

The Second Wave of the Fisheries Subsidies Negotiations: Overcapacity, Overfishing, and Other Disciplines

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The Agreement on Fisheries Subsidies (AFS) was concluded by the Ministerial Conference of the World Trade Organization (WTO) in June 2022. It was negotiated following the mandate contained in the Sustainable Development Goal (SDG) 14.6 adopted by the United Nations General Assembly in 2015. In the AFS, WTO Members were able to agree on subsidy prohibitions relating to illegal, unreported, and unregulated fishing, overfished stocks and unregulated waters. However, the AFS fails to address part of the SDG 14.6 mandate concerning subsidies contributing to overcapacity and overfishing. For this reason, WTO Members have, shortly after the conclusion of the AFS, engaged in a second wave of negotiations to address the missing elements in SDG 14.6, as well as other provisions left out of the AFS. At the time of writing, the WTO Negotiating Group on Rules has produced a draft text containing the proposals of Members on overcapacity and overfishing, including a sustainability carve-out and special and differential treatment for developing countries. In addition, this text includes a subsidy prohibition with respect to subsidies contingent upon or tied to fishing and fishing related activities in waters outside the subsidizing Member's jurisdiction and a notification obligation concerning the use of forced labour. The challenge is, therefore, to produce a text that is agreeable to both the representatives of Members sitting at the WTO Ministerial Conference and the stakeholders of each WTO Member who will decide, domestically, whether to ratify the agreement.

Keywords: fisheries subsidies, IUU fishing, overfished stocks, overcapacity, overfishing, forced labour, waters outside the jurisdiction

I INTRODUCTION

The conclusion of the Agreement on Fisheries Subsidies (AFS) in June 2022 is a great achievement of the negotiating function of the World Trade Organization (WTO). Although considerable efforts were deployed already since 2001,¹ WTO Members engaged in the negotiation of this agreement following the adoption, by the United Nations (UN) General Assembly, of the Sustainable Development Goals (SDGs) in 2015. In particular SDG 14.6 stated²:

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.¹⁶

¹⁶ Taking into account ongoing World Trade Organization negotiations, the Doha Development Agenda and the Hong Kong ministerial mandate.

WTO Members promptly started discussions in order to meet the 2020 deadline. At the 10th Ministerial Conference held in Nairobi in December 2015, a group of Members drew attention to the SDG 14.6 mandate by proposing a text for the inclusion to the Ministerial Declaration whereby Members would 'commit to working to clarify and improve WTO disciplines on fisheries subsidies taking into account UN Sustainable Development Goal Target 14.6'.³ Although this proposal was finally not reflected in the WTO Nairobi Ministerial Declaration, this communication could be considered the point of departure of the formal negotiations on fisheries subsidies pursuant to the SDG 14.6 mandate. This ushered in intense negotiations in the months that followed with the objective to reach an agreement by the 2017 WTO

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¹ See in this regard, *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, 20 Nov. 2001, paras 28 and 31.

² Transforming our world: the 2030 Agenda for Sustainable Development, Resolution A/70/L.1, adopted by the General Assembly on 25 Sep. 2015.

³ *MC10 Part III Text – Fisheries Subsidies*, Communication from Colombia, New Zealand and Pakistan, WT/MIN(5)/W/11, 11 Nov. 2015.

Ministerial Conference held in Buenos Aires. Although that endeavour proved to be too optimistic, the 2017 WTO Ministerial Conference adopted a decision echoing the mandate in SDG 14.6 to conclude an AFS based on three pillars: illegal, unreported, and unregulated (IUU) fishing, overfishing, and overcapacity. Like SDG 14.6, the WTO Ministerial Decision on Fisheries Subsidies stressed the need to preserve the principle of special and differential treatment (SD&T) in those negotiations.⁴

Negotiations were partially concluded in June 2022, that is, two years after the deadline given in both SDG 14.6 and the 2017 Ministerial Decision on Fisheries Subsidies. The COVID disruption can take the blame for the delay although it is unclear whether WTO Members would have been able to meet the 2020 target in the absence of the pandemic. At any rate, the resulting AFS successfully included the prohibition of subsidies concerning IUU fishing, overfished stocks, and unregulated waters. However, the final iteration of the AFS failed to address the disciplines concerning overcapacity and overfishing. Instead, a last-minute provision was added in Article 12 stating 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'.⁵

Pursuant to Article 12, WTO Members quickly resumed a 'second wave' of negotiations in an effort to give full effect to the SDG 14.6 mandate. On 27 January 2023, the WTO Negotiating Group on Rules appointed its new Chairperson, Ambassador Einar Gunnarson of Iceland, who resumed meetings with Members with an eye to arriving at a 'second phase' agreement by the 13th Ministerial Conference to be held in February 2024.⁶

Against this backdrop, this article aims at providing the state of play of the fisheries subsidies issue in the WTO. It begins by providing a brief overview of the AFS followed by an analysis of the issues at stake in the second wave of negotiations.

2 THE AGREEMENT ON FISHERIES SUBSIDIES

The second wave of WTO negotiations on fisheries subsidies may be explained only if we understand the concepts and issues contained in the AFS. To begin with, the AFS does not contain a preamble. Although this is not

unique in the WTO agreements,⁷ it would have been expected that negotiators would have taken the time to draft an inspirational preamble given the high environmental and sustainability-related stakes that this agreement seeks to protect.

The scope of application of the AFS is set out in Article 1. This provision is significant as it clarifies what 'subsidies' are covered by this agreement, that is, subsidies as defined in Article 1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) that are specific within the meaning of Article 2 of the same Agreement. Therefore, the AFS avoids introducing innovative ideas about the concept of 'specific subsidy' by simply importing from the SCM Agreement the established (and yet complex) notions of subsidy and specificity.⁸

In addition, Article 1 also speaks to a number of exclusions to be made from the scope of the AFS: it applies only to subsidies (1) 'to marine wild capture fishing and fishing related activities'; and (2) to 'fishing and fishing related activities at sea'. This means that the AFS does not apply to subsidies for aquaculture-related activities (not 'wild capture') or activities in the internal waters of a Member (not 'activities at sea') such as rivers, lakes or maritime areas within the baseline normally determined under Articles 5–14 of the UN Convention on the Law of the Sea.⁹ In addition, the so-called 'government-to-government' payments in the context of fisheries access agreements are not to be considered subsidies under the AFS, regardless of whether they could objectively qualify as such under Article 1 of the SCM Agreement.

Article 2 provides useful definitions of 'fish', 'fishing', 'fishing related activities', 'vessel', and 'operator'.

The substantive obligations are established in Articles 3, 4, and 5 of the AFS. The first relates to the prohibition of subsidies to vessels or operators engaged in IUU fishing or activities in support of IUU fishing. The gist of this obligation is straightforward for no Member may provide incentives to fishers that do not respect fisheries management rules or exploit unregulated waters. Article 3 further establishes conditions for who can make IUU fishing determinations (i.e. coastal Member, flag State Member, and a regional fisheries management organization or arrangement (RFMO/A)) and the conditions that an IUU determination must comply with (i.e. a final IUU fishing finding, as well as certain notification and due process

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⁴ *Ministerial Decision on Fisheries Subsidies*, WTO Ministerial Conference, 13 Dec. 2017, WT/MIN(18)/W/5.

⁵ See also, *WTO Ministerial Decision of 17 June 2022*, para. 4.

⁶ See *WTO Members Appoint New Chairs for Fisheries and Agriculture Talks* (27 Jan. 2023), https://www.wto.org/english/news_e/news23_e/agrifish_27jan23_e.htm#:~:text=Ambassador%20Gunnarson%20will%20chair%20the,buid%20momentum%20on%20agriculture%20negotiations.

⁷ See for instance, the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) and the Anti-Dumping Agreement.

⁸ For instance, India proposed to include 'non-specific fuel subsidies' within the scope of the AFS. (See *Draft Text: India Non-Paper: Alternative Simplified Text to Replace Article 2.2 of Document TN/RL/W/274/Rev.6*, RD/TN/RL/82, 8 Apr. 2019). This proposal was not included in the AFS.

⁹ See footnote 1 of the AFS.

requirements when a coastal state makes the determination).

Moreover, Article 4 contains a prohibition on subsidies when there is recognition by the coastal Member that a specific stock is overfished 'based on the scientific evidence available to it'. Despite this prohibition, a Member may continue to grant subsidies regarding overfished stocks if the subsidies provided or any other measures are implemented 'to rebuild the stock to a biologically sustainable level'.

Article 5 contains a prohibition on subsidies granted for fishing activities in unregulated waters (outside the competence of any state and an RFMO/A), as well as an obligation of 'special care' and 'due restraint' when granting subsidies to 'vessels not flying th[e subsidizing] Member's flag' and to fishing and fishing related activities 'regarding stocks the status of which is unknown'.

Furthermore, the AFS contains certain horizontal SD&T provisions. First, it contains a 'due restraint' obligation when 'raising matters involving a [least-developed country] Member'.¹⁰ Second, it establishes a 'voluntary WTO funding mechanism' for targeted technical assistance and capacity building to developing countries.¹¹ In addition, the AFS contains a long and detailed list of items that must be notified to the Committee on Fisheries Subsidies, including the type or kind of fishing activity for which the subsidy is provided and, to the extent possible, the status of fish stocks and the reference points used, conservation and management measures, fleet capacity, name and identification number of fishing vessels benefiting from subsidies, and catch data by species for which the subsidy is provided.¹²

With respect to dispute settlement, the AFS contains an ordinary reference to Articles XXII and XXIII of the GATT 1994 and to the Dispute Settlement Understanding.¹³ However, a major innovation is introduced to cater for the so-called 'disputed waters' situation. This arises when two or more Members claim sovereignty over certain waters due to the lack of a delimitation under international law. In this case, a panel might be confronted with a claim that there is an IUU fishing determination or a determination of overfished stocks which, in the view of the complainant, would trigger the subsidy prohibition. The respondent might argue that the determination invoked was not taken within the jurisdiction of

the Member (hence, the subsidy prohibition would not be triggered) on the grounds that these waters belong to another Member. This would require a WTO panel to assess, as a preliminary matter, whether the determination at issue was properly made, including whether the Member that adopted it had jurisdiction to do so. Since this determination would have political and diplomatic consequences wider than those intended by the AFS, WTO Members recognized that a WTO panel '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'.¹⁴

Finally, the AFS states that this agreement must not 'be construed or applied in a manner which will prejudice the jurisdiction, rights and obligations of Members, arising under international law, including the law of the sea'. This provision is relevant because the AFS makes several references to concepts regulated by the UN Convention on the Law of the Sea, even though some WTO Members are not parties to that treaty.¹⁵ Thus, this could be interpreted as a clarification that the AFS may not be used in the future as evidence of the acceptance of those concepts as part of customary international law.

3 THE MISSING PROVISION ON OVERCAPACITY AND OVERFISHING

A quick read of the SDG 14.6 and the AFS reveals that the negotiating mandate given to the WTO has not been fulfilled. In particular, the discipline concerning overcapacity and overfishing is missing from the AFS. This was surprising given that the draft agreement proposed by the Chair of the Negotiating Group on Rules of 10 June 2022 (that is, seven days before the conclusion of the 12th WTO Ministerial Conference) contained a detailed provision on overcapacity and overfishing. The choice to leave it out was thus a last-minute decision in an attempt to reach an agreement, albeit incomplete, before the conclusion of the 12th WTO Ministerial Conference. Instead, Members added Article 12, cited above, to urge Members to resume negotiations in order to give full effect to the SDG 14.6 mandate.

At the outset, a series of terminological confusions arising from both the AFS and the second wave of negotiations bear clarifying. The three disciplines called for in

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¹⁰ See Art. 6 of the AFS.

¹¹ See Art. 7 of the AFS. The voluntary WTO funding mechanism was promptly set up by the WTO Director-General days before the conclusion of the AFS. See in this respect, *WTO Fisheries Funding Mechanism Readied to Provide Support for Ending Harmful Subsidies* (14 Jun. 2022), https://www.wto.org/english/news_e/news22_e/fish_14jun22_e.htm.

¹² See Art. 8 of the AFS.

¹³ See Art. 10 of the AFS.

¹⁴ See Art. 11.2(b) of the AFS.

¹⁵ For instance, in accepting the AFS, Peru stated that 'given that it is not a party to the 1982 United Nations Convention on the Law of the Sea, any reference to that treaty or to the maritime areas set out therein that are referred to in the [AFS] shall apply to Peru only to the extent that they constitute international customary law or reflects general principles of law'. (*Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization done at Geneva on 17 June 2022. Agreement on Fisheries Subsidies. Notification of Acceptance*, WLI/100 21 Jul. 2023).

the SDG 14.6 were IUU fishing, overfishing, and overcapacity. The AFS contains disciplines on IUU fishing (Article 3) and overfished stocks (Article 4). Therefore, the first question to be asked is whether ‘overfished stocks’ and ‘overfishing’ are synonymous and, if not, whether the AFS went beyond its mandate by including disciplines on ‘overfished stocks’ even if these were not explicitly stated in SDG 14.6.

Although overfished stocks and overfishing are related concepts, they are not synonymous. A dictionary definition of ‘overfishing’ is ‘catching too many fish in an area of the sea, so that there are not many fish left there’.¹⁶ Accordingly, overfishing is the action of fishing unsustainably – i.e., beyond the minimum levels that are necessary to secure the proper recovery of the stocks over time. In contrast, ‘overfished stocks’ refer to the ‘state of a stock upon which overfishing has occurred’.¹⁷ Thus, a fisher may be overfishing in areas that are not yet overfished. If it continues to do so, the area will eventually be overfished. On the other hand, a fisher might not be overfishing if it fishes an overfished stock provided that it does so within the limits established to reconstitute the stock (e.g., within maximum catch levels allowed). Therefore, ‘overfishing’ and ‘overfished’ stocks are related but not synonymous concepts.

During the AFS negotiations, this word confusion was not given too much attention. Rather, negotiators quickly adopted a pragmatic position. While still keeping three disciplines, they reclassified them as IUU fishing, overfished stocks, and overfishing and overcapacity. To date, no one has argued that WTO Members went beyond the mandate contained in SDG 14.6 by including overfished stocks. The reason is that this discipline is favourable to the overall objective of the AFS to ensure that subsidies do not render fishing and fishing-related activities unsustainable. In fact, it could be argued that the reclassification effected by the WTO negotiators corrects a probable confusion of the drafters of SDG 14.6. It is unlikely that they wished to exclude from the negotiating mandate subsidies regarding overfished stocks.

With these clarifications in mind, the following pages discuss the specific issues addressed in the second wave of negotiations.

3.1 The Concept of Overcapacity

As stated earlier, WTO Members were not able to arrive at an agreement on overcapacity and overfishing. Negotiations on this discipline started later than those

on IUU fishing and overfished stocks and proved soon to be contentious.

Members have not considered it necessary to distinguish between overcapacity and overfishing or to provide specific definitions of these concepts. Overcapacity has a particular economic meaning as referring to a situation in which production outpaces demand. This is particularly common in industries that heavily rely on fixed costs such as steel and paper. In those cases, producers prefer to keep producing, even in the absence of buyers, because it is less expensive than stopping production.

Overcapacity in fisheries subsidies means something different. It does not concern itself with demand and supply conditions but, rather, with the relationship between production capacity and the sustainability of fish stocks. Yet it would be incorrect to hold that overcapacity in the fisheries field does not pursue an economic objective for the end-goal of the regulation of fisheries is to avoid the depletion of the stocks today so that we have fish to exploit in the future. Thus, the notion of overcapacity in the context of the fisheries subsidies disciplines has also a clear economic rationale.

Another important point is the relationship between overcapacity and the depletion of fish stocks. In this connection, it is inaccurate to assert that overcapacity inherently undermines the health of fish populations. This premise would assume that the fishing industry would always utilize its full capacity, which does not necessarily hold true in every case. A country may, for instance, have in place strict conservation measures (e.g., maximum catch limits) that prevent fishers from using their full capacity. Thus, the assumption that overcapacity *immediately* leads to the overexploitation of fish resources is not necessarily correct.

However, in the absence of effective regulation, fisheries subsidies may provide a strong incentive to engage in further fishing activities, thus posing a threat to the health of fish stocks. In fact, already in 1999, the UN Organization for Food and Agriculture (FAO) adopted the International Plan of Action for the Management of Fishing Capacity whereby it recognized that ‘[e]xcessive fishing capacity is a problem that, among others, contributes substantially to overfishing, the degradation of marine fisheries resources, the decline of food production potential, and significant economic waste’.¹⁸ This document thus established a series of objectives, principles, and urgent actions to ‘prevent or eliminate excess fishing

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¹⁶ ‘Overfishing’ Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/overfishing>.

¹⁷ ‘Overfished’, Fishionary.fisheries.org, <https://fishionary.fisheries.org/overfishing-overfished/#:~:text=Overfished%2C%20on%20the%20other%20hand,overfishing%20may%20not%20be%20occurring>.

¹⁸ *International Plan of Action for the Management of Fishing Capacity*, adopted by the twenty-third session of the FAO Committee on Fisheries in Feb. 1999 and endorsed by the FAO Council at the session it held in Jun. 1999, para. 1.

capacity and [to] ensure that levels of fishing effort are commensurate with sustainable use of fishery resources'.¹⁹

SDG 14.6 sought to echo the need to limit overcapacity by calling for the elimination of subsidies that contribute to that phenomenon. In the fisheries subsidies negotiations, WTO Members discussed two approaches to address overcapacity: the 'effects' approach and the 'list' approach. Under the effects approach, the negotiated discipline would prohibit any subsidy that enhances the capacity of the fishing industry. From a methodological standpoint, this suggests that a Member would act inconsistently with this discipline to the extent that it (1) provides a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and (2) it is established that the subsidy at issue contributes to overcapacity (i.e., a link between the subsidy and overcapacity).

Evidently, the 'effects' approach proceeds on the premise that there is no absolute concept of overcapacity. By its own nature, overcapacity is *relative* to the availability of the fish stocks. For instance, a country with thousands of kilometres of coastline and another with only a few hundred could have similar capacity. However, whereas, for the former, its fishing capacity would likely not lead to overcapacity, the same fishing capacity could constitute overcapacity in the latter. Accordingly, the effects approach would require the need to establish, in every case, a link between the subsidy and overcapacity.

In contrast, the 'list' approach would favour a pre-established list of subsidies that would, in all cases, be deemed to contribute to overcapacity (e.g., subsidies for the enhancement of vessels or the replacement of engines). This approach would render the legal analysis simpler in that it would be necessary only to establish that a subsidy fell within the scope of at least one of the listed subsidies for it to be prohibited.

3.2 The Approach Chosen in the Draft Text of the AFS

The draft AFS submitted by the Chair of the WTO Negotiating Group on Rules of 10 June 2022 (shortly before the 12th WTO Ministerial Conference) contained a hybrid approach. On the one hand, it included the general obligation that '[n]o Member shall grant or maintain subsidies to fishing or fishing related activities that

contribute to overcapacity or overfishing'. This is an expression of the 'effects' approach discussed above as it prohibits any subsidy that contributes to overcapacity or overfishing. On the other hand, it also adopted the list approach by stating that '[f]or the purpose of this paragraph, subsidies that contribute to overcapacity or overfishing include:'. This provision then listed eight categories of subsidies that would be deemed to contribute to overcapacity or overfishing.²⁰ For the listed categories of subsidies, there would be no need to establish separately that they contribute to overcapacity or overfishing.

As of the time of writing, the documents of the second wave of negotiations following the adoption of the AFS have not been made public. However, it is reported that the Chair of the Negotiating Group on Rules has, on 4 September 2023, issued a draft text containing the overcapacity and overfishing provision in substantially the same way as that of the text of 10 June 2022, which was not adopted during the 12th WTO Ministerial Conference.²¹ Accordingly, it appears that the hybrid approach continues to be the preferred choice.

In addition, it is also reported that there is a new provision stating that the largest 'providers' of fisheries subsidies by annual aggregate value must be 'deemed' to be providing subsidies contributing to overcapacity and overfishing.²² The term 'providers' appears to refer to WTO Members and the specific number of providers subject to the stated presumption is yet to be discussed. It still remains to be seen what method is considered for the quantification of the amount of subsidization per Member and the source of the information needed for that calculation.

3.3 The Sustainability Carve-Out

Both the 10 June 2022 text and the Chair's text of 4 September 2023 contained a way to escape the general subsidy prohibition concerning overcapacity and overfishing in cases in which the subsidizing Member shows that it has in place measures 'to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level'. This carve-out effectively allows Members to continue to provide subsidies that objectively contribute to overcapacity and overfishing, if it implements, in parallel, measures to preserve the sustainability of the stocks. Interestingly, the choice of words should not be

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¹⁹ *Ibid.*, para. 2.

²⁰ These categories are: (1) subsidies to construction, acquisition, modernization, renovation or upgrading of vessels; (2) subsidies to the purchase of machines and equipment for vessels (including fishing gear and engine, fish-processing machinery, fish-finding technology, refrigerators, or machinery for sorting or cleaning fish); (3) subsidies to the purchase/costs of fuel, ice, or bait; (4) subsidies to costs of personnel, social charges, or insurance; (5) income support of vessels or operators or the workers they employ; (6) price support of fish caught; (7) subsidies to at-sea support; (8) subsidies covering operating losses of vessels or fishing or fishing related activities.

²¹ The draft text has been circulated under the WTO number RD/TN/RL/174 as a restricted document. However, the content was disclosed in the item titled 'Chair Issues Draft Fisheries Text' published in the Washington Trade Daily, vol. 32, no. 172, 7 Sep. 2023, at 2–7.

²² See *Chair Issues Draft Fisheries Text*, Washington Trade Daily, vol. 32, no. 172, 7 Sep. 2023, at 3.

overlooked. The carve-out does not require that, through the measure in place, the stocks be at a biological sustainable level. It requires only that there be measures to that effect. Thus, if a Member adopts and implements a measure with a view to maintaining the stock at a biologically sustainable level but it does not fully achieve that objective, it appears that the carve-out would nonetheless still be available.²³ In addition, the Chair's text of 4 September 2023 subjects the sustainability carve-out to the notification of the measures implemented to maintain the biologically sustainable level. Members must also notify several other items.²⁴

It has been discussed above that overcapacity is not *per se* synonymous with, or does not necessarily lead to, overexploitation of fish stocks. Thus, the sustainability carve-out recognizes that a subsidy that objectively contributes to overcapacity might not be harmful if other measures cancel out the potential negative effects of overcapacity. It is intriguing, however, that, in contrast to overcapacity, overfishing is necessarily unsustainable in every case. Thus, when there is a finding that a subsidy contributes to overfishing, the sustainability carve-out should not be available to escape the subsidy prohibition.

3.4 Special and Differential Treatment

In addition, the overcapacity and overfishing provision would contain S&DT for developing countries. The Chair's text of 4 September 2023 establishes that the subsidy prohibition regarding overcapacity and overfishing would not apply to developing countries for a period yet to be negotiated from the entry into force of this subsidy prohibition.²⁵ Moreover, a peace clause of an additional two years would be introduced during which subsidies by developing countries would not be challenged in WTO dispute settlement. Extensions to the peace clause may be accorded by the Committee on Fisheries Subsidies.²⁶

Furthermore, a highly debated provision during negotiations is the issue relating to so-called artisanal fishing. The Chair's text of 4 September 2023 makes

provision for the exclusion, with respect to developing countries, of 'low income, resource-poor and livelihood fishing or fishing related activities, up to [12][24] nautical miles measured from the baselines'.²⁷ Likewise, least-developed countries would be excluded from the subsidy prohibition concerning overcapacity and overfishing.²⁸

Finally, the Chair's text of 4 September 2023 reflects the demand of developing countries to be permanently excluded from the measure if they fall below a certain threshold. The nature of this threshold appears to be the subject of negotiation. The Chair's text of 4 September 2023 contains two options: one is to base the threshold on the participation of a developing country in 'the annual global volume of marine capture production', in which case it is provisionally proposed to apply a threshold of 0.8%.²⁹ The second option is a maximum annual aggregate value of subsidization. In this case, the Chair's text of 4 September 2023 does not offer a precise threshold.³⁰

4 THE OTHER PROVISIONS CURRENTLY UNDER NEGOTIATIONS

In addition to the overcapacity and the overfishing provision, the second wave of the fisheries subsidies negotiations has been home to the discussion of at least two other proposals concerning (1) fishing activities beyond the jurisdiction of a Member or an RFMO/A and (2) the issue of forced labour.

With respect to the first proposal, it is reported that the Chair's text of 4 September 2023 introduces the prohibition of subsidies 'contingent upon, or tied to, actual or anticipated fishing or fishing related activities in areas beyond the subsidizing Member's jurisdiction' (the 'BNJ' provision). It is worth dwelling upon this provision. It was first proposed in April 2017 by Iceland, New Zealand, and Pakistan.³¹ At the time, there was a parallel UN negotiation, which had started two years earlier, on a convention for the conservation and sustainable use of marine biological diversity of areas

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²³ Interestingly, the earlier iterations of this provision referred to measures that 'are implemented in a manner that ensures'. (*Overfished Stocks: Facilitator's Working Paper*, RD/TN/RL/119, 4 Dec. 2019). Arguably, this formulation would have required not only that measures are implemented but that these measures 'ensure' the objective pursued.

²⁴ The items to be notified are: catch data by species or group species for which the subsidy is granted; the status of the relevant fish stocks; and the conservation and management measures in place for the relevant fish stocks. (See *Chair Issues Draft Fisheries Text*, *supra* n. 22, at 3). To the recall, these items must be notified under Art. 8 of the AFS 'to the extent possible'. However, it appears that, in order to avail themselves of the sustainability carve-out, Members would no longer have the flexibility of 'to the extent possible'.

²⁵ See *Chair Issues Draft Fisheries Text*, *supra* n. 22, at 8.

²⁶ See *ibid.*

²⁷ See *ibid.*

²⁸ See *ibid.*

²⁹ See *ibid.*

³⁰ See *ibid.*

³¹ See *Proposed MC11 Fisheries Subsidies Disciplines: Implementing SDG Target 14.6. Communication from Iceland, New Zealand, and Pakistan*, 27 Apr. 2017, TN/RL/GEN/186.

beyond national jurisdiction.³² In the context of the WTO fisheries subsidies negotiations, the group of Members proposing the BNJ provision probably thought it appropriate to complement the efforts being deployed at the UN by introducing a subsidy prohibition in waters outside the jurisdiction of the subsidizing Member.

From a legal perspective, the proposed BNJ provision marries two worlds. First, it introduces the UN concept of fishing activities in waters outside the jurisdiction of a Member. Second, it adds the terms ‘contingent upon, or tied to’, which appear to have been borrowed from the export subsidies provision in Article 3.1 (including 4) of the SCM Agreement. However, there appears to be confusion in the terms used. To recall, subsidies in Article 3.1 of the SCM Agreement may be ‘contingent’ upon export performance ‘in law or in fact’. Footnote 4 clarifies the notion of ‘in fact’ contingency by explaining that ‘[t]his standard is met’ when the subsidy ‘is in fact tied to actual or anticipated exportation or export earnings’. Accordingly, the term ‘contingent upon’ in Article 3.1 includes both ‘in law or in fact’, the latter meaning when the subsidy is ‘tied to’ exportation. The term ‘tied to’ is a form to demonstrate that the subsidy is ‘contingent upon’ export performance. Otherwise put, under Article 3.1 of the SCM Agreement, all subsidies that are ‘tied to’ are necessarily ‘contingent upon’ export performance.

In contrast, the BNJ provision juxtaposes ‘contingent upon’ and ‘tied to’ as two separate concepts. By using ‘contingent upon’ and ‘tied to’ referred to in Article 3.1 of the SCM Agreement, it is unclear whether the negotiators mean that ‘contingent upon’ is synonymous with ‘in law’ and ‘tied to’ with ‘in fact’. If that is the case, there would be a departure from Article 3.1 of the SCM Agreement, which, as explained earlier, uses ‘contingent upon’ to cover both in law and in fact. Another lingering question is whether the jurisprudence that has been developed by panels and the Appellate Body may offer guidance for the interpretation of BNJ provision, in particular, with respect to ‘in fact’ export subsidies. Some legal counsels would most likely avail themselves of the jurisprudential developments of the WTO adjudicatory bodies concerning Article 3.1 of the SCM Agreement to impart meaning to the BNJ provision. Yet other legal counsels would argue that this would be inapposite since the negotiators of the AFS explicitly decided not to use the terms ‘in law’

or ‘in fact’, which shows that they intended not to borrow the exact concepts of Article 3.1 of the SCM Agreement.

The second proposal discussed in the course of the second wave of negotiations is no less interesting. It is suggested that Members would be required to notify to the Committee on Fisheries Subsidies, on an annual basis, ‘any vessels and operators for which the Member has information that reasonably indicates the use of forced labour, along with relevant information to the extent possible’ (the ‘forced labour provision’). This proposal was first introduced by the United States on 27 May 2021 as part of its increased efforts to link international trade and the prohibition of forced labour (the so-called, ‘Worker Centric Trade Policy’).³³ Although this provision was dropped from the final text of the AFS in June 2022, the United States stated at the time that it would ‘continue to pursue more ambitious disciplines in the future, including enhanced transparency with respect to forced labour, shining a light on this egregious practice and with the aim of improving the lives of fishers and workers’.³⁴

Pursuant to the forced labour provision contained in the Chair’s text of 4 September 2023, any Member must notify any vessels and operators regardless of where they operate (in its waters or elsewhere) and the flag they fly. In other words, a Member must notify vessels or operators even if they operate far from its waters and are not flagged to them. The only condition is that the notifying Member have ‘a reasonable indication’ that the vessel or operator is using forced labour. The term ‘reasonable indication’ is not without ambiguity but what seems clear is that it does not require full certainty, let alone an official determination that the vessel or operator employs forced labour. Be that as it may, it would be appropriate to provide more accurate meaning to the term ‘reasonable indication’ in order to avoid light accusations.

5 CONCLUSION

The AFS constitutes no doubt a milestone in the multilateral efforts to curb harmful fisheries subsidies. It contains significant prohibitions on subsidies linked to IUU fishing and regarding overfished stocks. However, it is still an unfinished document since the mandate given by SDG 14.6 to the WTO has not been fulfilled. The disciplines on overcapacity and

Notes

³² See *Development of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, Resolution 69/292 adopted by the General Assembly on 19 Jun. 2015, A/RES/69/292, 6 Jul. 2015. This UN negotiation resulted, in May 2023, in the conclusion of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction. (See Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, adopted on 29 Jun. 2023 by the Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/CONF.232/2023/4).

³³ See *Fact Sheet: 2021 President’s Trade Agenda and 2020 Annual Report*, Office of the United States Trade Representative (2021), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2021/march/fact-sheet-2021-trade-agenda-and-2020-annual-report>. See also, *Testimony of Ambassador Katherine Tai Before the House of Ways and Means Committee Hearing on the President’s Trade Agenda*, Office of the United States Trade Representative (13 May 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/testimony-ambassador-katherine-tai-house-ways-and-means-committee-hearing-presidents-trade-agenda>.

³⁴ See *WTO MC12 Delivers Mixed Results*, Washington Trade Daily, vol. 31, no. 120, 17 Jun. 2022, at 5.

overfishing are still in the making and have proved to be contentious on several levels. It remains to be seen whether Members are able to bridge the gaps. As a final observation, it is worth recalling that WTO law-making takes place in two phases with respect to changes to the list of Agreements contained in Annex 1 to the Marrakesh Agreement Establishing the WTO.³⁵ First, it requires consensus by the WTO Ministerial Conference. Second, it requires the internal ratification of at least two thirds of the WTO Membership.

This means that acceptance at the WTO Ministerial Conference is only the start of the process of adoption. Members may accept the agreement at that stage and later decide not to ratify it. Thus, the text of the agreement must be such as to not only be agreeable to the representatives of Members sitting at the WTO Ministerial Conference but also to the stakeholders who will decide, domestically, whether to ratify the agreement.³⁶ The challenge is, therefore, complex.

Notes

³⁵ See Art. X:1 of the Marrakesh Agreement Establishing the WTO.

³⁶ See e.g., *Letter from Trade Unions & CSOs Explaining Why the 2022 WTO Agreement on Fisheries Subsidies Is Not in the Interests of India's Fishing Communities* (18 Jul. 2023), https://focusweb.org/wp-content/uploads/2023/07/WTO-Agreement-on-Fisheries-Subsidies_Letter-to-Government-of-India_MoC.pdf.