

THE PRESENT AND FUTURE OF THE 2022 WTO  
AGREEMENT ON FISHERIES SUBSIDIES

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I. INTRODUCTION: WHY TACKLE FISHERIES SUBSIDIES IN THE  
WORLD TRADE ORGANIZATION?

The World Trade Organization (WTO) signed the historic WTO Agreement on Fisheries Subsidies (AFS) on June 17, 2022, after a decades-long debate.<sup>1</sup> This can be catalogued as the first trade agreement with provisions which aim to effectively police measures that negatively affect both world trade and the environment, acknowledging the intertwined relation between the protection of the environment and trade policy making.

The subject matter of the WTO has never been limited to trade issues. The *Marrakesh Agreement Establishing the World Trade Organization* (WTO Agreement) of 1994 highlights in its preamble the need for free trade to be made “in accordance

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1. Agreement on Fisheries Subsidies, WTO Doc. WT/MIN(22)/33 (2002) [hereinafter AFS].

with the objective of sustainable development,” with an aim to “protect and preserve the environment.”<sup>2</sup> The AFS places environmental sustainability at the forefront of its concerns, outweighing the opposition of some Members, who did not want to agree on new disciplines that may reduce their ability to grant subsidies for local fisheries industries.<sup>3</sup>

This leap towards the promotion of environmental sustainability of trade considered the already existent WTO legal framework,<sup>4</sup> which regulates subsidies through the Agreement on Subsidies and Countervailing Measures (ASCM); the ASCM forbids subsidies that may affect competitive relations, distort trade, create unfair advantages in favor of subsidized products, and cause injury to local industries of WTO Members.<sup>5</sup>

Specifically, the ASCM already prohibits those subsidies that, *de jure*<sup>6</sup> or *de facto*,<sup>7</sup> are subjected to export performance<sup>8</sup> or to the use of domestic products in preference to imported

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2. Appellate Body Report, *United States—Import prohibition of certain shrimp and shrimp products*, ¶¶ 129, 153, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) (discussing the protection of the environment as another of the WTO goals and stating that “the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. (. . .) [w]e note once more that this language demonstrates a recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development”).

3. Karen McVeigh, *First WTO deal on fishing subsidies hailed as historic despite ‘big holes’*, GUARDIAN (June 21, 2022), <https://www.theguardian.com/environment/2022/jun/21/first-wto-deal-on-fishing-subsidies-hailed-as-historic-despite-big-holes>.

4. See AFS, *supra* note 1, art. 1.

5. Agreement on Subsidies and Countervailing Measures, annex 1, Apr. 15, 1994, 1869 U.N.T.S. 14 [hereinafter ASCM].

6. See Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶ 100, WTO Doc. WT/DS139/AB/R (adopted May 31, 2000).

7. See Panel Report, *Australia—Subsidies Granted to Producers and Exporters of Automotive Leather*, ¶ 9.55, WTO Doc. WT/DS126/R (adopted May 25, 1999).

8. Panel Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 7.648, WTO Doc. WT/DS316/R (adopted Jun. 30, 2010) stating “in order to qualify as a prohibited export subsidy, the granting of the subsidy must be contingent or dependent upon actual or anticipated exports or export earnings”).

ones.<sup>9</sup> Since the ASCM only prohibits subsidies that fit the mentioned criteria, governments possess a significant policy-making margin to grant subsidies with other objectives, including bolstering the efficiency of their national industries production and/or create incentives directed to balance the field for vulnerable economic sectors.<sup>10</sup>

Thus, WTO Members could award unlimited subsidies to local fisheries in support of their financial stability, collaterally harming the environment. For instance, subsidies on fuel and vessels spare parts have long been considered as trade distortive and harmful to the environment by indirectly promoting Illegal Unreported and Unregulated (IUU) fishing and overfishing and fishing overcapacity.<sup>11</sup>

While fishing overcapacity specifically refers to “the ability of a fleet to fish [legally] at levels which exceed the sustainable catch level in a fishery,”<sup>12</sup> IUU fishing and overfishing refer to “all aspects and stages of the capture and utilization of fish” through clandestine predatory practices.<sup>13</sup> Both lead to the depletion of fish stocks<sup>14</sup> and an increased risk of food

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9. See ASCM, *supra* note 5.

10. See *Industrial Subsidies*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/industrial-subsidies> (last visited Oct. 31, 2022) (stating that “all other subsidies are permitted, but are actionable (through national CVD actions or WTO dispute settlement action) if they are (i) “specific”, i.e., limited to a firm, industry or group of industries; and, (ii) found to cause adverse trade effects, such as material injury to a domestic industry or serious prejudice to the trade interests of another WTO Member”).

11. *OECD Review of Fisheries 2020*, ORG. FOR ECON. COOP. AND DEV. (OECD) PUBLISHING 98 (2020), <https://doi.org/10.1787/7946bc8a-en>.

12. *Overcapacity (fishing)*, WTO, [https://www.wto.org/english/thewto\\_e/glossary\\_e/overfishing\\_overfished\\_stocks\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/overfishing_overfished_stocks_e.htm) (last visited Oct. 27, 2022).

13. *What is IUU fishing?*, FOOD AND AGRIC. ORG., <https://www.fao.org/iuu-fishing/background/what-is-iuu-fishing/en/> (last visited Oct. 27, 2022).

14. See *Overfishing and IUU fishing*, OCEAN PROTECT FLOTILLA NGO, <https://www.oceanprotect.org/resources/issue-briefs/overfishing-iuu/> (last visited Oct. 27, 2022) (stating “the 2019 Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) report on global biodiversity concludes that fishing has had the greatest impact on marine biodiversity in the past 50 years (IPBES, 2019). The percentage of stocks fished at biologically unsustainable levels increased from 10% in 1974 to 33.1% in 2015 (FAO, 2018). Industrial fishing now covers 55% of the ocean (Kroodsma, 2018), and overfishing is exacerbated by widespread illegal, unreported or unregulated (IUU) fishing”).

insecurity.<sup>15</sup>

The Organization for Economic Co-operation and Development (OECD) has observed that the quantity of subsidies causing negative environmental externalities with trade distortive effects is not negligible. From 2016-2018, a total of USD 3.2 billion in subsidies aimed to reduce the cost of inputs—for instance, lower the costs of fuel<sup>16</sup>—were granted by world governments, indirectly promoting the build-up of overfishing capacities and sponsoring a market of underpriced sea products.<sup>17</sup>

Considering this data, WTO Members sought an effective legal framework that tackled these kind of subsidies, consistent with their mandate of promoting open, fair, and undistorted trade.<sup>18</sup> This effort had to be balanced with the interests of the WTO Members whose subsidies do not necessarily affect the environment or have trade distortive effects. Certain WTO Members award subsidies to small communities that conduct small scale fishing using traditional techniques, which in some countries represents not only the main source of income for thousands of families, but also a major food security guarantee.<sup>19</sup>

It is from this debate that the AFS was born. On one side, several WTO Members pushed for the AFS out of concern for the proliferation of subsidies indirectly promoting IUU fishing and overfishing and fishing overcapacity, while on the other

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15. Alice Tipping & Tristan Irschlinger, *25 Reasons Why the WTO Must End Subsidies That Drive Overfishing*, INT'L INST. FOR SUSTAINABLE DEV. (Nov. 2, 2020), <https://www.iisd.org/articles/25-reasons-wto-stop-funding-overfishing> (last visited Oct. 27, 2022).

16. See OECD, *supra* note 11.

17. *Id.* at 74.

18. See *Principles of the trading system*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Oct. 25, 2022) (stating “the WTO is sometimes described as a “free trade” institution, but that is not entirely accurate. The system does allow tariffs and, in limited circumstances, other forms of protection. More accurately, it is a system of rules dedicated to open, fair and undistorted competition”).

19. See *Voices of Small Fisheries Undervalued, Overlooked in Global Food Systems, Speakers at Lisbon Dialogue Stress amid Calls to Curb Illegal Practices, Overfishing*, U.N. (June 29, 2022) <https://press.un.org/en/2022/sea2150.doc.htm> (last visited Oct. 30, 2022).

side, Members wanted their particular subsidies to be acknowledged as not harmful, stalling negotiations.<sup>20</sup>

The AFS is now part of the WTO legal framework and provides additional tools for complying with all the environmental objectives of the WTO. Under this factual and legal basis, this commentary highlights the path that the Membership took towards achieving the WTO AFS, analyzing its most relevant provisions. Additionally, it will focus on the matters that were omitted and should be implemented in the future.

## II. THE LONG ROAD TOWARD THE WTO AGREEMENT ON FISHERIES SUBSIDIES

During the Doha Ministerial Conference of 2001, the WTO Membership agreed to start negotiations<sup>21</sup> to discipline fisheries subsidies under a set of rules, taking into account the WTO environmental and trade objectives.<sup>22</sup> During the 2005 Hong Kong ministerial conference, an informal group who called themselves the “Friends of Fish”<sup>23</sup> insisted on creating a specific legal framework prohibiting those subsidies that contribute to overcapacity and overfishing.<sup>24</sup> Contrarily, countries such as Japan and the Republic of Korea “expressed skepticism over the link between subsidies and over-fishing.”<sup>25</sup>

Both academia and the Membership conducted early efforts on structuring a multilateral agreement that included either a general prohibition of fisheries subsidies or a prohibition under an exhaustive list of specific types of subsidies.<sup>26</sup>

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20. Mark Godfrey, *WTO negotiations on fisheries subsidies hit “dark” patch*, SEAFOODSOURCE (Oct. 8, 2021), <https://www.seafoodsource.com/news/environment-sustainability/wto-negotiations-on-fisheries-subsidies-hit-dark-patch>.

21. See World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 31, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002).

22. *Id.* para 28.

23. Including Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines and the United States.

24. *Hong Kong WTO Ministerial 2005: Briefing Notes*, WTO, [https://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/brief\\_e/brief08\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief08_e.htm) (last visited Oct. 30, 2022).

25. *Id.*

26. See, e.g., Seung Wha Chang, *WTO disciplines on fisheries subsidies: a historic step towards sustainability?*, 6 OXFORD J. INT’L ECON. L. 879, 879 (2003).

This debate would effectively limit discussions to mere proposals and calls for action for the subsequent ten years.<sup>27</sup>

The WTO Negotiating Group on Rules conducted an isolated effort in 2007 to provide a comprehensive legal framework showing what a final agreement on fisheries subsidies could look like, trying to reconcile both positions.<sup>28</sup> The language used was significantly broad, in line with the “Friends of the Fish” ambition of agreeing on a framework that truly tackled overcapacity and overfishing.<sup>29</sup> Opposing WTO Members insisted that the inclusion of disciplines on subsidies was overreaching,<sup>30</sup> and other agricultural and industrial matters seemed more relevant for Members to negotiate during the Doha Round.<sup>31</sup>

The proposal remained boxed until 2015, when the United Nations (U.N.) Membership adopted the 2030 Agenda for Sustainable Development.<sup>32</sup> This provided for a fresh restart for the negotiation of fisheries subsidies at the WTO, considering, at least, the elimination of subsidies that contribute to IUU fishing and overfishing, as well as differential treatment for developing and least developed countries.<sup>33</sup>

This U.N. mandate was then followed by the 2017 Buenos Aires WTO Ministerial Conference, where a schedule for concluding negotiations on fisheries subsidies before the next

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27. See, e.g., *Lamy urges Doha deal for sustainable fishing*, WTO (June 8, 2009), [https://www.wto.org/english/news\\_e/sppl\\_e/sppl129\\_e.htm](https://www.wto.org/english/news_e/sppl_e/sppl129_e.htm) (last visited Oct. 30, 2022).

28. See World Trade Organization, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, WTO Doc. TN/RL/W/213 (2007).

29. See Chen-Ju Chen, *Current Development of Fisheries Subsidies Regulations After the Failure of WTO Doha Round Negotiations With a Focus on the Asia-Pacific Region*, 17 *ASIAN J. OF WTO & INT'L HEALTH L. AND POL'Y* 41, 45 (2022).

30. See Oliver Delves, *WTO disciplines and fisheries subsidies should the “SCM Agreement” be modified?* 37 *VICTORIA UNIV. L. REV.* 341, 342 (2006).

31. See Chen, *supra* note 29.

32. *Id.*

33. See G.A. Res. 71/313, ¶ 14.6 (Jul. 10, 2017) (stating “by 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation”).

Ministerial Conference was agreed upon.<sup>34</sup> Only then, ten years after its inception, the 2007 effort proved to be an important input during the negotiation of the Agreement. Members took this proposal as the main ground for the negotiations and began discussing around it.<sup>35</sup> The 2007 document proposed that an agreement on fisheries subsidies should be annexed to the ASCM.<sup>36</sup> However, WTO Members agreed to negotiate an independent agreement on fisheries subsidies allowing operators and interpreters to resort to ASCM when necessary.<sup>37</sup>

To be concluded, the AFS needed a “last mile” negotiation that took most of the night of June 17, 2022. The Membership was especially active during the last year of negotiation, where several proposals regarding the applicability of the Agreement separated from any issues related to the international law of the sea,<sup>38</sup> the Special and Differential Treatment (SDT) scope,<sup>39</sup> and the possibility for granting subsidies under the competence of a relevant Regional Fisheries Management Organization<sup>40</sup> (RFMO/A).<sup>41</sup>

### III. THE WTO AGREEMENT ON FISHERIES SUBSIDIES: A HISTORIC MILESTONE

The AFS is the second multilateral agreement reached in the Organization since its creation in 1995<sup>42</sup> and the first

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34. World Trade Organization, Fisheries Subsidies Ministerial Decision of 13 December 2017, WTO Doc. WT/MIN(17)/64 (2017).

35. See Chen, *supra* note 29, at 41.

36. *Id.*

37. *Id.*

38. See World Trade Organization, Draft Consolidated Chair Text art. 11.4, WTO Doc. WT/MIN(21)/W/5 (2021).

39. *Id.* art. 6.

40. *Id.* art. 3.2.

41. See *Regional fisheries management organisations (RFMOs)*, EUR. COMM'N, [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) (last visited Oct. 27, 2022) (stating “countries with fishing interests in a given geographical area form specific RFMOs. The organisations are open both to countries in the region (‘coastal states’) and countries that have interests in those fisheries (‘distant water fishing nations’)”).

42. The Trade Facilitation Agreement (TFA) was the first ever multilateral agreement reached after the WTO inception in 1995.

WTO multilateral agreement that matches environmental concerns with the promotion of freer and fairer world trade.<sup>43</sup>

A. *Prohibition on subsidies to IUU fishing and/or causing overfishing*

The AFS explicitly prohibits granting or maintaining any subsidy to a vessel or operator engaged in IUU fishing.<sup>44</sup> Further, it grants Coastal Members, Flag State Members, and relevant RFMO/A the power to “affirmatively determine” if certain vessels are engaged in IUU fishing,<sup>45</sup> creating an enforcement mechanism available for all of the WTO Membership.<sup>46</sup> This procedure must provide appropriate notice and guarantee due process to vessels and operators.<sup>47</sup>

This novel enforcement scheme created by the AFS will allow for Members to take immediate measures against those who profit from IUU fishing or overfishing, as long as it is done with transparency and following due process.<sup>48</sup> The determination of a Member or a relevant RFMO/A can be sustained on purely environmental reasons,<sup>49</sup> considering that investigating authorities usually assess the existence of overfishing and IUU fishing through environmental impact observations.<sup>50</sup> The grounds under which Members assess the existence of IUU will certainly have a high environmental component, since evidence determining IUU fishing includes (i) fishing non permitted species, (ii) fishing above quota, (iii) fishing with illegal gear, (iv) fishing out of season, among

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43. McVeigh, *supra* note 3.

44. AFS, *supra* note 1, art 3.1.

45. AFS, *supra* note 1, arts. 3.2, 3.3(a).

46. *Id.*

47. *Id.* art. 3.3(b).

48. *Id.* arts. 3.4, 3.5.

49. See *The WTO Agreement on Fisheries Subsidies - What it does and what comes next*, WTO, [https://www.wto.org/english/tratop\\_e/rulesneg\\_e/fish\\_e/fish\\_factsheet\\_e.pdf](https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_factsheet_e.pdf) (last visited Oct. 25, 2022).

50. See United States National Intelligence Council, *Global Implications of Illegal, Unreported, and Unregulated (IUU) Fishing*, U.S. NAT'L INTELLIGENCE COUNCIL, at 7, <https://irp.fas.org/nic/fishing.pdf> (last visited Oct. 25, 2022) (stating “areas with higher levels of IUU fishing also have some of the worst rates of fish stock decline, and affected developing nations often face a downward spiral as declining fishery stocks encourages more IUU fishing as fishers chase fewer fish”).



other common environmental concerns.<sup>51</sup> Thus, the main trigger for the subsidy's prohibition under article 3.1 will frequently be the environmental harm caused by a vessel or operator when fishing, in addition to other considerations or evidence the Coastal Member or relevant RFMO/A final determination might contain.

Traditionally, environmental concerns had to be addressed as an "exception" used to circumvent around trade restrictive measures<sup>52</sup> or as part of the compliance of an international standard, as required by, for instance, the Agreement on Technical Barriers to Trade.<sup>53</sup> The fact that environmental concerns can now be invoked by Members as the core reason to trigger a WTO provision, without needing to address the trade effects of the measure in a final determination, is a breakthrough accomplishment.

The enforceability mechanism that provided for prohibitions of both subsidies to IUU fishing and overfishing is then somewhat similar to the one provided under article VI of the GATT, which allows Members to conduct their own commercial defense investigations and impose trade remedies accordingly.<sup>54</sup> In the case of fisheries subsidies, the Coastal Member will be able to determine which operator or vessel is conducting IUU fishing or overfishing in its jurisdiction, a determination which shall prevent subsidies to benefit such operator or vessel.<sup>55</sup> If a subsidized vessel from country X, fishing in country Z waters is found, through an "affirmative determination" of country Z to be engaged in IUU fishing, Country X shall stop the flow of subsidies to that specific vessel.<sup>56</sup>

The efficacy of these procedures relies on each Member enforcing the Agreement's provisions through internal administration. In the case of prohibited fisheries subsidies, the subsidizing country grants can be stopped simply by the final determination of a Coastal Member or relevant RFMO/A, increasing the chances for real enforcement of the Agreement's

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51. *Id.* at 6.

52. General Agreement on Tariffs and Trade art. XX(b),(g), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

53. Agreement on Technical Barriers to Trade art. 2.5, Jan. 1, 1995, 1868 U.N.T.S. [hereinafter TBT Agreement].

54. *See* GATT, *supra* note 52, art. VI.

55. AFS, *supra* note 1, arts. 3.2, 3.3(a).

56. AFS, *supra* note 1, art. 3.1.

provisions at a never-before-seen degree in environmental matters.

If the subsidizing Member is not willing to comply with the final determination, the AFS considers the possibility of further review by the WTO DSS.<sup>57</sup> This assures the Membership that they will count with a proper review mechanism, creating a checks-and-balances system based on substantiated trade and environmental rules.

However, the main challenge of this scheme is the lack of mechanisms to assure that subsidies will stop flowing to the operator or vessel once the affirmative determination on IUU fishing is made. Usually, countries do not have mechanisms to confirm that no grants are coming from third countries to vessels or operators, and most of the times, Coastal Members and the RFMO/A will have to rely on the subsidizing Member's good faith to follow the AFS.<sup>58</sup>

B. *The downgrade of the “blanket” prohibition on fisheries subsidies*

In Article 5, the AFS includes a general prohibition on subsidizing any fishing activity conducted outside the jurisdiction of a coastal Member or non-Member and outside the competence of a relevant RFMO/A by presuming these activities as non-environmentally friendly and trade distortive, creating a “blanket” like prohibition inspired by the Friends of Fish early proposals.<sup>59</sup> This explicit prohibition tries to definitively

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57. *Id.* art. 10.

58. See *The Link Between Effective Fisheries Management and Ending Harmful Subsidies*, THE PEW CHARITABLE TRUSTS, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/04/the-link-between-effective-fisheries-management-and-ending-harmful-subsidies> (Apr. 5, 2019) (stating “[s]ome nations have concerns about their ability to implement potential rules that make subsidies contingent on their management efforts, arguing that they do not have the capacity or resources to undertake full fish stock assessments or to conduct fleet monitoring and surveillance. These countries fear they could be left vulnerable to accusations that they have breached their WTO obligations”).

59. Radika Kumar and Jadhav Chakradhar, *The effect of Fishery Subsidies Index on the Socio-Economic development for “Friends of Fish” and its Implications on WTO Negotiations on Fisheries Subsidies Disciplines*, RESEARCHGATE, at 2 (October 2019), [https://www.researchgate.net/publication/336364495\\_The\\_effect\\_of\\_Fishery\\_Subsidies\\_Index\\_on\\_the\\_SocioEconomic\\_development\\_for\\_Friends\\_of\\_Fish\\_and\\_its\\_Implications\\_on\\_WTO\\_Negotiations\\_on\\_Fish](https://www.researchgate.net/publication/336364495_The_effect_of_Fishery_Subsidies_Index_on_the_SocioEconomic_development_for_Friends_of_Fish_and_its_Implications_on_WTO_Negotiations_on_Fish)

end industrial fishing activities in highwaters, which would be unprofitable if it were not for subsidies.<sup>60</sup>

Unfortunately, the scope of the “blanket” prohibition was substantially reduced in the discussion ranging from 2021 to 2022. The AFS simply states a programmatic approach of “special care and exercise due restraint” when referring to subsidies granted to vessels not flying that Member’s flag or with an unknown status regarding their stocks, without any real enforcement mechanism.<sup>61</sup>

In comparison, Article 5 of the November 24, 2021 Draft Consolidated Chair Text (the 2021 draft) explicitly prohibited “subsidies contributing overcapacity and overfishing,” and prohibited a list of specific harmful, low input, subsidies such as (i) subsidies to construction, renovation or upgrading of vessels; (ii) subsidies to the purchase of machines and equipment for vessels; (iii) subsidies to the purchase/costs of fuel, ice or bait; (iv) price support of fish caught, among others.<sup>62</sup>

The 2021 draft also tried to soften this prohibition for developing WTO Members<sup>63</sup> by providing specific thresholds of market participation.<sup>64</sup> However, these Special and Differential Treatment caveats were not enough, and the final agree-

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eries\_Subsidies\_Disciplines/link/5e42a27e299bf1cdb91f8e09/download (last visited Dec. 19, 2022) (stating “the proposals of Iceland, New Zealand and Pakistan aim to prohibit subsidies for: (i) illegal, unreported and unregulated fishing; (ii) fishing activities where stocks are not assessed or are assessed as being overfished and (iii) fishing activities on the high seas and in the waters of another member. Also, the aim is to prohibit all subsidies which contribute to overfishing and overcapacity”).

60. Sarah Gibbens, *High Seas Fishing Isn't Just Destructive—It's Unprofitable*, NAT'L GEOGRAPHIC (June 8, 2018), <https://www.nationalgeographic.co.uk/environment-and-conservation/2018/06/high-seas-fishing-isnt-just-destructive-its-unprofitable> (last visited Oct. 30, 2022) (stating “a paper, published in the journal *Science Advances*, found that as much as 54 percent of high seas fishing would be unprofitable were it not for governments covering some of the industry’s costs”).

61. AFS, *supra* note 1, arts. 5.2, 5.3.

62. See World Trade Organization, Fisheries Subsidies—Draft Consolidated Chair Text, art 5.5, WTO Doc. TN/RL/W/276 (2021).

63. *Id.* (stating “the prohibition under Article 5.1 shall not apply to subsidies granted or maintained by developing country Members for low income, resource-poor or livelihood fishing or fishing related activities within 12 nautical miles measured from the baselines [for a period of [7] years from the date of entry into force of this [Instrument])”).

64. *Id.* art. 5.5.(d).

ment provisions, as they were drafted, lack mandatory language.<sup>65</sup>

Even if the final result was not completely satisfactory for those more interested in the mandatory prohibition of certain forms of subsidies, the reduced scope of the Agreement does not bury the discussion of taking measures against overcapacity and overfishing.

The importance of the Agreement should not be underestimated because of this downgrade. Instead, it should be highlighted that the Membership has now agreed to a minimum standard. From now on, all discussions should be exclusively focused on the specific forms of subsidies that should be banned considering their trade distortive effects and proven environmental impact—e.g. fuel subsidies.

#### IV. CONCLUSION: WHAT IS MISSING AND THE LONG ROAD AHEAD

The disciplining of overcapacity and overfishing subsidies is indeed a pending issue for the WTO and will continue to be discussed, as agreed upon in the MC12.<sup>66</sup> The World Wildlife Fund said “much more needs to be done to change course and help put us on the path to a healthier ocean and more resilient communities.”<sup>67</sup>

The AFS, even if imperfect, represents a gigantic advance in the path towards a legal international framework on sustainable trade. Other issues have to be addressed by the AFS, such as crafting a specific discipline that prevents subsidies to

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65. AFS, *supra* note 1, art. 6 (“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.”).

66. In the MC12 Ministerial Decision adopting the new Agreement, and in the Agreement itself, Members agreed to continue negotiations on outstanding issues, with a view to making recommendations by MC13 for additional provisions that would further enhance the disciplines of the Agreement. See *MC12 follow-up*, WTO, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc12\\_e/mc12\\_followup\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_followup_e.htm) (last visited Nov. 2022).

67. *WWF welcomes long-awaited WTO agreement to curb harmful fisheries subsidies*, WORLD WILDLIFE FUND (WWF) (June 17, 2022), [https://wwf.panda.org/discover/our\\_focus/oceans\\_practice/?5852941/WWF-welcomes-long-awaited-WTO-agreement-to-curb-harmful-fisheries-subsidies](https://wwf.panda.org/discover/our_focus/oceans_practice/?5852941/WWF-welcomes-long-awaited-WTO-agreement-to-curb-harmful-fisheries-subsidies) (last visited Oct. 30, 2022).

forced labor in the fishing industry and other that addresses the need for effective surveillance mechanisms in order to properly enforce the “blanket” prohibition.

Still, the AFS will play a major role in effectively curbing harmful fisheries subsidies directed at IUU fishing and overfishing stocks if put into force.<sup>68</sup> Even if not in force, it will push the Membership’s agenda towards more effective environmentally sustainable international trade rules. It is not too early to celebrate.

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68. For the Agreement to become operational, two-thirds of WTO Members have to deposit their instruments of acceptance before the WTO. *WTO Agreement on Fisheries Subsidies*, *supra* note 49, at 1.