

# Managing Externalities in the WTO: The Agreement On Fisheries Subsidies

Bernard M. Hoekman<sup>id\*</sup>, Petros C. Mavroidis<sup>\*\*</sup> and Sunayana Sasmal<sup>\*\*</sup>

## ABSTRACT

By prohibiting subsidies that support illegal, unregulated, or unreported fishing activities and contribute to the unsustainable depletion of marine resources, the 2022 Agreement on Fisheries Subsidies (AFS) is the first World Trade Organization (WTO) treaty to recognize that a specific trade policy instrument can have adverse consequences for the global commons. We assess the AFS as such and through the lens of the broader challenge confronting WTO members in determining how to address subsidy spillovers and adapt trade policy rules to protect the global commons. While the AFS is a step forward for the WTO, definitions of what constitutes a subsidy and the approach taken to ensure transparency are those that have been part of the WTO since 1995 and have become the cause for contestation and calls for reform. We suggest ways in which birth defects can be addressed while implementing and expanding the coverage of the agreement.

## I. INTRODUCTION

After two postponements because of the COVID-19 pandemic, World Trade Organization (WTO) members held their 12th ministerial conference (MC12) in Geneva on 12–17 June 2022. Expectations for a successful meeting were low, given Russia's war against Ukraine, geopolitical tensions, and deep disagreements among WTO members on various issues, ranging from agricultural support policies to the US decision to block the operation of the Appellate Body in 2019. Confounding doomsayers, MC12 produced a new multilateral Agreement on Fisheries Subsidies (AFS),<sup>1</sup> only the second new agreement since the establishment of the WTO in 1995 (the first was the 2013 Agreement on Trade Facilitation). The Agreement adds to an existing body of international law and governance efforts by regional and international institutions that have long sought to address the problem of overfishing.

WTO talks on fisheries subsidies date back to 2001, as these were part of the Doha Development Agenda.<sup>2</sup> The Doha round foundered in 2008, but WTO members continued to pursue

\* European University Institute and Center for Economic Policy Research.

\*\* Columbia Law School. We are grateful to two reviewers, Eyal Benvenisti, Lauro Locks, Andrea Mastromatteo, Luca Rubini, Shreyansh Singh, and Robert Wolfe for their helpful comments and discussions.

<sup>1</sup> Agreement on Fisheries Subsidies, WT/MIN(22)/W/22, Adopted on 17 June 2022 (AFS).

<sup>2</sup> For an excellent account of the history of fisheries subsidies negotiations in the WTO, see Kenneth A. Reinert, 'Fisheries Subsidies and the World Trade Organization: A Concise History', 1 *International Negotiation* 27 (2022); for the domestic political economy factors that affect trade policy cooperation in this area, see Stephanie Rickard, 'Interests, Institutions, and the Environment: An Examination of Fisheries Subsidies', 66 *International Studies Quarterly* sqac003 (2022).

negotiations on fisheries subsidies. The AFS reflects a decision by ministers to collect an ‘early harvest’ on a matter on which there was a consensus—a ban on subsidies for illegal, unreported, and unregulated (IUU) fishing<sup>3</sup> and capture of overfished stocks. It proved impossible at MC12 to agree to disciplines on subsidies that contribute to overcapacity or overfishing.<sup>4</sup> Negotiations on such subsidies were left for the future. To incentivize members to complete the job, a sunset clause was incorporated, making the AFS provisional. If comprehensive subsidy disciplines are not negotiated within four years of the entry into force of the AFS, the agreement lapses (Article 12 AFS).

The AFS is important because it addresses the use of a policy instrument that can have significant adverse consequences for the global commons but that may also be used to address the causes of overfishing.<sup>5</sup> The AFS entails a recognition that cross-border policy spillovers of subsidies that support illegal, unregulated, and unreported fishing extend beyond economic (competitive) concerns—the main focus of WTO agreements—and include their environmental effects. Some 60% of the estimated US\$35 billion in subsidies provided to worldwide fishing annually stimulate global overcapacity of fleets and overfishing.<sup>6</sup> Although the AFS only covers a subset of harmful fishing subsidies, many WTO members provide subsidies to fishing fleets that engage in IUU fishing through measures such as support for shipbuilding and tax exemptions for fuel. Fisheries subsidies are just one, albeit important, example of a national economic policy that generates negative international spillovers. Because the use of subsidies has become a major source of trade tensions, reform of WTO rules in this area is a priority for many countries. As the first post-1995 WTO agreement dealing with subsidies,<sup>7</sup> the AFS provides insight into the extent to which WTO members are willing to address weaknesses in the WTO Agreement on Subsidies and Countervailing Measures (ASCM).<sup>8</sup>

The AFS is a step forward in addressing the environmental spillover effects of fisheries subsidies and going beyond the narrow focus of the ASCM on the competitive effects of national subsidies. A comparison with fisheries disciplines found in recent free trade agreements (FTAs) reveals interesting differences and commonalities, illustrating the extent to which agreement among a small number of likeminded nations can go further than one that encompasses all WTO members. We also argue that the approach taken in the AFS to ensure transparency of policies is of particular interest, given that inadequate transparency of national subsidy programs affecting trade across a range of sectors has long been a matter of concern to many WTO members. By continuing to rely on self-notification of subsidies and formal dispute settlement to

<sup>3</sup> IUU fishing captures a wide variety of fishing activities. The FAO, elaborated by the IPOA to prevent, deter, and eliminate IUU fishing, defines the three main categories as follows: illegal fishing comprises activities by vessels without the permission or in contravention of laws and regulations of the state with jurisdiction or conservation and management measures adopted by a relevant RFMO; unreported fishing comprises activities that are not reported or misreported, to the relevant national authority, in contravention of national laws and regulations or a relevant RFMO; and unregulated fishing refers to activity in the area of application of a relevant RFMO conducted by vessels flying the flag of a state not party to that organization or that is inconsistent with or contravenes the conservation and management measures of an RFMO or if there are no applicable conservation or management measures, fishing activities conducted in a manner inconsistent with state responsibilities for the conservation of living marine resources under international law. See FAO, ‘Illegal, Unreported and Unregulated (IUU) fishing’, <https://www.fao.org/iuu-fishing/background/what-is-iuu-fishing/en/> (visited 1 February 2023).

<sup>4</sup> An agreement on such subsidies was not possible in large part because of differences in views regarding SDT for developing countries. This has been a factor impeding the negotiation of new WTO agreements more generally, reflecting demands by many WTO members that large developing countries engage in greater reciprocity.

<sup>5</sup> World Bank, *The Sunken Billions Revisited: Progress and Challenges in Global Marine Fisheries* (Washington, DC: World Bank, 2017).

<sup>6</sup> Sumaila U. Rashid et al., ‘Updated Estimates and Analysis of Global Fisheries Subsidies’, 109 *Marine Policy* 103 (2019), at 695.

<sup>7</sup> Aside from the 2015 agreement to eliminate agricultural export subsidies. See Export Competition Ministerial Decision, WT/MIN(15)/45—WT/L/980, Adopted on 19 December 2015.

<sup>8</sup> See e.g. Gregory Shaffer, Robert Wolfe, and Vinhcent Le, ‘Can Informal Law Discipline Subsidies?’, 18 *Journal of International Economic Law* 711 (2015) and Bernard Hoekman and Douglas Nelson, ‘Rethinking International Subsidy Rules’, 43 (12) *The World Economy* 3104 (2020).

enforce the AFS, WTO members missed an opportunity to begin a much-needed rethinking of the modalities of more effective cooperation on subsidies and their associated spillover effects.

## II. THE AFS

The AFS is the first WTO agreement dealing with an environmental management challenge and recognizing that certain types of trade-related policies can be a direct source of global environmental harm. Subsidies support both legal, regulated, and reported fishing and IUU fishing activities. The United Nations Food and Agriculture Organization (FAO) reports that some 20% of total fish caught globally involves IUU fishing, representing a major policy spillover given an annual loss of 11–26 million tons of fish, with an estimated economic value of US\$10–23 billion.<sup>9</sup> Sumaila et al. estimate the annual economic impact of IUU fishing at US\$26–50 billion, much of which bypasses the tax system, leads to forgone tax revenue of US\$2.2–4.3 billion annually.<sup>10</sup> Subsidies distort production and trade as operators that benefit from government support are provided with a competitive advantage vis-à-vis national fleets of (coastal) states that do not (or cannot) provide equivalent support—a negative economic spillover that is additional to the harm done to the global commons. Adverse spillover effects of both types may be compounded insofar as subsidized foreign fleets fish in the exclusive economic zones (EEZs)<sup>11</sup> of coastal states that do not have sufficient capacity to monitor adequately and/or enforce conservation and management measures.

The AFS seeks to both address competitiveness-related spillovers and protect the global commons by prohibiting subsidies for (i) IUU fishing (Article 3), (ii) fishing overfished stocks (Article 4), and (iii) fishing on unregulated high seas (Article 5). These prohibitions apply to all WTO members. Special and differential treatment (SDT) for developing countries takes the form of a two-year transition period after the entry into force of the agreement, during which activities occurring within a nation's EEZ are not subject to the prohibitions and safeguarded from dispute settlement.<sup>12</sup> No differentiation is made between developing countries and least-developed countries (LDCs).<sup>13</sup>

The definition of subsidies used in the AFS is that of the ASCM, i.e. a financial contribution by a government or public body that confers a benefit. ASCM disciplines apply only to those subsidies benefiting specific firms or industries. Subsidies to fishing activities are, by definition, specific and thus actionable under the ASCM.<sup>14</sup> To the extent that subsidy payments are not conditioned on the use of local content or exportation of harvested fish stocks, they are not prohibited by the ASCM. What the AFS does is to additionally prohibit the three categories of fishing subsidies mentioned earlier. These are motivated by the protection of the global commons. The absence of explicit preambular language, tests, or criteria of the type found in the WTO agreements on Technical Barriers to Trade (TBT) and Sanitary and Phyto-Sanitary (SPS) measures and General Agreement on Tariffs and Trade (GATT) Article XX (general exceptions) is noteworthy, raising the question of to what extent competitiveness issues play a role in the

<sup>9</sup> United Nations, 'International Day for the Fight against Illegal, Unreported and Unregulated Fishing 5 June', <https://www.un.org/en/observances/end-illegal-fishing-day> (visited 1 February 2023).

<sup>10</sup> Rashid U. Sumaila et al., 'Illicit Trade in Marine Fish Catch and Its Effects on Ecosystems and People Worldwide', 6 (9) *Science Advances* eaaz3801 (2020). DOI: 10.1126/sciadv.aaz3801.

<sup>11</sup> An EEZ is defined in Article 57 UNCLOS (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) to cover the area of the sea where a sovereign state has exclusive rights with respect to the exploration and exploitation of marine resources. It stretches from the outer limit of the territorial waters (12 miles from the coastline) up to 200 miles. Whereas a sovereign state has full sovereignty over its territorial waters, it enjoys only a right below the surface of the sea with respect to its EEZ.

<sup>12</sup> In the initial draft tabled for negotiation at MC12 (Agreement on Fisheries Draft Text, WT/MIN(22)/W/20, Adopted on 10 June 2022), the proposed territorial limit was a much more restrictive 12 nautical miles.

<sup>13</sup> Except for a best-endeavor LDC-specific provision (Article 6) that calls on WTO members to exercise due restraint in raising matters involving an LDC and tailoring solutions to the specific situation of the LDC concerned.

<sup>14</sup> Fish are not covered by the WTO Agreement on Agriculture and its associated subsidy disciplines.

AFS. The lack of the type of trade concern that is central to other WTO agreements supports arguments that the AFS is a new type of agreement for the WTO, one that deals with the environmental spillovers of a trade policy as opposed to dealing with trade and seeking to ensure competitive neutrality. While this is certainly the case, it is not clear-cut as the AFS does not specify the objectives of the agreement (reflected in the absence of a preamble).<sup>15</sup> Given the close links to the ASCM and the fact that competitive neutrality is the focus of the ASCM, trade-motivated issues may arise under the AFS and give rise to dialogue and potential disputes.

In the remainder of this section, we discuss the main substantive obligations included in the AFS. Before proceeding, we should note that the AFS must be ratified by two-thirds of the WTO membership to enter into force. This will take time. If the Agreement on Trade Facilitation, the only other multilateral agreement concluded after 1995, serves as a benchmark, the AFS may not be operational before 2024 or 2025.

### A. Article 3: IUU fishing

Article 3 of the AFS prohibits members from granting any subsidy to a vessel or an operator that engages in IUU fishing or related activities that further IUU fishing. In other words, the prohibition of fisheries subsidies is linked to the activities of vessels and operators. Article 3 does not impose obligations to prohibit IUU fishing per se but rather supports the existing disciplines on IUU fishing under national laws, regional fisheries management organizations (RFMOs) and arrangements, and instruments developed under the auspices of the FAO.<sup>16</sup> Coherence (in part at least) between the AFS and other international disciplines on fisheries is ensured by incorporating, by reference, the meaning of the term IUU fishing from the 2001 FAO International Plan of Action (IPOA)-IUU.<sup>17</sup>

Determinations of IUU fishing can be made by the coastal member, the flag state member (for activities by its vessels), and/or the relevant RFMO (Article 3.2 AFS).<sup>18</sup> The right to make findings of IUU fishing lies with a country or RFMO in whose waters the fishing is taking place, regardless of the nationality (flag) of a vessel. Article 3.2 includes a footnote stating that WTO members are not required to initiate IUU fishing investigations or to make IUU fishing determinations (AFS, footnote 6). Thus, coastal states and flag states possess rights but bear no obligation under the AFS to initiate necessary investigations and consequently make determinations of IUU fishing, almost rendering it a best-endeavor commitment. In international law and international legal jurisprudence, 'the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing rests with the coastal states [in their EEZ]'<sup>19</sup> although this 'does not release other [flag] states from their obligations.'<sup>20</sup> Article 3.6 recognizes the role of port states as pertinent actors in controlling IUU fishing. If a port state notifies a subsidizing WTO member that it has clear grounds to believe that a vessel flying its flag or beneficially owned by a national has engaged in IUU fishing, the subsidizing member shall give due

<sup>15</sup> This may reflect the interim nature of the AFS. Presumably, the comprehensive agreement to be negotiated will include preambular language.

<sup>16</sup> These include voluntary instruments such as the 1995 FAO Code of Conduct for Responsible Fisheries and associated international action plans. See FAO, 'Fisheries and Aquaculture', <https://www.fao.org/fishery/en/activities> (visited 1 February 2023). RFMOs span most of the world's oceans and may be species specific (e.g. dealing with migratory fish such as tuna) or general and territorially circumscribed. See European Commission, 'Regional fisheries management organisations (RFMOs)', [https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/regional-fisheries-management-organisations-rfmos\\_en](https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/regional-fisheries-management-organisations-rfmos_en) (visited 1 February 2023).

<sup>17</sup> FAO, above n 3. The IPOA-IUU is a compilation of good practices to combat IUU fishing, covering flag, port, coastal, and market state responsibilities, coordination among states, and the role of industry, fishing communities, and NGOs.

<sup>18</sup> RFMOs often span national EEZs as well as adjacent segments of the high seas. Johanne Fischer, 'How Transparent Are RFMOs? Achievements and Challenges', 136 *Marine Policy* 104,106 (2022).

<sup>19</sup> ITLOS, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, 4, para 106.

<sup>20</sup> ITLOS, Advisory Opinion of 2 April 2015, above n 19, para 108.

regard to the information received and take such actions in respect of its subsidies 'as it deems appropriate.'<sup>21</sup>

Article 3 does not establish a hierarchy between the obligations assumed by coastal states, flag states, and RFMOs in this respect. This leaves open the question of overlapping jurisdictions between coastal states, port states, and RFMOs. A footnote addressing this in earlier drafts of the AFS was not retained in the final text. Implicitly, this suggests an important role for RFMOs and port states in ensuring an effective implementation of the AFS, given that coastal states are not required to make IUU determinations.<sup>22</sup>

Article 3 conditions the prohibition on subsidization of IUU fishing on the satisfaction of certain due process requirements, including timely notification of IUU investigations to the flag state of the vessels or operators concerned (or, if known, the subsidizing member) and providing an opportunity to submit information. These due process requirements replicate language found in the FAO IPOA-IUU and many RFMOs. The WTO member or RFMO determining that IUU activities have occurred has the right to impose sanctions on the vessel(s) or operator(s) concerned. Given a determination of IUU activity, it is up to the subsidizing WTO member to ascertain if the vessels or operators concerned benefitted from subsidies and take action accordingly (Articles 3.4 and 3.6).

A vessel or operator found to engage in IUU fishing must be prohibited from receiving subsidies for a period that is at least as long as the duration of the sanction imposed following the IUU determination (Article 3.4 AFS).<sup>23</sup> This requires that national laws, regulations, and/or administrative procedures in subsidizing WTO members ensure that prohibited subsidies are not provided (AFS Article 3.7).<sup>24</sup> Assuming an IUU determination by a coastal state or RFMO, it is left to the WTO member(s) concerned to assess if subsidies were provided and what action to take.<sup>25</sup>

Only limited guidance on the nature of the sanctions is provided. The subsidizing state must account for three elements when deciding on the level of sanction: the nature, gravity, and repetition of IUU fishing. States may understand these elements in different ways. Learning from experience in different jurisdictions will be valuable to identify and support the adoption of effective sanctioning regimes by WTO members, as much is left to the discretion of the states concerned.

Flag states have been found to not effectively discharge their legal duties to exercise jurisdiction and control over the vessels they flag, thereby contributing toward the persistence of

<sup>21</sup> This discretionary language reflects the heterogeneity of approaches taken by WTO members to sanction vessels and operators found to engage in IUU fishing that were granted or are eligible for subsidies. See Claire Delpeuch, Emanuela Migliaccio, and Will Symes, 'Eliminating Government Support to Illegal, Unreported and Unregulated Fishing', OECD Food, Agriculture and Fisheries Working Paper 1 (2022), [https://www.oecd-ilibrary.org/agriculture-and-food/eliminating-government-support-to-illegal-unreported-and-unregulated-fishing\\_f09ab3a0-en](https://www.oecd-ilibrary.org/agriculture-and-food/eliminating-government-support-to-illegal-unreported-and-unregulated-fishing_f09ab3a0-en) (visited 1 February 2023). Delpeuch et al. identify three types of approaches: (i) using mechanisms specified in umbrella legislation or regulation to withdraw support, which may include a requirement to reimburse funds received based on noncompliance with eligibility criteria that condition the grant of support; (ii) including eligibility criteria for and provisions on withholding, withdrawing, or requiring pay-back of support in specific programs; and (iii) use of legal provisions for withdrawing fishing authorizations if found to engage in IUU activities.

<sup>22</sup> In contrast, port states are obligated to act against IUU fishing under the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (adopted 22 November 2009, entered into force 5 June 2016), <https://www.fao.org/3/i5469t/i5469t.pdf> (visited 1 February 2023). This legally binding treaty to combat IUU fishing requires port states to prevent vessels that have engaged in IUU fishing from using their ports and landing their catches.

<sup>23</sup> A vessel or operator may be granted subsidies again after the sanction ends. Previous draft texts of the AFS specified a minimum duration, but this was removed to bring in proportionality as the benchmark for imposing sanctions. See Fisheries Subsidies Draft Consolidated Chair Text, TN/RL/W/276/Add.1, 11 May 2021. Proportionality is generally regarded as good enforcement practice in such instances. See Delpeuch et al., above n 21.

<sup>24</sup> Measures taken to prohibit the subsidy must be notified to the Fisheries Committee established (Article 3.5 AFS). Article 9 of the AFS provides for the establishment of a Committee.

<sup>25</sup> Often, the subsidizing state will be the flag state, but this is not necessarily the case. A coastal state might subsidize vessels carrying foreign flags that fish in its waters to the extent that they employ nationals. The negotiating record makes clear that Article 5.2 of the AFS aims to cover this possibility (Prohibiting Subsidies to Fishing Vessels Not Flying the Member's Flag Submission of Argentina, Australia, Indonesia, Japan, New Zealand, the USA, and Uruguay, TN/RL/GEN/201/Rev.1, 2 December 2019).



IUU fishing.<sup>26</sup> In practice, enforcement may not occur, especially in regions where the states concerned have (very) limited capacity to do so. Implementation of the AFS will often involve two states and/or an RFMO (or even more than one RFMO) who must cooperate and coordinate. The wording of Article 3.4 of the AFS suggests that the remedies envisaged are prospective since those found to engage in IUU fishing are penalized by the withdrawal of subsidies by the subsidizing WTO member for at least the duration of the IUU sanction. This assumes that (i) sanctions have been imposed (to be determined by the coastal state) and (ii) subsidies were granted (to be determined by the subsidizing WTO member). The nature and gravity of acts will determine the sanctions imposed. There is no requirement in the AFS for reimbursement of subsidies obtained or penalties that go beyond the withdrawal of financial support. These may be incorporated into national legislation, but the AFS only provides guidance regarding the minimum standard, accepting national discretion in deciding the level of sanctions and treatment of subsidized vessels and operators.

### B. Article 4: overfished stocks

The share of stocks fished at biologically unsustainable levels increased from an estimated 10% in 1974 to 34% in 2017.<sup>27</sup> Article 4.1 of the AFS prohibits subsidies for fishing or fishing-related activities regarding an overfished stock. A stock is designated as overfished by a coastal state or the relevant RFMO in whose waters the fishing occurs and must be based on the best scientific evidence available to the state or RFMO. An implication is that any legal dispute may center on whether the designation made is appropriate and accepted by the subsidizing party. The AFS does not require acceptance of designations, but contesting such determinations would involve the need to collect detailed information to determine the best scientific evidence available to the country. This is not straightforward, rendering the implementation of the provision uncertain by increasing the risks of subsidies that cannot be justified by the extant science.

While the subjectivity emanating from the usage of the term ‘available to it’ mirrors Article 61(2) of the United Nations Convention on the Law of the Sea (UNCLOS), this could be considered as a missed opportunity for the WTO to strengthen accountability. In other areas, WTO members have agreed to use international standards where these exist, with a presumption that products complying with international standards satisfy national treatment (nondiscrimination) disciplines. The WTO TBT and SPS Agreements provide a framework that could be considered in the negotiations to expand the Agreement, i.e. inclusion of a provision akin to Article 2.4 TBT that calls for the use of international standards, when appropriate, and agreement that determinations of RFMOs and FAO bodies constitute international standards.

A notable feature of the AFS is a recognition that subsidies need not be harmful if they support activities that *reduce* overfishing. Article 4.3 specifies that the prohibition on subsidies for fishing or activities regarding an overfished stock does not apply if measures are designed and implemented to rebuild a stock to a biologically sustainable level.<sup>28</sup> This represents the introduction of a permitted category of subsidies that benefit from a presumption of legality, akin to the now defunct Article 8 ASCM or the ‘Green Box’ subsidies included in the Agreement on Agriculture (e.g. decoupled income support for farmers).<sup>29</sup> We return to this later.

<sup>26</sup> Jessica Ford et al., ‘Incentivizing Change to Beneficial Ownership and Open Registers—Holding Flag States Responsible for their Fleets and Costs of Illegal Fishing’, 23 (5) *Fish and Fisheries* 1240 (2022).

<sup>27</sup> FAO, ‘The State of World Fisheries and Aquaculture: Sustainability in Action’, (FAO 2020) <https://www.fao.org/documents/card/en/c/ca9229en/> (visited 1 February 2023).

<sup>28</sup> This level is determined by the relevant coastal state or responsible RFMO based on reference points commensurate with the data available for the fishery concerned.

<sup>29</sup> The pre-MC12 draft text made invocation of this provision conditional on prior notification. This was removed in the final text.

### C. Article 5: other subsidies

A major focus of fisheries subsidies negotiations centered on reducing governmental support measures that stimulate overcapacity and overfishing. These account for some 60% of global fisheries subsidies.<sup>30</sup> Until negotiations on such subsidies are concluded, Article 5 AFS prohibits subsidies for fishing in unregulated high seas and calls on WTO members to exercise due restraint on granting subsidies to foreign vessels and unknown fish stocks. The prohibition in Article 5 appears relatively inconsequential although all three of its subparagraphs are driven by a motive to curb subsidies where their consequences are unknown or difficult to measure. They are not contingent upon another action, such as an affirmative determination of IUU fishing in Article 3 or recognition of a stock as overfished under Article 4.

Article 5.1 imposes a strict prohibition on the subsidization of fishing on unregulated high seas. The drafting of the provision can lead to confusion.<sup>31</sup> It could be read as a voluntary departure from the definition of subsidies in Article 1.1(a) ASCM, where it is made clear that there is no room for 'transnational' subsidies, as all schemes coming under the purview of this provision must be granted to beneficiaries within the territory of the granting entity (government or public body). Such interpretations would be incorrect. Articles 91 and 92 of the UNCLOS leave no doubt that ships have the nationality of the state whose flag they fly. Furthermore, vessels can only carry one flag.<sup>32</sup> The official explanatory note of the Fisheries Agreement makes explicit reference to UNCLOS, stating that not all WTO members have signed it, so some terms have been expressed in a different manner.<sup>33</sup> This is not the case for the nationality of ships. No one expressed the view that Articles 91 and 92 are *lettre morte* as far as the Agreement on Fisheries is concerned. Thus, UNCLOS serves as context for the understanding of these terms that have been embedded in the AFS, and subsidies granted to fishing vessels are not extraterritorial, even when the vessels leave the national jurisdiction. Accordingly, Article 5.1 should be read within the spirit of Article 1.1(a) ASCM. The question of remedy in case of violation of this provision is not germane to the question of extraterritoriality of subsidies granted.

Scientific studies suggest that 'fishing at the current scale is enabled by large government subsidies, without which as much as 54% of the present high-seas fishing grounds would be unprofitable at current fishing rates.'<sup>34</sup> However, the total catch from the high seas in its entirety has been estimated to represent less than 5% of annual marine capture fisheries production,<sup>35</sup> implying that the catch from the unregulated portion of high sea catches, which is what Article 5.1 seeks to address, will be small. This must be read with the fact that most areas beyond national jurisdiction fall under at least one RFMO although their narrow mandates focus on managing a limited number of commercially important fish species,<sup>36</sup> further suggesting that Article 5.1 has limited practical relevance. Moreover, the due restraint provisions in Articles 5.2 and 5.3 are toothless, given the absence of requirements or incentives to ensure that the status of fish stocks is determined.<sup>37</sup>

<sup>30</sup> Rashid U. Sumaila, 'Subsidizing Global Fisheries. A Summary of a New Scientific Analysis', Pew Ocean Science Series (2010).

<sup>31</sup> Article 5.1 AFS reads: 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 and outside the competence of a relevant RFMO/A.

<sup>32</sup> Article 91 UNCLOS reads in the relevant part: ships have the nationality of the state whose flag they are entitled to fly. Article 92 UNCLOS reinforces the link between ships and the flag of the state they fly.

<sup>33</sup> Agreement on Fisheries Subsidies Draft Text, WT/MIN(21)/W/S/Add.1, 24 November 2021.

<sup>34</sup> Enric Sala et al., 'The Economics of Fishing the High Seas', 4 (6) Science Advances (2018). DOI: 10.1126/sciadv.aat2504.

<sup>35</sup> Laurence Schiller et al., 'High Seas Fisheries Play a Negligible Role in Addressing Global Food Security', 4 (8) Science Advances (2018). DOI: 10.1126/sciadv.aat8351. This figure is for 2014.

<sup>36</sup> Liz Karan and Nichola Clark, 'High Seas Treaty Must Reflect Critical Role of Fish in Marine Ecosystems', (Pew Charitable Trusts 14 March 2022), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/03/high-seas-treaty-must-reflect-critical-role-of-fish-in-marine-ecosystems> (visited 1 February 2023).

<sup>37</sup> A 2020 Environmental Justice Foundation publication reports on an investigation by China Dialogue that illustrates the type of scheme that fall under Article 5.2. It found that 35 trawlers operating across Ghana, Sierra Leone, and Guinea were ultimately owned by a single Chinese state enterprise, Dalian Mengxin Ocean Fisheries. Seventeen vessels were registered to nine Ghanaian 'PO box' companies that were 'fronts' for Dalian Mengxin. These vessels were also registered in China, potentially providing access

Articles 4 and 5 do not have a clause like Article 3.7 relating to IUU fishing, requiring that each WTO member has laws, regulations, and/or administrative procedures in place to ensure that prohibited subsidies listed in Article 3.1 are not provided. Whether an oversight or a deliberate omission, such a clause should find its counterpart in both Articles 4 and 5.

#### D. Article 8: transparency

Attaining the objectives of the AFS depends importantly on the domestic regulatory regimes put in place by WTO members and action to identify IUU and overfishing. Transparency obligations, therefore, assume great significance. The transparency provisions of the AFS are embodied in Article 8 of the Agreement. Not surprisingly, these center on compilation and reporting by WTO members of the extent to which subsidies support IUU and overfishing. Given that the ASCM already requires notification of all fishing-specific subsidies, in principle, there should already be full transparency on this front. A problem in this regard is that the ASCM does not offer a template for what should be reported aside from requiring specific subsidies to be reported. The AFS negotiators refrained from defining an illustrative list to guide notifications, only adding one item to the ASCM requirements in Article 8.1(a), obliging WTO members as part of their regular notification of fisheries subsidies under Article 25 ASCM,<sup>38</sup> to specify the type or kind of fishing activity for which notified subsidies are provided.

Given the critical link in the AFS between IUU/overfishing and subsidies, Article 8.1(b) additionally calls on WTO members to provide additional information on a best-endeavor basis (reflected in the inclusion of a qualifying provision ‘to the extent possible’) on (i) the status of the fish stocks in the fishery for which the subsidy is provided, distinguishing between overfished, maximally sustainably fished, or underfished, the reference points used, and whether stocks are shared with other WTO members or managed by an RFMO; (ii) conservation and management measures in place for the relevant fish stock; (iii) the fleet capacity in the fishery for which the subsidy is provided; (iv) the name and identification number of the fishing vessel(s) benefitting from the subsidy; and (v) catch data by species or group of species in the fishery for which the subsidy is provided.<sup>39</sup>

Both the ASCM Committee and the Fisheries Committee will receive notifications, so coordination between the two WTO Committees will be necessary. There are some important differences regarding notifications to the two Committees. Notifications to the ASCM Committee are not always a matter of legal compulsion. Submission of information regarding the type of fishing activity to which subsidies have been granted is compulsory under the AFS (Article 8.1(a)), while information on the status of fishing stocks, management fleet capacity, etc., is a matter of best endeavors (AFS Article 8.1(b)). Furthermore, notifications to the ASCM Committee are yearly, whereas notifications to the Fisheries Committee regarding matters covered under Articles 3, 4, and 5 must occur within a year of accession to the AFS and then whenever changes to notified measures have been introduced. Article 8.3 calls for notifying new measures and ‘changes’ relating to IUU fishing, but no such requirement pertains to matters covered in Articles 4 and 5. The detection of new subsidies under Articles 4 and 5 is left to interested parties. This lacuna should be addressed in the negotiations to extend the coverage of the agreement.

to Chinese subsidies. See Environmental Justice Foundation, ‘Off the Hook: How Flags of Convenience Let Illegal Fishing Go Unpunished’, (2020), <https://ejfoundation.org/resources/downloads/EJF-report-FoC-flags-of-convenience-2020.pdf> (visited 1 February 2023).

<sup>38</sup> The notification requirement in Article 25.2 ASCM encompasses fishing subsidies commonly identified in the specialized literature, e.g. subsidies for building new vessels, upgrading existing vessels, for machinery and equipment, for fuel and other operating costs, etc.

<sup>39</sup> In the pre-MC12 draft text of the AFS, this last provision was a binding requirement included in Article 8.1(a) as opposed to a best-endeavor obligation.



Article 8.2 requires WTO members to provide the WTO Fisheries Committee annually a list of vessels and operators determined to have engaged in IUU fishing.<sup>40</sup> This obligation covers both the domestic and foreign fleets operating in the EEZ (i.e. vessels permitted to fish in that state's EEZ). IUU fishing is to be monitored in a detailed manner. While there are IUU-specific transparency obligations contained in Articles 3.3(b) and 3.5, no such notification requirements apply to subsidies for fishing of overfished stocks (Article 4) and subsidies for high seas fishing (Article 5). Mapping this subsidy-related information on supported fishing activity to IUU/overfishing depends on compliance by coastal and port states with the Article 8.2 call to annually report a list of vessels and operators that have been determined as having been engaged in IUU fishing action. The comprehensiveness of this information will depend on the efforts made by the respective states to monitor and act against IUU fishing.

Article 8.3 requires notification of measures to ensure the implementation and administration of the Agreement, including the steps taken to comply with the prohibitions set out in Articles 3, 4, and 5. What such measures may comprise is not specified. Information provided under Article 8.1 may be useful to gauge adherence to commitments under Articles 4 and 5, but the absence of detailed guidelines in Article 8.3 risks incomplete and heterogeneous notifications. Including an illustrative list in Article 8.3 would help adjudicators avoid type II errors. Besides Article 8.3, WTO members also agreed to reference their fisheries regime and related laws, regulations, and administrative procedures that are relevant to the operation of the AFS (Article 8.4). Other parties can ask for clarifications and/or additional information, which notifying WTO members must satisfy given a duty to cooperate (Article 8.5). Finally, all AFS signatories must notify the RFMOs to which they are parties (Article 8.6).

Reporting data on fisheries stocks, conservation, and production as called for by Article 8.1(b) presumes that subsidizing WTO members have this information. They may insofar as fleets operate in national EEZs, but this is less likely to be the case if fishers operate in non-national EEZs and the high sea. The FAO compiles information on fish stocks and harvesting based on surveys of its members. This will be very useful to WTO members but leaves open the question of whether extant data are adequate. As mentioned, an overwhelming majority of fish is caught in EEZs,<sup>41</sup> which should facilitate reporting on the amount of overfishing and/or IUU fishing if coastal states act in good faith. However, even if most activity occurs in national EEZs, governments may not know the species affected by programs that subsidize fuel or equipment. Insofar as Article 8.1(b) is taken seriously, one beneficial effect of the AFS will be to incentivize the required 'homework' by WTO members that subsidize fishing in the process of improving the quality of information needed to assess the impact of subsidies on the realization of conservation and management measures for relevant fish stocks.

### III. THE AFS IN LIGHT OF RECENT FTAS

Several recent FTAs include disciplines on fisheries subsidies. These include the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the US–Mexico–Canada Agreement (USMCA), and UK agreements with Australia and New Zealand. They typically form part of chapters on 'Environment,' with subsidy provisions found as part of broader obligations on fisheries management. The types of subsidies covered are the same as the AFS in relation to IUU fishing, overcapacity and overfishing, and overfished stocks, except for the

<sup>40</sup> There are pertinent FAO standards that WTO members must, in principle, use to distinguish between registered vessels and IUU. Article 47.8 concerns the marking of fishing vessels in accordance with internationally recognized standards, such as the FAO Standard Specification and Guidelines for the Marking and Identification of Fishing Vessels. Vessels' fishing gear should similarly be marked in accordance with internationally recognized standards. See FAO, 'Best Practice: The Marking and Identification of Fishing Vessels' (2018), <https://www.fao.org/3/I9156EN/i9156en.pdf> (visited 1 February 2023).

<sup>41</sup> Sea Around Us, 'Catches by Taxon in the Global Ocean', <https://www.seararoundus.org/data/#/global?chart=catch-chart&dimension=taxon&measure=tonnage&limit=10> (visited 1 February 2023).

UK–New Zealand FTA, which prohibits several other subsidies, such as those for the transfer of fishing vessels from either party to other states, vessel-related capacity-enhancing subsidies, and subsidies to vessels and operators guilty of serious violation of conservation and management measures in the past year, among others.<sup>42</sup>

While the abovementioned FTA provisions are largely similar to the AFS, there are important differences in each category. All four FTAs prohibit subsidies to vessels listed for IUU fishing by the flag state, the subsidizing member, or an RFMO.<sup>43</sup> The AFS details procedures that must be followed in making IUU determinations and associated sanctions. The four FTAs do not establish detailed procedures. Each does include a ‘best efforts’ commitment to limit subsidies that contribute to overcapacity and overfishing and to review the elimination of this kind of subsidy through appropriate means. This is not found in the AFS.<sup>44</sup> As noted earlier, in the context of subsidies for overfished stocks, the AFS includes an element of subjectivity by qualifying the determination of an ‘overfished stock’ depending on the ‘best scientific evidence available to the subsidizing country.’ The four FTAs instead require the ‘best scientific evidence available’ to be used.<sup>45</sup>

The AFS requires notifications on different aspects of fisheries subsidies as per Article 25 of the ASCM, i.e. new and full notifications due every three years. Except for UK–Australia, the remaining FTAs require notification of any fisheries subsidy every two years.<sup>46</sup> The AFS requires information on the type or kind of fishing activity benefitting from the subsidy but only imposes a non-mandatory obligation with respect to other information, such as the status of fish stocks, conservation and management measures in place, fleet capacity, details of fishing vessels, and catch data by fish species. The FTAs mentioned earlier add details of the program and export–import data per species to this non-mandatory list while imposing a mandatory obligation regarding information under Article 25 ASCM.<sup>47</sup> The UK–New Zealand agreement goes further, requiring parties to explain an inability to provide any information required by the other party.<sup>48</sup> Notably, the USMCA, the CPTPP, and the UK agreements include non-mandatory provisions on fuel subsidies in relation to fishing activities,<sup>49</sup> which could not be included in the AFS. Conversely, AFS provisions requiring countries to provide information on the implementation of the agreement and RFMO memberships are not found in the FTAs.

The AFS makes the WTO Dispute Settlement Understanding (DSU) applicable to any disputes, without providing for an obligation to include a subject-matter expert in the process. The FTAs mentioned earlier provide for several rounds of negotiations (‘Environment Consultations’) between parties, ‘Senior Representative Consultations’ between committee representatives, and ‘Ministerial Consultations’ between ministers of disputing parties. Only if this does not resolve the matter will it proceed to dispute resolution provided for in the agreement.

<sup>42</sup> Article 22.9.6, ‘Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand (adopted 28 February 2022); <https://www.gov.uk/government/collections/uk-new-zealand-free-trade-agreement> (visited 1 February 2023) (UK–New Zealand FTA).

<sup>43</sup> Article 24.20.1, ‘United States–Mexico–Canada Trade Agreement (signed 30 November 2018, entered into force 1 July 2020); <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> (visited 1 February 2023) (USMCA); Article 20.16.5, ‘Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 8 March 2018, entered into force 30 December 2018); <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents> (visited 1 February 2023) (CPTPP); Article 22.12.5, ‘Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia (adopted 17 December 2021); <https://www.gov.uk/government/collections/free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-australia> (visited 1 February 2023) (UK–Australia FTA); Article 22.9.6(f) UK–New Zealand FTA.

<sup>44</sup> Article 24.20.3–0.4 USMCA; Article 20.16.7–8 CPTPP; Article 22.12.7–8 UK–Australia FTA; Article 22.9.8–9 UK–New Zealand FTA.

<sup>45</sup> FN 28, Chapter 24, USMCA; FN 16, Chapter 20, CPTPP; FN 15, Chapter 22, UK–Australia FTA; FN 10, Chapter 22, UK–New Zealand FTA.

<sup>46</sup> Article 24.20.5 USMCA; Article 20.16.9 CPTPP; Article 22.12.10 UK–Australia FTA; Art. 22.12.10 UK–New Zealand FTA.

<sup>47</sup> Article 24.20.6 USMCA; Article 20.16.10 CPTPP; Article 22.12.11 UK–New Zealand FTA.

<sup>48</sup> Article 22.12.13 UK–New Zealand FTA.

<sup>49</sup> Article 24.20.7 USMCA; Article 20.16.11 CPTPP; Article 22.12.9 UK–Australia FTA; Article 22.12.12 UK–New Zealand FTA.

The USMCA provides that if obligations under any listed multilateral environment agreement (MEA) are implicated, a dispute panel is mandated to not only seek technical advice from an entity authorized under the MEA but also provide due consideration to the advice received.<sup>50</sup> Similarly, the UK–Australia agreement provides that any panel established pursuant to a dispute arising under the ‘Environment’ chapter must have panelists who are competent in environmental law.<sup>51</sup> The UK–New Zealand agreement contains both these obligations—rather, unlike the USMCA, *any* panel in relation to the chapter containing fisheries subsidies must have sufficient expertise or experience in environmental law.<sup>52</sup>

We can conclude from this brief review that several recent FTAs contain WTO+ disciplines, many of which relate to the critique of the AFS outlined earlier and that we elaborate on later.

#### IV. GAPS AND OPPORTUNITIES

To attain the objectives of the AFS, several preconditions must be met, including that

- WTO members have access to (and support compilation of) accurate scientific information on stocks and catches in their EEZs as well as on fish stocks outside EEZs
- WTO members and RFMOs put in place systems to identify and penalize IUU and overfishing in their EEZs and adjacent high seas
- Comprehensive information on fishing subsidies is compiled and made available to all WTO members in a timely fashion.

The transparency provisions of Article 8 will help improve data on all these fronts. But the restricted focus on subsidies for IUU activities means that the AFS can only improve matters to a limited extent, given that most subsidized fishing activity is not illegal, unregulated, or unreported. From both an environmental and competitiveness perspective, much therefore depends on the willingness of negotiators to agree to meaningful disciplines in the coming years on capacity-enhancing subsidies that generate competitive distortions and overfishing. As discussed, this effort should include a focus on the collection and dissemination of subsidy information and data on fishing activities undertaken in EEZs and the high seas. The former requires recognition of the disincentives for governments to notify subsidies and the record of failure in the WTO on notification of subsidies more generally. The latter requires overcoming a collective action problem that has been the focus of extensive international cooperation for many decades, reflected in the extant national and RFMO regimes, good practice codes of conduct, and binding treaties such as the PSMA. A key question for the WTO membership to consider is how a trade agreement can serve to enhance data collection efforts and fill gaps in the existing regime that matter for the implementation of subsidy disciplines. What follows discusses options to enhance transparency and support the effective implementation of the agreement.

##### A. Data on fishing activity

The data-generating system envisaged in the AFS centers on coastal states and RFMOs. The working relationship between these parties is not addressed in the AFS, nor is the role of the FAO. A great deal of information is already collected on the operation of fisheries,<sup>53</sup> raising the questions of what more is needed to support the implementation of the AFS and what

<sup>50</sup> Article 24.32 USMCA.

<sup>51</sup> Article 22.26 UK–Australia FTA.

<sup>52</sup> Article 22.26.5 UK–New Zealand FTA.

<sup>53</sup> Arthur Appleton, ‘Options for Improving the Transparency of Fisheries Subsidies’, ICTSD (2017), <https://www.greengrowthknowledge.org/sites/default/files/downloads/resource/Options%20for%20Improving%20the%20Transparency%20of%20Fisheries%20Subsidies.pdf> (visited 1 February 2023).

WTO members (through the AFS) can do to support cooperation between national regulators, RFMOs, and the FAO and expand the resource envelope to permit these bodies to generate the data needed. These are matters that should become a standard item on the agenda of the Fisheries Committee and the subject of deliberations with the specialized agencies and non-governmental organizations (NGOs) with expertise—e.g. through thematic meetings that bring together experts and stakeholders to discuss what information is needed for the AFS Committee to do its work.<sup>54</sup> This, in turn, could be an input into making the AFS a mechanism to incentivize the allocation of more resources by WTO members for data collection and analysis/assessment by the agencies concerned. For example, a biannual report by the Fisheries Committee to the Ministerial Conference of the WTO would increase the political visibility of the need to mobilize and sustain the requisite funding. This strategy was used to good effect to sustain the Aid for Trade initiative that was launched in 2005 at MC6 in Hong Kong, which includes a biennial review in Geneva that brings together the leaders of the international development community.

Such deliberations can also fill gaps in national policies. Delpuech et al. note that in 2018 a third of the economies surveyed by the Organization for Economic Cooperation and Development (OECD) did not ask for information on beneficial owners in the context of registration processes.<sup>55</sup> They recommend that to minimize the risk that government support benefits IUU fishing, governments should make all support conditional on being flagged to the supporting country and having fishing authorizations. Delpuech et al. also note the potential benefits of information sharing between governments on the identity of actors engaged in IUU and benefiting from subsidies and actions to support sharing by RFMOs of lists of vessels found to engage in IUU fishing through mutual recognition arrangements,<sup>56</sup> a form of regulatory cooperation that has long been encouraged in trade agreements, including the WTO. The latter can have significant payoffs, given that many states rely on RFMO determinations of IUU activity. These are examples of initiatives that could be considered by AFS negotiators looking forward. Such cooperation need not concern all WTO members and thus could take the form of plurilateral agreements.

## B. Information on subsidies

The approach taken in the AFS to compile data on subsidy programs perpetuates the extant approach in the WTO. While there have been some changes over time,<sup>57</sup> the WTO membership has consistently refused to empower a common agent (such as the WTO Secretariat) to collect, report, and analyze subsidy information salient to the various WTO agreements. Subsidy notifications by WTO members under Article 25 ASCM are, quite often, incomplete or not made on a timely basis.<sup>58</sup> As of mid-2022, 95 WTO members (58%) had not notified 2021 subsidies, 40% of members had yet to report subsidies for 2017, and about one-third of the membership had not notified subsidies for two decades.<sup>59</sup> Members have expressed their displeasure with

<sup>54</sup> Robert Wolfe, 'Is World Trade Organization Information Good Enough? How a Systematic Reflection by Members on Transparency Could Promote Institutional Learning', Bertelsmann Stiftung (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3299015](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3299015) (visited 1 February 2023).

<sup>55</sup> Delpuech et al., above n 21.

<sup>56</sup> Barbara Hutniczak, 'Coordination between RFMOs on Mutual Recognition of IUU Vessel Lists', 107 *Marine Policy* (2019), at 103, 596.

<sup>57</sup> See Terry Collins-Williams and Robert Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows', 9 *World Trade Review* 551 (2010), at 551–581. Also see Petros C. Mavroidis and Robert Wolfe, 'From Sunshine to a Common Agent: The Evolving Understanding of Transparency in the WTO', XXI *Brown Journal of World Affairs* 117 (2015). These authors provide a comprehensive survey of the evolution of transparency disciplines in the WTO.

<sup>58</sup> Fisheries subsidies compilations by NGOs such as the International Institute for Sustainable Development (IISD) generally (far) exceed what is notified to the WTO. See *Compilation of WTO Notifications on Fisheries Subsidies*, International Institute for Sustainable Development (2021), <https://www.iisd.org/publications/report/compilation-wto-notifications-fisheries-subsidies> (visited 1 February 2023).

<sup>59</sup> Committee on Subsidies and Countervailing Measures, 'Notification Provisions under the Agreement on Subsidies and Countervailing Measures – Background Note by the Secretariat', G/SCM/W/546/Rev.13, adopted 31 March 2022.

the notification record for subsidies on numerous occasions. Whether all WTO members will behave in good faith is therefore open to question.

Notification of subsidies may not be incentive compatible as notifying WTO members risk providing self-incriminating information. Similar reasoning applies to the use of cross-notifications, which is not used by most WTO members apart from the European Union (EU) and the USA.<sup>60</sup> Cross-notifications are only of limited effectiveness in addressing instances of lack of cooperation, given that the use of the mechanism may generate counter-notifications. As most governments actively use many types of subsidies, they ‘live in glass houses’ and thus often will not have strong enough incentives to throw the first stone. The fact that there have been almost no GATT/WTO disputes regarding fishery subsidies illustrates the limited incentives to foster transparency. There have been only two GATT/WTO disputes on fisheries subsidies. Both involved countervailing duties (CVDs). The first was a GATT panel on a dispute between the USA and Norway centered on the legality of CVDs imposed by the USA on imports of fresh and chilled Atlantic salmon from Norway.<sup>61</sup> The second case involved a request for consultations by Chile against the USA regarding CVDs on salmon products.<sup>62</sup>

More pertinent for the AFS is a case regarding EU measures on Atlanto-Scandian Herring<sup>63</sup> brought by Denmark on behalf of the Faroe Islands. Although this did not involve subsidies, the case centered on economic measures against the Faroe Islands (Denmark) motivated by the latter’s high catch limits of the fish concerned. The EU based its measures on the fact that the fish was shared between the EEZs of five coastal states (including Denmark and its own) and that Denmark’s catch limit—although based on available scientific evidence—amounted to non-sustainable fishing, contrary to EU regulation on conservation of fish stocks. The matter was resolved with a mutually agreed solution but raises the question of whether WTO members can police other members’ fishing and related conservation and management policies under the AFS on the grounds that the common interest is affected. While more relevant in the context of overcapacity and overfishing (i.e. for the prospective negotiations to expand fisheries subsidies disciplines), it is relevant to Article 3.7 AFS, which obligates WTO members to establish laws, regulations, and administrative procedures to ensure that subsidies for IUU fishing are not maintained. Whether this gives *other* states the right to launch disputes alleging failure to establish such laws and mechanisms is an open question. A reading in the affirmative may provide positive incentives to appropriately notify measures as required under Article 8.1 and thereby avoid potential disputes.

There is significant heterogeneity in compliance, reflected in large differences in the types of fishing subsidies notified to the WTO and the share of notifications that provide information on specific features of subsidies. Research has documented that the USA and China report information on the objectives of subsidies at about the same rate (60% of notifications), but China provides data on subsidy amounts more often than the USA and much more frequently on the duration of subsidies.<sup>64</sup> Conversely, the US complies more in reporting the type of subsidy used. There are also major disparities in the magnitude and types of fishing subsidies reported

<sup>60</sup> Petros C. Mavroidis, *The Regulation of International Trade* (Cambridge, MA: MIT Press, 2016) Vol 2, 678.

<sup>61</sup> Report of the Panel, *United States—Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted on 28 April 1994, GATT Doc. SCM/153.

<sup>62</sup> Request for Consultations, *United States—Countervailing Duty Investigation of Imports of Salmon from Chile*, WT/DS97/1, 12 August 1997. This dispute did not proceed beyond the request for consultations stage.

<sup>63</sup> WTO, Request for Consultations, *European Union—Measures on Atlanto-Scandian Herring*, WTO Doc. WT/DS469/1, 7 November 2013.

<sup>64</sup> Lorenzo Formenti, ‘Assessing Transparency in Fisheries Subsidies: A Notification-Driven Analysis’, 136 *Marine Policy* 104152 (2022).



for these two large fishing nations in the OECD database underlying the Fisheries Support Estimate.<sup>65</sup>

The generally dismal record of underreporting of subsidies by WTO members<sup>66</sup> and the absence of disputes on fishing subsidies suggests doubt is in order whether AFS transparency goals will be realized. This is, of course, very much a function of what WTO members that subsidize fishing will do. A positive signal in this regard is that the concerted effort of WTO members to conclude fisheries subsidy negotiations helped improve notifications of fishing subsidies. In 2019, 17 of the biggest providers of fisheries subsidies had provided notifications to the WTO, with some making their first submission in twenty years.<sup>67</sup> This is a significant shift from the pattern just a few years earlier.<sup>68</sup>

The focus to date to bolster incentives to notify subsidies has been to use the threat of sanctions, which are unlikely to be effective. A more effective approach is to consider measures that generate positive incentives by distinguishing between types of subsidies and target those that have the largest potential adverse effects.<sup>69</sup> The ASCM reporting template for subsidies is generic, given that the ASCM encompasses a broad range of sectors. Formenti notes that there is a lack of standardized and comparable data reported to the WTO, with the USA and China using different classifications and categories of fishing subsidies.<sup>70</sup> The AFS only expanded on the ASCM notification template by calling on information to be provided on the type of fishing that is supported by a specific subsidy. While this is helpful, it does not ensure that WTO members have clarity on what to report, impeding comparisons across countries. Developing a fisheries-specific template for notifications, based on an agreed classification of specific fishing subsidies, would support greater clarity.<sup>71</sup> A work program to reflect on what types of information are most salient to authorities in supporting national or regional efforts to manage fish stocks would be a useful input into negotiations to expand the coverage of the AFS. Work on the classification of subsidies could also encompass an effort to identify what constitutes good subsidies as a category, with a view to establishing a presumption that these should be non-actionable.

The ASCM is not concerned with the objectives of governments or if subsidies are an efficient instrument to achieve them. There is no notion in the WTO of what constitutes a 'good' as opposed to a 'bad' subsidy.<sup>72</sup> Why a government uses a subsidy is not relevant. Under the WTO, all subsidies are either prohibited (export subsidies) or actionable, independent of whether it is used to deal with a market failure. As already mentioned, the AFS does distinguish between

<sup>65</sup> OECD, 'Fisheries Support Estimate', [https://stats.oecd.org/Index.aspx?DataSetCode=FISH\\_FSE](https://stats.oecd.org/Index.aspx?DataSetCode=FISH_FSE) (visited 1 February 2023). The discrepancy is much greater for the USA than for China, for which WTO notifications in more recent years are equivalent to OECD reports. In the case of the USA, OECD figures on fishing subsidy amounts are a multiple of that reported to the WTO.

<sup>66</sup> Sofia Baliño, 'As WTO Talks Continue on Subsidy Reform Initiatives, Concerns Persist over Poor Notification Records', IISD SDG Knowledge Hub (2020), <https://sdg.iisd.org/commentary/policy-briefs/as-wto-talks-continue-on-subsidy-reform-initiatives-concerns-persist-over-poor-notification-records/> (visited 1 February 2023).

<sup>67</sup> WTO, 'Members Welcome Progress in Notification of Fisheries Subsidies', [https://www.wto.org/english/news\\_e/news19\\_e/SCM\\_19nov19\\_e.htm](https://www.wto.org/english/news_e/news19_e/SCM_19nov19_e.htm) (visited 1 February 2023). In 2019, notifications were made by Australia, Brazil, Canada, Chile, China, Colombia, Costa Rica, the EU, Hong Kong, Iceland, India, Indonesia, Macao (China), Mauritius, Mexico, Montenegro, Morocco, New Zealand, Norway, the Philippines, the Republic of Korea, Russia, Switzerland, Taiwan, Thailand, Turkey, Uruguay, Vietnam, and the USA. See the series WTO/G/SCM/N/343/\*.

<sup>68</sup> See Appleton, above n 53.

<sup>69</sup> Alice V. Tipping, 'A "Clean Sheet" Approach to Fisheries Subsidies Disciplines', ICTSD and WEF 2015, <http://e15initiative.org/wp-content/uploads/2015/09/E15-Fisheries-Alice-Tipping-Final.pdf> (visited 1 February 2023); see Hoekman and Nelson, above n 8.

<sup>70</sup> See Formenti, above n 64.

<sup>71</sup> The draft fisheries text going into MC12 included an indicative list of subsidies. This included (i) subsidies to the construction, acquisition, modernization, renovation, or upgrading of vessels; (ii) 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); (iii) subsidies to the purchase/costs of fuel, ice, or bait; (iv) subsidies to costs of personnel, social charges, or insurance; (v) income support of vessels or operators or the workers they employ; (vi) price support of fish caught; (vii) subsidies to at-sea support; and (viii) subsidies covering operating losses of vessels or fishing or fishing-related activities. See Agreement on Fisheries Draft Text, above n 11.

<sup>72</sup> Subsidies and taxes can be efficient instruments to offset market failures and achieve noneconomic goals.

types of subsidies, recognizing that subsidies may act to undo as well as cause harm. However, it does not define what would constitute a ‘good’ subsidy—simply noting that the prohibition does not apply to support measures that aim at rebuilding fish stocks. Economic analysis and empirical evidence suggest that certain types of subsidies do (much) more to stimulate IUU activities. If WTO members had agreed to prohibit the worst types of subsidies and create a ‘safe harbor’ for a class of subsidies that do less to encourage IUU fishing, the AFS could help incentivize reporting of the latter type of subsidies, thus promoting greater transparency.

This was part of the rationale for Article 8 ASCM, which expired in 1999 because WTO members did take action to prevent triggering an automatic sunset clause. Article 8 aimed to exonerate notified subsidies that qualified as non-actionable. If a subsidy qualified as supporting ‘green,’ regional, or R&D objectives under criteria established in Article 8.2 ASCM and was properly notified, it would benefit from exoneration. In the event, no notification was made before the provision expired.<sup>73</sup> One reason for this may have been that some of the non-actionable subsidies were not specific, so there was no obligation to notify them in the first place. This is not the case for fisheries subsidies, which are specific.

### C. Review: dialogue and learning from experience

Regular review can inform deliberation on the extent of support provided by WTO members and action against subsidized entities found to engage in IUU or overfishing. The Fisheries Committee could help to enhance the effectiveness of AFS disciplines by undertaking policy reviews focusing on the status of fishing stocks and the capacity and activities of the fleets accounting for a large share of global catches. As is the case with Intellectual Property Rights reports, informed discussions should take place following the gathering of information. Committee review deliberations should be informed by complementary sources of subsidies and fisheries support information. In addition to the FAO, sources of such information include the Global Trade Alert, the Global Subsidies Initiative, and the OECD. As the information available from different sources depends on the purposes for which data were collected, the WTO Secretariat could seek ‘verification’ of data obtained from other sources. One purpose of considering existing data sources is to help countries understand the value of notifying policies and identifying types of measures that should be tracked from a national perspective.<sup>74</sup>

In the SPS and TBT context, the use of specific trade concerns (STCs) has become a standard feature of Committee meetings. An analogue could be considered by the (future) Fisheries Committee, encouraging both trade (competitiveness) concerns to be raised and environmental concerns relating to subsidized fishing. A complementary mechanism to consider implementation challenges and outcomes would be to organize regular thematic sessions as a means to engage with non-state actors. As noted previously, NGOs are active stakeholders in efforts to manage overfishing and monitor fishing activities. There is a need to do more to engage with the relevant NGOs and International Organizations, both in order to access missing information but also as means to place the WTO in the context of a wider discussion regarding the protection of global commons. AFS could help move the needle in opening the WTO to other stakeholders.<sup>75</sup>

## V. ENFORCEMENT

The ASCM envisages either CVDs or dispute settlement as measures to counteract the adverse effects of subsidization on domestic industries. The threat of CVDs on imports may suffice

<sup>73</sup> Aaron Cosbey and Petros C. Mavroidis, ‘A Turquoise Mess: Green Subsidies, Blue Industrial Policy, and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO’, 17 (1) *Journal of International Economic Law* 11 (2014).

<sup>74</sup> See Wolfe, above n 54.

<sup>75</sup> For a review of WTO practices on this front and pragmatic recommendations, see Robert Wolfe, ‘Informal Learning and WTO Renewal: Using Thematic Sessions to Create More Opportunities for Dialogue’, 12 (S3) *Global Policy* 30 (2021).

to address competition-distorting effects of subsidies on local industry, but CVDs do little to address damage to the global commons from associated overfishing. This leaves the alternative mechanism foreseen in the ASCM: the use of dispute settlement procedures to address the adverse effects of subsidies in third markets. The focus of such cases has been on trade effects, not on environmental effects.

Here, we should be mindful of the limits of action in the WTO context. Addressing global commons problems requires positive action by the world community. This means that besides avoiding overfishing (subsidized or not), nations should adopt effective environmental management programs, entrusting monitoring of the implementation of such programs to organizations with expertise in this area, like the FAO. As discussed, the WTO can and should help incentivize the required financial resources for monitoring and enforcement by these organizations, but its main job in support of the environmental effort is to ensure that harmful subsidies are identified and sanctioned and that subsidies paid to manage stocks at agreed levels are exempted from dispute settlement.

Under the AFS, subsidies for IUU fishing and overfishing are prohibited and not just actionable. In WTO law, the remedies for prohibited and actionable subsidies differ. Article 4.10 ASCM, dealing with the former, calls for ‘appropriate’ countermeasures, whereas Article 7.9 ASCM, dealing with the latter, calls for ‘commensurate’ countermeasures. Case law has evolved regarding the interpretation of these two terms. Originally, ‘appropriate’ meant that WTO members could impose countermeasures up to the level of the subsidy paid, whereas ‘commensurate’ entailed a lower level of countermeasures, whatever sufficed to take care of the commercial damage done. The idea was that the illegality in the former case was the payment itself of the subsidy, whereas, in the latter, it was the damage resulting from the payment of the subsidy. Following the report on US-Upland Cotton (Article 22.6 USA), case law has equated the two at the level of ‘commensurate’ countermeasures.<sup>76</sup>

The logic supporting this change centered on the protection of commercial interests. In the case of fishing subsidies, what matters is not just commercial interest but the protection of global commons. This is a good enough reason to re-instate the earlier case law and request repayments of the amounts bestowed. Designing sanctions to require (recouped) funds and payments to the Fisheries Funding Mechanism<sup>77</sup> for members found to violate the AFS would ensure countermeasures help to combat IUU fishing. These are matters for reflection by the membership when negotiating the more comprehensive agreement.

Turning to dispute settlement, the WTO provides that a complainant can seek consultations with a respondent when it has a substantial *trade* interest in respect of any violations of a covered agreement (Article 3.11 DSU). Article 10 of the AFS provides that the DSU shall apply. However, cause of action or new disputes under the AFS may involve situations where there is no trade interest, but there are environmental interests. The AFS does not specify whether only those subsidies that result in trade distortions can be challenged. The only way to meet sustainability goals would be to reconcile the AFS with the DSU in a manner such that adverse environmental impacts may provide grounds to bring a dispute. Clarifying this matter should figure in the negotiations to conclude a comprehensive AFS.

The WTO does not have the expertise to deal with fishing issues, implying the need for appropriate arrangements to be made with specialized institutions, like the FAO, to support conflict resolution. FAO’s Fisheries and Aquaculture Division has experience in the area of sustainable trade and value chains and in assessing and managing sustainable fisheries.<sup>78</sup> As

<sup>76</sup> See Mavroidis, above n 60, at 248 for further discussion.

<sup>77</sup> WTO, ‘WTO Fisheries Funding Mechanism Readied to Provide Support for Ending Harmful Subsidies’, [https://www.wto.org/english/news\\_e/news22\\_e/fish\\_14jun22\\_e.htm](https://www.wto.org/english/news_e/news22_e/fish_14jun22_e.htm) (visited 1 February 2023).

<sup>78</sup> FAO, ‘Fisheries and Aquaculture Division (NFI), Food and Agriculture Organization of the United Nations’, <https://www.fao.org/fishery-aquaculture/en> (visited 1 February 2023).

disagreements of legal or non-legal nature arising out of the AFS disciplines could potentially involve a considerable amount of scientific evidence, the FAO's subject-matter expertise and long-standing involvement in issues concerning the sustainability of global fisheries can complement the assessment of legal issues under the AFS. Thus, joint FAO/WTO panels could be tasked to evaluate concerns raised by a WTO member about a particular policy or action that is alleged to imperil the realization of the ultimate goals of the AFS. Such panels need not take the form of binding dispute settlement procedures but instead serve to enhance transparency and provide an assessment of a given situation. For example, in case of concerns regarding the invocation of Article 4.3 by a WTO member to grant an otherwise prohibited subsidy aimed at rebuilding the sustainability of a fish stock, FAO experts can help objectively determine the effect of the subsidy and simplify the specificities in footnote 11 of the AFS. Closer coordination with the FAO may also help WTO members understand better why certain policy measures may not be consistent with AFS disciplines but consider their salience from a sustainability perspective in the process helping to inform the entire WTO membership. In addition, as noted previously, use should be made of thematic sessions of the Fisheries Committee and opportunities created for WTO members to raise specific concerns regarding support programs and actions by other members to implement the AFS.

## VI. COMPLEMENTARY CLUB-BASED COOPERATION: OPEN PLURILATERAL AGREEMENTS

Individual restraint to avoid subsidies for overfishing may do little unless all major producers do so. In principle, concerted action can address the 'fishing subsidies problem' as this involves a relatively small number of nations. Six countries, China, Japan, the EU, South Korea, the USA, and Russia, account for two-thirds of global harmful fishing subsidies, with China having both the largest fishing fleet and being by far the largest subsidizer in absolute terms.<sup>79</sup> The relatively concentrated set of nations that account for most of the global fish harvest and trade suggests that a plurilateral agreement with AFS+ commitments on disciplining support leading to overfishing and overcapacity may be feasible. This can take the form of an open plurilateral agreement (OPA)<sup>80</sup>. Assuming critical mass, an OPA may allow circumvention of many of the controversial elements of the fisheries negotiations that have impeded agreement on a comprehensive set of disciplines, notably the treatment of developing countries. An OPA could also assist coastal states and RFMOs in monitoring and controlling IUU by e.g. sharing the cost of surveillance of fishing or pooling financial and technical assistance by the major players in the industry that have a collective interest in enhancing the sustainability of catches.

Technically, it is straightforward to conceive of appending an OPA that binds only signatories and applies on a nondiscriminatory basis to the AFS. An agreement under which national notifications regarding the management of stocks, overfishing, and subsidies paid under Articles 3, 4, and 5 become part of the schedules of concessions of each WTO member would be a first step forward. This could be complemented by AFS+ elements included in an OPA addressing matters such as the agreed evolution of the management of stocks, exoneration of subsidies paid to this effect, joint supervision of the disciplines embedded in Articles 3, 4, and 5, and delegation to a supervising entity to recommend action needed to attain the objectives of the AFS.

<sup>79</sup> Sumaila reports that the top fishing subsidizers are China, the EU, the USA, South Korea, Japan, Russia, Thailand, Indonesia, Canada, Norway, Spain, and Taiwan. The largest subsidizers are not necessarily the countries with the largest fleets. The top fishing nations globally comprise China, Peru, Indonesia, Russia, the USA, India, Vietnam, Japan, Norway, Chile, the Philippines, and Thailand (FAO, 2020). See Sumaila, above n 6.

<sup>80</sup> Bernard Hoekman and Charles Sabel, 'Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time', 12 (S3) *Global Policy* 49 (2021).

## VII. CONCLUSION

The AFS is a step forward for the global trade regime by recognizing that a specific trade policy instrument may help cause environmental degradation. While it does less than envisaged in the draft text that was sent to ministers in the run-up to MC12, it makes clear that WTO members are able to agree to disciplines that support both competitive neutrality and protection of the global commons. Multilateral disciplines on subsidies comprise an agenda that goes far beyond the sustainability of global marine fish stocks. The WTO membership confronts a range of trade–environment–climate change–related challenges, including defining the appropriate role of trade policy in the design and implementation of national programs to reduce greenhouse gas emissions associated with production. The AFS illustrates that the WTO can be a mechanism for members to agree on trade policy disciplines in the service of sustainability and the challenge of addressing the adverse spillover effects of subsidies.

A major takeaway from the AFS is that a business-as-usual approach was deemed appropriate in key areas for effective implementation such as transparency, monitoring implementation, and enforcing commitments. A positive feature of the AFS is that it recognizes that other actors play a central role in setting sustainability standards and implementing them, including through inspections and enforcement actions (sanctioning IUU fishing). Close cooperation and institutional links to support regular interaction between the FAO, other pertinent international organizations, and the WTO will be important in the effective implementation of the AFS. Less positive is that almost nothing was done to incorporate suggestions to improve WTO working practices and leveraging innovations made by various WTO bodies that support constructive dialogue and informed deliberation. The fact that WTO members did nothing to address the well-known and long-standing weaknesses associated with the reliance on self-notification of subsidies and dispute settlement is concerning, considering the need for the WTO to address subsidy-related trade conflicts more generally.

Failure to provide a clear mandate to the new Fisheries Committee to adopt mechanisms such as regular thematic sessions that include non-state stakeholders and use the Committee as a platform to raise specific concerns to defuse potential conflicts constitutes missed opportunities.<sup>81</sup> Many issues may arise that require deliberation and constructive engagement. An example concerns the specific standards and criteria for what constitutes IUU or overfishing across different regions, to what extent coastal states and RFMOs have such standards in place, and, if so, whether they have been established in a transparent and stakeholder-inclusive manner. Such deliberation could be used to use the AFS as an instrument to incentivize more attention and resources being given to frontline agencies and organizations to undertake the effort required to permit the identification of harmful subsidized activity and, conversely, document the extent and effects of support measures that rebuild fish stocks and adoption of sustainable fishing.

Since the AFS deals with a subset of subsidies, a consistent dialogue between the Committees serving the two agreements must be instituted in order to promote policy coherence. This could take the form of a roundtable, a joint periodic meeting between members of the two Committees, or something to this effect. And without reinventing the wheel, good practices followed elsewhere could find their way into this forum as well. For example, the WTO Committee on Subsidies and Countervailing Measures is one of the few WTO bodies that does not organize informal thematic sessions.<sup>82</sup> It also does not use the STC mechanism that has been employed to good effect in other committees. A mandate to do so could support the needed engagement with the international community of stakeholders concerned with sustainability and competitive

<sup>81</sup> Wolfe, above n 75, argues that WTO committees need no mandate to do this, as illustrated by the fact that many WTO bodies have done so. But a formal mandate can be useful nonetheless, especially in an area such as subsidies where such initiative has not emerged but is urgently needed. See Hoekman and Nelson, above n 8.

<sup>82</sup> See Wolfe, above n 75.



neutrality. The focus of the AFS is exclusively on subsidies that provide support for production. In our view, there are two priority steps that the membership should contemplate when drafting the more comprehensive agreement. First, they should make room for 'good' subsidies. After all, what matters is to avert overfishing. Preserving and rebuilding stocks is a key component of this endeavor. Second, the dissemination of information and fulfillment of transparency obligations need to be improved. Self-disclosures simply do not work when there are benefits from anti-contractual behavior. The costs of non-transparency when the protection of global commons is at stake go far beyond those associated with subsidies that only cause competitive distortions. It is, therefore, worrisome that WTO members largely stuck to a business-as-usual approach to transparency.