, establishing joint-enterprise companies operating with EU vessels, have proven disastrous for Argentine hake fishery.

⁵ See UNEP, *Evaluation de l’impact de la libéralisation du commerce. Une étude de cas sur le secteur des pêches de la République Islamique de Mauritanie*, 2006; Gareth Porter, *The Euro-African Fishing Agreements: Subsidizing Overfishing in African Waters*, Background Paper for UNEP/WWF Workshop, 1997.

⁶ UNEP, *Fisheries Subsidies and Marine Resource Management: Lessons learned from Studies in Argentina and Senegal*, 2003, pgs. 8 and 48.

⁷ ADE-PWC-EPU, *Evaluation of the Relationship between Country Programmes and Fisheries Agreements*. Final Report, prepared for European Commission, 2002. This report shows that even where scientific analysis comes to necessary conclusions, this advice is often ignored (e.g. octopus in EU-Mauritania 2001-2006).

⁸ Les Clark, *Perspectives on Fisheries Access Agreements: Developing Country View*, prepared for OECD Workshop on Policy Coherence for Development in Fisheries, 2006, COM/AGR/DCD/PCDF(2006)2. For an analysis of EU-ACP Fisheries Partnership Agreements, see: Niki Sporrang et al., *Fisheries Agreements with Third Countries – Is the EU Moving towards Sustainable Development?* IEEP for WWF, 2002.

⁹ For a recent illustration in the case of Mauritania, see “*Global Fishing Trade Depletes African Waters*”, Wall Street Journal, 18 July 2007 by John W. Miller.

¹⁰ Stephen Mbithi Mwikya, *Fisheries Access Agreements: Trade and Development Issues*, ICTSD 2006.

¹¹ Stephen Mbithi Mwikya, UNEP 2008 (forthcoming).

The fact that distant water fleets are often highly subsidized exacerbates the impacts depicted above. By lowering the production costs of fishing units, fishing agreements may encourage foreign vessels to fish beyond the economic optimum compatible with sustainable resource management, discourage the exit of fishing vessels from troubled fishing industries, and encourage overfishing as mentioned above.¹² To the extent that distant water fleets receive subsidised access when their governments acquire access rights for them, the subsidized access itself can further distort competitive relationships on the international level.

On the positive side, and in addition to the important contribution of access payments to SIDS and coastal developing countries' economies mentioned above,¹³ access arrangements have the potential to help integrate developing-country fishing or fish-processing industries into the global economy.¹⁴ Likewise, if properly designed and implemented, they can help promote conservation and sustainable fisheries management.¹⁵

International debate on fisheries access agreements and UNEP involvement

The mixed social, economic and ecological consequences of fisheries access arrangements have been explored by a multitude of actors on the national and international level, such as the Coalition for Fair Fisheries Agreements (CFFA),¹⁶ WWF,¹⁷ Enda Diapol,¹⁸ the International Centre for Trade and Sustainable Development (ICTSD),¹⁹ the OECD,²⁰ and the EU²¹ itself. Coming from different perspectives, ranging from an environmental to a policy coherence dimension, these actors have pointed to the negative impacts of inappropriately designed fisheries access agreements and have called for international action to make them supporting instead of undermining sustainable development.

¹² See for example Gareth Porter, *The Euro-African Fishing Agreements: Subsidizing Overfishing in African Waters*, Background Paper for UNEP/WWF Workshop, 1997.

¹³ For example, in Kiribati and the Federated State of Micronesia access fees amount to about 45 and 25 per cent of government revenue respectively (Mbithi, 2008, forthcoming).

¹⁴ Michaud (2003) illustrates, for example, how industrial tuna fishing and the tuna canning factory have become indispensable pillars of the Seychelles economy, in great part due to the access agreements which allow distant water fleets from the EU, Japan and Taiwan to fish for tuna in Seychelles waters.

¹⁵ David Schorr, *Healthy Fisheries, Sustainable Trade. Crafting New Rules on Fishing Subsidies in the World Trade Organization*, WWF 2004, pgs. 53 et seq.

¹⁶ Béatrice Gorez, *EU-ACP Fisheries Agreements*, CFFA Policy Study, 2005.

¹⁷ A stream of work by WWF started in 1998 with the publication *The Footprint of Distant Water Fleets on World Fisheries*, WWF International, 1998.

¹⁸ Enda Diapol (Senegal) has undertaken several activities on access regimes in the context of programmes related to fish (PCEAO, REPAO).

¹⁹ See Stephen Mbithi Mwikya, *Fisheries Access Agreements: Trade and Development Issues*, ICTSD 2006.

²⁰ See for example OECD, *Policy Coherence for development in fisheries*, 2005, AGR/FI(2004)3/REV2 or: Les Clark, *Perspectives on Fisheries Access Agreements: Developing Country View*, 2006, prepared for OECD Workshop on Policy Coherence for Development in Fisheries, COM/AGR/DCD/PCDF(2006)2.

²¹ Bartels et al., *Policy Coherence for Development and the Effects of EU Fisheries Policies on Development in West Africa*. Draft Report, submitted to the European Parliament, 2007.

UNEP has examined access arrangements in the broader context of its work on fisheries subsidies. Since 1997, UNEP has sought to improve the understanding of the impact of fisheries subsidies through a series of workshops, analytical papers and country projects. As mentioned above, subsidies related to access arrangements are often part of a broader package of subsidies having negative impacts on fishing stocks and associated ecosystems. A UNEP-commissioned study suggested, for example, that fees paid by European ship owners covered by the agreements represented only about 10 per cent of the price of access paid by the European Commission, itself representing only a fraction of the actual value of the target fisheries resources.²² Some of the complex environmental and development impacts of such subsidies have been covered by UNEP case studies (see above), and assessed in an analytical paper reviewing how the specific characteristics of a fishery (e.g., its level of exploitation and its management regime) may affect those impacts.²³

The legal and policy implications of the issues raised above have been discussed in several workshops organized by UNEP, for example at the workshop on “Fisheries Subsidies and Sustainable Fisheries Management” in April 2004. A June 2005 UNEP roundtable on fisheries subsidies resulted in a request by governments for UNEP to study the question of access arrangements in the broader political economy framework, with a view to providing analysis on how the issue might be handled in the WTO context.²⁴

On the basis of some preliminary results, the May 2006 discussion (UNEP-ICTSD-WWF Workshop) on access arrangements helped clarify some key points.²⁵ *First*, there appeared to be agreement that new WTO rules should not treat government-to-government access fee payments as “subsidies” flowing between Distant Water Fishing Nations and host EEZ nations. *Second*, participants from all perspectives appeared united in the view that new WTO rules should not impede or discourage the access payments on which many small vulnerable economies depend. *Third*, participants also generally agreed that the lack of transparency of current access arrangements poses significant problems and that there might be a role for the WTO in this regard. However, some differing views existed with regards to measuring the subsidy element of access agreements.²⁶

In December 2006, WWF, in collaboration with UNEP, organized a consultation at the WTO that showed growing consensus on the fact that there is no subsidy in the access arrangement *per se*,

²² UNEP, *Fisheries subsidies and Marine Resource Management: Lessons learned from Studies in Argentina and Senegal*, (2003), pg. 37.

²³ UNEP, *Analyzing the Resource Impact of Fisheries Subsidies: A Matrix Approach*, 2004.

²⁴ See Chair’s Summary, 30 June 2005, available at: <http://www.unep.ch/etb/events/Events2005/midTermReview/unepChairsSummary.pdf>.

²⁵ See Chair’s Summary, 11 May 2006, available at: <http://www.unep.ch/etb/events/2006ICTSDWWFMay11.php>.

²⁶ Some participants argued that a subsidy exists to the extent the access fees are not repaid to the DWFN government by its industry. Others referred to the difference between the commercial value of the access enjoyed by the private fleet and the amount the fleet paid to its government in return for the securing of that access.

but rather there is *only* a subsidy under ASCM Article 1 when a DWFN fails to receive sufficient payment from its distant-water fishing fleet in exchange for onward transfer of rights to fish in foreign EEZs. The legal analysis that supports this conclusion is presented below. It starts from the assumption that any subsidy that might be found within access arrangements can only arise between the DWFN and its own domestic fleet, on whose behalf the DWFN secured access to foreign fishing grounds.

Since December 2006, WTO negotiations have resumed, including debates in the Rules Negotiating Committee on fisheries subsidies reform. In this context, a number of proposals addressing access agreements have been submitted and discussed.²⁷ These submissions reflect the evolution of the debate by clearly distinguishing access agreements, the payments pursuant to such arrangement, and the further transfer of rights to the distant water fleet. Moreover, several country positions adhere to the idea of conditionality by suggesting environmental and transparency requirements – which reveals a growing attention to significant sustainability concerns related to fisheries access agreements.

²⁷ For a detailed overview of these submissions, please refer to chapter 5.

2. Issue, Scope and Terminology

This paper builds on the above-mentioned developments. It analyzes the legal framework governing access arrangements, and explores options for improved disciplines on fishing subsidies. In that regard, this paper takes the view that if negotiators can agree on appropriate means to include subsidies associated with fishing access arrangements within new WTO rules, it could contribute to reforms that help: (a) create a fair trading field for competing DWFN fleets, as well as for the local fleets of host nations operating in their own EEZs; (b) enhance sustainable development of SIDS and coastal developing countries; (c) establish greater international transparency in cases of subsidized access; and (d) avoid over-exploitation of fisheries resources and associated ecosystems.

More particularly, this paper will analyze the legal issues relevant to the treatment of access agreements under the disciplines of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement or ASCM), with a view to clarifying how subsidized fishing enabled by access arrangements falls under the subsidies definition of the SCM Agreement.

In approaching this task, the paper will take as a given the reader's familiarity with the ASCM, and will only refer to its architecture when the analysis so requires. Key legal texts may be found in the Annex of this document.

Further, at least three preliminary distinctions between “*government payments*”, “*access to fisheries*”, and “*money collected*” are relevant to this topic, namely:

- *Payments* from a DWFN to a coastal State to secure access to its EEZ fisheries.
- *Access* to foreign EEZ fisheries granted to a distant-water fleet pursuant to government-to-government access arrangements.
- *Remuneration* collected by DWFN from its distant-water fleet in exchange for the transfer of access rights to fish in a foreign EEZ.

Lastly, as to the issue of terminology, which has been the source of considerable confusion and controversy, this paper will use the terms access arrangements or access agreements interchangeably.

3. Access Arrangements and the Law of the Sea

In order to properly contextualize the Doha Negotiations on fishing subsidies, particularly as they relate to access arrangements, references to the origins of the Exclusive Economic Zone (EEZ) highlight the importance of access arrangements in fostering development and food security. In addition, the UN Convention on the Law of the Sea (LOS Convention) and the FAO Code of Conduct provide relevant legal context to access arrangements.

3.1. The Exclusive Economic Zone: Origins and Challenges

The concept and practice of the Exclusive Economic Zone originated in the Santiago Declaration of 1952,²⁸ where Chile, Ecuador, and Peru proclaimed their patrimonial sovereignty over the marine living resources within the 200 nautical miles off their coasts.²⁹ This was not, however, without opposition from traditional maritime powers, including the United Kingdom and the United States, who were seeing their fishing vessels routinely seized when captured fishing within these proclaimed EEZs, particularly by Peru and Ecuador.³⁰

The stated goals of developing countries claiming their EEZs were to secure resources for developing their economies and to ensure food security for the population. These ideas gained force in the emerging practices of newly independent States across the world, particularly in Africa amidst the process of decolonization, finally crystallising the EEZ into a norm of customary international law. The EEZ has become a fundamental concept of the contemporary law of the sea, now codified in the UN Convention on the Law of the Sea.

The EEZ provides the coastal State, *inter alia*, with sovereign rights over the living and non-living natural resources found in the column of water adjacent to its coast, up to 200 nautical miles seaward. This sovereign right, however, is not absolute, but qualified with respect to arrangements that may be necessary to secure access to other States to the surplus of the allowable catch, as explored further below. Moreover, it implies the duty to conserve and manage natural resources and to ensure that the maintenance of the living resources in the EEZ is not endangered by over-exploitation.³¹

²⁸ See F.V. García Amador, *Génesis de la Zona Económica Exclusiva*, in: *La Zona Económica Exclusiva, Una perspectiva latinoamericana*, (Francisco Orrego Vicuña, Ed, 1982), pgs. 13-31.

²⁹ Chile D.S. No. 432, OJ 22 November 1954; Colombia, Law 7, 4 February 1980; Ecuador, D.E. No. 275, RO 1.029, 24 January 1956; Peru, R.L. No.12.305, 6 May 1955.

³⁰ See M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone*, (Martinus Nijhoff), 1987, pgs. 14-17.

³¹ See article 56 (Rights jurisdiction & duties of coastal State in exclusive economic zone), 61 (Conservation of living resources) and 62 (Utilization of living resources) of the LOS Convention.

3.2. Access Arrangements and the UN Convention on the Law of the Sea

As noted, under the LOS Convention, coastal States retain sovereign rights over the natural resources found up to 200 nautical miles from their coasts. The LOS Convention qualifies this sovereign right in important ways. For example, the LOS Convention provides that where the coastal State does not have the capacity to harvest the entire allowable catch in its EEZ, it shall, through agreements or other arrangements give other States access to the surplus of the allowable catch.³² Again here, the objectives of food security and development are apparent in the attempt to ensure the optimum utilization of fisheries.

This obligation to grant access to the surplus of the allowable catch in its EEZ via access arrangements in turn calls for several important considerations. First, the coastal State determines the allowable catch and this determination is excluded from compulsory dispute settlement; so in practice the obligation to grant access remains at the discretion of the coastal State.³³ Second, in granting access, preference should be accorded to developing land-locked and geographically disadvantaged States, taking into account economic considerations and nutritional needs.³⁴ Third, EEZ laws and regulations shall also apply to nationals of countries granted access, including those relating to *inter alia*: vessel position reports; species, seasons, gear, etc; and requirements for local landings.³⁵

To recap, customary law confers a sovereign right on the coastal State over its EEZ, and under the LOS Convention the coastal State is under an obligation to grant access to its EEZ via access arrangements where it does not have the capacity to fish the allowable catch. This framework under the Law of the Sea governing access arrangements to foreign EEZs would stand in direct conflict with the WTO if it were to be concluded that access arrangements, *per se*, constituted a violation of WTO law. While instances of conflicts of norms may be found in international law, the situation in respect of access arrangements does not seem to present such conflict among the WTO and the LOS Convention, as examined further below. In other words, the WTO and the LOS Convention can be applied concurrently. Before analyzing WTO law and the SCM Agreement in particular, however, a final element of context is relevant to situate access arrangements.

³² LOS Convention, Article 62 – see Annex.

³³ LOS Convention, Articles 61 & 297(3).

³⁴ LOS Convention, Articles 62, 69 & 70.

³⁵ LOS Convention, Article 62.

3.3. Access Arrangements and the FAO Code of Conduct

In addition to the LOS Convention, the Code of Conduct for Responsible Fisheries adopted under the auspices of the UN Food and Agriculture Organization (FAO) contains several provisions relevant to access arrangements. Generally, the Code places strong emphasis on enhancing the ability of coastal States in developing their own fisheries,³⁶ as well as on securing a livelihood for subsistence, artisanal and small-scale fishers.³⁷ More particularly, the Code of Conduct provides that States should not condition access to markets on access to resources.³⁸ The Code also states that this principle does not preclude fishing agreements between States which include provisions referring to access to resources, trade and access to markets, transfer of technology, scientific research, training and other relevant elements. However, it links the “right to fish” to the obligation to do so in a responsible manner so as to ensure effective conservation and management of the living aquatic resources³⁹ and contains detailed provisions related to management measures for the long-term conservation and sustainable use of fisheries resources.⁴⁰

Having established the legal framework that enables and governs EEZ access agreements, it falls to examine how WTO Law and particularly the SCM Agreement relate to access arrangements. This analysis follows next.

³⁶ FAO Code of Conduct, Article 5.2.

³⁷ FAO Code of Conduct, Article 6.18.

³⁸ FAO Code of Conduct, Article 11.2.7.

³⁹ FAO Code of Conduct, Article 6.

⁴⁰ FAO Code of Conduct, Article 7.

4. WTO Law and Access Agreements

The problem of how access agreements relate to the SCM Agreement raises complex legal issues. These issues have been compounded both by terminology difficulties, as well as by the types of particular questions asked. Indeed, while early discussions focused on whether access agreements *per se* constituted a subsidy, more recent comments have sought to identify certain elements or practices enabled by access agreements that could constitute a subsidy.

In approaching the legal issues involved in the examination of access agreements under the SCM Agreement, it is important to recall the basic components of these agreements. The starting point is: a government-to-government agreement that establishes the right of access – under agreed conditions – for the distant water fleet of one government to EEZ fisheries of the other. According to the particular *structure* of a specific agreement, this right of access might be exchanged for a fee, for “free” (*i.e.*, without explicit *quid pro quo* on the face of the agreement), or in exchange for non-pecuniary rights, which might consist in the reciprocal access to fisheries. Then, variations in the *modes of implementation* could include, *inter alia*:

- the level of fees paid by one of the governments;
- the form in which fees are calculated and paid, *e.g.*, lump sum or catch contingent;
- the degree to which the government paying the fees recovers them from its industry;
- the kind of conditions and regulations introduced into the agreement, including *e.g.* vessel monitoring systems, local landings, quotas, seasons, technology transfer, etc.;
- the level of transparency in negotiations and reporting.

These modes of implementation are relevant to the analysis of how the SCM Agreement applies or relates to access arrangements because they will determine whether a government grants a financial contribution to its industry that confers a benefit, *i.e.*, a subsidy.

4.1. Definition of Subsidy under the SCM Agreement

The starting point in the analysis of access arrangements under the SCM Agreement is, of course, the definition of “subsidy” (ASCM Article 1, see Annex). For a subsidy to be deemed to exist within the scope of the SCM Agreement two elements need to be present. First, there must be a **financial contribution** by a government, or by a private body “entrusted” or “directed” by the government. Second, a **benefit** must thereby be conferred.⁴¹ When these two elements are found in a governmental measure, a subsidy exists under the ASCM.

⁴¹ SCM Agreement, Article 1.1; also see Appellate Body Report, – *Softwood Lumber IV*, para. 51.

WTO jurisprudence has clarified the meaning of these terms to a large extent. Still, several areas remain subject to interpretation and thus are open for discussion. For example, while the Appellate Body observed that Article 1.1(a)(1) sets out a “wide range of transactions” that fall within the meaning of a financial contribution,⁴² the particular scope of application of these “transactions” involves a degree of uncertainty. In regards to the second element of a subsidy, the term “benefit” is not defined at all in the text of the ASCM.⁴³ Due to the scarcity of textual guidance in the definition of a subsidy, the analysis that follows emphasizes jurisprudential developments.

The following sections focus on the two elements of the definition of subsidy in the SCM Agreement (financial contribution and benefit), with a view to identifying how the SCM Agreement, as it currently stands, applies to subsidized fishing under access arrangements. Recalling the terminological distinction highlighted above (section 2), this analysis will not concern the *payments* from a DWFN to a coastal State, but only refer to the onward transfer of access rights and the corresponding *remuneration* collected by the DWFN from its distant-water fleet.

4.2. Interpretation of “Financial Contribution”

Out of the two elements of a subsidy, financial contribution presents less of a definitional problem. As noted by the Panel in *EC – Countervailing Measures on DRAM Chips*, “Article 1.1(a)(1) subparagraphs (i) to (iii) set forth three situations that are considered to constitute such a financial contribution by the government,” while subparagraph (iv) “adds that a financial contribution may also be considered to have been provided by the government, in cases where the government has entrusted or directed a private body to provide one of the types of financial contributions.”⁴⁴

Stated differently, the overall parameters of what constitutes a financial contribution are well delineated in the SCM Agreement. In that regard, the Appellate Body observed that:

“... a financial contribution may be made through a direct transfer of funds by a government, or the foregoing of government revenue that is otherwise due... in addition to such monetary contributions, a contribution having financial value can also be made *in kind* through governments providing goods or services, or through government purchases.”⁴⁵

The emphasis added in the quote above clarifies that financial contribution need not take the form of money, but can also occur through in kind contributions, such as the provision of goods. In this ambit, one issue that immediately surfaces in respect of access arrangements concerns the provision of rights to goods, such as the right to fish. This issue is addressed further below.

⁴² Appellate Body Report, *US – Softwood Lumber IV*, para. 52.

⁴³ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.173.

⁴⁴ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.48.

⁴⁵ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 52 (emphasis added).

For the purposes of examining access arrangements under the terms outlined by the SCM Agreement, as interpreted by the Appellate Body, the following questions appear most relevant:

4.2.1. Is there a financial contribution by the government or a public body within the territory of a member?

According to ASCM Article 1, “there is a financial contribution by a government or any public body within the territory of a member (referred to in this Agreement as “government”)”. Thus the question whether there is a “government” that provides a financial contribution.

The answer to this question will operate as a threshold and determine whether the examples of financial contributions listed in the SCM Agreement apply to access arrangements. It appears that in the context of a government-to-government access agreement which secures access to fish in the coastal State EEZ, the DWFN is a “government” for the purposes of the ASCM. Further, the access rights so obtained by the government are then transferred by the government to its fishing industry. Consequently, subsidized fishing under access arrangements falls under the scope of ASCM Article 1.

It has been argued, however, that no government-to-government transfers occur “within the territory of a member”, as access arrangements occur between governments, and that consequently these agreements are beyond the scope of the ASCM. This interpretation appears to read into Article 1 a territorial limitation of the ASCM. In that sense, this interpretation confuses the territorial application of the SCM Agreement, on the one hand, with the definition of public body, on the other.

On account of the text in its context, and in light of the object and purpose of the SCM Agreement, the better interpretation reads the phrase “within the territory of a member” as a way to distinguish and qualify the “public body” that immediately antecedes the phrase. In other words, a public body within the territory of a member that provides a financial contribution will be subject to the ASCM. Consequently, the place where the financial contribution takes place is not relevant. This interpretation is also consonant with the object and purpose of the SCM Agreement, which, *inter alia*, attempts to reduce distortions in the conditions of competition in international trade.

4.2.2. Is there a government practice involving a direct transfer of funds?

According to ASCM Article 1, there is a financial contribution where a government practice involves a direct transfer of funds (*e.g.*, grants, loans, and equity infusion), potential direct transfers of funds or liabilities (*e.g.*, loan guarantees); thus the question. This question received some attention by commentators before the Appellate Body decision in the *Softwood Lumber* case, examined further below.

At first sight the wording of Article 1.1(a)(1)(i) does not explicitly cover government-to-government access payments, but it does not exclude a coverage either.

It has been observed by Porter that access payments are not a “direct” transfer of funds from government to industry, but rather a transfer of funds from government-to-government.⁴⁶ This view is also shared by Stone, who observed that such payments would be indirect and thus outside the scope of the ASCM.⁴⁷

On the other hand, it has been argued that payments are a direct transfer of funds from the government that confers a benefit. Schorr has explored this vein, noting that the term “direct” does not require that the subsidy flow “directly to the subsidized party.”⁴⁸ In light of the context of Article 1.1(a)(1)(i), Schorr bases his argument on the fact that for a subsidy to exist under Article 1 there must not only be a “financial contribution” (Art. 1.1(a)) but also a “benefit” conferred (Art. 1.1(b)). These requirements are set out in separate paragraphs of Article 1. This separate treatment implies that it is only the benefit and not necessarily the financial contribution that must run to the subsidized party. According to this reasoning the word “direct” is only meant to define one form of a financial contribution (the actual transfer of money) in contrast to other forms listed in Article 1.1(a)(1) (e.g., contribution through an intermediary funding mechanism named in Article 1.1(a)(1)(iv)). Schorr’s argumentation is therefore that not only “direct” but also “indirect” transfers of benefits are covered by the definition of Art. 1.1(a)(1)(i).

As noted by Chang, another argument that supports the view that a financial contribution may accrue indirectly through a transfer of funds is that Article 1 of the SCM Agreement does not require that the recipient and the beneficiary of a ‘financial contribution’ be identical.⁴⁹ Chang further underlines that indirect subsidies are not a unique feature of the fisheries sector but are just as likely to occur in other manufacturing sectors as well, citing the WTO panel’s decision in the *United States Lead*.⁵⁰

These “indirect transfer” analyses, however, falter in the case of access agreements insofar as they focus on government-to-government payments instead of on the relationship between a Distant Water Fishing Nation and its industry. A different and ultimately more satisfactory approach arises under ASCM Art. 1.1.(a)(1)(iii). This alternative approach – which has been explored in detail

⁴⁶ UNEP, *Fisheries Subsidies, Overfishing and Trade*. 1998, pg. 63.

⁴⁷ Christopher Stone, *Too Many Fishing Boats, Too Few Fish: Can Trade Laws Trim Subsidies and Restore the Balance in Global Fisheries?*, in: *Ecological Law Quarterly* 24, 1997, pg. 505.

⁴⁸ David Schorr, *Healthy Fisheries, Sustainable Trade*, 2004, pg. 55.

⁴⁹ Seung Wha Chang, *WTO Disciplines on Fisheries Subsidies: A Historic Step towards Sustainability?*, in: *The Journal of International Economic Law*, pgs. 893, 894.

⁵⁰ Id. At 894, citing Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the U.K.*, WT/DS138/R, adopted on 6 July 1998, as upheld by the Appellate Body Report (WT/DS138/AB/R, 7 June 2000).

by the Appellate Body's *Softwood Lumber* decision and might be more relevant to the issue of access arrangements in the fisheries subsidies context – will be examined next.

4.2.3. Is there a provision of goods or services by the government?

According to the SCM Agreement, there is a financial contribution where the government provides goods or services. This question is probably the most directly applicable to the access rights acquired by the Distant Water Fishing Nation and the transfer of these fishing rights to its distant water fleet. By entering into access arrangements, do governments provide goods or services to its industry? Or rather, by transferring the fishing rights obtained by virtue of access agreements to its industry, do governments provide goods or services to its industry?

On the one hand, it could be argued that access rights (licenses, permits) are not a provision of goods given their regulatory character. Just like other laws or regulations permitting economic activities, such licenses do not constitute a provision of goods. On the other hand, it could be argued that access rights to fish – and particularly of rights to fish *in a foreign EEZ* – do constitute a “provision of goods” under the ASCM. In that vein, the purpose of the Article 1 is to reach any government measure that provides capital, operating resources, or other services to specific industries on terms better than could be obtained on the open market. As observed by Schorr, access payments are “tantamount to the provision of foreign fishing licenses to domestic industry, in a context in which the only alternative for the industry would be to purchase the licenses themselves.”⁵¹

This issue, i.e., whether rights to fish constitute a provision of goods, is illuminated by the *US – Softwood Lumber IV* case, as explained next. The discussion is divided into two parts: first the question of what is a “good”, and second the question of what does it mean to “provide” goods.

Interpretation of “goods” in Article 1.1(a)(1)(iii)

In *US – Softwood Lumber IV* Canada appealed the final determination of the US Department of Commerce that “Canadian provincial governments made a financial contribution because, through stumpage arrangements, those governments provide goods to timber harvesters.”⁵² The Panel had ruled that “providing standing timber to the timber harvesters through the stumpage programmers” fell within the scope of Article 1.1(a)(1)(iii), as providing the access rights to standing timber could be classified as providing goods.⁵³

Appealing this decision, Canada argued, “standing timber, that is, trees attached to the land and therefore incapable of being traded as such, are not ‘goods’.”⁵⁴ Canada’s argument was based

⁵¹ David Schorr, *Healthy Fisheries, Sustainable Trade*, 2004, pg. 56.

⁵² Appellate Body Report, *US – Softwood Lumber IV*, para. 46.

⁵³ Appellate Body Report, *US – Softwood Lumber IV*, para. 47.

⁵⁴ *Id.*, para. 48.

primarily on the contention that the term “goods” only encompasses “tradable items with an actual or potential tariff classification.”⁵⁵

The argument that only “harvested timber” is traded, and not “standing timber” – and therefore, because the latter is not a “tradable item,” it is not a “good” – was rejected by the Appellate Body. In rejecting this argument, the Appellate Body decided that stumpage contracts that provide access to an area of land implicitly provide the individual trees for purposes of harvesting.⁵⁶ For this reason, the Appellate Body found no reason to exclude standing timber from the scope of “goods” based on the notion that stumpage agreements do not explicitly provide the individual harvested trees. Also, in considering the ordinary meaning of the term “goods” in Article 1.1(a)(1)(iii), the Appellate Body found that it does not “exclude tangible items of property, like trees, that are severable from land.”⁵⁷

The argument that “goods” must have a “potential or actual tariff classification” was also rejected, as it implies that the term “goods” in the SCM Agreement has the same definition as “products” in the GATT 1994.⁵⁸ In the Appellate Body’s view, the scope of the meaning of “goods” should not be limited by the definition of the term “products” in Article II of the GATT 1994. Such an interpretation would “undermine the object and purpose of the *SCM Agreement*, which is to strengthen and improve GATT disciplines.”⁵⁹ Accordingly, the Appellate Body decided “‘Goods’ in Article 1.1(a)(1)(iii) of the SCM Agreement and ‘products’ in Article II of the GATT 1994 are different words that need not necessarily bear the same meanings in the different contexts in which they are used.”⁶⁰

In sum, the Appellate Body found that:

“nothing in the text of Article 1.1(a)(1)(iii), its context, or the object and purpose of the SCM Agreement, leads us to the view that tangible items – such as standing, unfelled trees – that are not both tradable as such and subject to tariff classification, should be excluded... from the coverage of the term ‘goods’ as it appears in that Article.”⁶¹

This decision is relevant to the question of subsidized fisheries under access agreements in light of the clear parallels between trees and fish. Both trees and fish are tangible goods that can be harvested from the land or the sea. Both trees and fish are generally fungible goods, except in rare circumstances. Both trees and fish are harvested by virtue of regulatory permits that usually specify conditions of harvest, such as quotas and location. Further, both trees and fish become

⁵⁵ Id., para. 54.

⁵⁶ Ibid., para. 66.

⁵⁷ Ibid., para. 59.

⁵⁸ Ibid., para. 61.

⁵⁹ Ibid., para. 64.

⁶⁰ Ibid., para. 63.

⁶¹ Ibid., para. 67.

the object of possession and exclusive appropriation when harvested. Thus, if trees standing in provincial lands are “goods”, it would be extremely odd that fish swimming in the EEZ were not.

In sum, trees under stumpage agreements as well as fish under access agreements are “goods” under Article 1 of the SCM Agreement. Thus, if they are provided by the government, there will be a “financial contribution”. This leads to the question of what does it mean to “provide” goods, addressed next.

Interpretation of “provides” in Article 1.1(a)(1)(iii)

The second issue regarding financial contribution raised in the *US – Softwood Lumber IV* dispute is the scope of the term “provides” in Article 1.1(a)(1)(iii). Canada argued, “stumpage arrangements do not ‘provide’ standing timber... all that is provided by these arrangements is an intangible right to harvest.”⁶² That is, the access agreement only “makes available” standing timber. Canada’s contention was that “makes available” is not the same as “provides.” The Panel and Appellate Body were not impressed by these arguments.

In *US – Softwood Lumber IV*, the Appellate Body observed that:

“[...] the Panel found that stumpage arrangements give tenure holders a right to enter onto government lands, cut standing timber, and enjoy exclusive rights over the timber that is harvested. Like the Panel, we conclude that such arrangements represent a situation in which provincial governments provide standing timber. [...] By granting a right to harvest, the provincial governments put particular strands of timber at the disposal of timber harvesters and allow those enterprises, exclusively, to make use of the resources.”⁶³

Moreover, as the Appellate Body observed, “the evidence suggests that making available timber is the *raison d’être* of the stumpage arrangements.”⁶⁴ Accordingly, the Appellate Body concluded that “by granting a right to harvest standing timber, governments provide that standing timber to timber harvesters.”⁶⁵

For this reason, the Appellate Body upheld the findings of the US Department of Commerce, that providing standing timber through stumpage programmes is the same as providing a good, and therefore falls within the meaning of providing a financial contribution in Article 1.1(a)(1)(iii).⁶⁶

Again here, the similarities between stumpage arrangements and access arrangements are ostensible. To paraphrase, making available fish is the *raison d’être* of the access arrangements. And by granting a right to harvest fish in the foreign EEZ, DWFNs provide that fish to fishers.

⁶² *Id.*, para. 68.

⁶³ *Id.*, para. 75.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*, para. 76.

In light of these similarities, the conclusion is warranted that the transfer of foreign EEZ access rights by the DWFN to its fleet constitutes a financial contribution. Still, the fact that there is a financial contribution does not mean that there is a subsidy, as the second element of the definition of subsidy, *i.e.*, a benefit, also needs to be satisfied. We turn there next.

4.3. Interpretation of “Benefit”

The second element that must be satisfied for a subsidy to be deemed to exist is the conferral of a “benefit”. However, the SCM Agreement does not define what is meant by the term “benefit”. In that regard, the determination of the definitional scope of the term is an issue where WTO jurisprudence is particularly helpful. A second issue relevant to the determination of whether a benefit exists is the appropriate benchmark that should be used to calculate the numerical value of a benefit. These two issues are examined in light of the WTO jurisprudence, where available.

The most useful source for establishing what is meant by the term “benefit” is the Appellate Body Report in *Canada – Aircraft*. The issue in this case was whether the Panel had erred in its interpretation of “benefit.” The decision process followed by the Panel, as quoted by the Appellate Body, set out that:

“... the ordinary meaning of ‘benefit’ clearly encompasses some form of advantage. ... In order to determine whether a financial contribution confers a ‘benefit’, *i.e.*, an advantage, it is necessary to determine whether the financial contribution places the *recipient in a more advantageous position than would have been the case but for the financial contribution*. In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the market. Accordingly, a financial contribution will only confer a ‘benefit’, *i.e.*, an advantage, if it is *provided on terms that are more advantageous than those that would have been available to the recipient on the market.*”⁶⁷

The Appellate Body, in rejecting Canada’s appeal, upheld the Panel’s interpretation of the term “benefit.”⁶⁸ The decision is based on several considerations. First, it argued, the term “benefit” implies that there must be a recipient, and this “provides textual support for the view that the focus of the inquiry under Article 1.1(b) *should be on the recipient* and not on the granting authority” (emphasis added).⁶⁹ This is backed up by the ordinary meaning of the word “confer” in Article 1.1(b), which “calls for an inquiry into *what was conferred on the recipient.*”⁷⁰

Article 14 (see Annex) provides contextual support for this interpretation. The “explicit textual reference to Article 1.1” in Article 14 indicates that the two Articles are using the term in the same

⁶⁷ Panel Report quoted in Appellate Body Report, *Canada – Aircraft*, para. 149 (emphasis added).

⁶⁸ Appellate Body Report, *Canada – Aircraft*, para. 161.

⁶⁹ *Ibid.*, para. 154.

⁷⁰ *Ibid.*, para. 154.

way.⁷¹ Therefore, “the reference to ‘benefit to the recipient’ in Article 14 also implies that the word ‘benefit,’ as used in Article 1.1, is concerned with the ‘benefit to the recipient and not with the ‘cost to government.’⁷²

In this discussion, three elements may be distinguished:

1. Whether the recipient is left in a more advantageous position than would have been the case but for the financial contribution;
2. Whether the recipient is left better off, regardless of any cost to the government;
3. Whether the terms of the financial contribution are more advantageous than those that would have been available on the market.

Although these three elements are intertwined, they are addressed separately in turn.

4.3.1. Whether the recipient is left in a more advantageous position than would have been the case but for the financial contribution

The Panel in *EC – Countervailing Measures on DRAM Chips* equated the ordinary meaning of “benefit” to “that of an ‘advantage,’ something which leaves the recipient better off.”⁷³

On the one hand, it has been argued that access arrangements improve the competitive position of an industry that acquires access to a resource that it otherwise would not have had. Stated differently, if it were not for the financial contribution, certain fishing industries might not be able to capitalize on their investments and thus would be forced off the market. On the other hand, it has also been argued that such access *per se* does not make the recipient better off if other conditions are present, such as recovery of adequate fees by the government, etc. Under this light, the access *per se* does not appear determinative of whether the recipient is left in a more advantageous position, but rather an inquiry is due to the *conditions associated to the financial contribution*, in particular whether the industry has been charged adequate fees for the goods it has been granted.

4.3.2. Whether the recipient is left better off, regardless of any cost to the government

One implication of the Panel’s findings in *Canada-Aircraft* is that, in interpreting the term “benefit,” no consideration needs to be given to the “cost to government.”⁷⁴ That is, when seeking to establish if a benefit has been conferred by a financial contribution, what needs to be taken into account is the relative position of the *recipient* and not the government.⁷⁵ This is particularly important for

⁷¹ Ibid., para. 155.

⁷² Ibid., para. 155.

⁷³ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.173.

⁷⁴ Appellate Body Report, *Canada – Aircraft*, para. 150.

⁷⁵ This interpretation is based on a contextual reading of the *SCM Agreement* with particular regard given to Article 14. At the same time, Annex IV was found to be irrelevant to the context of “benefit”. See Appellate Body Report, *Canada – Aircraft*, para. 150.

access agreements, as consequently the analytical focus is not on the cost to the government, *i.e.*, the level of access fees that the DWFN paid to the coastal State, but on the value of the goods or services that the fishing industry received from the DWFN.

Further, in the context of subsidized fishing under access arrangements, the recipient appears to be the distant water fleet that gains access to an EEZ fishing right. Whether such recipient is left better off as a result of the transfer of such access rights must be determined by *reference to the market*, as explored next.

4.3.3. Whether the terms of the financial contribution are more advantageous than those that would have been available on the market

In accordance with the Appellate Body, the word “benefit” in Article 1.1(b) implies some kind of comparison. When this requirement is assessed in the contextual light of the SCM Agreement, the Appellate Body decided that the marketplace is the “appropriate basis for comparison.”⁷⁶ The Panel in *EC – Countervailing Measures on DRAM Chips* agreed with the Appellate Body decision in the *Canada – Aircraft* case that the appropriate benchmark for determining whether the recipient has received a benefit is the market, based on a contextual reading of Article 14. By implication, while general criteria can be identified regarding the existence of a benefit, ultimately the presence of such benefit will require a case-by-case analysis.

Thus, a benefit is conferred “if the recipient has received a financial contribution on terms more favorable than those available to the recipient in the market.”⁷⁷ This reference to the “market” raises several questions in regards to access agreements.

In the *Softwood Lumber* case, the Appellate Body concluded that “a benefit is conferred when a government provides goods to a recipient and, in return, receives insufficient payment or compensation for those goods.”⁷⁸ When this reasoning is applied to access rights to foreign EEZ fish, the issue immediately turns on whether the recipient fishing industry has paid an *adequate price* to its government in exchange for the access rights. Where industry has received access rights for free, there will be a strong case that a benefit has been conferred. But when industry has received access rights in exchange for some amount of payment, the question then becomes how to determine the adequacy of remuneration.

In accordance with Article 14 of the SCM Agreement, “the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).”

⁷⁶ *Ibid.*, para. 158.

⁷⁷ *Ibid.*, para. 159.

⁷⁸ Appellate Body Report, *US – Softwood Lumber IV*, Para. 84-5.

The starting point in the analysis is by reference to the prices of the goods in relation to the prevailing market conditions in the country of provision. As anticipated, the reference to the “market” raises several questions. *Firstly*, is it a market of access rights or of fish? As the financial contribution refers to the provision of goods, the analysis could thus focus on which *goods* are provided. In that sense, it appears that it is not just fish generally, but live fish in a foreign EEZ. If this is right, then there may not always be a market for such swimming fish in the water. And *secondly*, is it a market in the DWFN, in the coastal State, or a world market? As the financial contribution refers to the provision of goods, the country that *provides* the goods is the DWFN. However, the fish are located in a different jurisdiction, which raises difficult interpretative problems.

These questions have not been addressed in dispute settlement, and so there is little guidance from the Appellate Body. In any event, while the answer to these questions will be key to determining whether in a specific case a subsidy has been granted, for the purposes of this analysis, we do not need to arrive at definitive answers to these questions, because what is clear is that there will be a “benefit” when the fishing industry has not paid an adequate price to its government in exchange of fishing rights.

As much as we do not need to answer the questions outlined above, we do need to demonstrate nevertheless that the questions are *answerable*. Stated differently, is it possible to reach a determination of “benefit” under the current rules of the SCM Agreement? This question surfaces in a submission by the ACP to the Negotiating Group on Rules, which states, “Since the fishery access payments made are usually the result of a series of bilateral negotiations with the DWFNs, there appears to be no workable “market” benchmark against which one can examine whether the recipient is better off than it would otherwise have been.”⁷⁹

In this regard, there appears to be some indicia in WTO jurisprudence which could guide the analysis relating to the question of whether a workable “market” benchmark can be found or constructed. In this vein, in the *US – Softwood Lumber* case the Appellate Body addressed the issue whether “an investigating authority may use a benchmark, under Article 14(d) of the SCM Agreement, other than private prices in the country of provision.”⁸⁰ The Appellate Body found that:

“Members are obliged, under Article 14(d), to abide by the guideline for determining whether a government has provided goods for less than adequate remuneration. However, contrary to the views of the Panel, that guideline does not require the use of private prices in the market of the country of provision in every situation. Rather, that guideline requires that the method selected for calculating the benefit must relate to, or be connected with, the prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).”⁸¹

⁷⁹ TN/RL/W/209 (2007) para. 9.

⁸⁰ Appellate Body Report, *US – Softwood Lumber IV*, para. 82.

⁸¹ *Id.* at para. 96.

Stated differently, prices in the market of the country of provision are the primary, but not the exclusive, benchmark for calculating a benefit.⁸² The question that then surfaces is: when is it permissible to consider a benchmark other than private prices in the country of provision, for purposes of calculating a benefit. In this regard, the Appellate Body observed that, “an investigating authority may use a benchmark other than private prices of goods in question in the country of provision, when it has established that those prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods.”⁸³

The question of what alternative benchmarks can then be used has also received some attention by the Appellate Body, which noted that, “alternative methods for determining the adequacy of remuneration could include proxies that take into account prices for similar goods quoted on world markets or proxies constructed on the basis of production costs.”⁸⁴ The Appellate Body, however, observed that in the particular case it did not need to determine the consistency of any method with the SCM Agreement, as such evaluation will be determined by the way that any such method is applied in a particular case.

Consequently, it is submitted that it is possible to establish a workable market benchmark to determine whether a benefit has been conferred on the recipient of a financial contribution. This benchmark may need to be constructed on the basis of production costs or may take into account world markets. Either way, a benefit will be conferred to a distant water fishing industry when it fails to pay adequate remuneration for the rights to fish in a foreign EEZ. Clearly, the measure of “adequate remuneration” is not the amount paid from DWFN government to EEZ government for access rights. In the light of the figures mentioned above,⁸⁵ it is more likely that the “adequate remuneration” – since it is supposed to reflect the actual value of those access rights – substantially exceeds the amount paid by the DWFN government under the access agreement.

4.4. Conclusion on Access Agreements under the ASCM

This chapter analyzed the two elements of the definition of subsidy under the ASCM Agreement (as summarized in Table 1 below). It found that a financial contribution exists where a DWFN provides its fleet with access rights to fish in a foreign EEZ. It also found that such financial contribution confers a benefit where the DWFN fails to receive sufficient payment in exchange for the right to

⁸² *Id.* at para. 97.

⁸³ *Id.* at para. 103.

⁸⁴ *Id.* at para. 106.

⁸⁵ An additional example to those mentioned above is the case of Guinea-Bissau, where the EU compensation and license payments by the EU vessel owners in 1996 were equal to 10.5 per cent of the estimated value of resources taken by EU vessels from the Guinea-Bissau coastal waters; See Kaczynski/Fluharty, *European policies in West Africa: who benefits from fisheries agreements?*, in: *Marine Policy* 26 (2002), 75-93, pg. 85.

fish that it provides to its distant water fishing fleet. This chapter also emphasized that only a case-by-case analysis can show whether these two elements are present in any particular situation.

In sum, access agreements *per se* do not breach any rules of the SCM Agreement, but certain fisheries enabled by access agreements may fall within its disciplines.

In light of this conclusion, there are several options available to WTO members to improve existing rules. Before exploring some of these options, the next section will summarize the proposals that have directly addressed access payments in the Negotiating Group on Rules.

Table 1: Summary of Legal Analysis: The onward transfer of rights in the context of fisheries access agreements falls under the ASCM definition of subsidies of Art. 1 ASCM.

Subsidy Definition under ASCM Article 1	Analysis with regards to fisheries access agreements	Result
“Financial contribution” Art. 1.1. (a)(1)		✓
... by the government or a public body?	DWFN is a “government” for the purposes of the ASCM.	✓
... within the territory of a member?	This refers to the “public body” – the place where financial contribution takes place is irrelevant.	✓
Government practice involving a direct transfer of funds? Art. 1.1(a)(1)(i)	Access agreements include a direct transfer of funds from government to government – the recipient and the beneficiary of the “financial contribution” do not have to be identical.	?
Provision of goods or services by the government? Art. 1.1.(a)(1)(iii)		✓
... “good”?	Given the clear parallels between trees and fish, the Appellate Body’s interpretation of trees being a “good” under the ASCM in <i>US – Softwood Lumber IV</i> can be transferred to fish under access agreements.	✓
... “provides”?	Given the similarities between stumpage arrangements and access arrangements, the affirmative answer of the Appellate Body with regards to “provision” in <i>US – Softwood Lumber IV</i> can be transferred to the case of access agreements.	✓
“Benefit” conferred Art. 1.1.(b)	A benefit is conferred when the fishing industry has not paid an adequate price to its government in exchange of fishing rights. It is possible to establish a workable market benchmark to determine if this is the case, but this has to be done on a case-by-case basis .	✓

5. WTO Submissions Addressing Access Arrangements

Several WTO members have submitted proposals to the Negotiating Group on Rules that address access payments directly. The following table summarizes, in the simplest terms, the various positions submitted to date (June 2008). These submissions reflect different views on the role and legal status of access arrangements – with none of them proposing to include access agreements *per se* under new fisheries subsidies disciplines. They rather vary in (i) totally exempting access agreements from new disciplines and (ii) conditioning the exemption of access agreements upon the non-existence of a *subsidy element*, upon environmental and/or transparency criteria. With regards to the subsidy element, the different positions further differ in how to determine this (see discussion above).

Table 2: Key elements of country submissions

WTO member(s)	Key elements of position towards access agreements	Conditions for exemption
Small & Vulnerable Economies ⁸⁶	Propose to exclude access fees in fisheries access agreements from subsidies disciplines on account of special and differential treatment. However, are generally willing to examine possible disciplines which seek to minimize environmental and ecological damage so long as they are mutually supportive of the developmental priorities of SVE and other similarly situated developing countries.	None.
New Zealand ⁸⁷	Proposes to allow access payments but subject them to strict transparency provisions.	Transparency provisions.
Brazil ⁸⁸	Considers that a fishery subsidy shall be deemed to exist if a benefit is conferred in the onward transfer of access rights from the paying government, and proposes to prohibit such fishery subsidy. In addition, Brazil subjects access payments and transfer of access rights to strict transparency requirements.	Access agreements do not include <i>subsidy element</i> ; Transparency provisions.
Japan, Korea and Taiwan ⁸⁹	Propose to include access payments in a green box (non-actionable), provided that they comply with transparency and environmental criteria.	Transparency and environmental criteria.
Norway ⁹⁰	Is not proposing to include access fees in the discipline; however Norway is willing to consider suggestions that make it necessary for the fishing industry of developed members to reimburse their governments for the financing of such access agreements.	Potentially: DWFN government is reimbursed by its fishing industry for financing of access agreements (= no subsidy element).

⁸⁶ TN/RL/W/136 (2003); TN/RL/GEN/57/Rev.2 (2005); TN/RL/W/210/Rev.2 (2007).

⁸⁷ TN/RL/GEN/100 (2006); TN/RL/GEN/141 (2006).

⁸⁸ TN/RL/GEN/79/Rev.4 (2007).

⁸⁹ TN/RL/GEN/114 (2006); TN/RL/GEN/114 Rev.2 (2007).

⁹⁰ TN/RL/GEN/144 (2007).

Argentina ⁹¹	Distinguishes between payments pursuant to government-to-government agreements (outside of the scope of the ASCM) and the transfer of access rights by a government to specific enterprises if not done in exchange for a fair trade price (covered by the ASCM).	Transfer of access rights by a government to specific enterprises is done in exchange for a fair trade price (= no subsidies element).
The ACP Group ⁹²	Notes the general agreement amongst the WTO membership that government-to-government payments are not subsidies. The Group also argues that any secondary transfer of rights should be non-prohibited and non-actionable, on account of the difficulties in identifying a workable “market” benchmark against which the existence of a “benefit” could be determined	None.
United States ⁹³	Proposes to include the onward transfer of access rights to a member’s fleet within the definition of subsidies, but to exclude such transfer from the prohibition if in compliance with substantive economic, transparency, and environmental requirements.	Fleet pays compensation to its government comparable to the cost <i>it would otherwise have to pay for access to the fisheries resources</i> (= no subsidies element); Transparency and environmental requirements.
Indonesia ⁹⁴	Proposes to include the onward transfer of access rights to a member’s fleet within the disciplines, but to exclude such transfer from the prohibition provided that a benefit is not conferred by the onward transfer of such rights to the member’s fishing fleet and that agreements are in compliance with environmental and notification requirements.	Member’s fleet pays <i>compensation comparable to the value of the access of the resource</i> (= no subsidies element); Environmental and notification requirements.
Chair’s text ⁹⁵	Proposes to (i) prohibit subsidies arising from the further transfer of access rights and clarifies that government-to-government payments for access “shall not be deemed to be subsidies within the meaning of this Agreement” (Art I g), (ii) exempt access-related subsidies from prohibition for LDCs (Art III.1) and, under certain conditions, where the fishery in question is within the EEZ of a developing country member (Art III.3), (iii) require publishing of access agreements and notifying the committee of publication references and of the terms on which access rights are transferred (Art IV.2 and 3); in case of a dispute, the payer member has to bear the burden of proof in case of non-notification (Art VIII.3).	Exemptions under S&DT conditioned upon agreements (a) being made public, (b) containing provisions to prevent overfishing based on internationally-recognized best practices for fisheries management and conservation, including requirements & support for previous & regular science-based stock assessment, for management and control measures, for vessel registries, for reporting of effort, catches & discards and other measures as appropriate.
India, Indonesia and China ⁹⁶	Agree with Chair’s text on access-related provisions. Suggest mentioning explicitly that developing countries have the right to access the waters of other developing countries.	As chair’s text, with stock assessment being subject to peer review in the SCM Committee.

⁹¹ TN/RL/GEN/138/Rev.1 (2007).

⁹² TN/RL/W/209 (2007).

⁹³ TN/RL/GEN/145 (2007).

⁹⁴ TN/RL/GEN/150 (2007).

⁹⁵ TN/RL/W/213 (2007).

⁹⁶ TN/RL/GEN/155/Rev.1(2008).

While early submissions referred to access payments or fees, more recent submissions more clearly distinguish between the access arrangements, the payments pursuant to such arrangements, and the further transfer of rights to the distant water fleet. On the basis of the analysis conducted in this paper, it is submitted that this distinction is key to improving subsidies disciplines under the SCM Agreements. To this end, several options available for WTO members are discussed in the next section.

Moreover, several submissions suggest establishing conditions for the exemption of access-related subsidies of a potential prohibition. The Chair's text, issued on 30 November 2007 (see table 2), reflects this idea of conditionality. Although not directly linked to the Chair's text,⁹⁷ certain criteria for an exemption of access-related subsidies will be explored in the following chapter.

⁹⁷ When the Chair's text was submitted, this paper was already in its final writing stage. Therefore, no reference to the Chair's text is included in the following chapter on options for improvement of the ASCM. However, some elements of the Chair's text are similar to the options explored below and corresponding commentaries might provide useful input and insights for further elaboration of the Chair's draft.

6. Options for Improvement of the ASCM

WTO Negotiations on fisheries subsidies offer the possibility of improving disciplines to ensure that access agreements contribute to development of coastal and other States, to removing trade distortions in international fish markets, and to the sustainable harvest of fish stocks. Several options are available to WTO members in approaching these negotiations. These options range from inaction (6.1.) or improving the definition of subsidies (6.2.) to clarifying potential remedies (6.3.), introducing an exception for developing countries that meet certain criteria (6.4.), and strengthening transparency requirements (6.5.). These options are explored below. Concrete textual suggestions presented under these options vary from rather stand-alone elements only on access-related subsidies⁹⁸ to passages where access-related subsidies are embedded into a more general fisheries subsidies language. Nonetheless, all options have obviously to be considered in the context of the overall reform – single useful elements may thus be adapted accordingly and flow into broad proposals. The chair’s text, issued when this paper was in its final writing stages, contains some of these elements, subject to discussion and refinement as negotiations continue (see footnote 97).

6.1. Maintaining the Status Quo

The first option is, naturally, inaction; that is, maintaining the status quo with respect to subsidized fishing under access agreements.⁹⁹ This option is not without implications, however, given that access agreements and fishing subsidies are closely linked. At one level, maintaining the status quo could represent a lost opportunity to introduce effective disciplines and thus achieve the objectives articulated in the Doha Mandate. At another level, countries that suffer injury from artificially low prices or barriers to market access that result from subsidized fishing under access arrangements might explore dispute settlement.

In light of the conclusions reached above, any challenge to subsidized fishing under access agreements will be stronger where the foreign fishing industry does not pay or pays a minimal amount in exchange for the access rights. In this regard, the theory presented by some countries that access arrangements, *per se*, constitute an advantage that provides a benefit, on account of their use as tools to access resources otherwise off-limits, might be asserted in a confrontational, legal context. Still, any such challenge will face the difficulty identified above of determining the appropriate benchmark to demonstrate that a benefit has been conferred to the fishing industry.

⁹⁸ “Access-related subsidies” are subsidies that arise out of the relationships surrounding the procurement or transfer of foreign access rights, and that are – or under new rules would become – cognizable by the ASCM. Consistent with the discussion in chapter 4, above, this oblique term is preferable to the commonly used term “access subsidies” in order to clarify that the granting of access by a host country is not itself a subsidy, but that other elements of access relationships, such as the onward transfer of access rights, may be.

⁹⁹ This option is still seen in the context of a fisheries subsidies reform, which in this case would not mention fisheries access agreements.

Yet at another level, maintaining the status quo at the ASCM could displace the fisheries subsidies discussion regarding access agreements onto different forums.

6.2. Improving the Definition of Access-related Subsidies in the ASCM

Improving the definition of subsidies in the ASCM by explicitly referencing transfers of access rights acquired by virtue of access arrangements would provide for a comprehensive coverage of fishing subsidies and related practices in the improved disciplines. This improved definition could address both the “financial contribution” element and the “benefit” element of the subsidies definition. In this regard, it may be more important to clarify the “benefit” element, as the “financial contribution” element has been clarified by the Appellate Body. The analysis above (see chapter 4.4.) shows that this clarification would not change existing law but would simply make explicit what appears already to be implicit in it, reducing potential disputes over the treatment of access agreements as part of potential new fisheries subsidies disciplines.

If this definitional clarification avenue is pursued, an important element to be considered is an exception for developing countries that could safeguard the income of SIDS and other coastal developing countries. In this vein, it could be considered whether this exception should be subject to environmental, economic, and transparency criteria.

Option #1: *Clarifying Subsidy Element*

The definition of subsidy could be improved to include particular language clarifying the specific subsidy element involved in access arrangements:

Article 1

Definition of a Fisheries Subsidy

- 1.1 For the purpose of this Agreement, a **fisheries** subsidy shall be deemed to exist if:
- (a)(1) there is a financial contribution by a government or any public body within the territory of a member (referred to in this Agreement as “government”), i.e. where:
 - (v) **a government provides to its nationals direct or indirect access to fish under the jurisdiction of third States.**
- and
- (b) a benefit is thereby conferred, i.e. where:
 - (i) **the government fails to recover from its nationals the value of the access provided in (v) above.**

Commentary on Option #1

Option #1 addresses the relationship between access agreements and the ASCM by focusing on the two definitional elements of a subsidy.

First, the financial contribution element explicitly covers the situation where a government provides to its nationals direct or indirect access to fish under the jurisdiction of a third State. The reference to direct or indirect is meant to be encompassing of a broader range of situations. It must be noted that this clarification will clearly cover foreign EEZs. Additionally, reference to indirect may also encompass a situation where a party to a Regional Fisheries Management Organization is selling its fishing quota to another party.

Second, the benefit element explicitly covers the situation where a government fails to recover the value of such access from its fleet.

The merits of option #1 include: there would be no tension between UNCLOS, which encourages and in certain circumstances requires access agreements, and the ASCM, which would not cover access agreements *per se*. In addition, this option addresses the concerns of small developing countries regarding access agreements, as these arrangements would not be deemed illegal *per se*.

The demerits of option #1 centre on its workability in situations where the value of the access is hard to determine, for instance as a result of market distortions or lack of transparency. In such situations, techniques designed to determine the value of access to fish resources are further explored in option #2 below.

Option #2: *Techniques to Determine the Value of Access*

In addition to improving the definitional elements of a subsidy, the rules could explicitly address the difficulties in determining the value of access to fish resources. Under this option, the definition of a fisheries subsidy could read as follows:

Article 1

Definition of a Fisheries Subsidy

- 1.1 For the purpose of this Agreement, a **fisheries** subsidy shall be deemed to exist if:
- (a)(1) there is a financial contribution by a government or any public body within the territory of a member (referred to in this Agreement as “government”), i.e. where:

- (v) **a government provides to its nationals direct or indirect access to fish resources under the jurisdiction of third States,**
- and
- (b) a benefit is thereby conferred, **i.e. where:**
- (i) **the government fails to recover from its nationals the value of access to fish resources granted in (v) above (referred to in this Agreement as “fisheries subsidy”).** Where it is difficult to determine the value of access to fish resources as a result of market distortions, lack of transparency, or any other reason, a benefit will be deemed to exist where a prevailing market price reveals a failure to recover the value of access to fish resources. Alternative techniques to determining a prevailing market price include, but are not restricted to, the construction of a price on the basis of costs of production or the consideration of world market prices.

Commentary on Option #2

Option #2 addresses the difficulty in establishing the value of access to fish resources in situations where markets are distorted, lack adequate transparency, or are otherwise incapable of providing a workable benchmark for comparison to determine whether a benefit has been conferred. In such situations, the definition utilizes a constructed market price to determine whether the amounts recovered confer a benefit to the distant water fishing fleet.

The advantages of option #2 include its flexibility, as the phrase “prevailing market price” is sufficiently broad to encompass various techniques. Some techniques were explored in the *Softwood Lumber* cases, where the Appellate Body noted that the ASCM did not require the use of any particular one. For purposes of guidance and clarity, certain examples of alternative benchmarks constructed by reference to costs of production or world market prices are included.

The drawbacks of option #2 include its ambiguity, as the “prevailing market price” could be different depending on the technique employed. While this issue may lead to a degree of uncertainty, in case of a dispute, in light of the *Softwood Lumber* cases referred to above, the WTO is equipped to address and determine a “prevailing market price”.

6.3. Improving the Remedies Associated to Covered Subsidies

If the improved rules are to cover the transfer of access rights for insufficient price in the definition of a fisheries subsidy, then the first question that arises is whether it should be prohibited. A second level of analysis is whether there should be any exception to the prohibition, and if so, if such exception should be subject to conditions (see options under 6.4.). This section addresses the prohibition discussion:

Option #1: *Prohibited Subsidies*

Article 3

Prohibition

- 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
- (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;
 - (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.
- 3.2 **Fisheries subsidies.**
- 3.3 A member shall neither grant nor maintain subsidies referred to in **this Article paragraph 1.**

Commentary on Option #1

Option #1 provides that a fisheries subsidy cannot be granted or maintained, including the subsidies arising from the onward transfer of foreign access rights (assuming that this has been clarified in Article 1 as suggested in chapter 6.2.). In the light of current negotiations as well as the submissions presented in section 5, it is clear that this “simple blanket ban” approach is not a realistic option for reformed subsidies disciplines, neither for subsidies in general nor for access-related subsidies. For the sake of the logical sequence of this paper it is nevertheless presented at this point – more differentiated sub-options will follow below.

The merits of option #1 include its clear, bright line and associated remedies that contribute both to reducing market distortions as well as to securing sustainable fish stocks.

In the strict ambit of trade, it would not be necessary for a claimant to establish adverse effects in order to bring an action against the subsidy, because such effects would be presumed to result from the prohibited subsidy.

In the ambit of sustainability, option #1 has the advantage of introducing greater protection to the fish stocks, which may suffer from over-exploitation if the offending subsidy is not removed. That is, remedies other than the removal of the subsidy do not necessarily ensure the sustainability of the fisheries resources. In addition, the removal of the prohibited subsidy is in the interest of all WTO members, and does not concern the economic interests of any one member alone.

Another merit of this option is its workability, as it is easier to show the existence of a prohibited subsidy than it is to show adverse effects in the marketplace. Given its greater workability, this option is better suited to inducing the removal of such access-related subsidies.

The disadvantage of option #1 is that if a country fails to remove the prohibited subsidy, countermeasures (*i.e.*, the denial of concessions) are then the only remedy available. Still, this is not different from other prohibited subsidies, and according the ASCM Article 4, an accelerated remedies process is available in such instances.

6.4. Establishing Exceptions to the Prohibition and Conditioning the Transfers of Access Rights to Environmental and Economic Criteria

As mentioned above, negotiators might want to provide for exceptions to the prohibition of subsidies presented in 6.3., potentially accompanied by certain conditions. The following options address these elements:

Option #1: *Prohibited Subsidies with Exception*

Article 3

Prohibition

- 3.1 Except as provided in **Article 4bis and in** the Agreement on Agriculture, the following subsidies shall be prohibited:
- (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;
 - (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.
- 3.2 **Fisheries subsidies except as provided in Article 4bis.**
- 3.3 A member shall neither grant nor maintain subsidies referred to in **this Article paragraph 1.**

Commentary on Option #1

Option #1 provides an exception (labelled Article 4bis) to the prohibition to the granting or maintenance of an access-related fisheries subsidy, subject to certain requirements. Such requirements in effect condition that transfer of access rights to certain criteria, examined further below (option #2). If this exception subject to conditions were included in the rules, the environmental and economic criteria would both secure an income for SIDS as well as secure the transition toward the sustainable management of fish stocks.¹⁰⁰

The merits of this option include its emphasis on securing the income that island and coastal developing states obtain from access arrangements. Subject to certain requirements, the State securing access to foreign waters for its fleet by way of an access arrangement may not need to recover the full value of the access it has procured and transferred to the fishing industry.

A variant of this exception option could relate to a sunset clause, whereby the exception would lapse after a specified period of time (see option #3). This sunset clause could be designed to enable coastal States to acquire the capacity necessary to benefit from their natural resources. The effect of the sunset clause is that the foreign fleet would be required to pay in full the value of the access to fish resources that it has obtained from its government.

The demerit of this option includes the fact DWFNs could still provide access to fish to its fleet for free or in terms that provide a benefit. As has been documented, such subsidies both distort international trade and create pressures leading to stock depletion. This latter element could be addressed by strict requirements in the conditions established in the exception, explored in turn.

An exception for subsidized fishing under access arrangements that meet certain criteria could strengthen the contribution of improved disciplines on fishing subsidies to sustainable development, in accordance with the WTO mandate. In addition, this exception secures an important source of revenue for SIDS and coastal developing countries while introducing key environmental and social elements.

¹⁰⁰ It should be noted that the exemption and corresponding conditions examined here and in the following sections only refer to access-related fisheries subsidies (see footnote 98). A recent joint UNEP-WWF publication entitled "Sustainability Criteria for Fisheries Subsidies – Options for the WTO and Beyond" (2007) discusses possible conditions for those subsidies that will be exempted from the prohibitions. These are linked to management-, capacity-, and stock-related criteria and could, potentially, inform the debate on access-related subsidies.

Option #2: An Exception with Conditions

Article 4 bis

Exception to the Prohibition in Article 3

- 4.1 bis Access-related¹⁰¹ fisheries subsidies that comply with all requirements set out below are exempt from the prohibition in Article 3.**
- (a) Members shall notify all the terms and conditions of access arrangements that they sign, accede or ratify, including their financial terms;**
 - (b) Members granting access to the waters under their jurisdiction shall adopt and enforce laws and regulations necessary to ensure the sustainable exploitation of fish stocks, including requirements for effective reporting of catches and vessel position, in accordance with applicable international law;**
 - (c) Members shall ensure that rules of origin relating to access agreement do not constitute a market access barrier to the fish products of the coastal State.**
 - (d) Members shall ensure that access arrangements contemplate effective programs for capacity-building, technology transfer, and other tools for local development.**

Commentary on Option #2

An exception does not necessarily mean *carte blanche*. In order to secure special and differentiated treatment for SIDS and other coastal developing States, the options for an exception could consider certain cumulative criteria.¹⁰² These criteria could emphasize the need to transition toward sustainable fish stocks management. In addition to the sustainability dimension, the options could consider how these criteria enable a better functioning of the disciplines discussed in the options above, particularly with respect to transparency and fees. Further, the criteria could address issues of local development and technology transfer.

In that light, the criteria in the carve-out in option #2 address several issues, including:

- *Process*: transparency in negotiations and disclosure of the access agreement;
- *Sustainability*: in accordance with the LOS Convention, EEZ fishing and related access arrangements should be subject to various laws and regulations design to ensure the sustainable exploitation of the stocks, including, inter alia: environmental management, level of catch, control measures and multilateral negotiations for highly migratory species;

¹⁰¹ See footnote 98 that suggests a definition of “access-related”.

¹⁰² See footnote 100.

- *Trade*: Access arrangements could address the protectionist elements written into rules of origin, which operate as market barriers to fish products from developing countries;
- *Development*: capacity-building initiatives associated to access arrangements are key to securing the developmental benefits of fisheries for coastal States. In this vein, local landings and technology transfers (e.g., to meet SPS requirements in foreign markets) would enable greater value-added, creation of jobs, and better export capabilities. A limit in duration of access arrangements might also be required.

While some of these criteria may be controversial, they reflect the opportunities opened by improved disciplines on fisheries subsidies.

Option #3: An Exception Subject to Sunset

Article 4 bis

Exception to the Prohibition in Article 3

4.1 bis Access-related fisheries subsidies that comply with all requirements set out below are exempt from the prohibition in Article 3.

- (a) **Members shall notify all the terms and conditions of access arrangements that they sign, accede or ratify, including their financial terms;**
- (b) **Members granting access to the waters under their jurisdiction shall adopt and enforce laws and regulations necessary to ensure the sustainable exploitation of fish stocks, including requirements for effective reporting of catches and vessel position;**
- (c) **Members shall ensure that rules of origin relating to access agreement do not constitute a market access barrier to the fish products of the coastal State.**
- (d) **Members shall ensure that access arrangements contemplate effective programs for capacity-building, technology transfer, and other tools for local development.**

4.2. bis This Article will remain in force twenty years following the entry into force of this Agreement.

Commentary on Option #3

As noted above, a carve-out could be set to expire after a given period of time. Such “sunset” provision may be justified in order to enable SIDS and coastal developing States to develop their own capacity to exploit their sovereign rights over marine living resources in their EEZs. Moreover, a sunset provision would arguably move the world to more ecologically responsible fisheries without overcapacity/overfishing from DWFNs by reverting, at the time of sunset, to a presumption that an

access-related subsidy was ecologically harmful and trade-distorting. As noted above, the effect of this sunset provision would be that the DWFN would, at the time of the sunset, be required to recover from its fleet sufficient remuneration in exchange for the transfer of EEZ access rights. At no time, neither before nor after the sunset, would access agreements *per se* be prohibited.

6.5. Improving Transparency

The need for transparency in the operation of access agreements cuts across a number of areas. For example, transparency is relevant to strengthening the bargaining position of coastal States, as well as for obtaining adequate reporting on fish stocks. Transparency may also aid in the adequate determination of the value of the fish resources in question.

Still, at a conceptual level, the key challenge appears not to simply require transparency, but to attach particular consequences to practices devoid of transparency, including with respect to subsidized fishing under access arrangements. In that regard, it may be that the use of presumptions of illegality that cannot be rebutted could induce countries to ensure transparency – although this would be likely seen by some governments as an extreme remedy, and is accordingly not reflected in the following hypothetical text.

Article 25

Transparency

25.1 bis Access-related fisheries subsidies are subject to the following transparency requirements:

- (a) Members shall notify all the terms of government-to-government access arrangements that they sign, accede or ratify, including their financial terms;**
- (b) Members shall notify all the terms and conditions of fishing licenses and permits that it grants to foreign vessels;**
- (c) Members granting access to its EEZ to foreign vessels shall establish effective monitoring schemes regarding the biological status of the species subject to harvest, and shall continuously publish the data collected in the monitoring schemes;**
- (d) Members granting access to its EEZ to foreign vessels shall periodically notify the level of fishing capacity that operates in its EEZ.**

Commentary on transparency provisions

Transparency requirements included above encompass not only government-to-government access arrangements, but also situations where a member grants access to its EEZ through private deals. Disclosure of information regarding these practices is important for introducing greater transparency to the relevant markets in the coastal States.

Transparency requirements included above also refer to certain environmental issues that are key to ensuring that a fishery does not become over-harvested or depleted. In particular, the coastal State that grants access to its EEZ to foreign vessels is required to establish effective monitoring schemes regarding the biological status of the targeted fish stocks and associated populations and to publish the data produced by the monitoring schemes. This data should be published continuously, as the schemes produce the data, so that at any given time accurate information exists regarding the biological status of the fisheries. Even if this implies a challenge for many coastal developing countries, with research institutes being in a poor state and funds lacking for adequate surveillance, availability of up-to-date data is a crucial element of sustainable fisheries management and its collection should be supported by corresponding assistance by DWFN (see suggested Art 4bis (d)).

Finally, as a means to prevent overcapacity and overexploitation, every member is required to notify the level of fishing capacity that is authorized to fish in its EEZ.

Conclusion and Way Forward

This paper has sought to clarify how WTO subsidies rules relate to fisheries access agreements concluded between two or several governments. The results and related suggestions were intended to flow into ongoing WTO fisheries subsidies negotiations where the treatment of access agreement has emerged as a divisive topic amongst negotiating parties. This is mainly due to significant foreign currency flows that these access agreements represent for many small coastal and island developing countries – provoking the fear that these financial flows might cease once they are subjected to WTO disciplines.

However, the detailed legal analysis of the WTO Agreement on Subsidies and Countervailing Measures and relevant jurisprudence provided by this paper leads to the conclusion that access agreements *per se* do not breach any rules of the ASCM. Only where the Distant Water Fishing Nation is not sufficiently reimbursed by its fleet for the provision of access rights, the corresponding financial element of access agreements may be covered by ASCM disciplines. The amount of this “subsidy element”, arising between a Distant Water Fishing Nation and its own fleet, would have to be determined on a case-by-case basis.

The analysis of the current legal situation concerning access agreements is followed by textual suggestions for integrating access-related subsidies into potential new fisheries subsidies disciplines. These options have been elaborated while negotiations in the WTO were ongoing and an initial draft text has been proposed by the Chair of the Rules Negotiating Group.

The contribution of WTO rules towards more sustainable access regimes will depend on the practical application of the norms. Most importantly, the question of how to determine the value of access rights has to be explored in a detailed way, since this would constitute the basis for calculating the existence and amount of subsidization. Moreover, all criteria for access related subsidies would have to be designed in a way to incentivise and ensure technical assistance for developing countries to sustainably manage their EEZs.

This said, disciplining access-related subsidies via WTO fisheries subsidies rules, as explored in this paper, might have several potential consequences. The most direct one would be the revision of current access regimes, in a way (i) to ensure full reimbursement of access payments by distant water fleets to their government, (ii) to guarantee that levels of access payments reflect the value of the access rights, and (iii) to design, in collaboration between DWFN and host countries, access arrangements that contain adequate provisions for ensuring sustainable fisheries management of the EEZ, including technical assistance.

However, even with increased sustainability of government-to-government agreements, there are broader questions related to access fishing that are beyond the scope of this paper but need to be addressed. Increasingly, other forms of arrangements are used to regulate the access to foreign resources, such as joint ventures or private-to-government agreements – that is, industry associations

or individual companies negotiating access to foreign EEZ fisheries without any cover agreement concluded by their government. It has been noted as well that the departure of fleets under governmental agreements might not necessarily lead to a decrease in fishing intensity, but might entail a change to a flag of convenience and/or an increase in private fishing agreements.¹⁰³ It has been argued that these government-to-private sector arrangements provide weaker governance regimes, are often more opaque and less beneficial for EEZ countries than governmental agreements.

In this regard, a growing number of private agreements would still raise concerns of sustainability and fairness, even if the access-related subsidy element of government-to-government agreements had vanished. Indeed, private agreements do not contain a subsidy in the meaning of Article 1 ASCM. However, it has been discussed that private agreements should nevertheless be covered by specific management and transparency requirements. Such an approach would acknowledge that most of the sustainability concerns related to fishing under access regimes are not limited to government-to-government agreements.

Still, the need remains to identify other fora, complementary to the WTO, to address these concerns in a consistent manner. A first step might take the form of a high-level engagement of coastal states and DWFNs. Even if the latter are not always directly involved via negotiating access rights for their fleets, they provide the legal framework for the activities of their distant water fleets and have some instruments at their disposal to regulate their behaviour in distant waters – as in the case of IUU fishing. A potential future international initiative to promote more sustainable access regimes might include the development of binding transparency requirements for access-related financial and information flows as well as concrete sustainability criteria for access fishing, related to the state of the stocks, to fishing capacity, and to the management system of the EEZ.¹⁰⁴ This could be accompanied by provisions to encourage on-shore investments by Distant Water Fishing Nations and companies to the benefit of the local fishing community and its fisheries management structures.

These considerations, intending to put the access-related elements of WTO fisheries subsidies negotiations into a broader context, should however not question the significance of including corresponding provisions into a revised ASCM. With a clarification of “access-related” subsidies as part of reformed fisheries subsidies disciplines, potential litigation at a later stage could be avoided. Moreover, the establishment of criteria on access-related subsidies would ensure that government-to-government access agreements, as a key element of international fisheries policy, do not compromise but contribute to the sustainable development of small island and coastal developing countries.

¹⁰³ Moustapha Kamal Gueye (2008). *Will the WTO Mandate Stand up against the Tragedy of the Commons in Fisheries?*, in: ICTSD Bridges Monthly Review, Year 12 No. 3, 12-13.

¹⁰⁴ This idea is based on sustainability criteria for fisheries subsidies that have been developed by a UNEP/WWF study under the same title (see footnote 100).

Annexes

Annex I: Selected Legal Texts

Un Convention on the Law of the Sea

Article 62 – Utilization of the living resources

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.
2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.
3. In giving access to other States to its exclusive economic zone under this article the coastal State shall take into account all relevant factors, including, inter alia, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.
4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State.

These laws and regulations shall be consistent with this Convention and may relate, inter alia, to the following:

- a. licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;
 - b. determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;
 - c. regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;
 - d. fixing the age and size of fish and other species that may be caught;
 - e. specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;
 - f. requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;
 - g. the placing of observers or trainees on board such vessels by the coastal State;
 - h. the landing of all or any part of the catch by such vessels in the ports of the coastal State;
 - i. terms and conditions relating to joint ventures or other co-operative arrangements;
 - j. requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;
 - k. enforcement procedures.
5. Coastal States shall give due notice of conservation and management laws and regulations.

FAO Code of Conduct for Responsible Fisheries

Special Requirements of Developing Countries

5.2 In order to achieve the objectives of this Code and to support its effective implementation, countries, relevant international organizations, whether governmental or non-governmental, and financial institutions should give full recognition to the special circumstances and requirements of developing countries, including in particular the least-developed among them, and small island developing countries. States, relevant intergovernmental and non-governmental organizations and financial institutions should work for the adoption of measures to address the needs of developing countries, especially in the areas of financial and technical assistance, technology transfer, training and scientific cooperation and in **enhancing their ability to develop their own fisheries** as well as to participate in high seas fisheries, including access to such fisheries.

General Principles

6.18 Recognizing the important contributions of artisanal and small-scale fisheries to employment, income and food security, States should appropriately protect the rights of fishers and fishworkers, particularly those engaged in subsistence, small-scale and artisanal fisheries, to a secure and just livelihood, as well as **preferential access, where appropriate, to traditional fishing grounds and resources in the waters under their national jurisdiction.**

Responsible International Trade

11.2.7 **States should not condition access to markets to access to resources.** This principle does not preclude the possibility of fishing agreements between States which include provisions referring to access to resources, trade and access to markets, transfer of technology, scientific research, training and other relevant elements.

WTO Agreement on Subsidies and Countervailing Measures

Article 1

Definition of a Subsidy

- 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
- (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”), i.e. where:
- (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
 - (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);¹⁰⁵
 - (iii) a government provides goods or services other than general infrastructure, or purchases goods;
 - (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
- or
- (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
- and
- (b) a benefit is thereby conferred.
- 1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

¹⁰⁵ In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

Article 14

**Calculation of the Amount of a Subsidy in Terms
of the Benefit to the Recipient**

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

- (a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;
- (b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;
- (c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;
- (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

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