

Fisheries Subsidies and the World Trade Organization: The Negotiated Agreement

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Abstract: Fisheries subsidies have been part of the negotiating history of the World Trade Organization since 2001, with an agreement being reached in 2022. This brief supplement to a longer article provides an assessment of the negotiated Agreement on Fisheries Subsidies in the context of its negotiation history. The agreement is historic from both the points of view of fisheries sustainability and the WTO as a multilateral institution governing trade, but it does contain a few significant weaknesses highlighted here.

Keywords: Fisheries, subsidies, World Trade Organization

Introduction

Fisheries subsidies have been part of the negotiating history of the World Trade Organization (WTO) since 2001, with an agreement being reached in 2022. This supplement to a longer article on the negotiation history provides a brief assessment of the final agreement, a rare success for the WTO. As will be seen, the negotiated Agreement on Fisheries Subsidies (AFS) is historic from both the points of view of fisheries sustainability and the WTO as a multilateral institution governing trade. However, it does contain a few significant weaknesses and even the seeds of its own potential demise. This article will concisely describe both these aspects of the AFS.

In its most recent annual report, the Food and Agricultural Organization (FAO) (2022) reports that fish are the source of 17 percent of humanly consumed animal protein, but that this reaches as high as 50 percent in some countries. The FAO (2022) also reports that just over one third of fishery stocks are overfished to unsustainable levels. In its discussion on rebuilding

¹ The author would like to acknowledge very useful comments from Mary Lisa Madell, former Senior Trade Policy Advisor at United Kingdom Mission Geneva.

sustainable fisheries, the FAO mentions “the need to remove harmful subsidies” (p. 181). These fisheries subsidies have been major interventions in world fisheries markets with Sumaila et al. (2019) providing an estimate of US\$35 billion of subsidies in 2018. A great deal of concern has been expressed about the impact of these subsidies on the sustainability of the fisheries sector and their consequent impact on food security. For example, Sumaila et al. (2007) raised this issue early on in the negotiations process, noting that these subsidies enable “otherwise unprofitable fleets to continue fishing” and that they “contribute to overfishing, i.e. more fish being caught than can be sustained” (p. 2). They further stated that “the WTO has an opportunity to demonstrate that it can balance global trade and the environment, and help solve one of the most worrisome environmental issues of our time—the decline in global fisheries” (p. 4). With the AFS, the WTO has gone some distance in addressing these concerns.

There was also the issue of fisheries subsidies within the legal provisions of the WTO. In the WTO’s Agreement on Subsidies and Countervailing Measures (ASCM), subsidies are defined as any “financial contribution by a government or any public body” or as an “income or price support” where, in both cases, “a benefit is thereby conferred” to the private sector (Article 1). Under the ASCM, there is a “specificity” requirement that the subsidy must be “specific to an enterprise or industry or groups of enterprises or industries” (Article 2). “Prohibited” subsidies include export subsidies and subsidies contingent on the use of domestic over imported goods (Article 3). “Actionable” subsidies are not prohibited per se but can be responded to if they cause “injury” or “serious prejudice” to another WTO member (Article 5). These appear to be relevant considerations. Indeed, Chang (2003) and Grynberg and Rochester (2005) concluded that the ASCM does indeed apply to fisheries subsidies. If so, the WTO needed to clarify how.

The third impetus towards negotiations was illegal, unreported, and unregulated (IUU) fishing. These activities posed a serious challenge to regional fisheries management organizations (RFMOs) attempting to address fisheries sustainability under the 1995 United Nations Fish Stock Agreement (UNFSA). The FAO (2022) has stated that IUU fishing “undermines national and regional efforts to manage fisheries sustainability and conserve marine biodiversity” (p. 129). As we will see, this issue was addressed in the negotiated agreement.

The sustainability issue, considerations of the ASCM, and the IUU fishing issue pushed the overall fisheries subsidies issue onto the WTO agenda. This agenda item was given new

impetus by the 2015 Sustainable Development Goals (SDGs). Under SDG targets 14.4 and 14.6, the United Nations established an implicit 2020 deadline for an agreement on IUU fishing and fisheries subsidies, respectively. While this target date was not met, an agreement was eventually reached at the 12th Ministerial Conference in June 2022.

The Negotiations

The history of the negotiations over fisheries subsidies at the WTO has been described in some detail by Reinert (2022). To summarize here, the negotiations can be traced back to the 1999 Seattle Ministerial where a “Friends of Fish” coalition (New Zealand, Norway, and the United States) proposed including fisheries subsidies in a new round of multilateral trade negotiations. More serious impetus was given by 2001 Doha Development Agenda (DDA) or Doha Round Ministerial Decision that committed members to phasing out export subsidies and domestic support in agriculture. It further extolled members to “clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries” (WTO, 2001, p. 6).

In 2003, the United States made an important submission that was somewhat specific about potential ways forward (WTO, 2003). This submission introduced a traffic light analogy, familiar to trade policy analysts, with “red light” subsidies that “are deemed to result in overcapacity or overfishing” (p. 2) and “amber light” subsidies that would be presumed to be harmful unless shown otherwise and would include subsidies that exceeded a certain value. This analogy proved to be important in moving the negotiations forward.

The fishing subsidies issue also received support from the 2005 Hong Kong Ministerial Declaration (WTO, 2005) with an entreaty for negotiations to begin in earnest. In the interpretation of Campling and Havice (2013), this Ministerial Declaration was “historic.” These authors stated that “for the first time, WTO Members committed to introducing disciplines to limit explicitly those subsidies that cause environmental harm” (p. 842). They also stated that the Declaration “moved the WTO directly into the realm of making legally binding judgements on environmental outcomes of trade relations” (p. 842), correctly noting that such a commitment had not taken place previously.

In 2007, the Chair of the WTO’s Negotiating Group on Rules (NGR) set out a draft text on fisheries subsidies disciplines (WTO, 2007, Annex VIII). Using a “bottom-up” approach, Article I of the draft text defined eight categories of prohibited subsidies, Article II presented a list of general exceptions, and Article III considered special and differential treatment (SDT). Importantly, Article I of this draft text prohibited all subsidies “the benefits of which are conferred on any fishing vessel or fishing activity affecting fish stocks that are in an unequivocally overfished condition” (p. 88). This was a notable and explicit link between the trade and sustainability realms.

At this point, negotiations on fisheries subsidies stalled, but were given new impetus in 2015 by the above-mentioned SDGs. In 2016, and in preparation for the 2017 Ministerial Conference, the WTO’s NGR announced member interest in a rules agenda that featured fisheries subsidies.² This Ministerial produced a working document of a proposed text (WTO, 2017a), as well as a Ministerial Decision regarding fisheries subsidies (WTO, 2017b) that provided further forward momentum.

In May 2021, the Chairman of the fisheries subsidies negotiations introduced a new draft text, a previous text having been considered in December 2020. This 2021 draft was in preparation for a meeting of Ministers in July 2021 on the specific topic of fisheries subsidies (WTO, 2021a).³ The July 2021 meeting did not result in an agreement, but seems to have included some forward progress, with the next deadline pushed to December 2021 and the Geneva Ministerial Meeting. In November 2021, a subsequent draft was prepared by the Chair of the NGR for the meeting (WTO, 2021b). Unfortunately, the Geneva Ministerial Meeting was cancelled due to emerging travel restrictions that were developing in response to COVID-19 concerns.⁴

The WTO Ministerial was rescheduled to June 2022, and among other things, produced a negotiated AFS (WTO 2022). This AFS was the product of over two decades of efforts and was a significant “win” for the WTO. We next consider the substance of that agreement, both in brief and in some detail.

² https://www.wto.org/english/news_e/news16_e/rule_25may16_e.htm.

³ Note that the related document DR/TN/RL/126/Rev.2 was still restricted at the time of this writing and could not be fully cited nor consulted.

⁴ At about this point in the negotiations, Cisneros-Montemayor et al. (2022) observed that “the WTO and its member nations have an opportunity to benefit fishers and seafood production for generations to come” (p. 2). For an analysis of the draft text, see Reinert (2022).

The Agreement in Brief

In announcing the AFS, the WTO stated: “The WTO Agreement on Fisheries Subsidies, adopted at the 12th Ministerial Conference (MC12) on 17 June 2022, marks a major step forward for ocean sustainability by prohibiting harmful fisheries subsidies, which are a key factor in the widespread depletion of the world’s fish stocks.”⁵ A WTO brief on the AFS summarized its content as follows: “The Agreement prohibits support for illegal, unreported and unregulated (IUU) fishing. It bans support for fishing overfished stocks. And it takes a first but significant step forward to curb subsidies for overcapacity and overfishing by ending subsidies for fishing on the unregulated high seas.”⁶ Not surprisingly, the AFS was featured at the 2022 WTO Public Forum as a notable success and one that might even apply to other subsidy issues within the organization.

The 2022 AFS, however, is not necessarily the last word on the subject nor the end of negotiations on fisheries subsidies. The Ministerial Decision accompanying the AFS states: “the Negotiating Group on Rules shall continue negotiations based on the outstanding issues... with a view to making recommendations... for additional provisions that would achieve a comprehensive agreement on fisheries subsidies” (WTO, 2022, p. 1). This statement suggests that the AFS is not yet “comprehensive” and that there are further issues that were not fully resolved. As we will see, this is indeed the case.

The Agreement in Detail

The details of the AFS are presented in Table 1. As seen there, Article 1 sets out the scope of the agreement, explicitly linking it to Article 1.1 of the ASCM, as well as the “specific” definition of ASCM Article 2 (see above), applying these to “marine wild capture fishing and fishing related activities at sea.” What was left out of Article 1 was bracketed text in the draft agreement applying this same ASCM language to fuel subsidies. This draft text had stated: “also applies to fuel subsidies to fishing and fishing related activities at sea that are not specific within the meaning of 2 of the ASCM Agreement” (WTO, 2021a,b). Consequently, the relevant issue of fuel subsidies was left out of the scope of the AFS because they did not qualify as “specific” under ASCM Article 2.

⁵ https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm.

⁶ https://www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bffish_e.htm.

Article 2 of the AFS provides definitions for the terms “fish,” “fishing,” “fishing related activities,” “vessel,” and “operator.” Importantly, “fishing related activities” is given a relatively broad scope that spans the fishing value chain. This language is in keeping with the draft text. While it is easy to overlook the significance of AFS Articles 1 and 2, the fact is that they explicitly extend WTO-related matters to environmental issues, something that at one time was considered rather controversial.⁷ This is a big step.

Article 3 of the AFS addresses IUU fishing, known to be of serious consequence, outlining the cases in which an “affirmative determination” of IUU can be made. This has become known as the first of three FSA “pillars.” IUU determinations can be made in response to information provided by another WTO member or, importantly, a RFMO. This information is to be forwarded to a Committee of Fisheries Subsidies formed under Article 9. Article 3.7 requires that Members put in place “laws, regulations and/or administrative procedures” to ensure that subsidies to vessels engaged in IUU “are not granted or maintained.” Given the critical nature of the IUU issue from both sustainability and organized crime perspectives, progress on this issue alone is noteworthy.⁸

Article 4 addresses the sustainability issue of overfished stocks (the second FSA pillar) in four well-crafted articles. Articles 4.1 to 4.3 had been unbracketed in the draft agreement, so this is perhaps no surprise. The articles deal with the overfishing issue in a reasoned fashion, bringing environmental considerations into WTO deliberations in a real way and involving RFMOs and scientific evidence. In this sense, it is a landmark article long envisioned by those advocating that the WTO address fishing subsidies. It could potentially be a reference point for future efforts to address “non-trade” issues within the organization.

Article 5 concerns “other subsidies” related to overcapacity and overfishing (pillar three). This article, unfortunately, differs significantly from the draft text. This appears to have been the result of objections on the part of some “developing” countries and their concerns with special and differential treatment (SDT). The draft version of Article 5.1 stated: “No Member shall grant or

⁷ See, for example, Cosbey and Mavroidis (2014) on the general environmental issue and Chang (2003) of fisheries subsidies *per se*. Grynberg and Rochester (2005) argued quite strongly *against* any environmental considerations. In their words, in such arrangements, “the WTO will venture beyond its traditional competencies” (p. 525).

⁸ For an example of recent research on the IUU issue and its deleterious impacts, see Stefanus and Vervaele (2021).

maintain subsidies to fishing or fishing related activities that contribute to overcapacity or overfishing.” Draft Article 5.1 also defined nine types of subsidies that were to be covered by the agreement.⁹ The AFS falls far short of this. Article 5.1 of the AFS states: “No 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 out outside the competence of a relevant RFMO.” In the draft agreement, this AFS Article 5.1 was Article 5.2. So, in essence, Article 5.1 of the draft agreement has been *removed*, and any curbing of subsidies contributing to overcapacity or overfishing are limited to the high seas. Consequently, as stated by Bangura and Kromah (2022), “the FSA does not give effect to the mandate on subsidies contributing to overcapacity and overfishing” (p. 435). This pillar-three failure represents a significant weakness of the FSA.

There are other important, related issues here. Recall that the Ministerial Decision accompanying the AFS calls for continued negotiations regarding outstanding issues. These outstanding issues clearly include Article 5. Further however (and to jump ahead a bit), Article 12 states: “If 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*” (emphasis added). It therefore appears that there is a threat mechanism in the FSA that would end progress made if agreement cannot be reached on what had been draft Article 5.1. There is thus a potential tragedy written into the FSA.

Article 6 addresses specific provisions for least developed country (LDC) members, using much simpler language than the draft agreement and invoking “due restraint.” Further, Article 7 considers technical assistance and capacity building, and this involves the creation of a voluntary funding mechanism.

Article 8 concerns notification and transparency and is directly related to Article 25 of the ASCM, integrating these two agreements. Article 8 is relatively detailed, requesting information on the kind of fishing activities subsidized, status of fish stocks, conservation and management measures, fleet capacity, fishing vessel identification numbers, and catch data. Relatedly, Article 9 establishes a new Committee on Fisheries Subsidies (CFS) with special responsibilities regarding IUU fishing (under Article 3), notification, and transparency (under Article 8). Article 9.5 links

⁹ See Reinert (2022), Table 2. The combination of a “list approach” and an “effects approach” in the draft Article 5.1 is known as the “hybrid approach” and represented a compromise between advocates of the list and effects approaches.

the CFS to the FAO and RFMOs, thereby establishing several relevant inter-organizational relationships anticipated by Young (2009).¹⁰

Article 10 concerns dispute settlement, linking the AFS to the dispute settlement language of both GATT94 on trade in goods and the ASCM and using the same language as the draft agreement. Article 11 differs slightly from the draft agreement and sets out final provisions in the areas of disaster relief, territorial claims, the Law of the Sea, RFMOs, and the ASCM.

Finally, as previously mentioned, Article 12 represents a threat mechanism related to Article 5 on “other subsidies” (pillar three on overcapacity and overfishing). Failure to address pillar-three issues in the form of “comprehensive disciplines” could result in the complete failure of the AFS in the form of termination, a loss of progress on the first two pillars, and a complete failure to meet SDG fisheries subsidies targets.

Conclusion

Bangura and Kromah (2022) state that “the FSA represents a victory for the WTO, especially at a time in which the organization’s vitality was being called into question” (p. 435). That is indeed the case. The AFS has addressed IUU fishing, overfished stocks, and overcapacity and overfishing on the high seas. However, the threat mechanism of Article 12 points to a significant limitation of the AFS. The failure of Article 5 to address overcapacity and overfishing within countries’ jurisdictions remains a serious issue. In this regard, it is worth recalling that SDG 14.6 that gave a mandate to conclude the AFS explicitly mentioned “prohibiting certain forms of fisheries subsidies that contribute to overcapacity and overfishing.” While the first two pillars have been addressed, this third pillar in the form of overcapacity and overfishing not only on the high seas but within countries’ jurisdictions remains incomplete. This is a challenge that needs to be met, and the durability of the whole AFS depends on the WTO’s ability to do so.

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¹⁰ FAO (2022) reports that the FSA involves “a specific role for FAO to contribute with technical expertise” (p. 129).

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Table 1: The Text of the Fisheries Subsidies Agreement

<i>Article</i>	<i>Topic</i>	<i>Content</i>	<i>Comments</i>
1	Scope	“Applies to subsidies, within the meaning of Article 1.1 of the Agreement on Subsidies and Countervailing Measures that are specific within the meaning of Article 2 of that Agreement, to marine wild capture fishing and fishing related activities at sea.”	Article 1 of the agreement ties it to the ASCM and its language regarding “specificity.” The draft agreement had extended the application to fuel subsidies in bracketed text, but this was not included in the final agreement.
2	Definitions	Definitions are provided for the terms “fish,” “fishing,” “fishing related activities,” “vessel,” and “operator.”	“Fishing related activities” is given a relatively large scope that spans the fishing value chain.
3	Subsidies Contributing to Illegal, Unreported, and Unregulated Fishing (Pillar One)	<p>3.1: “No Members shall grant or maintain any subsidy to a vessel or operator engaged in illegal, unreported, and unregulated (IUU) fishing or fishing related activities in support of IUU fishing.”</p> <p>3.2 to 3.6: Definition of IUU fishing stated in terms of “affirmative determination” and the details of such determinations and notification procedures to a newly formed Committee on Fisheries Subsidies (Article 9). This process involves RFMOs.</p> <p>3.7: “Each Member shall have laws, regulations and/or administrative procedures in place to ensure that subsidies... are not granted or maintained.”</p> <p>3.8: Special and differential treatment in the form of a two-year transitional period for “developing” and “least-developed” WTO members within their exclusive economic zones (EEZs).</p>	Articles 3.1 to 3.7 are the result of significant progress on what is widely regarded as a critical issue in fisheries sustainability. Article 3.8 on special and differential treatment had been bracketed in the draft agreement.

<i>Article</i>	<i>Topic</i>	<i>Content</i>	<i>Comments</i>
4	Subsidies Regarding Overfished Stocks (Pillar Two)	<p>4.1: “No member shall grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock.”</p> <p>4.2: Definition of ‘overfished’ that includes the involvement of RFMOs and “best scientific evidence.”</p> <p>4.3: “A Member may grant or maintain subsidies... if such subsidies or other measures are implemented to rebuild the of the stock to a biologically sustainable level” as determined by a Member of a RFMO and involving maximum sustainable yield (MSY) measures.</p> <p>4.4: Special and differential treatment in the form of a two-year transitional period for “developing” and “least-developed” WTO members within their exclusive economic zones (EEZs).</p>	Article 4 addresses the sustainability issue in a reasoned fashion, bringing environmental considerations into WTO deliberations in a real way and involving RFMOs and scientific evidence. In this sense, it is a landmark article long envisioned by those advocating that the WTO address fishing subsidies.
5	Other Subsidies (Pillar Three)	<p>5.1: “No 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 out outside the competence of a relevant RFMO.”</p> <p>5.2: “A Member shall take special care and exercise due restraint when granting subsidies to vessels not flying that Member’s flag.”</p> <p>5.3: “A Member shall take special care and exercise due restraint when granting subsidies to fishing or fishing related activities regarding stocks the status of which is unknown.”</p>	Even though Article 5.1 was not bracketed in the draft text, the final text differs from the bracketed text. The draft text had identified nine subsidy types that contribute to overcapacity and overfishing and provided definitions of overcapacity and overfishing. The draft text of Article 5.2 had been stated in terms of “no Member shall grant,” but this has been changed to “take special care and exercise due restraint.”

<i>Article</i>	<i>Topic</i>	<i>Content</i>	<i>Comments</i>
6	Specific Provisions for LDC Members	“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.”	The draft agreement had included Articles 6.1 to 6.3, some of which were bracketed. The final text is much simpler.
7	Technical Assistance and Capacity Building	“Targeted technical assistance and capacity building assistance to developing country members, including LDC members shall be provided.... A voluntary WTO funding mechanism shall be established....”	This is standard for WTO agreements, but the entire text had been bracketed in the draft agreement.
8	Notification and Transparency	8.1: Notification requirements under Article 25 of the ASCM with details. 8.2: IUU reporting requirements. 8.3: Implementation and administration of the agreement. 8.4: Description of fisheries legal regime. 8.5: Information requests from other members. 8.6: Information on RFMO membership with additional details. 8.7: Relationship to GATT94 and the ASCM. 8.8: Confidential information.	The stated purpose here in Article 8.1 is the “effective surveillance of the implementation of fisheries subsidies commitments.” Explicitly linking AFS notifications to the ASCM is notable, as it the informational link to RFMOs.
9	Institutional Arrangements	9.1: “There is hereby established a Committee on Fisheries Subsidies composed of representatives from each of the Members.” 9.2: “The Committee shall examine all information pursuant to Articles 3 and 8 and this Article.” 9.3: Annual review. 9.4: Review of operation of the AFS. 9.5: Relationships with other organizations.	The establishment of a committee to oversee the AFS is notable. Article 9.2 gives special importance to IUU fishing in Article 3.

<i>Article</i>	<i>Topic</i>	<i>Content</i>	<i>Comments</i>
10	Dispute Settlement	Linkage to the Dispute Settlement Mechanism under both GATT94 and the ASCM.	Standard for nearly all WTO agreements and exactly the same as the draft agreement.
11	Final Provisions	11.1: Subsidies under disaster relief. 11.2: Territorial claims. 11.3: Relationship to the Law of the Sea. 11.4: Relationship to RFMOs. 11.5: Relationship to ASCM.	Relatively close to the draft agreement and quite standard.
12	Termination of Agreement if Comprehensive Discipline Are Not Adopted	“If 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.”	Article 12 was not part of the draft text and appears to function as something of a threat mechanism to ward against WTO Members not taking it seriously enough and to give impetus to further negotiations.

Source: World Trade Organization (2022).