



UNIVERSIDADE CATÓLICA PORTUGUESA

**The WTO Fisheries Subsidies Agreement and
Ocean Sustainability**

Ana Margarida Ferreira Gaspar Pinto de Seabra

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Ana Margarida Ferreira Gaspar Pinto de Seabra

Sob orientação do Professor Doutor

Manuel Fontaine Campos

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Abstract

This work starts by analysing the disciplines of the new World Trade Organization Fisheries Subsidies Agreement and then delves deeper into the provisions that did not make it into the final Agreement. Most subsidies granted by governments to the fishing sector encourage overfishing and overcapacity. The agreement includes a prohibition of subsidies to illegal, unregulated, and unreported fishing, to the fishing of overfished stocks, and a more general prohibition of subsidies to fisheries on the unregulated high seas. Our primary aim is to analyse the contours of the contribution by the WTO to the conservation and sustainable use of oceans, seas, and marine resources. This is one of the 17 goals of the 2030 Agenda for Sustainable Development, adopted by the United Nations, and the WTO and its Members have been entrusted to reach an agreement to achieve SDG 14.6, contributing to ocean equity and sustainability.

Keywords: World Trade Organization; Fisheries Subsidies; Sustainable Development Goals; Illegal, unreported and unregulated (IUU) fishing; Overfished stocks; Unregulated high seas; Ocean sustainability.

Resumo

A nossa dissertação começa por analisar as normas do novo Acordo da Organização Mundial do Comércio sobre as Subvenções à Pesca e, de seguida, aprofunda as normas que não foram incluídas no Acordo. A maioria das subvenções concedidas pelos governos ao setor das pescas incentiva a sobrepesca e a sobrecapacidade. O Acordo contempla uma proibição de subvenções à pesca ilegal, não regulamentada e não declarada, uma proibição relativa às unidades populacionais sobre-exploradas e uma proibição absoluta dos subsídios à pesca em zonas não regulamentadas no alto mar. O principal objetivo do nosso trabalho é analisar os contornos da contribuição da OMC para a conservação e a utilização sustentável dos oceanos, dos mares e dos recursos marinhos. Este é um dos 17 objetivos da Agenda de 2030 para o Desenvolvimento Sustentável, adotada pela Organização das Nações Unidas (ONU), e a OMC e os seus membros foram incumbidos de chegar a um acordo para alcançar o ODS 14.6, contribuindo para a equidade e a sustentabilidade dos oceanos.

Palavras-Chave: Organização Mundial do Comércio; Subvenções à pesca; Objetivos de Desenvolvimento Sustentável; Pesca ilegal, não regulamentada e não declarada; Unidades populacionais sobre-exploradas; Zonas não regulamentadas no alto mar; Sustentabilidade dos oceanos.

List of Abbreviations and Acronyms

ASCM	Agreement on Subsidies and Countervailing Measures
DSU	Dispute Settlement Understanding
EEZ	Exclusive Economic Zone
EU	European Union
FAO	Food and Agriculture Organization
IUU	Illegal, Unreported and Unregulated
LDC	Least Developed Countries
MC12	12 th Ministerial Conference
MC13	13 th Ministerial Conference
MSY	Maximum Sustainable Yield
OECD	Organisation for Economic Co-operation and Development
RFMO/A	Regional Fisheries Management Organisations or Arrangements
SDG	Sustainable Development Goals
SDT	Special and Differential Treatment
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
WTO	World Trade Organization

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Introduction

In June 2022, after more than two decades of negotiations, members of the World Trade Organization concluded an agreement on fisheries subsidies. The World Trade Organization's recent effort in tackling harmful fisheries subsidies and to decide on a coherent and comprehensive Agreement has its roots in the adoption of the United Nations 2030 Agenda for Sustainable Development. This was a unique moment in the organization's history, as the agreement established, for the first time, a binding set of global rules with environmental sustainability at its heart.

At the root of the concept "harmful fisheries subsidies" lies an idea of non-environmental-friendly financing by governments. To this end, we will discuss the legal concept of "fisheries subsidies". To do that, the legal concept of "subsidy" requires clarification. Furthermore, we will trace the history of WTO fisheries subsidies negotiations.

Afterwards, we will discuss the rules and legal provisions that have been agreed in the new WTO Agreement on Fisheries Subsidies and explain what the disciplines require. We provide some suggestions that we believe may be helpful to the interpretation of certain provisions.

Moreover, we will reflect on the steps the Agreement has taken and what additional steps must be taken. In this respect, we focus on provisions that were the *cornerstone* of the draft Agreement but on which consensus was not reached. To conclude, we will shed some light on the role of the Agreement in improving ocean equity and sustainability and achieving the United Nations Sustainable Development Goal 14 to conserve and sustainably use the oceans.

1. Ocean Equity and Sustainability

The world's oceans are currently facing numerous challenges, with three of the most pressing issues directly linked to climate change.¹ Firstly, ocean warming has far-reaching consequences, including the devastating death of coral reefs, which are vital ecosystems supporting marine biodiversity.² Rising sea levels is another consequence of ocean warming, threatening coastal communities and entire nations, and exacerbating the vulnerability of those living in low-lying regions.³ Secondly, deoxygenation is altering marine ecosystems by reducing oxygen levels in the water, impacting fish populations and leading to a concerning trend of smaller fish sizes.⁴ This phenomenon disrupts the delicate balance of marine food chains, affecting not only the livelihoods of fishermen but also the availability of seafood for consumers. The third climate-related challenge is ocean acidification⁵, which results from the absorption of excess carbon dioxide by seawater and impacts the ecosystem's health, favouring species that are more tolerant to acid conditions while negatively impacting others. Apart from these climate-related concerns, two additional critical problems are harming the oceans. The first one is pollution and the second one is harmful fisheries practices. Both pollution and harmful fisheries are reversible, as long as governments are willing to cooperate and act decisively.

However, a sustainable and equitable ocean is a very complex issue, and there are no simple solutions for complex problems. For that reason, the WTO's Agreement on Fisheries Subsidies approach to environmental harm and ocean health can be the key for States to move away from subsidies that hinder sustainability.

A great deal of research has been done on the effects of harmful subsidies. Economists write that most large-scale fishing within the waters of developing coastal states is conducted by distant-water fleets, which do not share the same interests in conserving local ecosystems.⁶ As already anticipated, this negatively impacts local communities who lack the capacity to access these fish, and whose diets depend more on

¹ Switzer, Morgera, & Webster, 2022, pp. 360-362.

² Cheung, et al., 2021, pp. 1-2.

³ International Tribunal for the Law of the Sea, Case No. 31 (2023). Written Statement of the Food and Agriculture Organization of the United Nations (FAO) for the Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law, p. 4. See https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/3/C31-WS-3-2-FAO.pdf.

⁴ Limburg, Breitburg, Swaney, & Jacinto, 2020, pp. 24-29.

⁵ *Idem*, p. 3.

⁶ Cisneros-Montemayor, et al., 2020, p. 2.

fish than any other animal protein.⁷ With this in mind, we stress that capacity-enhancing subsidies provided to these distant-water fleets can worsen inequalities between communities and nations.⁸ More than half of high seas fishing grounds would not be profitable without subsidies⁹ and reducing these capacity-enhancing subsidies would improve food and nutrition security¹⁰, employment in coastal fisheries, and enable culture continuity.¹¹ This said, capacity-enhancing subsidies end up, in the long run, actually harming the very people they were meant to help. These subsidies allow vessels to fish further from the port and fish more days a week which, in the short run may seem beneficial but in the long run undermines progress towards SDGs related to poverty (SDG 1), hunger (SDG 2), health (SDG 3), water (SDG 6), cities (SDG 11), climate (SDG 13), and ocean (SDG 14).¹²

The World Trade Organization did not fail to pay attention to social equity and sustainability in fisheries and oceans, and negotiators fulfilled their duty to reach an Agreement in June 2022, uncovering a considerable set of transformative rules and taking us one step closer to achieving target 14.6 of the UN Sustainable Development Goals: *“By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation.”*¹³

2. The World Trade Organization Agreement on Fisheries Subsidies

2.1 Background

The problem of overfishing is one of the most pressing global challenges. According to the research done by the Food and Agriculture Organization of the United

⁷ McCauley, et al., 2018, pp. 1-9.

⁸ Sumaila & Cisneros-Montemayor, 2019, pp. 1-2.

⁹ Sala, et al., 2018, pp. 5-8.

¹⁰ Schiller, Bailey, Jacquet, & Sala, 2018, pp. 1-4.

¹¹ Cisneros-Montemayor & Sumaila, 2019, pp-1-2.

¹² Díaz, et al., 2019, p. 15.

¹³ United Nations General Assembly, A/RES/70/1, 2015, p. 24. See https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf

Nations, in 2019, 35% of assessed marine fish stocks were exploited beyond sustainable levels.¹⁴ Indeed, the percentage of stocks fished at biologically unsustainable levels has been increasing since the 1970s.¹⁵ Failure to manage fisheries compromises the sector's productivity, threatens the sustainability of marine resources but also food security, human livelihood, employment opportunities, and global trade.¹⁶

This said, we recognized that some subsidies can have negative effects by causing overcapitalisation and excess capacity of fishing fleets and incentivize unsustainable fishing levels.¹⁷ This leads to less fish for consumers rather than more and brings risks to the health of the ocean environment. Subsidies to the fisheries sector came around to \$35.4 billion USD per year, in 2018, of which over 2.2 billion enhanced fishing capacity and fishing effort.¹⁸ While many of these subsidies are aimed at helping coastal communities, they can instead, encourage fishing beyond sustainable levels, risking the degradation of the very resources on which the communities that the subsidies are meant to help depend. In light of this, a reform of fisheries subsidies was widely perceived by negotiators at the WTO as the necessary step towards safeguarding our ocean and the people who rely on it.

This is an issue that has been attracting a lot of international attention since 2015, when the United Nations agreed on the 2030 Agenda for Sustainable Development. The adoption of the UN Sustainable Development Agenda gave new momentum to the WTO negotiations on fisheries subsidies, and failure to achieve such an agreement would reduce confidence in our ability to achieve the UN Agenda.

As a legal concept, under Article 1.1 of the Agreement on Subsidies and Countervailing Measures (ASCM) of the WTO, a subsidy is a “financial contribution” by a government¹⁹ or a public body²⁰ which confers a “benefit” to the private sector. Article

¹⁴ Food and Agriculture Organization, 2022, p. 51.

¹⁵ *Idem*, p. 46.

¹⁶ Irschlinger & Tipping, 2023, p. 1.

¹⁷ Innes & Martini, 2018, p. 8.

¹⁸ Sumaila, et al., 2019, p. 4.

¹⁹ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.42. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 286. The Appellate Body explained that the term “government”, for the purposes of the ASCM, “encompasses both the government in the 'narrow sense' and 'any public body within the territory of a member'”.

²⁰ In *US – Carbon Steel (India)*, the Appellate Body noted that “the mere ownership or control over an entity by a government, without more, is not sufficient to establish that the entity is a public body” (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10.) and added that “In determining whether or not a specific entity is a public body, it may be relevant to consider whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member.” (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.9).

1.1(a)(1) identifies the government conducts which constitute a financial contribution under the ASCM. The provision sets forth an exhaustive and closed list (“...i.e. where...”) ²¹, which must be interpreted and applied according to the relevant *case law*. And again, under Article 1.1.(b), to determine whether or not a subsidy exists, the financial contribution has to confer a benefit. ²²

Subsidies are generally permitted, and they are not problematic under Article 1.2 of the ASCM if they are not “specific”. The ASCM uses a “traffic-light system” ²³, classifying subsidies into different categories. The “green light” subsidies are the subsidies that are not specific to an enterprise or industry or group of enterprises or industries. ²⁴ These subsidies are permitted and cannot be challenged at the Dispute Settlement Understanding (DSU) nor can they lead to countervailing measures.

The “specific” subsidies can follow one of two different criteria. If they fall under the criteria defined by Article 3 of the ASCM – export subsidies and subsidies contingent upon the use of domestic over imported goods (import substitution subsidies) – they are prohibited or “red light” subsidies.

All the other specific subsidies ²⁵ are not prohibited nor permitted. ²⁶ These subsidies are called “actionable subsidies” or “orange light” subsidies and they can be countervailed or challenged directly at the DSU when, under Article 5 of the ASCM, they cause adverse effects to the interests of other Members. Adverse effects are caused if there is an injury to the domestic industry of another Member, nullification or impairment of benefits accruing to another Member, or serious prejudice to the interests of another Member.

Fisheries subsidies have been governed by the disciplines under the ASCM since 1995 ²⁷ and they are “actionable subsidies” or “orange light” subsidies. ²⁸ However, the ASCM has proven ineffective at disciplining subsidies in the fisheries sector. In part, this may be because the ASCM focuses only on the trade distorting-effects of a subsidy, and it does not address environmental externalities of fisheries subsidies.

²¹ Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.955.

²² Appellate Body Report, *Brazil – Aircraft*, para. 157. In *Brazil – Aircraft*, the Appellate Body noted that a subsidy shall be deemed to exist if the two separate legal elements – “a financial contribution” and “benefit” exist together. Furthermore, the Panel, in *US – Export Restraints* emphasized the distinction between these two distinct elements (Panel Report, *US – Exports Restraints*, para. 8.20).

²³ Guzman & Pauwelyn, 2012, pp. 405-408.

²⁴ According to the concept of specificity under Article 2 of the ASCM.

²⁵ All the other subsidies that qualify as specific under Articles 2.1 and 2.2. of the ASCM.

²⁶ Fontaine Campos, 2019, p. 522.

²⁷ A working party on problems of trade in fisheries set up within the framework of the GATT was unsuccessful in negotiations and fisheries subsidies were included in the ASCM.

²⁸ Scholaert, 2022, pp. 1-3.

At the root of the concept of “fisheries subsidies” lies the concept of “subsidy”. The Agreement on Fisheries Subsidies applies to subsidies that are specific within the meaning of Article 2 of the ASCM, to marine capture fishing and fishing related activities at sea. It should be clear that the intention behind this agreement is not to end support for fisheries. There are beneficial subsidies which provide support to crucial functions and create new economic opportunities. There are, however, others which “artificially lower the costs or increase the revenues of fishing, thereby giving rise to overcapacity, which can lead to overfishing.”²⁹

Going back in time and reflecting on how this matter first became a concern for the WTO, back in 2001, as part of the Doha Ministerial Conference, WTO members decided to put the issue of fisheries subsidies on the organization’s agenda.³⁰

Later, in 2005, the Hong Kong Ministerial Conference added a more detailed mandate to this original one. During this mandate, WTO members recalled their commitment at Doha “to enhance the mutual supportiveness of trade and environment”³¹ and to “strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing”.³² Members also acknowledged that “appropriate and effective special and differential treatment for developing and least-developed members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns.”³³ Despite this, the conclusion of new multilateral rules for the subsidization of fisheries remained a challenge. Only after years of on-and-off talks and after the adoption of the UN Sustainable Development Goals, members decided to resume negotiations and look into this issue with the appropriate seriousness it deserves.

When the 11th WTO Ministerial Conference did not succeed in concluding an Agreement in 2017, and when the 12th Ministerial Conference (MC12) was postponed due to the COVID-19 pandemic, the chair of the negotiations released a complete draft text for the Agreement in May 2021³⁴ based on proposals and discussions from members. Considering that up until May 2021 summaries, working-papers, Member’s submissions,

²⁹ Millage, et al., 2022, p. 2.

³⁰ Bernasconi-Osterwalder, et al., 2020, pp. 16-19.

³¹ World Trade Organization, WT/MIN(05)/DEC, 2005, paragraph 30.

³² World Trade Organization, WT/MIN(05)/DEC, 2005, paragraph 9.

³³ World Trade Organization, WT/MIN(05)/DEC, 2005, paragraph 9.

³⁴ Negotiating Group on Rules, TN/RL/W/276, 2021.

and the progress of the negotiations was rarely made available to the public, this prolonged lack of transparency was criticised by academics.³⁵ These *travaux préparatoires* - the negotiating and drafting history - are an important stepping stone for the understanding of the Agreement and, under Article 32 of the Vienna Convention on the Law of the Treaties, they can have a valuable role in the interpretation of the international treaties. Regrettably, some of these works could not be of use for the purpose of this dissertation.

In November 2021, when Members were preparing for the 12th Ministerial Conference, revised draft texts were then released.³⁶ The negotiators were committed and worked hard to table proposals. In the week leading up to the Ministers' arrival in Geneva, a draft Agreement was presented³⁷ which included only very few brackets around unresolved issues to be decided by the Ministers. However, travel restrictions linked to the Omicron variant of COVID-19 forced the postponement of MC12 until June 2022.

In February 2022, as a result of Russia's invasion of Ukraine, work at the WTO was then disrupted and talks on fisheries subsidies only really resumed in May 2022, a month and a half before MC12. As the conference came closer, discussions intensified, and negotiators tried to come up with solutions for some of the remaining laying points of the draft that was circulated in November 2021. This process led to progress on several issues and a new version of the draft agreement was then released on June 10, 2022.³⁸ While some of the issues could not be solved at MC12, on June 17, 2022, members succeeded in concluding an agreement containing several key provisions. With more than two decades of negotiations behind it and during a very politically difficult moment in the geopolitical context, WTO members reached an Agreement, at the 12th Ministerial Conference, on a new legally binding treaty that will govern the subsidies that they provide to their fishing fleets. The Agreement "marks a major step forward for ocean sustainability"³⁹ and Members committed to further talks to conclude a more comprehensive agreement in the future.⁴⁰

Amidst such effort, Members agreed on three main substantive areas with new rules and prohibitions. The first rule prohibits subsidies that contribute to IUU fishing (Article

³⁵ Guglya, 2023, pp. 253-255.

³⁶ Negotiating Group on Rules, TN/RL/W/276/Rev.1, 2021 and Negotiating Group on Rules, TN/RL/W/276/Rev.2, 2021.

³⁷ Draft Text, WT/MIN(21)/W/5, 2021.

³⁸ Draft Text, WT/MIN(22)/W/20, 2022.

³⁹ World Trade Organization, Agreement on Fisheries Subsidies, 2022.

⁴⁰ WTO, Agreement on Fisheries Subsidies, WT/MIN(22)/33, 2022.

3 of the Agreement). The second rule prohibits subsidies provided to fishing or fishing related activities regarding overfished stocks (Article 4 of the Agreement). Lastly, the third rule prohibits subsidies to fishing on the unregulated high seas (Article 5 of the Agreement).

In order to reach the consensus on these rules, there were very important and sensitive discussions going on about the balance of rights and obligations between developed and developing members of the WTO. But in the end, Members were able find a common ground on an effective Agreement that can be a turning point for the ocean and pave the path for other SDGs.

2.2 Scope and Definitions

Article 1 sets out the scope of application of the rules. The Agreement applies to “specific” subsidies⁴¹ provided to marine wild capture fishing and fishing-related activities that take place at sea. In the context of Article 2 of the ASCM, specific subsidies refer to those that do not benefit all economic sectors but instead, benefit a specific enterprise or industry or group of enterprises or industries. Based on this scope, the Agreement does not cover subsidies to aquaculture, to inland fishing (lakes, rivers)⁴² and to any onshore activities, such as onshore processing and packaging. Meanwhile, the rules apply to subsidies to activities like onboard processing and transshipping of catch.⁴³ To provide clarity, footnote 3 explains that subsidies must be attributed to the member providing them, regardless of the flag or registry of vessels or the nationality of recipients.

Article 2 of the Agreement on Fisheries Subsidies defines several important terms, most of which have been taken from the FAO’s Agreement on Port Measures to prevent, deter and eliminate illegal, unreported and unregulated fishing.⁴⁴ As defined in the article, fish means “all species of living marine resources” including invertebrates, mammals, plants, and reptiles.⁴⁵

⁴¹ According to the concept of specificity under Article 2 of the ASCM.

⁴² Footnote 1 of the Agreement.

⁴³ Irschlinger & Tipping, 2023, pp. 3-4.

⁴⁴ Article 1 of the FAO’s Agreement Port State Measures to prevent, deter and eliminate Illegal, Unreported, and Unregulated fishing.

⁴⁵ Irschlinger & Tipping, 2023, p. 4.

2.3 Illegal, Unreported and Unregulated fishing

The first substantive pillar in the Agreement introduces a prohibition to grant or maintain subsidies to vessels or operators engaging in Illegal, Unreported and Unregulated fishing. IUU fishing persists as a global fisheries problem, undermining the rule of law⁴⁶ by not only violating technical regulations but also supporting associated illegal activities.⁴⁷

For greater certainty, the Agreement follows the definition of IUU fishing set out in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing adopted by the Food and Agriculture Organization of the United Nations, in 2001.

Illegal fishing refers to activities⁴⁸:

- (a) conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;*
- (b) conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or*
- (c) in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.*

Unreported fishing refers to fishing activities⁴⁹:

- (a) which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or*
- (b) undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.*

Finally, unregulated fishing refers to fishing activities⁵⁰:

- (a) in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that*

⁴⁶ Bonnier & Bonnier, 2019, p. 62.

⁴⁷ Sumaila, et al., 2020, pp. 1-2.

⁴⁸ Paragraph 3.1 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

⁴⁹ Paragraph 3.2 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

⁵⁰ Paragraph 3.3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

(b) in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

Article 3 prohibits members from granting any subsidy to a vessel or operator that has been found to engage in IUU fishing activities or vessels that provide at-sea support to an IUU vessel (this support could be by bunkering, replenishment or other support activities).⁵¹ While the rule does not impose a prohibition of IUU fishing, it does prohibit members from encouraging and giving benefits to vessels and operators engaging in these activities.

For the subsidy prohibition to be triggered, there must be an affirmative determination of IUU fishing (Article 3.2). The prohibition can be triggered by an affirmative determination of IUU fishing made by a WTO member acting either in its capacity as a coastal state, for activities occurring in the waters under its jurisdiction⁵², or as a flag state, for the activities of vessels flying its flag, which can occur on the high seas or in another member's EEZ. In both instances, the determination can apply to either a domestic vessel or a vessel owned, operated, and/or subsidized by another member. The reason behind this is that vessel registration rules differ significantly from country to country. While some countries only allow the registration of vessels with ties to their country, others allow vessels controlled or owned by foreign companies to fly their flag.⁵³ These vessels are often called "open registers".⁵⁴ Importantly, this means that, in some cases, a member can provide subsidies to a vessel that flies the flag of another country. Lastly, the subsidy prohibition can also be triggered by a determination made by a Regional Fisheries Management Organization or Arrangement (RFMO/A), if the IUU fishing activity took place in the waters, and for the species under its competence. When the affirmative determination is made by a RFMO/A it must follow the RFMO/As' own rules and procedures, in accordance with relevant international law, and must also include the provision of timely notification and relevant information.

⁵¹ Irschlinger & Tipping, 2023, p. 6.

⁵² In its exclusive economic zone (EEZ), an area of sea out to 200 nautical miles from the baseline.

⁵³ Ford, Wold, Currie, & Wilcox, 2022, pp. 1241.

⁵⁴ *Idem*, p.1241.

This said, Members have the right but bear no obligation under the Agreement to initiate necessary investigations and consequently make determinations of IUU fishing (footnote 6). Rather, in the event that a competent authority issues an affirmative IUU determination, members have an obligation to refrain from providing subsidies to the vessel, operator, or support vessel subject to the determination.

For the determination to be triggered, Article 3.3 (b) refers to some requirements. When a Coastal State Member is making the determination, the flag state member and if know, the subsidizing member have to be notified in the beginning of the determination process and they must have the opportunity to provide information to be taken into consideration in the final determination process. If an affirmative determination is issued, the flag state and the subsidizing member must be notified of the definitive determination, the sanctions applied and, if applicable, their duration.⁵⁵ Finally, the Coastal State Member has an obligation to inform the Committee on Fisheries Subsidies responsible for overseeing the agreement, as well as all other WTO members, of any positive determination it has issued (Article 3.3).

In Article 3.4, Members agreed that when the subsidizing member is deciding on how long the vessel or operator will be prevented from receiving subsidies, it must account for three elements: the nature, gravity, and repetition of IUU fishing. States may interpret these elements differently, allowing room for discretion and flexibility in how the rule is applied, granting them a certain degree of control over the effects of the prohibition.⁵⁶ However, this discretion is not absolute since the Agreement requires that the prohibition of subsidies has to be applied at least as long as any sanction applied by the authority who made the determination, or as long as the vessel or operator is listed by an RFMO/A, whichever is the longer.

In line with the FAO's Port State Measures Agreement to target IUU fishing, Port State members are not authorised to make affirmative determinations of IUU fishing. Although, they may alert and bring evidence of possible IUU fishing to the attention of the subsidising Member. When a member receives a notification from a Port State about suspected IUU activities by one of its vessels, an obligation is triggered, and the Member

⁵⁵ The Agreement does not include any particular requirement for IUU determinations made by flag state members to trigger the subsidy prohibition. As a result, in cases where the coastal member making an IUU determination is also the relevant flag state, such determination does not have to meet any particular requirement to trigger the subsidy prohibition.

⁵⁶ Irschlinger & Tipping, 2023, p. 9.

must “give due regard to the information received and take such actions in respect of its subsidies as it deems appropriate” (Article 3.6).

In this context, a decision-support tool called SubsidyExplorer, designed to assist WTO members to explore the different ecological and economic outcomes of their proposals and to overcome the information gaps that have persistently hindered WTO negotiations must be highlighted. This was fundamental for members to compare the relative ambition levels of their proposals.⁵⁷ Back when negotiations were still going, and Members were getting ready for MC12, a research article based on this tool was published on June 3rd, 2022. In relation to IUU fishing, specialists found that solely based on eliminating subsidies to vessels that appear on RFMO IUU vessel lists, the prohibition of subsidies supporting IUU fishing would likely lead to minimal effects on biomass, catch, revenue, and fishing mortality.⁵⁸ However, the rule that was agreed on MC12 includes alternative methods of identifying IUU activity, allowing the Coastal States and Flag States to make determinations. The decision-support tool couldn't anticipate the potential effects of the elimination of subsidies supporting IUU fishing of vessels or operators identified by Coastal States and Flag States. This is because most of them do not have a list of IUU vessels or operators, and if they do, they do not make it publicly available.⁵⁹ As a result, the rule's impact may be considerably greater than what the model predicts. In this matter, specialists recognised that the shift to prohibiting subsidies to IUU fishing has a unique value that can't be measured by the model and that is the “consensus-binding foundation for a global agreement and sending a strong anti-IUU message.”⁶⁰

In conclusion, this is a rather strict prohibition. However, for the subsidy prohibition to be triggered, determinations of IUU fishing must be made and specific criteria that relates to the evidence that was used and the procedures that were followed for the determination process must be met. The purpose of this rule is to ensure that unfair IUU determinations do not end up triggering the subsidy prohibition.

⁵⁷ Millage, et al., 2022, p. 1.

⁵⁸ *Idem*, 2022, p. 15. “By searching global RFMO lists, we find that fewer than 175 vessels of 2.8 million motorized fishing vessels estimated to operate across global oceans in 2018 had been identified as partaking in IUU fishing.”

⁵⁹ *Idem*, 2022, pp. 16-17.

⁶⁰ *Idem*, 2022, p. 17.

2.3.1 Special and Differential Treatment

In Article 3.8, members agreed that developing country members and least developed countries members benefit from a two-year grace period for the activities that occur within their EEZs. In other words, this “peace clause”⁶¹ implies that the rules are applicable to developing countries right from the start, but for a period of 2 years from the Agreement's entry into force, these rules cannot be enforced through dispute settlement, for those activities. This is particularly important because, while Members acknowledged that IUU fishing is a sensitive and serious concern, they also acknowledged the challenges faced by developing countries and least-developed countries in fulfilling this obligation. All-in-all, this provision reflects a commitment to equitable implementation and a well-thought-out transition that ensures no one is left behind.⁶²

2.4 Overfished Stocks

The second pillar of the Agreement, addressed in Article 4, prohibits WTO members from subsidising the fishing of stocks that are in an overfished condition. A stock is considered to be overfished when its size falls below a specific threshold (in terms of numbers or biomass of fish).⁶³ According to FAO's terminology, “a stock is considered overfished when exploited beyond an explicit limit beyond which its abundance is considered too low to ensure safe reproduction.”⁶⁴ The assessment that triggers the subsidy prohibition can be done by a Coastal State, for the stocks in its water and it can also be done by a relevant RFMO/A for the stocks that fall within the areas and for the species under its competence (Article 4.2).

With regard to the decision-support tool - SubsidyExplorer - specialists concluded that the prohibition to grant subsidies for fishing on overfished stocks can have significant impacts, depending on the criteria used to define overfished stocks.⁶⁵ To minimize arbitrary judgments, the Agreement follows the language used in Article 61 of the United Nations Convention on the Law of the Sea and requires that decisions regarding stock

⁶¹ Irschlinger & Tipping, 2023, p. 9.

⁶² Cisneros-Montemayor, et al., 2020, pp. 1-3.

⁶³ Headley, 2020, p. 3.

⁶⁴ FAO Term Portal, available at: <https://www.fao.org/faoterm/en/>.

⁶⁵ Millage, et al., 2022, p. 17.

status made by the coastal member or RFMO/A must consider the "best scientific evidence available".

Considering this, this prohibition is notably quite strict but here is a fundamental flexibility. In Article 4.3, the Agreement allows the provision of subsidies for fishing or fishing-related activities related to an overfished stock if these subsidies are specifically aimed at restoring the stock "to a biologically sustainable level". Notwithstanding, the Agreement does not require evidence of the effectiveness of these subsidies or management measures in restoring a stock to a biologically sustainable level for a member to apply this exemption. It was not easy for members to agree on the concept of a biologically sustainable level. As a result, footnote 11 explains that a biologically sustainable level is the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using reference points such as maximum sustainable yield (MSY) or other reference points that are commensurate with the data available for the fishery, or by an RFMO/A in areas and for species under its competence.

In relation to this, it's important to clarify that members do not have an obligation to assess stocks. They must only refrain from providing subsidies when stocks are recognised as overfished by a relevant coastal member or RFMO/A.

2.4.1 Special and Differential Treatment

Much like the IUU subsidy prohibition, the Agreement includes a 2-year grace period from WTO dispute settlement for breaches of the prohibition to grant or maintain subsidies to fishing or fishing-related activities regarding overfished stocks, when subsidies are provided by developing and least developed country members to activities that occur within their own waters (Article 4.4). In other words, the rule applies but it cannot be challenged at the WTO for a period of two years from the date of entry into force of the Agreement.

2.5 Other Subsidies

In this section of this work, we will explain the third and last substantive pillar of the new rules. Article 5 of the Agreement regroups three additional rules. The first one is a general prohibition to provide any subsidies to fishing and fishing-related activities in

the unregulated high seas (Article 5.1).⁶⁶ That covers situations where there is absolutely no conservation or management measures in place because there is no real management competence over those fisheries.

For a better understanding of this rule, it is important to clarify some key definitions. First, maritime areas are parts of the ocean that are delimited under the United Nations Convention on the Law of the Sea (UNCLOS). Even though not all WTO members are UNCLOS signatories, in practice, members understand and respect the following concepts. According to the UNCLOS, the territorial sea is the area of water that is closest to the coast, and it extends at most 12 nautical miles from the baseline of a coastal state and governments have sovereign rights over these waters (UNCLOS Article 3). Essentially, the coast state has full jurisdiction over the activities in the territorial sea, with the exception that it must allow the innocent passage of foreign vessels (UNCLOS Article 17). Then there is a further band of sea which is adjacent to the territorial sea and extends to 24 nautical miles from the baseline. This area is called Contiguous Zone, and, in this zone, the Coastal State can only exert limited control, for the purposes of preventing or punishing infringements of its customs, fiscal, immigration and sanitary laws and regulations (UNCLOS Article 33). The Exclusive Economic Zone or the EEZ is another larger zone which is also adjacent to the territorial sea. This is a zone with a much wider band of water that extends to 200 nautical miles from the baselines of a Coastal State (UNCLOS Article 57), and over which the Coastal State has the exclusive right to exploit marine resources but bears the obligation to manage those resources sustainably. Finally, the last area is called the high areas or areas beyond national jurisdiction, and this is everything that goes beyond Coastal States EEZs (UNCLOS Article 86). In this area States can fish freely but they have an obligation to do so sustainably, and they are required to cooperate, when necessary, through the establishment or through joining Regional Fisheries Management Organizations.

⁶⁶ Alger, Le Billon, Leinberger, & Sumaila, 2023, p. 2. Article 5.1 is the only rule in the agreement that bans subsidies in general on unregulated high seas, “and it could lay the foundation for more general bans on harmful subsidies for unregulated fishing.”

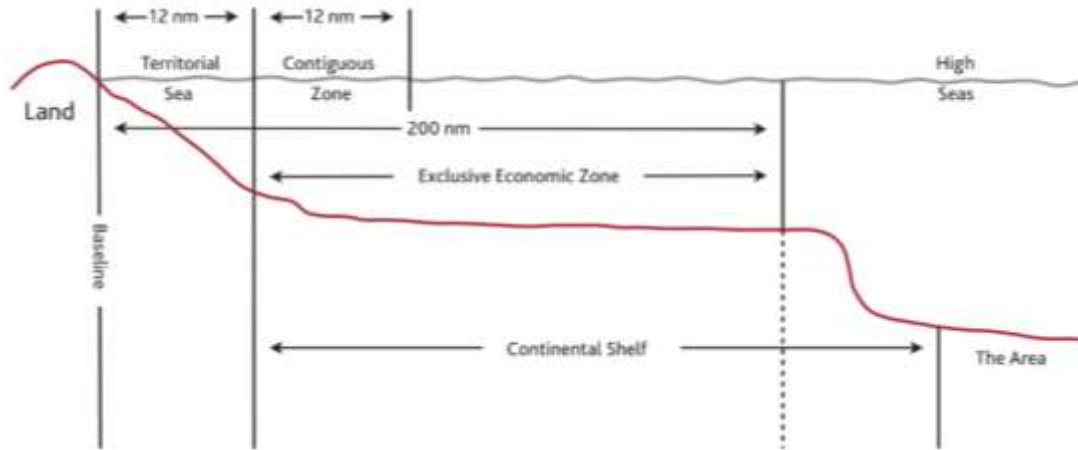


Fig. 1. Maritime Zones. Source: (Rothwell & Stephens, 2016).

To regulate fishing in the high seas, many States have become members of Regional Fisheries Management Organizations or Arrangements (RFMO/As).⁶⁷ There are broadly two kinds of RFMOs. On the one hand, there are RFMOs that govern only certain species in a particular area, such as tuna and tuna-like species. On the other hand, the second kind of RFMOs are the ones responsible for marine resources, in general, in a given area. They have a more general management mandate. In this context, it is important to elaborate on some differences between RFMOs. RFMOs differ significantly in terms of what they can do and the types of measures they can establish. Some of them establish detailed limits on catch of certain species but others only have much softer rules and measures in place. Measures can also differ between species, in a given RFMO. While some RFMOs have stricter measures on some species, others have softer measures.⁶⁸

The unregulated high seas include any ocean space outside of the Exclusive Economic Zones (EEZs) of countries and outside the competence of a relevant Regional Fishery Management Organization (RFMOs). For a better understanding of the extent to which the prohibition addressed in Article 5.1 protects fish stocks in the high seas, relevant data must be examined. Using the spatial coordinates for the 36 RFMOs listed in the FAO Map Catalog database, a recent study produced under the Marine Policy

⁶⁷ Alger, Le Billon, Leinberger, & Sumaila, 2023, p. 4. There are 53 RFMOs in the FAO Map Catalogue. To give some examples, there is the IATTC (Inter-American Tropical Tuna Commission), the PSC (Pacific Salmon Commission), the WCPFC (Western and Central Pacific Fisheries Commission), the IWC (International Whaling Commission), the PICES (North Pacific Marine Science Organization) and so many others.

⁶⁸ Irschlinger & Tipping, 2023, p. 15.

Journal⁶⁹ has shown that only ~1.35% of the high seas and 0.8% of the global ocean are not covered by national EEZs or the “geographic area of competence” of RFMOs.⁷⁰

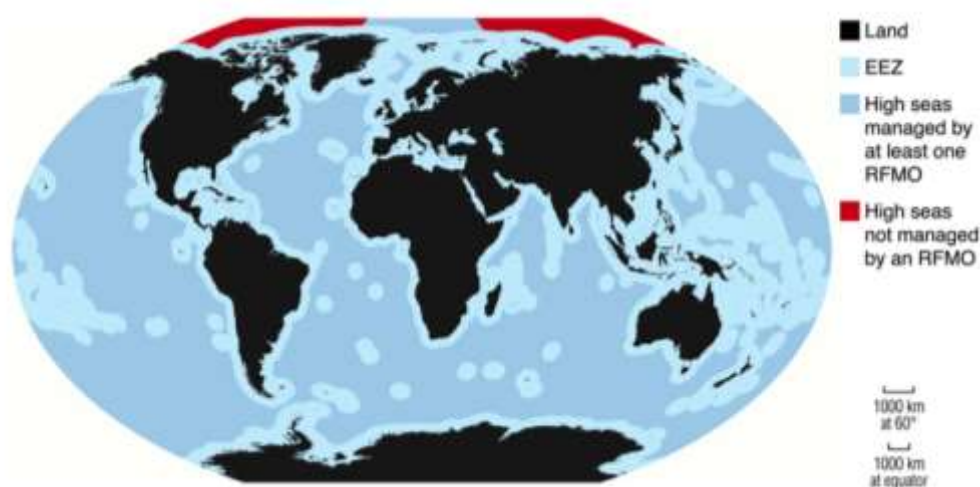


Fig. 2. High seas not managed by an RFMO. Source: (Alger, Le Billon, Leinberger, & Sumaila, 2023, p. 2)

Therefore, the ambition level of Article 5.1 for protecting fish stocks in the high seas depends on an area and species-based interpretation. If interpreted and enforced this way, there may be high institutional and normative value in Article 5.1.⁷¹ If not, the areas outside of RFMO geographical jurisdiction are too small for the prohibition to have its desired effect, which is to protect fish stocks against harmful subsidies on the high seas.⁷² Such an area and species-based interpretation and implementation would mean that subsidies to fishing and fishing-related activities outside the geographic mandate of any RFMO are prohibited, but so are subsidies to activities within the geographic mandate of an RFMO/A but regarding species that are not in its species mandate.⁷³

Reforming subsidies for high seas fishing has received a great deal of attention and support.⁷⁴ This prohibition will lead to a decrease in fishing activities within the high seas⁷⁵ allowing fish populations the chance to recover undisturbed by human activity, and spill over to EEZs. By doing so, the productivity of fisheries within States will be

⁶⁹ Alger, Le Billon, Leinberger, & Sumaila, 2023, p. 1.

⁷⁰ *Idem*, 2023, p. 2.

⁷¹ *Idem*, 2023, p. 2.

⁷² *Idem*, p. 3. “Therefore, a purely geographical (or area-based) interpretation of Article 5.1 would achieve little for protecting fish against harmful subsidies on the high seas.”

⁷³ *Idem*, p. 3. This interpretation seems to be supported by Articles 5.1, 3, 3.2(c), 4.2, 4.3 footnote 11, and 8.6 of the Agreement, which specifically refer to species under the competence of a “relevant RFMO in areas and for species under its competence”.

⁷⁴ Attempting to achieve the same objective, the High Seas Treaty was formally adopted June 19, 2023, at the United Nations to reduce environmental degradation and protect biodiversity on the high seas.

⁷⁵ Sumaila, et al., 2010, pp. 495-497.

enhanced as well. An interesting approach to this rule has been proposed in literature, concerning how high-seas vessels are defined.⁷⁶ By defining a high-seas vessel as one that spends at least 95% of its time fishing on the high seas, researchers have identified 2,144 vessels from their global vessel database in 2018, accounting for approximately 16% of global fishing effort. If, however, high-seas vessels are defined as those that spend at least 5% of their annual fishing activities on the high seas, researchers have identified 4,075 vessels, accounting for approximately 34% of global industry effort. This is a very ambitious approach and one that could have a significant increase in global biomass.⁷⁷

Importantly, unlike the subsidy prohibitions regarding IUU fishing and overfished stocks, this prohibition is not triggered by any decision or determination made by the institutions in charge of fisheries research, management, or enforcement. Instead, the prohibition addressed in Article 5.1 results from the absence of a management regime for some activities occurring on the high seas.

The two following rules are not as strong as this prohibition, but they both follow the same principle, as they introduce an obligation to give special care and to exercise due restraint when providing subsidies in two situations. The first obligation requires members to show particular caution and take special care when granting subsidies to vessels not flying the subsidising member's flag (Article 5.2). As already mentioned above, it may be possible for a member to provide subsidies to a vessel flying another country's flag and, when that is the case, the subsidizing member does not have any jurisdictional link or control over the vessel's activities, when those activities are conducted outside the waters of the subsidizing member.⁷⁸ The second obligation applies to situations in which the fish stocks are not assessed, and their status is unknown. In these situations, where members have no idea whether the fish stocks are healthy or depleted, they are required to take special care and exercise due restraint when granting subsidies (Article 5.3). We are not entirely sure how to define these obligations because the Agreement is not narrow in this regard and does not specify what actions would need to be taken in order for members to take "special care" and exercise "due restraint."⁷⁹

⁷⁶ Millage, et al., 2022, pp. 18-19.

⁷⁷ Millage, et al., 2022, p. 19. Researchers assessed both alternatives and concluded that the first definition of high seas fishing would result in a 1.20% increase in global biomass compared to a "business as usual" scenario. In comparison, the second would yield a 3.90% increase.

⁷⁸ Irschlinger & Tipping, 2023, pp. 15-16.

⁷⁹ Alger, Le Billon, Leinberger, & Sumaila, 2023, p. 3. The Agreement sets out broad principles and, as with other WTO Agreements, much of the interpretation is expected to be done through the WTO dispute settlement process.

These three rules have something in common. In all of these cases, there is a lack of control over the impact subsidies may have, making subsidization particularly risky.

Finally, we noticed that there are no SDT provisions related to obligations in Article 5, but there is, however, an exemption that applies to all WTO members. This exemption is for subsidies that are provided specifically for disaster relief, and they must meet some criteria (Article 11). They must be limited to the relief of a disaster, limited to the affected geographic area, time limited and, for reconstruction subsidies, limited to restoring the affected fishery or fleet to its pre-disaster level.

2.6 Horizontal Differential Treatment Provisions: LDCs and Technical assistance and Capacity building

The Agreement addresses a number of provisions that relate to least-developed countries and to technical assistance. Beyond the grace period for developing countries under the subsidy prohibitions regarding IUU and overfished stocks, Article 6 of the Agreement introduces an obligation for members to exercise due restraint in raising matters involving least developed countries, and they must look for solutions that take into consideration LDC's particular situation. As we previously mentioned, the obligation for members to exercise due restraint is not clear in the Agreement. "Due restraint" is an intangible, non-quantifiable exercise. To further strengthen the envisioned provision, the Agreement should provide some indicative descriptors to increase transparency, clarity, and certainty for all members.

On technical assistance and capacity building, Article 7 of the Agreement provides that targeted technical assistance and capacity building shall be provided to developing countries to support the implementation of the Agreement. For this purpose, the Agreement provides for the establishment of a fisheries funding mechanism that will be funded through voluntary contributions by WTO members. The funding mechanism became operational in June 2022, and it was an important milestone for the success of the negotiations, providing confidence that the needs of least developed countries will be addressed.⁸⁰ Furthermore, for the purpose of implementation of the disciplines under the

⁸⁰ Japan, Canada, Germany, Iceland, Australia, The Netherlands, France, and Sweden are some of the members who have voluntarily contributed to the Fund. For further insights as to the status of the funding mechanisms please see https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_fund_e.htm (last accessed on the 15 October 2023).

Agreement, investing in research and capacity building is necessary, since without it, Members can't identify IUU fishing boats or overfished stocks.

2.7 Notification and Transparency

Article 8 of the Agreement includes introduces provisions related to notification and transparency to enable more effective surveillance of the implementation of fisheries subsidies commitments. As part of its regular subsidy notification to the WTO, under the ASCM, all members are required to notify their subsidies by 30 June every year (Article 25.1). Under the new Agreement on Fisheries Subsidies, as part of these notifications, members are required to notify the type or kind of fishing activity for which the subsidy is being provided (Article 8.1, a)).

On top of existing ASCM requirements, under Article 8.1. b), members are required to provide, to the extent possible, additional information such as the status of fish stocks (overfished, maximally sustainably fished, or underfished), relevant reference points and whether these stocks are shared with any others members or managed by an RFMO/A, conservation and management measures of these stocks, the name and identification number of subsidized vessels, the fleet capacity and the catch data by species or group of species in the fishery for which the subsidy is provided.⁸¹

Meanwhile, regarding Special and Differential Treatment, footnote 13 of the Agreement further explains that Least Developed Countries and Developing Countries members accounting for less than 0.8% of global catch⁸² (the so-called “de minimis” exemption)⁸³ can provide this additional information every 4 years.

Members already had an obligation to notify their subsidies, including fisheries subsidies, under Article 25 of the ASCM. However, with the new Agreement, Members need to include additional information on the fisheries they subsidize, as part of their regular notification.

⁸¹ Cisneros-Montemayor, et al., 2022, p. 1. The experts “commend the inclusion of specific requirements for reporting of granted amounts and recipients of fisheries subsidies, as well as the state of affected fish stocks”. In fact, at the beginning of the Ministerial Conference, a different draft proposal was on the table and this draft proposal included the information on catch data by species or group of species as part of a member's regular notifications under Article 25 of the ASCM and not as information to be provided to the extent possible.

⁸² According with the most recent published FAO data which was circulated by the WTO Secretariat.

⁸³ Irschlinger & Tipping, 2022, p. 11.

Article 9 of the Agreement establishes a Committee on Fisheries Subsidies (hereafter, the Committee) composed of representatives from each of the Members. One year following the Agreement's entry into force, Members will have to inform the Committee of measures it has taken to ensure the implementation of the Agreement (Article 8.3).

In addition, Members have an obligation to notify the Committee, on an annual basis, with a list of vessels and operators that it has affirmatively determined as having been engaged in IUU fishing (Article 8.2). Within one year of the date of entry into force of the Agreement, Members are required to provide the Committee with a description of its fisheries regime, with reference to its laws, regulations, and administrative procedures, and notify the Committee of any modifications (Article 8.4). Finally, as soon as the Agreement enters into force Members have to notify the Committee of any RFMO/A to which they are parties (Article 8.6).

Even though these new additional information has the potential to improve State's understanding of the impact of subsidies on fish stocks and present them with the opportunity to learn how economic policies impact the environment, the truth is that compliance with notifications under the ASCM is the *Achilles heel* and a chronic problem of the WTO system, since too many members are not fulfilling their notification obligations, and those that do comply with their obligations, do not always produce quality notifications.⁸⁴ According to the World Trade Organization's news, in May 2023, "88 members have still not submitted their 2021 notifications", which were due on the 30th of June.⁸⁵

Compliance with the new notification requirements is important for several reasons. First, the information provided could help WTO members monitor each other's compliance with the new fisheries rules.⁸⁶ Second, it could help members assess the environmental effects of fisheries subsidies on fish stocks.⁸⁷ Third and last, it could help members learn more about their own economic policies as well as other members economic policies.⁸⁸ Still, non-compliance with notification obligations is not sanctioned

⁸⁴ Appleton, 2017, p. v.

⁸⁵ See the World Trade Organization's news on Subsidies and Countervailing Measures available at: https://www.wto.org/english/news_e/news23_e/scm_02may23_e.htm.

⁸⁶ Appleton, 2017, p. vi.

⁸⁷ Cisneros-Montemayor, et al., 2022, p. 1. Fisheries economists with diverse background and expertise argue that the "current lack of transparency in subsidy programs' rationales, recipients, and even basic information on their outcomes for fish stocks and fleet dynamics hinder any kind of sustainability effort."

⁸⁸ Appleton, 2017, p. vi.

under the ASCM or the Fisheries Subsidies Agreement, and even though it is possible for a WTO dispute to arise from failure to notify, it is unlikely that a member would resort to WTO dispute settlement solely to challenge another member's obligation to notify a subsidy, unless the subsidy causes adverse trade effects within the territory of the complaining member. As such, failure to notify subsidies poses few risks, except reputational ones.⁸⁹ The European Commission recognises that transparency is a precondition for trust and proposes that incentives and disincentives should be created for (non)compliance with notification obligations.⁹⁰ The Commission proposes that failure to notify subsidies should lead to those subsidies being presumed to produce serious prejudice. This wouldn't pose any problems, according to the EU, because this presumption could be rebuttable by the subsidizing member.⁹¹ In any case, while we may understand the many challenges that States may face in monitoring fisheries subsidies,⁹² we agree with the Commission on the importance of incentivizing notifications and preserve compliance with international trade rules.

We might wonder why States fail to comply with notification requirements. Well, while on the one hand members may face resource challenges due to a lack of human, financial and technical resources to collect and notify information, on the other hand, members may lack the political will to notify such subsidies because they're afraid that this information will be used against them in dispute settlement proceedings.⁹³ When members have the political will and want to notify their subsidy regimes, the WTO can provide technical assistance and financial resources to help with the collection and notification of fisheries related information (Article 7). These challenges could also be addressed if members work with academic research groups, national, and non-governmental initiatives on these matters⁹⁴ and with closer collaboration with the OECD (Organisation for Economic Co-operation and Development) and the Food and Agriculture Organization (FAO), which is helping UN members improve their domestic data collection skills.⁹⁵

⁸⁹ Appleton, 2017, p. 2.

⁹⁰ Fontaine Campos, 2019, p. 524.

⁹¹ Communication from the European Union, TN/RL/W/260, 2015.

⁹² Cisneros-Montemayor, et al., 2022, p. 2.

⁹³ Appleton, 2017, p. 13. Appleton explains, in his research paper, that only the first challenge can be fixable.

⁹⁴ Cisneros-Montemayor, et al., 2022, p. 2.

⁹⁵ Appleton, 2017, p. 13.

However, the lack of political will is a much more difficult challenge to tackle, especially because non-compliance with notification obligations has rarely been used against a member in a dispute settlement.⁹⁶

In principle, members know how much money they are going to allocate for subsidies to their fisheries sector, and they should know how to make this information available for the WTO, since “instructions” are available on the WTO website⁹⁷ but nevertheless, training could be given to members on how to make notifications.⁹⁸ The real struggle for governments is to establish what subsidies are required to be notified to the WTO. To fill in the information vacuum, literature proposes that WTO members could authorise the WTO Secretariat to gather missing information from the FAO’s estimates.⁹⁹

Finally, and this was an important provision on which members agreed in Article 9.3 of the Agreement, an annual session facilitated by the Committee on Fisheries Subsidies on the implementation and operation of the Agreement gives members the opportunity to pose questions and discuss shared information.¹⁰⁰

2.8 Institutional Provisions and Dispute Settlement

The Agreement contains, in Articles 9, 10 and 11, important provisions regarding the review of the operation of the Agreement. The Committee on Fisheries Subsidies, composed of representatives from each of the Members will meet twice a year (Article 9.1). Furthermore, the Committee will meet annually to review the implementation and operation of the agreement (Article 9.3) and will meet, at least every two years, to examine all the information provided by members in their notifications (Article 9.2). To monitor the implementation and operation of the Agreement, the Committee will meet to identify all necessary modifications five years after the treaty’s entry into force, and every 3 years there on after (Article 9.4).

⁹⁶ Appleton, 2017, p. 13. Appleton argues that “Providing additional technical assistance and financial resources to help members meet notification disciplines will help those members who want to notify their subsidy regimes, but such provisions will not overcome problems stemming from political will.”

⁹⁷ Committee on Subsidies and Countervailing Measures, G/SCM/6/Rev.1, 2003. See the Questionnaire available at: [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=16630,10284&CurrentCatalogueIdIndex=0&FullTextSearch=.](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=16630,10284&CurrentCatalogueIdIndex=0&FullTextSearch=)

⁹⁸ Appleton, 2017, p. 18.

⁹⁹ *Idem*, 2017, p. 14. Appleton suggests that “in order to help fill gaps where fisheries data is missing from individual notifications, WTO members could authorise the WTO Secretariat to source, and table in the ASCM, specific kinds of fisheries information gathered by the FAO beyond that provided in national notifications (such as estimates of stock status).”

¹⁰⁰ *Idem*, 2017, p. 18.

With regard to dispute settlement, Article 10.1 of the Agreement establishes that the existing rules under the WTO's dispute settlement mechanism apply to the Agreement, except those related to "non-violation" complaints. Under the new Fisheries Subsidies Agreement, members cannot use unilateral trade policy remedies, such as countervailing duties. Instead, if subsidies are found to breach the Agreement's rules, Members can only react through the multilateral dispute settlement process. In case a dispute settlement panel decides that a member has failed to bring measures into compliance with the new agreement, another member may take retaliatory action by taking "appropriate countermeasures".¹⁰¹ This is an ambiguous term that needs to be defined in a specific context by a dispute settlement compliance panel, if such need ever arises.

Last but not least, the Agreement addresses the very important issue related to situations where the jurisdiction over maritime areas is disputed. For example, if an IUU determination is made in disputed waters, or a stock is determined to be overfished in disputed waters, Article 11.2(a) clarifies that the Agreement and the legal proceedings involved in its application have no legal implications with regard to questions of territoriality or delimitation of maritime boundaries. Importantly, Article 11.2(b) further explains that dispute settlement panels "shall make no findings" that would require them to base such findings on "any asserted territorial claims or delimitation of maritime boundaries." Article 11.3 of the Agreement clarifies that the provisions may not be applied in a way that prejudices the jurisdiction, rights, and obligations of members under international law, including the law of the sea. Finally, Article 11.4 further explains that nothing in the Agreement shall imply that members are bound by measures or decisions taken by and RFMO/A, or that they recognise an RFMO/A, if they are not parties or cooperating non-parties to such RFMO/A.

3. What's next and what remains to be discussed

At this point and trusting that no doubts remain on the disciplines of the Agreement, we will now consider the multiplicity of provisions on which members couldn't find consensus at the 12th Ministerial Conference. The Agreement leaves out subsidies to fishing in EEZs (domestic and foreign) and to fishing within the competence of RFMOs,

¹⁰¹ Irschlinger & Tipping, 2023, p. 23.

when there is no recognition of an overfished stock or no determination that IUU fishing has occurred (See Fig. 3). Notwithstanding, in these situations, subsidies can still have negative impacts by encouraging overcapacity and overfishing.

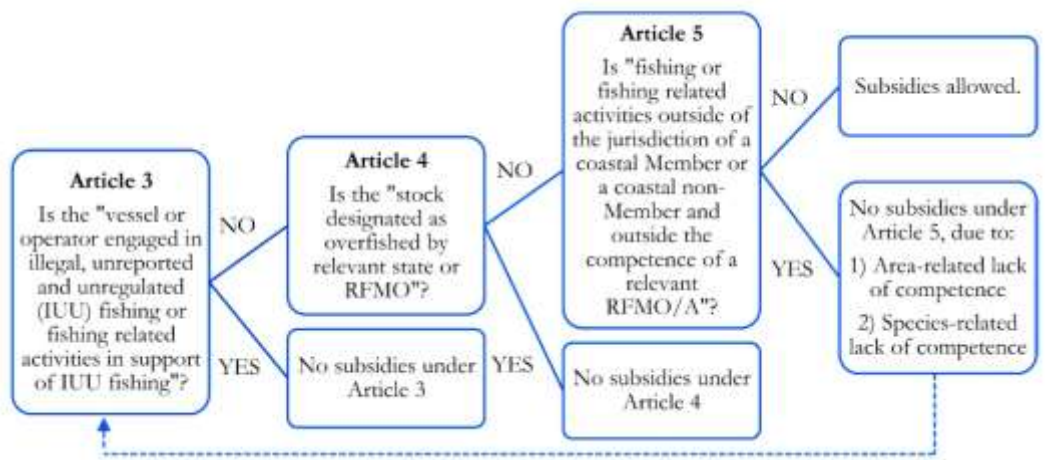


Fig. 3. Conditions for Subsidies to be Allowed under WTO Agreement. Source: (Alger, Le Billon, Leinberger, & Sumaila, 2023).

If we look at the draft text that was on the table at the beginning of the Ministerial Conference¹⁰² and compare it to the final text, there are a number of provisions that did not make it into the final agreement. The most important one is the prohibition of subsidies that contribute to overfishing and overcapacity. It may be therefore important to clarify some concepts.

The concepts of overfishing and overcapacity were introduced, for the first time, in 2005, at the Hong Kong Ministerial Conference, when members recalled their commitment at Doha “to enhance the mutual supportiveness of trade and environment and strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing.”¹⁰³

To explain overcapacity, the concept of fishing capacity has to be introduced. The FAO technical guidelines defined fishing capacity as the “amount of fish or fishing effort that can be produced over a period of time by a vessel or a fleet if fully utilized.”¹⁰⁴ There are various indicators that can be used to measure capacity, such as the number of boats or the engine power of a fleet.¹⁰⁵ Overcapacity occurs when fishing capacity exceeds the

¹⁰² World Trade Organization, WT/MIN(22)/W/20, 2022.

¹⁰³ World Trade Organization, WT/MIN(05)/DEC, 2005.

¹⁰⁴ Food and Agriculture Organization, 2008, p. 10.

¹⁰⁵ Headley, 2020, pp. 2-4.

level required to sustainably achieve the desired management objective¹⁰⁶. This management objective is often a given amount of catch, but it can also focus on social and economic aspects (maximising profit or maximising employment).¹⁰⁷ To put it another way, overcapacity occurs when the fleet is overcapitalized and is capable of catching too many fish. As an example, if we consider a fishery where the desired management objective is two tons of fish per day, and if there are two vessels capable of fishing two tons per day, it is sufficient to use the two vessels. However, if there are four vessels in that fishery, there is overcapacity. If this occurs, either the vessels will be underutilized, resulting in lower profits *per vessel*¹⁰⁸, or, on the other hand, the vessels can catch too many fish overall, in excess of what is sustainable, resulting in overfishing.

Overfishing occurs when, for a given stock, the amount of fish that's caught is excessive in relation to the stock's biomass and its reproduction rate.¹⁰⁹ This means that the desired management objective cannot be achieved or maintained sustainably. A third and closely related concept is the concept of overfished stocks. An overfished stock can be defined as a stock that has been fished beyond a set limit below which its biomass is considered to be too low¹¹⁰. A fleet with excess capacity (overcapacity) will fish too much (resulting in overfishing) and, in the absence of a strict management, this will lead to a stock being in an overfished condition. Ultimately, the stock being assessed as overfished is the end of the causal chain, but the problem actually starts building before that.

The draft text that was on the table at the beginning of the Ministerial Conference included, in Article 5.1, an illustrative list of subsidies which were generally considered to incentivize overfishing and overcapacity. This list included subsidies to vessel acquisition and modernization, purchase of engines, machinery, equipment and to fuel costs and other variable costs (ice, bait, etc.).¹¹¹ However, this list was not exhaustive and other subsidies could also be prohibited under Article 5.1, if they were shown to incentivize and contribute to overfishing and overcapacity.

¹⁰⁶ Food and Agriculture Organization, 2008, p. 23.

¹⁰⁷ Global Subsidies Initiative, 2021, p. 5.

¹⁰⁸ Cisneros-Montemayor, et al., 2020, p. 2. "the lost potential value due to overcapacity is estimated at US\$83 billion per year and declines in fish stocks can cause collapses and cascading effects on ecosystems and economies that are difficult to recover from."

¹⁰⁹ Global Subsidies Initiative, 2021, pp. 6-7.

¹¹⁰ *Idem*, p. 6.

¹¹¹ Cisneros-Montemayor, et al., 2022, p. 1. Subsidies to fuel and to modernisation, construction, acquisition, renovation, or upgrading of vessels are harmful subsidies that incentivize overfishing and overcapacity and "contribute to inequitable competition within and between national fishing sectors."

Similarly to the flexibility that has been agreed in Article 4 on overfished stocks, these subsidies were not to be prohibited if the subsidizing member could show that management measures were in place to keep stocks healthy (Article 5.1.1 of the draft text).

Article 5 of draft text was considered particularly important by many delegations because of its broader and more direct nature in how it's triggered.¹¹² This is because it did not need a particular fisheries-related decision to be triggered, unlike the prohibition of subsidies to IUU fishing or the prohibition of subsidies to overfished stocks.

However, during the Ministerial Conference, members could not agree on the exact parameters of this rule, in particular relating to demands from developing countries for special and differential treatment, which were significantly more substantial than under disciplines related to IUU fishing and overfished stocks.¹¹³

While it is true that the negotiations mandate referred explicitly to the prohibition of certain forms of fisheries subsidies that contribute to excessive fishing effort and capacity and Article 5 was the centrepiece of the draft agreement¹¹⁴, there was no consensus on this rule. To allow the conclusion of the Agreement, as a compromise, members committed to continue negotiations to achieve a more comprehensive agreement and include all the disciplines on the subsidies that contribute to overfishing and overcapacity and they will aim to make recommendations to the 13th Ministerial Conference.

Most importantly, and with the intention to strengthen this commitment, Article 12 of the Agreement introduces a sunset clause, requiring States to reach consensus on comprehensive rules. If comprehensive rules are not adopted in the four years following its entry into force, the agreement shall expire, in the sense that this is a self-destruction clause. In other words, the four years begin to tick when two thirds of WTO members, which amounts to 110 members, ratify the agreement. So far, ratification has been slow.¹¹⁵

¹¹² Irschlinger & Tipping, 2023, p. 26.

¹¹³ Irschlinger & Tipping, 2022, p. 11, "Several delegations have highlighted the need not only to protect the livelihoods and employment of poor fishing communities but also to develop their fishing fleets and ensure a fairer distribution of shared resources among fishing nations. Meanwhile, other members have insisted that broad exemptions from the rules would undermine the effectiveness of an agreement from a sustainability perspective."

¹¹⁴ Alger, Le Billon, Leinberger, & Sumaila, 2023, p. 1. Article 5 of the draft agreement enabled a transition to achieve SGD Target 14.6, so its "omission from the Agreement is a significant loss for addressing overfishing."

¹¹⁵ Only 43 Members have formally accepted the Protocol of the Agreement on Fisheries Subsidies. For further insights on ratification status, please see

In order to reach a consensus on the Agreement, a sunset clause was needed so that more controversial issues could be discussed later. While the hope is that this sunset clause will pressure members to agree on comprehensive rules¹¹⁶, the opposite could happen, and game theoretic thinking suggests that members who don't want an agreement can just let it collapse by delaying on agreeing on such rules until the agreement expires. Professors Alger, Le Billon, Leinberger and Sumaila, from the Universities of Melbourne and British Columbia argue that the sunset clause should be reversed, meaning that, if in four years members wouldn't have agreed on comprehensive rules, all the outstanding clauses would come into force automatically.¹¹⁷ This would ensure that ongoing negotiations proceed in good faith instead of leaving it at the mercy of members who don't want the agreement to pass, almost like a *Russian Roulette*.

These provisions were an integral part of the compromise found by members at the 12th Ministerial Conference. It was particularly important for the members who were the most disappointed by the exclusion of the prohibition of subsidies that contribute to overcapacity and overfishing to put real pressure on all members to deliver through those future negotiations, although we can't know for sure if the sunset clause will have this desired effect and put real pressure on members, or if it will lead to the agreement's collapse.

Regarding fisheries subsidies that contribute to overcapacity and overfishing, the invidious option that many governments face is either letting the problems persist and become worse and more urgent or tackle them now and help their fishery sectors transition to more sustainable profitability. All-in-all, that is what these negotiations are meant to be all about.

The work is not done yet and there are several changes that members must put into place to strengthen the rules of the Agreement. The benefits the Agreement brings depends entirely on Member's willingness to lead with ambition.¹¹⁸ At the moment, we've got an agreement that does not fulfil its purpose because it is not in place. We may

https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_acceptances_e.htm (last accessed on the 15 October 2023).

¹¹⁶ Alger, Le Billon, Leinberger, & Sumaila, 2023, p. 3. "The Agreement set out broad principles rather than fine details, so the process of interpreting the treaty will be gradual and based on a good faith interpretation in accordance with ordinary meaning, as required by the 1969 Vienna Convention on the Law of Treaties."

¹¹⁷ Alger, Le Billon, Leinberger, & Sumaila, 2023, p. 2., "Instead, a clause ensuring automatic entry into force of strict measures to address outstanding issues would ensure ongoing negotiations in good faith to reach consensus on comprehensive disciplines."

¹¹⁸ Costello, et al., 2021, pp. 1391-1396.

have to wait a few years before we see any positive results from this Agreement if we take into consideration the lengthy ratification process of the FAO Port Measures Agreement and the fact that it didn't need the approval of two-thirds of its members to come into force. Before the agreement can be implemented, information gathering and transparency must be established, within each country and across countries. Members need to collect and record information on fisheries subsidies that are in place, where those fleets that are being subsidized operate, and what fish are they targeting, and they must notify the WTO.

Importantly, members need to establish rules and procedures regarding prohibited subsidies. As every country has its own legal system, this is a task that must be accomplished by each country individually. To implement the Agreement, members must produce laws, regulations, and administrative procedures or change the current ones. These laws need to ban IUU vessels/operators from receiving subsidies and ensure that if a vessel or operator is found to be engaging in IUU fishing, the subsidy must be stopped right away. Also, there should be a regulation in place that says that when a vessel or operator is granted a subsidy, it cannot act in an IUU fashion, and it cannot misreport or underreport the relevant data. Aware of the complexity of these changes, in our opinion, Members need to establish coordination mechanisms between agencies and information needs to be exchanged within countries, between countries, between countries and RFMOs and between all partners involved and WTO. This information needs to be transferred quickly so that it does not take many years for Coastal States to have a list of illegal, unreported and unregulated vessels and they can take action. The same goes for flag states, for the activities of vessels flying its flag. Nevertheless, similar information must be collected regarding overfished stocks. As in the case of IUU fishing, similar laws, regulations, and procedures must be introduced. All subsidies to overfished stocks need to be removed. Regarding coordination measures, it is important for members to identify those overfished stocks. This could be done by a fisheries science department, a fishing authority, or an RFMO. This said, all this can be put into place now and members don't need to wait for the Agreement to enter into force. In fact, members shouldn't wait. These changes should be put into place before the agreement comes into effect.¹¹⁹

¹¹⁹ Cisneros-Montemayor, et al., 2022, p. 1, “urge members to proactively and inclusively formalize their fishing definitions and practices to prevent inequitable outcomes for vulnerable fishers during the implementation stage of a new agreement.”

At this point, it is worth noting that the new Chair of the Negotiating Group on Rules, Ambassador Einar Gunnarsson of Iceland circulated, on the 4th of September a new draft¹²⁰ and explanatory note¹²¹ in preparation for the 13th Ministerial Conference, which will take place in Abu Dhabi, in February, next year. The new draft text includes a broad prohibition of subsidies contributing to overfishing and overcapacity and a closed list of prohibited subsidies that contribute to overcapacity and overfishing (Article A.1^a of the new draft). The Chair uses a “hybrid approach”¹²² meaning that the subsidies on the list are specifically banned and any other subsidies that might be considered to contribute to overfishing and overcapacity can be challenged as well. Furthermore, the draft includes a possible substantive provision on non-specific fuel subsidies (Article D: Other overcapacity and overfishing provisions). This is an ambitious starting point for the 13th Ministerial Conference and a great opportunity for the WTO to build an even more sustainable fishery framework and system.

This said, so many questions remain unanswered. What are the chances of the Agreement entering into force before MC13? And will the sunset clause put pressure on all members to deliver through those future negotiations? Finally, what does the Agreement mean for the WTO in tackling other sustainability issues? There’s an ongoing discussion about fossil fuel subsidies¹²³ and informal dialogues on plastic pollution¹²⁴. Could the Agreement on Fisheries Subsidies be an important precedent for the WTO to tackle other issues of environmental significance going forward?

¹²⁰ Negotiating Group on Rules, RD/TN/RL/174, 2023.

¹²¹ Negotiating Group on Rules, RD/TN/RL/174/Add.1, 2023.

¹²² Negotiating Group on Rules, RD/TN/RL/174/Add.1, p. 3.

¹²³ See https://www.wto.org/english/news_e/news23_e/ffsr_18jul23_e.htm.

¹²⁴ See https://www.wto.org/english/news_e/news23_e/ppesp_21sep23_e.htm.

Conclusion

The Fisheries Subsidies Agreement is the first WTO Agreement with “ocean sustainability” and “subsidies” being shoulder to shoulder. The Agreement has established important rules to address the negative impacts of subsidies, in the most alarming situations.

Finishing the treaty was the end of the beginning. Every step forward is important for both the WTO and the oceans. The negotiations were long, difficult, and gruelling. Notwithstanding, the Agreement undoubtedly shows that the WTO is in the forefront battle against ocean degradation and depletion. It is a truly remarkable achievement for international trade and international environmental governance, for several reasons. Firstly, because fishing is a major source of employment, fish is a major source of nutrition and food security, and fishers are often quite politically powerful. Secondly, subsidies are amongst the most sensitive of all trade policy tools. Therefore, what we now have is an Agreement that deals with a particularly sensitive policy tool, in a particularly economically sensitive sector.

In our opinion, the flaws and the weaknesses in the agreement must not distract us from the actual opportunities that the agreement presents. On the one hand, there is an opportunity to create rules on overfishing and overcapacity. On the other hand, this is an opportunity that we never had before since we’ve never had global binding rules on fisheries subsidies, and we’ve never had a treaty at the WTO that deals with sustainability. The Agreement opens the door for governments to think critically about their subsidy policies and how they’re spending the money damaging the environment and the health of the ocean.

While it is true that members traded a comprehensive agreement with disciplines on overcapacity and overfishing for an incomplete agreement, they promised to return to these issues in the near future.

The new Agreement, when in place, can help the oceans to recover. Over time, reduced fishing will allow fish stocks to recover, marine ecosystems will be healthier, and balance in the ocean will be restored. We hope the sunset clause speeds up Member’s efforts to ratify the Agreement (instead of letting it collapse) so that the Agreement can enter into force as soon as possible and the world can reap its benefits.

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