



Current Legal Developments *World Trade Organization*



Agreement on Fisheries Subsidies

Mitchell Lennan | ORCID: 0000-0003-4744-4496

School of Law, University of Aberdeen, Aberdeen, United Kingdom

mitchell.lennan@abdn.ac.uk

Stephanie Switzer | ORCID: 0000-0002-3928-988X

Law School, University of Strathclyde, Glasgow, United Kingdom

stephanie.switzer@strath.ac.uk

Abstract

At the 12th Ministerial Conference in June 2022, Members of the World Trade Organization (WTO) reached a historic Agreement on Fisheries Subsidies that aims to contribute to the United Nations Sustainable Development Goals. This article provides the necessary background to the Agreement, tracing briefly the history to the negotiations. After a general overview of the Agreement, three key provisions of the Agreement are examined, namely, the prohibition of subsidies to (1) illegal, unreported and unregulated fishing, (2) the fishing of overexploited stocks, and (3) fisheries on the high seas outside the competence of regional fisheries management organisations. The provisions of the Agreement on special and differential treatment in favour of developing and least developed countries, as well as notable procedural and institutional features, are also considered. The remaining issues still to be addressed at the WTO are highlighted in the conclusion.

Keywords

fisheries subsidies – World Trade Organization (WTO) – illegal, unreported and unregulated (IUU) fishing – sustainable development goals

Introduction¹

Certain forms of fisheries subsidy are considered harmful because they reduce the costs of fishing and artificially increase profits or revenue.² This inevitably increases fishing capacity in a fishery system, potentially leading to overfishing.³ Fisheries subsidies can also promote illegal, unreported and unregulated (IUU) fishing.⁴ Harmful fisheries subsidies may also threaten the livelihoods and food security of millions of people who rely upon fish as an important source of protein.⁵ In addition, overexploitation reduces the resilience of fish stocks, their constituent ecosystems, and the ocean as a whole

- 1 This article has been prepared under the UKRI GCRF One Ocean Hub. The One Ocean Hub is a collaborative research for sustainable development project funded by United Kingdom Research and Innovation (UKRI) through the Global Challenges Research Fund (GCRF) (Grant Ref: NE/S008950/1). GCRF is a key component in delivering the UK AID strategy and puts UK-led research at the heart of efforts to tackle the United Nations Sustainable Development Goals. For the purpose of open access, the authors have applied a Creative Commons Attribution (CC BY) licence to any Author Accepted Manuscript (AAM) version arising from this submission. This article makes use of original material and ideas from the authors found in a blog post published immediately after the 12th Ministerial Conference of the World Trade Organization: S Switzer and M Lennan, 'The WTO's Agreement on Fisheries Subsidies. "It's good, but it's not quite right"' (One Ocean Hub, June 2022) available at <https://oneoceanhub.org/the-wtos-agreement-on-fisheries-subsidies-its-good-but-its-not-quite-right/>. All websites were last accessed on 11 November 2022.
- 2 AM Cisneros-Montemayor *et al.*, 'Changing the narrative on fisheries subsidies reform: Enabling transitions to achieve SDG 14.6 and beyond' (2020) 117 *Marine Policy* 103970.
- 3 Y Sakai, N Yagi and UR Sumaila, 'Fishery subsidies: The interaction between science and policy' (2019) 85 *Fisheries Science* 439.
- 4 Defined by the Food and Agriculture Organization of the United Nations (FAO) in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (FAO, Rome, 2001), para 3.1 [IPOA-IUU]; further clarification of those definitions is provided in M Tsamenyi, B Kuemlangan and M Camilleri, 'Defining illegal, unreported and unregulated (IUU) fishing' in FAO, *Report of the Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally* (FAO, Rome, 2015) 24–37 available at <http://www.fao.org/3/a-i5028e.pdf>.
- 5 FAO, *The State of World Fisheries and Aquaculture 2022* (FAO, Rome, 2022) available at <https://www.fao.org/publications/sofia/2022/en/>.

to the impacts of climate change.⁶ Harmful subsidies include fuel subsidies which promote fuel inefficiency, wasteful fuel consumption and consequential greenhouse gas emissions.⁷ Notably, the Glasgow Climate Pact 2021 called for a phase-out of inefficient fossil fuel subsidies.⁸

Not all fisheries subsidies are harmful. As noted by Sumaila *et al.*, “good” subsidies help to maintain or enhance the growth of fish stocks through conservation and monitoring of catch rates via control and surveillance measures.⁹ However, such categorisations of ‘good’ and ‘bad’ subsidies, which focus on the impact of a subsidy upon maximum and/or biologically sustainable yields, may ignore the wider impacts of a subsidy on, for example, human rights and other socioeconomic and labour-related interests.¹⁰ Furthermore, fisheries subsidies are allocated inequitably by States across the industry. Of the estimated US\$35.4 billion of public subsidies provided to the fishing industry in 2018,¹¹ US\$22.2bn was in the form of capacity-enhancing subsidies.¹² Of total subsidies, 81 per cent (US\$28.8 billion) were provided to large-scale industrial fishers, with 19 per cent (US\$6.6 billion) provided to the small-scale fishing sector.¹³ Fuel subsidies are the largest form of subsidy for the entire fishing sector. However, only 7 per cent of this goes to the small-scale sector.¹⁴ This creates and perpetuates inequality [b]y fueling unfair competition between large fleets and

6 UR Sumaila and TC Tai, ‘End overfishing and increase the resilience of the ocean to climate change’ (2020) 7 *Frontiers in Marine Science* 10.3389/fmars.2020.00523.

7 A Schuhbauer *et al.*, ‘The global fisheries subsidies divide between small- and large-scale fisheries’ (2020) 7 *Frontiers in Marine Science* 10.3389/fmars.2020.539214.

8 See United Nations Framework Convention on Climate Change (UNFCCC), The Glasgow Climate Pact, Decision 1.CP/26 (13 November 2021), para 20; UNFCCC, The Glasgow Climate Pact, Decision 1.CMA/3 (13 November 2021), para 36; M Lennan and E Morgera, ‘The Glasgow Climate Conference (COP26)’ (2022) 37 *International Journal of Marine and Coastal Law* 137.

9 UR Sumaila *et al.*, ‘The World Trade Organization and global fisheries sustainability’ (2007) 88 *Fisheries Research* 1, at p. 2.

10 M Kermoade *et al.*, *The Human Rights Impacts of Fisheries Subsidies* (Danish Institute of Human Rights, 2022) available at <https://www.humanrights.dk/publications>. See also S Switzer, E Morgera and E Webster, ‘Casting the net wider? The transformative potential of integrating human rights into the implementation of the WTO Agreement on fisheries subsidies’ (2022) 31 *Review of European, Comparative and International Environmental Law* 360–373.

11 UR Sumaila *et al.*, ‘Updated estimates and analysis of global fisheries subsidies’ (2019) 109 *Marine Policy* 103695.

12 *Ibid.*

13 Schuhbauer *et al.* (n 7).

14 *Ibid.*

individual artisanal fishermen, [such subsidies] are also fostering inequality'.¹⁵ As we have argued elsewhere, these environmentally, socially and economically destructive subsidies are primarily benefiting large, industrial-scale fishers.¹⁶ As UNCTAD has stated, these monies could and *should* be reinvested, 'in sustainable fisheries, aquaculture and coastal community livelihoods to reduce the pressure on fish stocks'.¹⁷

The issue of fisheries subsidies has been on the formal negotiating agenda of the World Trade Organization (WTO) since 2001, but it was not until June 2022, at the WTO's 12th Ministerial Conference (MC12), that an Agreement on Fisheries Subsidies (AFS) was reached. This was despite the consensus in the international community, as reflected in the Aichi Biodiversity Targets and Sustainable Development Goal (SDG) 14.6, directing that discussions on eliminating harmful fisheries subsidies should conclude by 2020.¹⁸ Pressure to end harmful subsidies was also manifest at the resumed 2016 Review Conference of the Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,¹⁹ and there has been continued pressure from civil society groups, among others, to address harmful fisheries subsidies.²⁰

The WTO's AFS joins the framework of international fisheries law, a suite of multilateral agreements, stemming from the 1982 United Nations Convention on Law of the Sea (LOSC).²¹ The LOSC provisions on shared/international stocks are supplemented, clarified and modernised by the UN Fish Stocks Agreement

15 UNCTAD, 'Regulating Fisheries Subsidies' (no date) available at <https://unctad.org/project/regulating-fisheries-subsidies>.

16 Switzer and Lennan (n 1).

17 UNCTAD (n 15). See also Switzer, Morgera and Webster (n 10).

18 Conference of the Parties to the Convention on Biological Diversity, Decision X/2: The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets, UN Doc UNEP/CBD/COP/DEC/X/2 (29 October 2010), Annex, Target 3; United Nations General Assembly (UNGA) Res 70/1 (21 October 2015) Transforming Our World: The 2030 Agenda for Sustainable Development, UN Doc A/RES/70/1.

19 UNGA, Report of the resumed 2016 Review Conference of the Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, UN Doc A/CONF.210/2016/5 (1 August 2016), paras 54–56, 59–62, and Annex, para 8.

20 See, for example, Stop Funding Overfishing Coalition, 'Policy Statement' (no date) available at <https://stopfundingoverfishing.com/statement/>.

21 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994), 1833 UNTS 397 [LOSC].

(UNFSA),²² as well as several binding and non-binding subject-specific instruments adopted under the auspices of the Food and Agriculture Organization of the United Nations (FAO)²³ and components of UN General Assembly (UNGA) resolutions. Several regional trade agreements – the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), the United States/Mexico/Canada Agreement (USMCA) and United Kingdom free trade agreements with Australia and New Zealand – also contain provisions on fisheries subsidies,²⁴ underlining the move to address subsidies within the international trade arena more generally.

This article provides the necessary background to the negotiations at the WTO, including how fisheries came to be a subject of negotiations within the WTO; analyses the key provisions of the AFS and concludes with suggestions for research priorities moving forward, as well as signposting potential future legal developments.

The WTO and Fisheries Subsidies

The WTO was established in 1995. It has 164 Members, consisting of both States and customs territories with full autonomy in their trade relations. The core functions of the WTO are (i) to administer the operation of the trade agreements which comprise the WTO legal framework, (ii) to provide a forum for negotiations between Members on both the existing agreements, (iii) and multilateral trade relations more generally, (iv) to provide a forum for the settlement of disputes between Members, (v) to provide a trade policy review mechanism for Members and (vi) to cooperate with relevant agencies to achieve coherence in global economic policy-making.

The WTO mandate to address subsidies in fisheries flows from the WTO Agreement on Subsidies and Countervailing Measures (ASCM). The ASCM regulates two forms of specific subsidy granted by governments, namely,

22 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995, in force 11 December 2001), 2167 *UNTS* 3 [UNFSA].

23 For example, the Code of Conduct for Responsible Fisheries 1995 (FAO, Rome, 1995) and IPOA-IUU (n 4).

24 For discussion, see B Hoekman, PC Mavroidis and S Sasmal, *Managing Externalities in the WTO: The Agreement on Fisheries Subsidies*, Robert Schuman Centre for Advanced Studies Research Paper No. RSC_76 (6 December 2022), pp. 14–15, available at SSRN: <https://ssrn.com/abstract=4294984> or <http://dx.doi.org/10.2139/ssrn.4294984>.

prohibited subsidies, which are those contingent upon export or the use of domestic over imported goods, and *actionable* subsidies.²⁵ Although fisheries subsidies are 'subject to the disciplines of the ASCM Agreement',²⁶ the ASCM does not directly address the issues caused by certain forms of fisheries subsidy. In essence, the ASCM focuses on the trade effects of a subsidy. Prohibited subsidies under the ASCM are per se illegal, but for a WTO Member to take action against another Member over an actionable subsidy depends upon the extent to which the subsidy in question causes 'adverse' trade effects to the interests of another Member. Fisheries subsidies may cause trade effects, but it is often their other effects, that is, adverse impacts on fish stocks, biodiversity, and food security, that are the focus of particular concern.²⁷ These types of effects are not considered by the ASCM.

Part of the attraction in using the WTO to address fisheries subsidies stemmed from the Organization's dispute settlement mechanism, which possesses stronger powers of enforcement than other multilateral fora.²⁸ This is interesting because, despite the fact many contentious fisheries disputes have been brought under the LOSC Part xv dispute settlement regime, none have survived to the merits phase.²⁹

Shortly after the formation of the WTO, the pernicious impacts of certain forms of fisheries subsidies became the subject of discussion within the WTO's Committee on Trade and Environment.³⁰ Members agreed in 1996 that fisher-

25 WTO, Agreement on Subsidies and Countervailing Measures (15 April 1994, in force 1 January 1995) 1869 *UNTS* 14, Articles 1–3 [ASCM].

26 WTO Committee on Trade and Environment, GATT/WTO Rules on Subsidies and Aids Granted in the Fishing Industry, WT/CTE/W/80 (9 March 1998) available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/CTE/W/80.pdf&Open=True>.

27 WTO Negotiating Group on Rules, The Doha Mandate to Address Fisheries Subsidies: Issues – Submission from Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines and The United States, TN/RL/W/324 (April 2002).

28 See, WE Schrank, *Introducing Fisheries Subsidies*, FAO Technical Series Paper 437 (FAO, Rome, 2003) available at <https://www.fao.org/3/Y4647E/y4647e00.htm#Contents>.

29 On this point see A Serdy, 'Managing transboundary fish stocks for sustainability' in Ø Jensen (ed), *The Development of the Law of the Sea Convention: The Role of International Courts and Tribunals* (Edward Elgar, Cheltenham, 2020) 104–138.

30 The WTO Committee on Trade and Environment was formed in 1994 with the 'aim of making international trade and environmental policies mutually supportive' and with the mandate to, *inter alia*, identify the relationship between both trade and environmental measures to promote sustainable development, making recommendations 'on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system. See 'Decision on Trade and Environment' available at https://www.wto.org/english/docs_e/legal_e/56-dtenv.pdf quoting MTN.TNC/40 Annex 2, at p. 10, available at https://www.wto.org/gatt_docs/English/SULPDF/92150092.pdf.

ies subsidies should 'be included among the economic sectors that would be discussed by the Committee [on Trade and Environment] in the context of the environmental benefits of subsidy removal'.³¹ Advocacy by a coalition of concerned WTO Members, the so-called Friends of Fish, ultimately led to pressure for inclusion of the issue within the formal negotiating agenda, as opposed to being confined within Committee discussions of the WTO.

With the launch of the so-called Doha Round of multilateral trade negotiations in 2001, WTO Members committed to negotiations to 'clarify and improve WTO disciplines on fisheries subsidies',³² recognising the need to ensure 'the mutual supportiveness of trade and environment'. The 2005 WTO Hong Kong Ministerial Declaration expanded upon this by noting that 'there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing'.³³ Under the Declaration, the mandate of the fisheries subsidies negotiations was extended and WTO Members were further called upon to

promptly ... undertake further detailed work to, *inter alia*, establish the nature and extent of those disciplines, including transparency and enforceability. 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.³⁴

Despite the direction under the Hong Kong Ministerial Declaration that work be undertaken 'promptly', negotiations ultimately failed to secure an agreement. It was not until June 2022 that an Agreement on Fisheries Subsidies was reached.

31 United Nations Environment Programme, *Fisheries Subsidies and Overfishing: Toward a Structure Discussion* (UNEP, Geneva, 2001) available at <https://www.unep.org/resources/report/fisheries-subsidies-and-overfishing-towards-structured-discussion>.

32 WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/1 (20 November 2001), para 28; see also para 31.

33 WTO, Hong Kong Ministerial Declaration, WT/MIN(05)/DEC (22 December 2005), Annex D, para 9.

34 *Ibid.*

The Agreement on Fisheries Subsidies

The AFS will enter into force and become legally binding on the WTO Members who have accepted it once a quorum of at least two-thirds of the 164 WTO Members accept the AFS.³⁵ Reservations are not permitted to the AFS.³⁶ Accordingly, once a Member has accepted the AFS, its terms cannot be unilaterally altered. To ensure coherence in the application of WTO law, the definition of a subsidy under the AFS draws directly from the ASCM.³⁷ This form of cross-referencing avoids disciplinary fragmentation, but it raises questions about whether this might stymie measures to account for broader socio-economic, human rights and labour concerns.³⁸

The AFS applies exclusively 'to marine wild capture fishing and fishing related activities at sea'.³⁹ It sets out several central disciplines in respect of subsidies granted in respect of IUU fishing, overfished stocks, and subsidies granted to fishing-related activities on the high seas. The AFS contains further provisions aimed specifically at the position of developing and least developed Members (special and differential treatment), as well as procedural and other related provisions designed to enhance, among other things, transparency in the sector. Each is dealt with in turn below.

IUU Fishing

It is generally understood that IUU fishing undermines conservation and management measures taken by coastal States and regional fisheries management organisations or arrangements (RFMO/As).⁴⁰ IUU fishing can deplete

35 WTO, Agreement on Fisheries Subsidies – Ministerial Decision of 17 June 2022, WT/MIN(22)/33 WT/L/1144 (22 June 2022), Annex: Agreement on Fisheries Subsidies [AFS]. Further guidance on acceptance is provided at WTO, 'How to Accept the Protocol of Amendment to Insert the Agreement on Fisheries Subsidies into Annex 1A of the WTO Agreement' (no date) available at https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/agreement_fisheries_subsidies_e.htm.

36 Of note is that reservations are also prohibited under the LOSC (n 21), Article 309.

37 Under Article 1.1 of the ASCM (n 25), a subsidy is defined as a financial contribution/income or price support by the government or a public body with the financial contribution/income or price support in question required to confer a benefit. Under Article 2 of the ASCM, the subsidy in question must be 'specific'; in essence, this requires that it is targeted towards certain enterprises, industries or geographical areas. Accordingly, only fisheries subsidies that involve a financial contribution, income or price support, confer a benefit and also specifically fall within the scope of the AFS.

38 See Switzer, Morgera and Webster (n 10); Kermoade *et al.* (n 10).

39 Under Article 1 of the AFS (n 35), aquaculture and inland fisheries are not included within the scope of the AFS.

40 FAO, 'Illegal, Unreported and Unregulated (IUU) fishing' (no date) available at <https://www.fao.org/iuu-fishing/en/>.

fish stocks and damage associated ecosystems, with implications for food security and human rights.⁴¹ The AFS has the potential to support the fight against IUU fishing. To ensure coherence across legal regimes, the definition for IUU fishing adopted in the AFS is the same as that provided in paragraph 3.1 of the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).⁴² The IPOA-IUU was adopted by FAO in 2001, with its object and purpose being to 'prevent, deter and eliminate' IUU fishing through a system of comprehensive, transparent, and effective measures. The IPOA-IUU is a voluntary instrument, so the incorporation of its definition of IUU fishing into the WTO AFS has the potential to significantly strengthen its normative impact.

Article 3.1 of the AFS prohibits the grant or maintenance of subsidies to vessels or operators engaged in IUU fishing or activities in support of IUU fishing.⁴³ However, it is unlikely that States would openly admit to providing subsidies in support of illicit activities. Under the AFS, determinations of IUU fishing or IUU supporting activities may be made by any Member in their capacity as coastal or flag State, as well as by RFMO/As.⁴⁴ Port State Members are not entitled to make determinations of IUU fishing/IUU supporting activities. However, should the relevant port State notify another Member that it believes that a vessel in port has been engaged in such actions, the relevant subsidising Member 'shall give due regard to the information received and take such actions in respect of its subsidies as it deems appropriate'.

A subsidising Member notified of an affirmative IUU fishing determination needs to 'take into account the nature, gravity, and repetition of IUU fishing committed by a vessel or operator'⁴⁵ when deciding on how long to prohibit the relevant vessel or operator from receiving further subsidies. The prohibition must last as long as any sanction applied by the determining State or RFMO/A. Actions taken by Members pursuant to the prohibition must be communicated to the Fisheries Subsidies Committee (discussed below).⁴⁶ All Members are required to have in place relevant laws, regulations and/or administrative procedures to ensure that the prohibition on subsidisation of IUU fishing and related activities are not granted or maintained.⁴⁷ Consideration was given during the negotiations to, among other things, granting the subsidising

41 FAO (n 5).

42 AFS (n 35), footnote 4.

43 Definitions for key terms such as vessel, operator and fishing related activities are set out in AFS, *ibid.*, Article 2.

44 *Ibid.*, Article 3.2.

45 *Ibid.*, Article 3.4.

46 *Ibid.*, Article 3.5; see also Article 8.3.

47 *Ibid.*, Article 3.7.

Member considerable discretion in the application of the prohibition, including, for example, granting Members the power not to impose any sort of sanction if the IUU infraction was minor.⁴⁸ This was rejected in the final text.

Overfished Stocks

FAO has consistently reported that around a third of global fish stocks are over-exploited.⁴⁹ Article 4 of the AFS prohibits Members from granting or maintaining subsidies, 'for fishing or fishing related activities regarding an overfished stock'. This provision complements the relevant provisions of international fisheries law on managing and conserving fish stocks within biological limits.⁵⁰

Whether a fish stock is overfished is a decision for the Member 'under whose jurisdiction the fishing is taking place or by a relevant RFMO/A in areas and for species under its competence, based on best scientific evidence available to it'.⁵¹ One of the more contentious issues during the AFS negotiations was the lack of an agreed definition on when a fish stock will be deemed to be overfished.⁵² Opting for an approach which grants national and regional agencies autonomy to determine whether a particular fish stock is overfished has the significant drawback of the prohibition being largely self-determining.⁵³ However, it may also promote cooperation between different national authorities; that is, those granting subsidies and those managing fish stocks.⁵⁴ The autonomy of Members and RFMO/As to make such a determination is also tempered by the requirement that any decision must be based on the best scientific evidence available to it.⁵⁵

Subsidies for overfished stocks to facilitate recovery to biologically sustainable levels are excluded from the scope of the AFS.⁵⁶ In respect of unassessed stocks, some Members had called for unassessed stocks to automatically be

48 WTO, Fisheries Subsidies Revised Draft Consolidated Chair Text, TN/RL/W/276/Rev.1/Add.1 (30 June 2021), at p.6, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/RL/W276R1A1.pdf&Open=True>.

49 FAO (n 5), at p. 109.

50 LOSC (n 21), Articles 61–64, 118–119; UNFSA (n 22), Articles 5, 7(d), Annex II.

51 AFS (n 35), Article 4.2.

52 International Institute for Sustainable Development (IISD), 'WTO Negotiations on Fisheries Subsidies: What's the state of play?' *GSI Policy Brief* (2020), at p. 9, available at <https://www.iisd.org/sites/default/files/2020-07/wto-negotiations-fisheries-state-play.pdf?q=sites/default/files/publications/wto-negotiations-fisheries-state-play.pdf>.

53 *Ibid.*

54 *Ibid.*

55 As noted in *ibid.*, this reflects similar language in Article 61 of the LOSC (n 21).

56 AFS (n 35), Article 4.3.

considered overfished. This was, however, rejected in favour of a 'special care' and 'due restraint' obligation in respect of such unassessed stocks.⁵⁷

The High Seas

Article 5 of the AFS contains further disciplines under the broad phrase of 'other subsidies'. Article 5.1 directs that '[n]o Member shall grant or maintain subsidies provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant RFMO/A'. No special and differential treatment for developing and least developed Members is provided in respect of this prohibition. Although certain Members had been of the view that this prohibition should only apply to the most harmful subsidies such as fuel subsidies,⁵⁸ ultimately a convergence of views was reached to allow the inclusion of this very far-reaching provision prohibiting subsidies for unregulated high seas fishing. However, as we have noted elsewhere,⁵⁹ without further regulation in the form of, for example, catch limits to exploitation, this prohibition can only go so far. Accordingly, this provision will not, on its own terms, prevent overexploitation on the high seas. Article 5 also contains special care and due restraint obligations in respect of foreign-flagged vessels and, as noted above, in respect of fish stocks whose status is unknown.⁶⁰

Special and Differential Treatment

In line with the direction that special and differential treatment for developing and least developed countries should be an integral part of fisheries subsidies negotiations, the AFS contains numerous provisions to consider the special situation of such countries. In respect of the prohibition on subsidisation of IUU fishing, Article 3.8 provides that 'for a period of 2 years from the date of entry into force of this Agreement, subsidies granted or maintained by developing country Members, including least-developed country (LDC) Members, up to and within the exclusive economic zone (EEZ) shall be exempt' from actions related to this prohibition.

The AFS makes further provision for special and differential treatment in respect of overfished stocks whereby, 'for a period of 2 years from the date of entry into force of this Agreement, subsidies granted or maintained by developing country Members, including LDC Members, up to and within the EEZ

57 *Ibid.*, Article 5.3.

58 WTO (30 June 2021) (n 48), at p. 9.

59 Switzer and Lennan (n 1).

60 AFS (n 35), Articles 5.2, 5.3.

shall be exempt from actions based on Articles 4.1 and 10 of this Agreement'.⁶¹ Article 6 of the AFS directs that, '[a] Member shall exercise due restraint in raising matters involving an LDC Member and solutions explored shall take into consideration the specific situation of the LDC Member involved, if any'. Article 7 further sets out that developing and LDCs 'shall' be provided with technical assistance and capacity building for the purposes of implementation of the AFS. To that end, the AFS mandates the establishment of a 'voluntary WTO funding mechanism ... in cooperation with relevant international organizations such as the [FAO] and International Fund for Agricultural Development'.⁶²

The above concerns reflect a more general issue within the negotiations about how to balance/reconcile a sufficient level of ambition with some countries' development needs. A particular difficulty stems from the heterogeneity of Members eligible to claim special and differential treatment. The impacts of China's distant water fleet, together with its position as the world's largest subsidiser, are not comparable, for example, to the activities of subsistence and artisanal fishers in developing country coastal communities.⁶³ More generally, China did not start subsidising its fisheries until 2006; at that point, the provision of special and differential treatment for developing and least developed countries was firmly embedded in the WTO negotiating mandate.⁶⁴ How to deal with China as a developing country and its demands for special and differential treatment has led to major ruptures in negotiations.⁶⁵ At the same time, the historical responsibility of the developed world for the degradation and in some cases destruction of fish stocks has led to calls for an approach to fisheries subsidies grounded in the principle of common but differentiated responsibilities.⁶⁶ This also points to the wider concern of how to ensure equity in regulatory activity where clearly not every Member is equal, whether in terms of implementation capacity, historical responsibility for problems or in respect of the impact of changes upon certain Members.

61 *Ibid.*, Article 4.4.

62 *Ibid.*, Article 7. This has entered into force. See WTO, 'WTO Fisheries Funding Mechanism Now Operational to Assist Developing Countries and LDCs' (8 November 2022) available at https://www.wto.org/english/news_e/news22_e/fish_08nov22_e.htm.

63 See generally R Sengupta, Third World Network, 'Fisheries Subsidies Negotiations towards the WTO's 12th Ministerial Conference: Considerations for developing countries and LDCs' (27 May 2022) available at https://twm.my/title2/briefing_papers/MC12/briefings/Fisheries%20subsidies%20TWNBP%20MC12%20Sengupta.pdf.

64 See K Hopewell, 'The Dragon in the World's Oceans: Fisheries Subsidies', in *Clash of Powers: US-China Rivalry in Global Trade Governance* (Cambridge University Press, Cambridge, 2020) 94–132.

65 *Ibid.*

66 Sengupta (n 63).

Procedural Obligations and Institutional Arrangements

The AFS also sets out a number of procedural obligations, and includes a range of provisions to improve the notification and transparency of fisheries subsidies.⁶⁷ The ASCM mandates that any specific subsidy as defined in the ASCM must be notified.⁶⁸ Notifications are then reviewed in special sessions of the Committee on Subsidies and Countervailing Measures. This is an important means of enhancing the transparency, surveillance and compliance with subsidies disciplines. While notifications of fisheries subsidies have increased in recent years, concerns relating to compliance with notification requirements persist.⁶⁹ In addition, the ASCM lacks a specific framework for fisheries subsidies notification which has resulted in significant differences in the information provided by Members.⁷⁰ The AFS therefore includes informational requirements to address these shortcomings and complement the existing transparency provisions of the ASCM. Under Article 8 of the AFS, Members are required to provide information on the type or kind of fishing activity to which they provide subsidies and, to the extent possible, provide information on the following: (i) the status of the fish stocks in the fishery for which a subsidy falling under the ASCM/AFS is provided, for example, whether the stock is overfished, maximally sustainably fished, or underfished; (ii) whether that stock is shared or managed by an RFMO/A, as well as the reference points used; (iii) any conservation and management measures in place for the fish stock; (iv) fleet capacity in respect of which the subsidy is provided; (v) identifying details for the fishing vessel(s) receiving the subsidy; and (vi) catch data by species/group of species in relation to the fishery for which the subsidy is granted. Given that transparency has typically been lacking in this sector, the informational requirements imposed under the AFS have been hailed as vital to 'increase the transparency of government support measures to a sector that is a crucial contributor to incomes and food security'.⁷¹ Special and differential treatment is also provided for least developed Members and developing country Members

67 AFS (n 35), Article 8.

68 Specifically, ASCM (n 25), Article 25.2. Furthermore, even if a subsidy is not 'specific' within the meaning of the ASCM, GATT Article XVI:1 directs that it must still be notified if it impacts trade.

69 WTO, 'Members Welcome Progress in Notification of Fisheries Subsidies' (19 November 2019) available at https://www.wto.org/english/news_e/news19_e/scm_19nov19_e.htm.

70 UNCTAD, *Transparency in Fisheries Subsidies: Notification-driven Analytics of Country Performance and Disclosure Requirements*, UNCTAD Research Paper No. 36, UN Doc UNCTAD/SER.RP/2019/8, available at https://unctad.org/system/files/official-document/ser-rp-2019d8_en.pdf.

71 A Tipping, 'WTO Members Clinch a Deal on Fisheries Subsidies' (IISD, 17 June 2022) available at <https://sdg.iisd.org/news/wto-members-clinch-a-deal-on-fisheries-subsidies/>.

with an annual share of the global volume of marine capture production not exceeding 0.8 per cent in the form of less regular notification obligations.

The AFS further mandates the establishment of a Committee on Fisheries Subsidies which will, among other things, review annually the implementation and operation of the Agreement,⁷² and ‘review the operation of this Agreement with a view to identifying all necessary modifications to improve the operation of this Agreement, taking into account the objectives thereof.’⁷³

The AFS sets out numerous provisions on dispute settlement in respect of fisheries subsidies. The existing WTO Dispute Settlement Understanding will apply to disputes brought between Members in respect of disputes arising under the WTO AFS, except in respect of any matter under Articles 3, 4 and 5 of the AFS, where the provisions of Article 4 of the ASCM shall instead apply. It should, however, be noted that the WTO dispute settlement system is not currently working as intended, with its appellate function stalled due to political disagreements over its mandate and functioning.⁷⁴ To the extent that at least part of the rationale for the inclusion of fisheries subsidies within the WTO framework was its dispute settlement system, it remains to be seen how disputes over such subsidies will play out once the AFS enters into force. A final point of note is that the AFS cannot be used to arbitrate territorial claims or delimitation of maritime boundaries.⁷⁵ Accordingly, ‘[a] [dispute settlement] panel established pursuant [to the AFS] shall make no findings with respect to any claim that would require it to base its findings on any asserted territorial claims or delimitation of maritime boundaries.’⁷⁶

The Missing Pieces

The AFS does not deal with all aspects of fisheries subsidies. SDG 14.6 requires States to ‘prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing’. Agreement on subsidies contributing to overcapacity and overfishing proved elusive at MC12.⁷⁷ Accordingly, while the AFS text agreed to in June 2022

72 AFS (n 35), Article 9.

73 This is without prejudice to AFS (n 35) Article 12, see discussion in text.

74 WTO, ‘Appellate Body’ (no date) available at https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm noting that ‘[c]urrently, the Appellate Body is unable to review appeals given its ongoing vacancies. The term of the last sitting Appellate Body member expired on 30 November 2020.’

75 AFS (n 35), Article 11.2 (a).

76 *Ibid.*, Article 11.2 (b).

77 See, WTO, Agreement on Fisheries Subsidies Draft Text, WT/MIN(21)/2/5 (24 November 2021), Article 5, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN21/W5.pdf&Open=True>.

contains a prohibition on subsidies granted in respect of fish stocks which are overfished, there is still work to be done on the prohibition of subsidies which, in general terms, are likely to contribute to overfishing and/or overcapacity. Previous drafts of the AFS text had included provisions on this vital issue. For example, the November 2021 draft AFS text set out a general prohibition on the grant of subsidies liable to contribute to overcapacity and overfishing, together with an indicative list of the type of the sorts of payments which would fall within the scope of the prohibition. This list included, *inter alia*, subsidies for the purchase of machines and equipment for vessels, fuel subsidies as well as subsidies for ice and bait, subsidies for the costs of personnel, social charges or insurance.⁷⁸ As consensus on these issues could not be reached at MC12,⁷⁹ it was agreed that negotiations would continue with a view to making recommendations for the 13th WTO Ministerial Conference,

for additional provisions that would achieve a comprehensive agreement on fisheries subsidies, including through further disciplines on certain forms of fisheries subsidies that contribute to overcapacity and overfishing, recognizing that appropriate and effective special and differential treatment for developing country Members and least developed country Members should be an integral part of these negotiations.⁸⁰

Should negotiations fail, and assuming there is no consensus to keep the AFS, the Agreement will cease to apply. This is set out in Article 12 of the AFS which directs that '[i]f comprehensive disciplines are not adopted within four years of the entry into force of this Agreement, and unless otherwise decided by the General Council, this Agreement shall stand immediately terminated'.

Conclusion

The Agreement is far from comprehensive, and there are clear roadblocks ahead in securing an agreement on the 'missing elements' of the mandate.⁸¹ However, the AFS is significant as the first WTO multilateral agreement

⁷⁸ *Ibid.*

⁷⁹ Special and differential treatment in respect of subsidies for overcapacity and overfishing was a particular issue of contention in this regard. See WTO, 'Statement by Ambassador Santiago Wills of Colombia, Negotiating Group on Rules Chair', Press Briefing (10 June 2022), at p. 3, available at https://www.wto.org/english/news_e/news22_e/fish_10jun22_e.pdf.

⁸⁰ AFS (n 35), para 4.

⁸¹ See further, Switzer and Lennan (n 1).

established to tackle environmental issues.⁸² The establishment of a Committee on Fisheries Subsidies has the potential to create new norms and shared understandings via a process of deliberation, learning and dialogue.⁸³ As the ‘work-horses of the system’,⁸⁴ the WTO committee structure can add ‘dynamism’ to WTO legal texts, ‘help[ing] the agreements keep pace with current realities and challenges’.⁸⁵ The notification and transparency provisions are also useful and indeed notable though that they are in part framed as best endeavour clauses – the obligation to provide certain aspects of the information listed being ‘to the extent possible’ – may pose difficulties for enforcement.

The establishment of a funding mechanism to provide developing and least developed countries with technical assistance and capacity building for the implementation of the AFS is a welcome step forward. However, this could have been enhanced by tying the acceptance of obligations to the receipt of assistance,⁸⁶ as was the case with the WTO Agreement on Trade Facilitation. Although this was unlikely to have been accepted, it would have focused attention upon the provision of appropriate assistance to secure successful implementation.

The failure to tackle the issue of subsidies promoting overfishing and overcapacity is of real concern.⁸⁷ Negotiators at MC12 traded a comprehensive agreement with disciplines on overcapacity and overfishing for an incomplete interim or ‘starter agreement’,⁸⁸ with the promise to return to these more contentious issues in due course. Whether such action is kicking the proverbial tuna can down the road, or a politically astute and sensible decision which

82 Tipping (n 71).

83 In respect of the Committee system more generally, see A Lang and J Scott, ‘The hidden world of WTO governance’ (2009) 20 *European Journal of International Law* 575.

84 PC Mavroidis and EN Wijkström, ‘Moving out of the shadows: Bringing transparency to standards and regulations in the WTO’s TBT Committee’ in T Epps and MJ Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar, Cheltenham, 2013) 204–237.

85 D McDaniels, AC Molina and EN Wijkström, ‘A closer look at WTO’s third pillar: How WTO committees influence regional trade agreements’ (2018) 21 *Journal of International Economic Law* 815, at p. 829.

86 As suggested by Sengupta (n 63), at p. 5.

87 See Switzer and Lennan (n 1); D Skerritt, ‘The WTO Agreement Saves Face, But Does It Save Fish?’ (Oceana blog, 17 June 2022) available at <https://oceana.org/blog/the-wto-agreement-saves-face-but-does-it-save-fish/>.

88 The phrasing of the AFS as a ‘starter agreements’ comes from the Trade Talks podcast with Chad Bown, ‘162. Poor Countries Could Once Enforce WTO TRADE. That Is Now at Risk’ (Trade Talks, 4 July 2022) available at <https://tradetalkspodcast.com/podcast/162-poor-countries-could-once-enforce-wto-trade-that-is-now-at-risk/>.

provides Members with adequate time and space to reach an agreement on these contentious areas of the negotiating mandate, remains to be seen.

Finally, in cases where subsidies are withdrawn, how those saved monetary sums are then spent needs consideration. However, the AFS is (perhaps understandably) silent on this subject, and only time will tell how any such monies saved are redistributed.⁸⁹

89 See generally, Switzer, Morgera and Webster (n 10).